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JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

FLORIDA—Supreme Court.

GEORGE P. RANEY, CHIEF JUSTICE.

JUSTICES.

AUGUSTUS E. MAXWELL. HENRY L. MITCHELL.

ALABAMA—Supreme Court.

GEORGE W. STONE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

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LOUISIANA—Supreme Court.

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ASSOCIATE JUSTICES.

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CHARLES E. FENNER. SAMUEL D. McENERY.
JOSEPH A. BREAUX.²

¹Term expired April 19, 1890.

²Appointed April, 1890.

SUPREME COURT RULES—MISSISSIPPI.

In Force October, 1889.

1. **TRANSCRIPT—WHEN FILED.** In all cases brought to this court by appeal, the transcript of the record shall be filed in the clerk's office on or before the first day of the term, or time appointed for taking up the district to which the case may belong; and no transcript not filed by that day shall be received by the clerk, unless ordered by the court upon affidavit showing good cause for such failure.

2. **TRANSCRIPT—HOW PREPARED.** Every transcript of a record brought to this court shall be distinctly and plainly written on one side of every leaf, and bound together at the top or side, and each page numbered in figures, and shall have annexed a suitable index; and no transcript not conforming to this rule shall be filed by the clerk; and no clerk shall be entitled to any fee for a transcript which does not conform to this rule.

3. **TRANSCRIPT—WHAT TO CONTAIN.** A transcript on appeal to this court shall not contain any part of the case except the pleadings, evidence, instructions, bills of exception, and order, judgment, or decree appealed from, unless the appellant shall by writing request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript; and no fee shall be allowed for anything besides those matters required to be embraced in the transcript.

4. **AGREED TRANSCRIPT.** By agreement of parties or their attorneys, made in writing and attested by the clerk of the court in which any cause may be pending or record existing, (which agreement shall be filed and made a part of the transcript of such record,) such parts of the record and proceedings as shall be so agreed shall constitute the transcript of the record to be brought to this court, and shall be certified as such, and be considered a full transcript in this court for the consideration and final adjudication of the cause here.

5. **SUGGESTION OF DIMINUTION.** If a record be imperfect, diminution may be suggested by either party, and *certiorari* awarded: provided, it be done in the first week of the term, or within four days after the assignment of errors is filed.

6. **RECORDS AND PAPERS—HOW FILED.** No record or other paper shall be considered as filed until so marked by the clerk, (process of this court excepted,) and the clerk shall indorse the date of filing.

7. **ASSIGNMENT OF ERRORS.** The appellant shall file on a separate sheet of paper a written or printed statement of the grounds or points of error relied on, before the call of the docket on the first day for it to be called in all cases where the transcript of the record is filed one week before that day, and within the first three days of the time for calling the docket where the transcript is filed within a week of the return-day for the appeal, or the case shall be dismissed; and no error not so distinctly assigned shall be argued by counsel or considered by the court. In appeals returnable at any time, the assignment of errors shall be filed two days before the hearing of the case, unless otherwise ordered by the court; and where the transcript is filed by order of the court after the return-day for the appeal, the assignment of errors shall be filed within two days after the transcript is filed.

8. **ABSTRACTS AND BRIEFS.** Before any cause will be taken up on submission or heard, the counsel shall furnish the court with a full abstract of all the material matters involved in the consideration of the cause, as they appear in the record, printed, or written in a plain and legible hand; and the counsel on each side shall also, at the time of the submission, file copies of their briefs, printed or written, as aforesaid, containing the points and authorities relied on; and no case will be taken on submission, or considered by the court, unless the foregoing requisites be complied with.

9. **ARGUMENT.** Not more than two counsel on the same side, nor a longer time for argument than two hours on a side, will be allowed in any case, unless by special leave of the court. Where there are two counsel on the same side they may divide the time allowed for argument between themselves.

10. **PETITION FOR REARGUMENT—SUGGESTION OF ERROR.** Applications for reargument shall be presented in open court by petition, and noted on the minutes of the court on or before the Monday succeeding the delivery of the opinion; and no reargument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause. No extension of the time for making such application will be granted except on account of sickness or other extreme cause. The court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper.

11. **PETITION FOR REARGUMENT—EFFECT OF ADJOURNMENT.** Where an adjournment of the court shall preclude the required presentation of the petition for reargument in open court, its presentation to the clerk and his filing it within the time prescribed for presenting such petition to the court shall stay all proceedings under the judgment until the next meeting of the court, when it shall be acted on by the court as if it had been presented to it when it was presented to the clerk, unless a majority of the judges of the court shall certify in writing to the clerk prior to the next meeting of the court that they have considered the application for a reargument, and have determined to refuse it; and on receipt of such certificate such proceedings shall be had as if a petition for a reargument had not been presented.

12. **PETITION FOR REARGUMENT—HOW PREPARED.** Petitions for reargument must be signed by at least three members of the bar, who shall certify that they have carefully read and examined the record and the briefs of counsel, and have read the opinion of the court and the authorities cited, and are satisfied from such examination and investigation that such opinion is erroneous.

13. **REARGUMENT—WHEN HEARD.** When a reargument is ordered the cause shall be placed at the end of the docket of its district, and heard at the same term.

14. **PAPERS OUT OF OFFICE.** When a cause is regularly called on the docket for hearing, if the transcript of the record be not in court, the counsel to whom it is charged by the clerk shall pay a fine of \$25.

15. **MOTIONS.** Every Saturday shall be motion-day; and if counsel be not present, and have no brief filed when their motions are regularly called, such motions shall be dismissed, and no motion once disposed of or dismissed shall be again heard.

16. **MOTIONS DOCKETED—REASONS FILED.** No motion shall be heard unless it has been entered on the docket, and the reasons in support thereof filed with the papers on at least a half sheet of paper, one entire day before it is called.

17. **MOTION TO DISMISS—WHEN WAIVED.** When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed for want of prosecution, it shall be considered a waiver of the defect on which the motion was based, unless it be so material that no judgment can be given.

18. **DISMISSED CAUSE—HOW REINSTATED.** No cause that has been dismissed shall be reinstated without an affidavit setting forth probable error in the proceedings.

19. **DOCKET—HOW CALLED—DELAY CAUSES.** At each term of the court the docket of each district shall be taken up in its order; but on regular motion-day, by motion entered for that purpose, causes may be submitted on a suggestion that they were brought here for delay, and, if satisfied of the truth of such suggestion, the court will take up such causes first of their district, and make proper disposition of them.

20. **FAILURE TO PROSECUTE—CAUSE DISMISSED.** When any case shall be called for trial in its order, if no counsel appear, and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

21. **CALCULATIONS.** When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the court in writing and figures, with a certificate by some counselor not interested in the cause that the calculation is correct; and no such error will be noticed unless so presented to the court.

22. **AGREEMENT OF COUNSEL.** No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them.

23. **AUTHORITY OF COUNSEL—WHEN REQUIRED.** On motion supported by affidavit, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this court; and on failing to produce such authority or furnish such evidence the appeal may be dismissed.

24. **STATE CASES—WHEN HEARD—ASSIGNMENT OF ERRORS.** In all criminal cases, and in all cases in which the state shall be the party interested, the docket containing such cases shall be taken up on the second Monday of the time for taking up the district to which

they belong, and regularly proceeded with in their order on the docket; and in all such cases the assignment of error shall be filed on or before the first day of the time for taking up the docket of the district to which the cases belong.

25. WHEN APPELLEE MAY NOT WAIVE TIME. After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term.

26. ATTORNEYS MUST BE ADMITTED TO PRACTICE. Attorneys at law who have not been admitted to practice in this court shall not be permitted to argue orally, or file briefs or any paper, in any cause in this court.

27. PAPERS NOT FILED AFTER SUBMISSION. The clerk of this court shall not file with the papers of any cause in this court any paper, after the cause has been argued or submitted, except when permission has been given by the court: provided, that briefs may be filed during the day of the submission of the cause.

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THE
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VOLUME VII.

Ex parte HARRIS.

(Supreme Court of Florida. Jan. 18, 1890.)

JUDGE—DISQUALIFICATION—AFFINITY—BAIL.

1. The interest which disqualifies a judge under section 28, p. 337, McClel. Dig., is a property interest in the action or its result, in contradistinction to an interest of feeling or sympathy or bias that would disqualify a juror.

2. Affinity is the tie between a husband and the blood relations of the wife, and between a wife and the blood relations of the husband, but it does not exist between the blood relations of either party to the marriage and those of the other party, and hence there is no affinity between a brother of a wife and the brother of her husband, and the latter is not disqualified by affinity to preside in the trial of the former for a crime.

3. That a judge has boarded with his sister-in-law, and that she is and has been a daily visitor to his home, remaining there sometimes for days, and the judge has always been a great admirer and friend of a brother of the sister-in-law, and has always regarded him as scrupulously honest, and these considerations lead him to fear that he might not be able to do the state justice, do not disqualify the judge from presiding in the trial of such brother for a criminal offense.

4. Where a party is in custody under an information charging him with a bailable felony, and the judge of the criminal court of record before which he is charged refuses to take any action whatever in the case, either as to bail or trial, on the ground that he is disqualified by reason of interest and affinity to act, and it does not appear to the supreme court on a *habeas corpus* proceeding that the judge is disqualified, bail conditioned for the party's appearance before the criminal court of record will be allowed.

(Syllabus by the Court.)

Habeas corpus.

Frank W. Pope and O. J. H. Summers, for petitioner. William B. Lamar, Atty. Gen., for the State.

RANEY, C. J. The petitioner was arrested on a charge of robbery, and an information was filed against him in the criminal court of record of Duval county, and he was brought into that court for arraignment; whereupon the judge, the Honorable LOTON M. JONES, refused to take any action in the cause, either to try him or to admit him to bail, although the petitioner announced his willingness and readiness to be tried, and offered bail with good and sufficient sureties. The reasons given by the judge for his course are that he is the brother of the husband of a sister of peti-

tioner, and is therefore disqualified to take any action in the cause; and, further, he has boarded with his said sister-in-law, and she is and has been a daily visitor to his home, remaining there sometimes for days, and petitioner has also been a visitor to his house, and he, the judge, has always been a great admirer and friend of the petitioner, and has always regarded him as scrupulously honest, and these considerations lead him to fear that he might not be able to do the state justice.

Being in the custody of the sheriff on *capias* issued upon the information, under the above circumstances, Harris applied to one of the justices of this court for a writ of *habeas corpus*, which he issued, making it returnable before the court, and the sheriff has made a return in keeping with the above facts, stated in the petition.

The petitioner asks to be discharged or admitted to bail.

The act of December 4, 1862, provides that "no judge of any court or justice of the peace shall sit or preside in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the parties, nor shall he entertain any motion in the cause other than to have the same tried." It also makes it the duty of the judge or justice so incompetent to retire of his own motion without waiting for an application to that effect, and declares void all judgments, decrees, or orders made by a justice so disqualified. Sections 28, 29, p. 337, McClel. Dig.

Judge JONES is not a party to this proceeding, nor is it the proper remedy for obtaining an adjudication between the state and him, or the prisoner and the judge, upon the question of his qualification in the premises or power to try the petitioner, and directing him to proceed in the cause as it is his duty to do, if he is not disqualified. *State v. Walker*, 25 Fla. —, 6 South. Rep. 169, 172. Still it is urged on behalf of petitioner that the judge is disqualified, and for this reason he should be discharged or bailed, as, under the circumstances, his detention will amount to indefinite imprisonment. If he is disqualified to hear the cause, and such disqualification is ground for the petitioner's discharge, he should be given

his liberty; so, without meaning to conclude Judge JONES upon the question in any direct proceeding against him, but merely as an answer to petitioner's claim, we must give our views on the subject.

The interest that disqualifies a judge under the statute is a property interest in the action or its result, in contradistinction to an interest of feeling or sympathy or bias, that would disqualify a juror. *Salus v. Freeman*, 24 Fla. 209. 4 South. Rep. 525; *Ochus v. Sheldon*, 12 Fla. 188. There is, of course, no consanguinity between Harris and Judge JONES. Is there any affinity? Not according to any law we can find on the subject. Affinity is the tie arising from marriage, between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband, but there is no affinity between the kinsmen of the wife and those of the husband, or *vice versa*. Thus, say the books, the husband's brother and the wife's sister have no affinity. The same must be true of the husband's brother and the wife's brother. See title "Affinity," in the Law Dictionaries of Tomlin, Bouvier, Abbott, and Rapalje & Lawrence. There is no affinity between the blood relatives of the husband and blood relatives of the wife. *Paddock v. Wells*, 2 Barb. Ch. 331; *Carman v. Newell*, 1 Denio, 25; *Spear v. Robinson*, 29 Me. 531; *Waterhouse v. Martin*, Peck, (Tenn.) 373. These authorities and those cited in them show beyond question that there is no affinity between Judge JONES and the prisoner. Moreover, in view of the doctrine in the Case of Leefe, 2 Barb. Ch. 39, by Chancellor WALWORTH, citing *Moore v. White*, 6 Johns. Ch. 360, by Chancellor KENT, it is questionable whether the statute operates as to affinity in a case like this, where the constitution has created a court, and made no provision for a trial by another judge or tribunal. The other circumstances upon which the judge bases his fear that he will not be able to do justice to the state are, as indicated above, not such interest as disqualifies him, nor is the presence of the apprehension any good evidence that he will not be careful or able to do justice.

The offense is bailable under our constitution and laws, and the prisoner should not, under the circumstances, be denied the right of bail, particularly as no steps have been taken by the state to test the correctness of Judge JONES' position. The proper order will, if it shall be necessary, be made, on application of counsel for petitioner, for inquiry into the circumstances of the alleged offense, with a view to fixing the amount of the bail, which will be conditioned, in the form usual and proper in such cases, for his appearance before the criminal court of record of Duval county at the time or times to be specified, under our direction, in the bail-piece.

It will be ordered accordingly.

LENFESTY *et ux.* v. COE.

(Supreme Court of Florida. Jan. 23, 1890.)

FORECLOSURE PROCEEDINGS—REGULARITY—APPEAL—REVIEW.

1. The regularity of a decree of foreclosure and sale cannot be questioned on an appeal taken from a personal decree rendered under the eighty-ninth

equity rule for balance of amount reported by the master to be due on the former decree, over and above the proceeds of the sale of the mortgaged property.

2. That the original promissory note secured by the mortgage, or other proper evidence of the indebtedness, is not shown by the record to have been filed or produced before the master, is a question affecting the regularity of the decree of foreclosure and sale, as distinguished from its legality or validity.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county; G. A. HANSON, Judge.

On motion for *supersedeas*.

Phillips & Carter, for the motion.

RANEY, C. J. Appellee filed his bill against appellants to foreclose a mortgage on real estate, and decree *pro confesso* was entered for want of pleading thereto, and the cause was referred to a master to report the amount due, and, he having made his report, a decree was rendered on the 31st day of July, A. D. 1889, foreclosing the mortgage, and decreeing a sale of the property covered by it to satisfy the amount found due, which was \$1,657.50, principal and interest, \$32.40, moneys expended by the complainant in the protection of his mortgage upon the property, \$200 attorney's fees, and \$13.22 costs, the several sums aggregating \$1,903.12. A sale having been made, the master made a report of the same, and of the balance remaining unpaid of the amount so adjudged to be due over and above the proceeds of the sale, and for this balance, \$526.65, a decree was rendered on the 7th day of September last, confirming the sale, and that appellee recover the balance of the said James Lenfesty, under the eighty-ninth equity rule.

On the 4th day of October the appellants entered their appeal in the following form: "Now come the defendants in the above cause on this the 4th day of October, A. D. 1889, and within thirty days after the entry of the final decree therein rendered, and enter their appeal from the decree herein rendered to the supreme court of the state of Florida, to be held at the city of Tallahassee on the second Tuesday in January, A. D. 1890."

The citation issued upon this entry of appeal calls the appellee to appear and show cause why the decree of September 7th, mentioned above, should not be reversed.

Considering the entry of appeal and the citation, our conclusion is that the decree of the 7th of September is the one appealed from. It is true that the decree of foreclosure of July 31st is the final decree in the cause according to the ordinary meaning of the term "final decree" when used with reference to appeals in foreclosure cases; still the term is not so used in the entry of appeal before us. If the word "decree," appearing subsequently in the entry, could otherwise be held to refer not to the same decree as the words "final decree" do, but to the decree of foreclosure of July, we think we are precluded from regarding it as doing so by the fact that appellants have cited the appellee to answer simply an appeal from the September decree.

An appeal from a personal decree for the balance of the amount of the decree of fore-

closure remaining unpaid over and above the proceeds of the mortgaged property does not involve a consideration of any question as to the regularity, as distinguished from the validity, of the decree of foreclosure and sale, or of any proceeding prior thereto, but only errors arising subsequent to that decree. *Mann v. Jennings*, 25 Fla. —, 6 South. Rep. 771. We are asked to grant a *supersedeas* on the ground that the original promissory note secured by the mortgage or other proper evidence of the indebtedness is not shown by the record to have been produced before the master to whom the cause was referred, and upon whose report the decree of foreclosure and sale of July 31st is based. This is properly an objection to the July decree, from which decree no appeal has been taken, and not one that can be considered on this appeal, as the question does not affect the validity or legality of that decree as distinguished from its regularity.

The motion for a *supersedeas* is denied.

Ex parte JOICE et al.

(*Supreme Court of Alabama*. Nov. 23, 1889.)

COSTS IN CRIMINAL CASES—IMPRISONMENT.

Code Ala. § 4508, provides that, if a fine and costs are not paid or a judgment confessed therefor, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county. Section 4504 provides that if, on conviction, judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid or judgment confessed therefor, then the court may impose additional hard labor for such period as may be sufficient to pay the costs, etc. *Held*, that where defendants have been convicted of carrying on a lottery, which offense, under Code Ala. § 4068, is punishable by fine without imprisonment, and have paid the fine imposed, but refused to pay the costs, payment of the same may be enforced by sentence to hard labor, under the above sections. *CLOFFON, J.*, dissenting.

Application for *habeas corpus*.

Humes, Walker, Sheffey & Gordon, for petitioners. *W. L. Martin*, Atty. Gen., for the State.

SOMERVILLE, J. The petitioners were convicted of the offense of carrying on a lottery contrary to the provisions of section 4068, Code 1886, which is punishable by fine alone, without imprisonment. The justice imposed a fine of \$100, the least amount authorized by the statute. Justices of the peace in Madison county are vested with "original jurisdiction, concurrent with the circuit court, of all misdemeanors committed in said county," by the act approved February 8, 1877. Acts 1876-77, pp. 197, 198. Pursuant to this authority the justice adjudged the defendant guilty, and awarded, by way of punishment, "a fine of one hundred dollars and the costs of the proceeding." The defendants paid the fine, but failed to pay the cost. The contention of the petitioners now is that, inasmuch as there was no hard labor imposed on them as defendants to enforce the payment of the fine, there could not be a sentence imposed on them for costs. In other words, as stated by counsel, before there can be a sentence to hard labor for costs there must be a preliminary

sentence to hard labor, either in default of the payment of the fine or in the execution of the original judgment of the court. In support of this view, a strict adherence to the letter of the statute is invoked, as it is found embodied in section 4504, Code 1886.

The naked question is whether a defendant is to be permitted to resort to the device of paying his fine, and thus entirely escape the payment of the costs. If this can be done, the purpose can be effected as well where a nominal fine of one cent is imposed as where the fine is a hundred or a thousand dollars. Do the statutes embraced in our Penal Code, relating to imprisonment for the enforcement of fine and costs, contemplate this result? Was this the legislative intention, as gathered from all the statutes bearing on this subject? Code 1886, §§ 4501-4504. Imprisonment, as a legal punishment for crime in this state, is authorized for three distinct purposes: (1) As a distinct penalty for the particular offense, either in the penitentiary, the county jail, or by way of sentence to hard labor for the county, (Code, §§ 4492-4498;) (2) to enforce the payment or satisfaction of the fine imposed by the court or the jury, which may be by imprisonment in the county jail, or by sentence to hard labor for the county, (section 4508;) and (3) to enforce the payment of the costs, which is alone by sentence to hard labor for the county, (section 4504.) We may add, just here, that no reason in the nature of things can be perceived why the legislature should make the imposition of either of these separate punishments a *sine qua non*, or condition precedent, to the imposition of the other. Each has its own function to perform, and its own sphere to fill, clearly distinct from that of the other two.

Imprisonment, as a satisfaction of the fine imposed, has always prevailed in this state, and in every other country where an enlightened system of criminal jurisprudence obtains. It is the only practical alternative, where the defendant refuses to pay or secure the fine. The plain purpose of the legislature for the past 20 years has been to place the enforced payment of certain costs upon a like compulsory basis. Such of these costs as are incurred by the state in the prosecution of the offender are produced by the fault of the defendant. The justice of imposing them on the convicted criminal is a question purely of legislative policy, with which the courts can have no concern except to ascertain the intent of the law-making power as to the conditions and mode of their enforcement. The constitutional validity of statutes enforcing the payments of such costs by imprisonment of the defendant has been raised before this court time and again, and they have uniformly been held to be constitutional, and not to violate that provision of the constitution which prohibits imprisonment for debt. It was said in *Caldwell v. State*, 55 Ala. 133, (1876,) which arose under sections 3760, 3762, and 4061 of the Revised Code of 1867, corresponding to sections 4503, 4501, and 4504, respectively, of the present Code, that "the legislature intended [thereby] to make the non-payment of costs imposed in a criminal case the ground of an increase of punishment." And

again: "It [the statute] simply augmented, to that extent, the punishment imposed, as a consequence of the non-payment of fine and costs."

In *Re Long*, 87 Ala. 46, 6 South. Rep. 328, the origin, history, and construction of these statutes were fully discussed. The defendant in that case had been convicted of vagrancy, and fined \$20, and was sentenced to imprisonment to pay the fine, and to hard labor in default of the payment of costs. It was contended in his behalf that inasmuch as the offense was punishable by fine only, and no preliminary sentence to hard labor as a penalty for the particular offense itself was authorized, there could be no imprisonment by hard labor to enforce the costs. A strict and technical reading of section 4504 of the Code (1886) seemed to justify this narrow interpretation, but it was repudiated by a majority of the court, and we held, in accordance with the uniform practice of the *nisi prius* courts, that there could be a lawful sentence to imprisonment by hard labor to satisfy costs without a previous or preliminary "judgment against the accused that he perform hard labor for the county," as the letter of the statute apparently requires. It was thought that the interpretation contended for would defeat the plain legislative purpose to enforce the payment of costs by hard labor for the county in all cases of that character, and for this reason it was rejected, and for the further reason that a contrary construction had been long ago adopted by this court.

The contention in the present case is based upon a like attempt to adhere so closely to the letter of the statute as to defeat the obvious purpose of its enactment. There is a class of cases in the Criminal, not less than in the Christian, Code, where "the letter of the law killeth, and the spirit giveth life." The present case is of that class. It must have been intended that the statute, in its strict letter, should apply only to those cases where a preliminary judgment can be lawfully rendered that the accused "perform hard labor for the county," not to those where such a judgment is both unnecessary and unauthorized. The offense in question is punishable only by fine. The statute requires both the fine and costs to be paid or secured. Imprisonment is the authorized mode of enforcing the one as much as the other. "If," says the statute, "the fine and the costs are not paid," etc. Section 4503. The officer had no authority to receive the fine so as to release the costs. The rights of the state could not, therefore, be prejudiced by receiving the one without the other.

The case of *Nelson v. State*, 46 Ala. 186, (1871,) is directly in point. There the defendant was fined the sum of \$25 by the court. He paid the fine, as here, and refused to pay the costs. Failing to pay the costs, or to confess judgment for the same, he was sentenced to hard labor for the county to pay the costs. He moved for his discharge from this judgment. This court refused the motion, but reversed the judgment on the ground that the fine was fixed by the court, while the statute re-

quired it to be fixed by the jury. If the contention in this case is correct, the defendant was entitled to his discharge.

So, in *Morgan v. State*, 47 Ala. 34, (1872,) the defendant was convicted of an assault and battery, and fined one dollar, and judgment was rendered for the fine and costs of prosecution. She paid the fine, and refused to pay or secure the costs, and moved for her discharge. The motion was denied, and the court sentenced her to hard labor for the county for 10 days, to enforce such payment. The judgment was affirmed by this court on appeal.

It is our opinion that these interpretations of the statutes, rendered 17 years ago, ought not to be disturbed. They have been accepted by the legislature. The inferior courts, charged with the administration of our Penal Code, have uniformly acted on them, and they have been generally acquiesced in by the bar. *Long's Case*, 87 Ala. 46, 6 South. Rep. 328.

In reaching this conclusion we have not been unmindful of the principle that penal statutes are to be strictly construed. The healthy limitation on this principle is that an interpretation should never be adopted which would defeat the obvious purpose of the statute, if any other reasonable construction can be given to it. As was observed by this court in *Thompson v. State*, 20 Ala. 54: "The inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law-giver." In that case a statute was under review which provided that no new road should be opened "through any inclosure while there is a crop growing on the same." It was held that the statute did not embrace a crop planted or sowed after the order of the commissioners' court establishing the road, although such a case fell within the letter of the statute. Such construction, said the court, would be unreasonable, as it would frustrate the manifest object the legislature had in view, inasmuch as any person could always thwart the action of the court by always having some sort of crop sowed after its order was made. So, in the case of *The Emily and The Caroline*, 9 Wheat. 381, where the statute declared forfeited any vessel "which shall be fitted out" in the United States for carrying on the slave trade, it was contended that the letter of the statute required that the vessel must be completely fitted and ready for sea, and not merely in process of construction, for the forbidden purpose. The court rejected this view, holding that it would defeat the purpose of the law, and observed: "To apply the construction contended for on the part of the claimant, that the fitting or preparation must be complete, and the vessel ready for sea, before she can be seized, would be rendering the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner." Many other cases could be cited to illustrate the principle in

question, which is thus stated by a recent writer: "Where the real design of the legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, though in so doing the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter;" and this rule, he concludes, "holds good even in the construction of criminal statutes." End. *Interp. St.* § 295.

The offense of carrying on a lottery is punishable only by a fine. No independent term of imprisonment is affixed, as a separate penalty, as in many other cases, additional to the fine. For myself, I see no reason why a convicted defendant should not be allowed to pay his fine if he choose, and still work out the costs. This would be a humane construction of the statute, favorable to human liberty. But the payment of the fine certainly can go no further than relief from imprisonment for its satisfaction. It cannot satisfy the costs; and, in the absence of the costs being paid or secured as required by the statute, the plain legislative intent is that they shall be satisfied by sentence to hard labor for the county. If the present case were before us on direct appeal, we would have the defendant in the attitude of absurdly complaining of prejudicial error in the record, on the ground that he had been merely sentenced to hard labor to pay the costs, and had not, by preliminary judgment, been first sentenced to satisfy a fine which he himself had paid, or to an imprisonment which the law did not authorize as an independent penalty for the offense charged. It is apparent that any other construction of the statute under consideration than the one above adopted would practically operate to repeal the whole system of hard labor for the counties in its bearing on a large number of offenses which have been so punished uniformly for the past 20 years.

We think there is no reasonable doubt as to the constitutionality of the act of February 8, 1877, (*Acts* 1876-77, pp. 197, 198,) which vests in the justices of the peace jurisdiction to try all misdemeanors in the counties designated. This legislative power arises from section 9 of article 1 of the present constitution of 1875. The phrase there used, of "other misdemeanors," is not weakened by the previous enumeration of five or six particular misdemeanors. *Anderson v. State*, 72 Ala. 187.

The application for the writ must be denied.

CLOPTON, J., (*dissenting*.) Due respect for my conviction as to the proper interpretation of the statutes under which the justice of the peace exercised, in this case, the power to impose hard labor for the costs, requires that I briefly state the reasons which constrain me to dissent from the opinion of the majority of the court.

In *Re Long*, 87 Ala. 46, 6 South. Rep. 328, section 4504 of Code 1886 was construed to confer authority to impose hard labor for the payment of the costs on conviction for offenses punishable or punished by fine only.

On the application for a rehearing, the extent of the modification of the opinion rendered on the original hearing is expressed in the following language: "To so modify our former opinion as to hold that in all cases in which the defendant is sentenced to hard labor as a punishment for the offense of which he has been convicted, either in default of the payment of or confession of judgment for the fine assessed, or in execution of the original judgment, the court may impose additional hard labor, as provided by section 4504 of the Code, for the payment of costs." In that case there had been a sentence to hard labor under section 4503. I was constrained to dissent from the construction then placed upon the statute, but did not anticipate it would be carried to the extent now proposed. I then suggested, in my dissenting opinion, that the construction in that case would lead to double sentences to hard labor for the costs, should a case arise in which the defendant paid the fine, but failed to pay or confess judgment for the costs.

In this case the defendants were fined only. They paid the fine, but failed to pay or confess judgment for the costs, as provided by section 4502. Without sentencing them to hard labor under section 4503, the justice imposed hard labor for the county for the term of eight months to pay the costs, under section 4504. The question is not whether a defendant is to be permitted to resort to a device of paying the fine, and thus entirely escape the payment of the costs.

In *Morgan v. State*, 47 Ala. 34, it was held that under section 4503 the accused could be sentenced to hard labor for the county, as therein provided, on failure to pay or confess judgment for the fine and costs, or either of them, the term of the sentence being graduated by the amount of the fine. Under this construction, the justice could have sentenced the petitioners to hard labor on failure to pay or secure the payment of the costs under section 4503, though they may have paid the fine, and then, under the construction placed on section 4504, in *Re Long*, *supra*, could have imposed additional hard labor for the costs. This necessary consequence was one of the reasons on which I based my dissent in that case, and my conclusion that section 4504 was not intended to be applied in case of conviction for offenses punishable by fine only. It does not necessarily follow that the petitioners could have escaped the payment of the costs by paying the fine. The sole question is whether the justice can impose hard labor for the costs under section 4504, when no judgment has been rendered that the defendants perform hard labor for the county.

The highly penal character of section 4504 requires that it shall be construed with "reasonable strictness." The rule of strict construction should not be so rigorously applied as to restrict the language employed in the statute to its literal meaning, to the exclusion of cases which would be comprehended within its scope, and the purview of the words employed, when used in their ordinary popular sense, and given their generally accepted meaning. But the rule requires that effect shall be given to all

the words, unless obviously mere surplusage; and that no case be held as coming within the statute by construction which does not come within the import of the language, fairly interpreted. It has been said: "The purpose of the rule is to prevent acts from being brought within the scope of punishment because courts may suppose they fall within the spirit of the law, though not within its terms." *Com. v. Cooke*, 50 Pa. St. 201. In no case is it permissible for the court to go beyond the plain meaning of the phraseology in an effort to discover a legislative intention not clearly implied from the language employed. *End. Interp. St. § 329*, where the rule and its limitations are clearly defined.

The language of section 4504 is plain and unambiguous. "If, on conviction, judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid, or judgment confessed therefor, as provided by law, then the court may impose additional hard labor for the county for such period, not to exceed eight months in cases of misdemeanor, and fifteen months in cases of felony, as may be sufficient to pay the costs, at a rate not less than thirty cents *per diem*." By its express provision a judgment against the accused that he perform hard labor for the county is preliminary and essential to the exercise of the power to impose hard labor for the costs. The imposition of hard labor for this purpose is contingent and dependent on the concurrent happening of the rendition of judgment that the accused perform hard labor for the county, either as a penalty prescribed by statute on conviction for the particular offense, or as alternative punishment, as provided by section 4503, and the failure to presently pay or confess judgment for the costs. It is hard labor super-added to an antecedent sentence to the same kind of punishment,—additional hard labor. Neither of the events required by the statute can be dispensed with, nor is either mere surplusage.

Nelson v. State, 46 Ala. 186, is cited as an authority sustaining the construction put upon the statute by the majority of the court. In that case the defendant was fined only. He paid the fine, but refused to pay the costs, and thereupon was sentenced to hard labor for the county at the rate of 40 cents *per diem* to pay the costs, the amount of which and time necessary to pay the same were to be ascertained by the clerk. The ruling was that if a party who, on conviction, is punished by fine only, fails to pay or secure the payment of the fine and costs, he may be sentenced to hard labor for the county during the time prescribed by section 3760 of the Revised Code, which corresponds to section 4503 of Code 1886. On the contrary, it is said: "When both the fine and costs are not paid by a party found guilty on an indictment for a public offense punishable by fine or imprisonment in the county jail, or to hard labor for the county, the foregoing section [3760] of the Revised Code prescribes the limit of the period during which he may be sentenced to hard labor for the county, if the sentence is under this section." This is the extent to which that

case and *Morgan v. State*, *supra*, go. The construction in both is confined to section 3760, and neither makes any allusion to or purports to construe the section for the Revised Code corresponding to section 4504 of the present Code. It may be difficult to see on what ground it was held in *Nelson's Case* that the circuit court did not err in refusing to discharge the defendant; but, to be consistent with the opinion, it can only be based on the ground that, the sentence not being for a definite period, the defendant should be held until he serves the number of days prescribed by section 3760 of the Revised Code. Neither of the cases is a judicial construction of section 4504.

The words of section 4504, being plain and unambiguous, leave no room for construction or interpretation. Ambiguity, which does not reasonably arise from the language employed, should not be attributed in search of a case which does not come within the scope and fair meaning of the phraseology. When the words are plain and unambiguous, the legislature must be intended to mean what they have clearly expressed. *Carlisle v. Godwin*, 68 Ala. 137. To construe the section as authorizing the imposition of hard labor for the costs on the assessment of a fine only, and a failure to pay or confess judgment for the costs, necessarily eliminates or makes of no effect the material and controlling words, "if, on conviction, judgment is rendered against the accused that he perform hard labor for the county;" and to construe it as if to read, "if, on conviction, the costs are not presently paid or judgment confessed therefor, as provided by law, then" hard labor for the county may be imposed for the costs for the time and at the rate specified. It may be that the legislative policy is to enforce payment of the costs by the imposition of hard labor, but they have seen proper to restrict it to cases in which the accused is sentenced to perform hard labor for the county. I submit, with due respect, that the construction now placed on section 4504, by which a statute highly penal in its character is extended to cases which do not come within the scope and fair meaning of the language employed, is unauthorized by any established canon of construction or the adjudged cases.

STONE, C. J. I concur in the conclusion of Brother SOMERVILLE mainly on the following grounds:

First. His opinion follows the principle declared in *Nelson v. State*, 46 Ala. 186, decided in 1871, and in *Morgan v. State*, 47 Ala. 34, decided in 1872.

Second. Since those decisions were announced, there have been many sessions of the legislature, and two codifications of the statutes, and no change has been made in the law affecting the imposition of hard labor for costs, except to fix limits beyond which the term cannot be extended.

Third. The practice in the trial courts has been general, if not universal, to impose hard labor for costs, if not paid or secured, and this without reference to any previous sentence to hard labor for an unpaid fine.

In my opinion, an interpretation of the

statutes, and a practice under that interpretation, have become established, and it would be injurious to the administration of the criminal law if we were to depart from them.

STATE *ex rel.* ATTORNEY GENERAL v. SAVAGE.

(Supreme Court of Alabama. Dec. 12, 1889.)

IMPEACHMENT OF OFFICER—INFORMATION—JURISDICTION.

1. Under Code Ala. 1886, § 4840, requiring the attorney general to institute proceedings to impeach certain officers, when it appears from the report of any grand jury that any such officer ought to be removed for any of the causes enumerated in section 4818, which includes drunkenness, the information, if it refers to the report of a grand jury, and is accompanied by it as the authorization, is *prima facie* sufficient, without specifically setting forth the contents of the report.

2. A report of a grand jury, which states that an officer should be removed "for and on account of his habitual drunkenness while in such office prior to and down to the making of this report," sufficiently complies with Code Ala. § 4839, requiring a grand jury, if it finds that an officer should be removed, to report to the court, "setting forth the facts."

3. The supreme court has no original jurisdiction to consider a motion to quash an information impeaching an officer, on the ground that the information was not concurred in by 12 jurors, and was not based on the evidence of witnesses examined or on legal documentary evidence, but such objections must be first raised in the court to which the report is presented.

W. L. Martin, Atty. Gen., for the State.
H. C. Tompkins and Jos. A. Walden, for respondent.

CLOPTON, J. This case, which is an impeachment proceeding against R. R. Savage, judge of probate of Cherokee county, instituted in this court, is submitted on a motion to quash the information on the fourth, fifth, ninth, and tenth grounds, and on a demurrer to the other grounds.

In respect to the impeachment of public officers, a jurisdiction not theretofore existing is created by the constitution and statutes, and the mode of its exercise provided, to which the proceeding must substantially conform. Section 4840, Code 1886, provides: "It shall be the duty of the attorney general to institute proceedings under this chapter, and prosecute the same against any officer included in section two, article seven, of the constitution, [which includes judges of probate,] when the supreme court shall so order, or when the governor shall, in writing, direct the same, or when it appears from the report of any grand jury that any such officer ought to be removed from office for any cause mentioned in the first section of this chapter." The causes mentioned are: "Willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith." Section 4818. Whether such proceedings shall be instituted is not rested on the discretion of the attorney general; authorization in one of the statutory modes is essential to uphold the proceeding. The present informa-

tion purports to be founded on the report of a grand jury.

The fourth and fifth objections are substantially the same, though varied in form, namely, it does not appear that the alleged report was made by a grand jury of Cherokee county to the circuit court for that county. The information recites that the proceeding is instituted on the report of a duly organized grand jury of Cherokee county; that it was made to the circuit court at the July term, 1889, and entered on the minutes of the court; and that a certified copy, which accompanies the information, was transmitted to the attorney general. When the information refers to the report of a grand jury, and is accompanied by it, as the authorization, this is *prima facie* sufficient to uphold the proceeding, without the contents being specifically set forth in the information itself.

The ninth and tenth grounds of the motion are that the facts constituting the misconduct with which the defendant is charged are not set forth in the report of the grand jury, as required by the statute. Section 4839 of the Code declares: "It shall be the duty of every grand jury to investigate and make diligent inquiry concerning any alleged misconduct or incompetency of any public officer in the county which may be brought to their notice; and if, on such investigation and inquiry, they find that such officer, for any cause mentioned in this chapter, ought to be removed from office, they shall so report to the court, setting forth the facts, which report shall be entered on the minutes." It was held in *State v. Seawell*, 64 Ala. 225, that setting forth the facts in the report is essential to the authority of the prosecuting officer to institute such proceeding; and, though the facts need not be set forth with the accuracy usually required in pleading, unless the report contains a succinct statement, showing the nature and description of the acts of the official misconduct charged, it is insufficient to uphold the proceedings. In that case the defendant was charged with extortion and corruption in office, which are conclusions of law from facts, which may differ in different cases. The report of the grand jury, on which the present information is based, is as follows: "In the discharge of our duties as a grand jury we find, and do hereby report, that R. R. Savage, judge of probate in and for the county of Cherokee, ought to be impeached and removed from such office for and on account of his habitual drunkenness while in such office, prior to and down to the time of making this report." No greater fullness of description of the acts and less accuracy of statement is required in such report than in an indictment. In an indictment, it is sufficient to use the words of the statute creating the offense, when, by doing so, the fact or facts constituting it are directly and expressly alleged. For instance, an indictment for selling intoxicating liquor to a man of known intemperate habits is sufficient, if it describes the offense in the language of the statute; and a witness, having opportunities and acquaintance, showing knowledge of a particular person, may state that he is a man of intemperate habits. *Smith v. State*, 55

Ala. 1. When being a common drunkard is declared an offense, an indictment sufficiently charges it by the use of the term itself. *Com. v. Whitney*, 5 Gray, 87. Habitual drunkenness is the effect of frequent repetition of the excessive use of intoxicating liquors. It is a fact of which the term itself is descriptive. Specific instances of drunkenness, or the frequency of its repetition, or the effect upon the physical or mental state of the person, need not be alleged. When the official misconduct charged is a fact in itself, and not a conclusion of law from facts, the report conforms to the statutory requirement if it describes the offense in the words of the statute by which such act is declared a cause of impeachment and removal from office. *Trigg v. State*, 49 Tex. 645.

The other grounds of the motion to which a demurrer was interposed are that the report was not concurred in by 12 of the grand jurors, and was not based upon the evidence of witnesses examined before the grand jury, or upon legal documentary evidence. By our statute, as well as at common law, the concurrence of 12 grand jurors is requisite to find an indictment. Code, § 4353. And by section 4350 the grand jury, in the investigation of a charge for an indictable offense, is forbidden to receive any other evidence than is given by witnesses before them, or legal documentary evidence. Under these statutes, it was ruled in *Sparrenberger v. State*, 53 Ala. 481, that when it appears that a paper, purporting to be an indictment, was not returned into court with the concurrence of 12 of the grand jurors, or was found without the evidence of witnesses, or legal documentary evidence, it should be quashed and stricken from the file. It is insisted that these rules and statutory provisions are applicable to the report of a grand jury upon which proceedings are to be instituted under section 4350. In respect to impeachment proceedings, the report of the grand jury is an informal accusation, and is in the nature of a presentment or instructions upon which to base and frame an information. Whether it is necessary that 12 of the grand jury should concur in such report, or that it should be made upon other evidence than personal knowledge, it is unnecessary to decide.

In *Sparrenberger v. State*, supra, it was held that inasmuch as such objections do not go in abatement, but to the legal existence of the indictment, the motion to quash and strike from the files must be addressed to the court upon whose records or into whose files the paper has been introduced, without warrant of law, before pleading to the indictment. Such motion is an invocation of the inherent power of the court over its own records to make them speak the truth. That court is clothed with exclusive jurisdiction and power to expunge it from the records. When the proceeding is not void, no other court has authority to declare that the record speaks a falsehood. Its verity cannot be collaterally assailed. This court is without authority to quash an indictment, or strike a paper from the files of the circuit court, however illegally introduced,

unless in the exercise of its appellate or supervisory jurisdiction. So long as it remains a part of the record we must, except on appeal or writ of error, receive and regard it as absolutely true. It admits of grave doubt whether the rule as to quashing an indictment on the statutory objections, that 12 of the grand jurors did not concur therein, or that it was found without legal evidence, should be extended to the report of a grand jury, the basis of an impeachment proceeding. The statute requires that the report shall be entered on the minutes of the court. Judicial action is not necessary. No notice to the officer charged is required or provided. It is questionable whether, after the report has been returned and entered on the minutes, the accused will be permitted to go behind it, and show that it was not found by the requisite number of jurors, or without legal evidence. This question we do not decide. Be this as it may, the information being an original proceeding in this court, we hold that such objections cannot be taken advantage of, for the first time, in this court by motion to quash the information. *Jackson v. State*, 74 Ala. 26. The motion is overruled as to fourth, fifth, ninth, and tenth grounds, and the demurrer to the other grounds is sustained.

CONERY *et al.* v. NEW ORLEANS WATER- WORKS Co. *et al.*

(*Supreme Court of Louisiana*. May 22, 1889. 41
La. Ann.)

MUNICIPAL CORPORATIONS — WATER COMPANIES — OBLIGATIONS OF CONTRACT.

1. Act No. 56 of 1884 does not conflict with any article of the constitution of the state. Ordinance No. 909, passed by the city in pursuance of said act, is a valid ordinance, and the contract made between the city of New Orleans and the water-works company is a legal contract.

2. There is but one object embraced in the title of the act, and all the subdivisions of the title relate to and are intimately connected with the principal object expressed in the title; and, as all of the sections of the act relate and are germane to the object expressed in the title, the act does not conflict with article 29 of the constitution. It does not conflict with articles 45, 46, 57, and 234, as the act does not amend the charter of the water-works company, or grant any extra compensation to it.

3. The city of New Orleans had the power to contract for a water supply, under the provisions of her charter; and, having this power to contract, the price, the kind of water, and the amount, are matters of legislative discretion, vested in the city council; and when the city confines herself within the limits of her powers to contract, this legal discretion exercised by the city council will not be inquired into by the courts, in the absence of fraud and corrupt and extravagant legislation, which are beyond the legitimate object and purpose of municipal government.

4. To impose any public burden upon a corporation not warranted by its charter, and against its consent, violates both the state and federal constitutions.

5. A judicial decree interpreting a contract authorized by legislative will cannot prevent the legislature from further legislation, authorizing the parties to alter or amend this contract, or to annul the existing and make a new and a different contract.

BERMUDEZ, C. J., and FENNER, J., dissenting.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

Mr. Breaux, Mr. Hall, and J. R. Beckwith, for appellant. *E. H. Farrar and Carlton Hunt*, City Atty., for appellees.

McENERY, J. Ed. Conery and other taxpayers, residents of the city of New Orleans, brought suit against the New Orleans Water-Works Company, and the city of New Orleans, to have the existing contract for the supply of water to the corporation declared a nullity. They aver they are tax-payers of New Orleans in amounts aggregating \$10,000. They recite the history of the present charter, the obligation growing out of the city's attempt to subject the property of the corporation to taxation, and the judgment in the case of *City of New Orleans v. Water-Works Co.*, reported in 36 La. Ann. 432, and that the supreme court interpreted the legislative contract contained in act 33 of 1877, which is the charter of said company, and that the water-works company had no power to receive from the city any greater amount for a free supply of water than the sum of \$11,484.87, allowed the company on its reconventional demand in that suit, as an equivalent. They allege that the city had no authority to make the contract; that the contract is *ultra vires* null and void, illegal and unconstitutional. They also aver that after the termination of the suit of *New Orleans v. Water-Works Co.*, the company, not satisfied with the judicial construction placed upon its charter, in order to obtain an unjust advantage over the city, procured the enactment of act 56 of 1884, and that, pretending to act under this statute, the city council of New Orleans passed ordinance No. 909, ordering the mayor of said city to enter into a contract with the water-works company, and that said ordinance 909, and the contract made in pursuance thereof, were not authorized by the terms of act 56 of 1884, and that the legislature never intended that the contract relations as interpreted by the supreme court should be changed or modified, unless for the purpose of furnishing the city with clear and filtered water, and that, if said act contemplated a contract between the city of New Orleans and the water-works company as to the nature of the water to be supplied, then said act is unconstitutional and void, and conflicts with articles 45, 46, 57, 24, of the constitution of the state. The petition prays for an injunction. The city of New Orleans filed an exception to the petition,—(1) that the plaintiffs' petition disclosed no legal cause of action; (2) that the plaintiffs disclosed no interest or authority to institute and maintain the suit,—and prayed that it be dismissed. Some years after this exception was filed, on a change of the city administration the attorney of the city appeared and joined the plaintiffs in this suit. Complaint is made of this change of front on the part of the city, and it is alleged that the city is estopped from filing a contrary plea. While this may be true as to the city in its corporate or political capacity, it cannot operate on the plaintiffs (tax-payers) who allege the nullity of the contract. The company also filed an exception, alleging several grounds

for the dismissal of the suit, some of which are identical with the exception filed by the city. But they are so intimately associated with the merits of the case that we will not disturb the order of the district judge in overruling the exceptions. The water-works company filed an answer pleading a general denial, and also a supplemental answer alleging other matters, all of which, however, are summed up in maintaining the integrity of the contract, the authority of the city to make the contract, independent of act 56 of 1884, and the constitutionality of said act, and the validity of ordinance 909, and the contract made in pursuance thereof. There was a judgment in favor of the plaintiffs, and the water-works company has appealed.

The city of New Orleans purchased from the Commercial Bank the water-works' property and franchises. The city undertook to supply the inhabitants of the city with water. The experiment was disastrous, and her experience was that of all great municipal corporations which have attempted this scheme,—an insufficient supply of water, debt, through extravagant and bad management, and complaints from her citizens. To rid herself of this incumbrance the city appealed to the legislature for relief, and at her instance, and in answer to her prayers, the present company was composed, under the direction of her officers, in pursuance of act 33, extra session of 1877. Section 11 of that act is as follows: "Be it further enacted, etc., that the city of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions, and that the said company shall place, free of any charge whatever, two hydrants of the most approved construction in front of each square, where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets, and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned, at all times, during the continuance of this charter; and in consideration thereof the franchises and property of said New Orleans Water-Works Company, used in accordance with this act, shall be exempted from taxation,—state, municipal, and parochial." For several years the company supplied the city with water, and no tax was demanded from the company. In 1881 the city brought suit against the company for taxes assessed against the company, amounting to \$11,484.87. The company claimed that if it had to pay the tax the city was bound to pay for the amount of water supplied under the above section, and recovered for the sum of \$40,-281.87. There was judgment for the taxes due the city, and in favor of the company,

on the reconventional demand, of the exact amount of the taxes, as equivalent for the water already furnished the city. *City of New Orleans v. Water-Works Co.*, 36 La. Ann. 432. It is contended by plaintiffs that the decree in the case fixed and determined the respective obligations of the city of New Orleans and the water-works company, and regulated the future supply of water to the city, and the amount which the city should pay annually for its supply of water, and the amount of the taxes assessed against the company as fixed in said suit. In this case the sole question was whether or not the property of the company was exempted from taxation, and it involved the determination whether or not section 11, Act. 33 of 1877 was void as being in conflict with the constitution of 1868. Under the issues presented the court could not interpret the legislative contract or charter of the company in its interests, because the only question was as to the nullity of one section of the act. It found up to the date of the suit an executed contract to deal with, the consideration of which was illegal. It declared the illegality of the consideration, and ordered the amount paid on account of it to be returned to the party who had paid his part of the obligation. The contract with the city was that for furnishing water, without specifying the amount, the city would not collect taxes from the company. The company furnished the water, and the city refused to allow the tax. The judgment annulled the contract, and returned to the water-works company the value of the water which they had furnished, and which had been fixed in the contract annulled at \$11,484.87, as the only consideration for exemption from the city taxes. To say that the decision in that case regulated the contract of the parties in the future as to the price of the water to be furnished by the water-works company would be to maintain that this court has made a contract for the parties which they never intended, and which is not warranted by any promises in the water-works company's charter. The contract between the city and the water-works company was made directly by the state at the solicitation of the city. The state withdrew the privilege of exemption from state taxation, which in amount equaled the city taxes. Thus one-half of the consideration was withdrawn by the state without giving any equivalent. To have fixed the price of the water to be furnished at the exact amount allowed the company in its reconventional demand would have been unjust. The company now pays in taxes twice the amount found to be due on the reconventional demand. If the increase has been so great in so short a time, it is reasonable to suppose that the increase will be in greater ratio in the future with the acquisition of additional property by the company, the increase in the value of its present property with the improvement and advancement in the commercial prosperity of the city, which is so confidently predicted and expected. From this it will appear how inequitable it would have been had the decree arbitrarily fixed an amount to be paid by the city for her water supply. It would

have been an amount never contemplated by the legislature when it made the contract for the city and the company. The effect of the judgment in the case was to destroy and annul section 11 of act 33 of 1877, extra session. One may look in vain in any other paragraph or section of the act for any obligation, express or implied, which compels the water-works company to furnish free water to the city for any franchise or privilege granted by the state. The water-works company was organized at the instance and invitation of the city, and by authority of law. The city cannot impose any obligation upon it contrary to the original grant without its consent. To impose upon it an onerous duty not contained in the charter would be a violation of state and federal constitutions. There is no provision in the charter requiring it to furnish water to the city at any stipulated or regulated price.

In the case of the *City of New Orleans v. Telephone Co.*, 40 La. Ann. 42, 3 South. Rep. 533, there was almost a similar state of facts. The city had by grant induced a telephone company to establish an expensive plant, and gave it certain privileges to erect its poles. Afterwards she attempted, in certain localities, to put a charge upon 600 of defendant's poles at \$5 per pole. There was judgment for the company, this court deciding that the company was protected by the constitutional right against the impairment of its contract. In the instant case the city promoted the organization of the water-works company, and now seeks to impose upon it an obligation not warranted by its charter. "Obviously," said the court in the *Telephone Case*, "upon the closest consideration of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine since the *Dartmouth College Case*, 4 Wheat. 518." In this case we have affirmed the principles resting upon the *Dartmouth College Case*, under which corporations have protected their rights and franchises, the titles to and uses of property, safely from any alteration or impairment of their rights and freedom from increased public burdens. It has become fixed in jurisprudence by repeated affirmations for over 60 years, and has become venerable because announced and maintained during this period by the highest judicial tribunal in the land through a succession of judges eminent for learning and purity of character. It would not yield to a persistent local popular clamor, and will not be reasoned to satisfy local prejudice and sentiment. 9 Rep. Amer. Bar Ass'n, 229. In *Binghamton Bridge*, 3 Wall. 73, Mr. Justice Davis said: "The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken. A departure from it now would involve dangers to society not to be foreseen, would shock the sense of justice of the country, and weaken, if not destroy, the respect which has always been felt for the judicial department of the government." To place the construction upon the decree in the case

of *City of New Orleans v. Water-Works Co.*, 36 La. Ann. 432, contended for by plaintiff, would be to impose an obligation upon the company not warranted by its charter, and would be in violation of both the state and federal constitutions.

It will be unnecessary to go into the specific details of the existing contract of the city with the water-works company. If the city had the power to make the contract, and confined herself within the limit of this power, the quantity and kind of water, the price, etc., were matters within the legislative discretion of the city council, and when this is found in the execution of the contract, courts will not inquire into this discretion. 1 Dill. Mun. Corp. 121; *Water-Works Co. v. Reed*, 15 Atl. Rep. 10; *Intendant v. Pippin*, 81 Ala. 545; *Valparaiso v. Gardner*, 97 Ind. 2. When the common council of a municipal corporation is vested with full powers over a subject, and the mode of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient. And when a municipality has power, under its charter from the legislature, to obtain a supply of water for fire and domestic purposes, it will not be enjoined from levying a tax to increase its supply when it is alleged to be ample. The extent of the use of such power rests in its discretion, and the question of expediency is for the municipality, and not for the courts. *Lucia v. Village of Montpellier*, 15 Atl. Rep. 321.

In the case of *Handy v. City of New Orleans*, 39 La. Ann. 107, 1 South. Rep. 593, this court said: "The serious charge is, after all, that the city has maladministered the public thing respecting the lease of her wharves. Under such a complaint, can the petitioners be heard? If it could be questioned whether the city, in the exercise of the police power which is inherent in all municipal corporations, could build and keep wharves, and exact compensation for the use of the facilities derived from them by those enjoying the same, or convey and transfer unto another that right, all discussion on the subject would be at once hushed by the positive and express delegation of authority in that respect made to the city by the sovereign, in the charter under which she breathes, moves, and acts. * * * It is apparent that the city was formally vested by the legislature with the power of administering, by herself or by the agency of others, the wharves and landings dedicated to commerce. There can be no doubt, then, that what the city has done in this regard, in the exercise of the police power, can no more be questioned than if the state herself had acted directly." In approving the doctrine expressed in *First Municipality v. Pease*, 2 La. Ann. 538, the court said: "The correctness of the ruling, and the soundness of the views supporting it, are not questioned, but the material fact on which the same rest must not be lost sight of." The fact referred to by the court was that in the power delegated to the municipality there was no restraint imposed upon its discretionary use; and, in the language of *First Municipality v. Pease*, "the remedy for this can be had elsewhere than from the judicial power,"—in the intelligent exercise of electoral power devoted to leg-

islative action to compel the municipality to confine itself within fixed limits. The case of *Handy v. City of New Orleans* was remanded to be tried on the merits solely because the corporation of New Orleans had transgressed the mandatory prohibitions of its charter. In the opinion the court said: "Courts, in passing upon such matters, ought to do so with great caution and due regard to the legal discretion which the sovereign may have vested in such corporations." The causes for which tax-payers can attack the acts of the municipality are succinctly and well defined in this case. 39 La. Ann. 107, 1 South. Rep. 593. It is not, therefore, even a contract, nor the details of contracts involving the exercise of vested discretion in the municipality, that can be attacked by the tax-payers outside of and independent of the civil corporation. To authorize such a cause would be to put an end to organized local government, and to vest the powers of municipal government in the hands of every irresponsible, self-constituted committee, noisy demagogues, and professional tax resisters. Under such a system there could be no progress, improvement, or advancement; there would be no well-paved streets and proper sewerage, or the inauguration of effective sanitary methods. Every act, contract, and every exercise of legal discretion, would inevitably be brought up for judicial investigation. Delay and disorder would follow in the track of fruitless litigation.

There is no proof in the record of any fraud or undue advantage obtained by the water-works company over the city. The motives which prompted the members of the legislature to pass act 56, and of the members of the council in passing ordinance No. 909, are beyond our power to investigate. 1 Dill. Mun. Corp. 326; *Baird v. Mayor*, 96 N. Y. 567; *Villavaso v. Barthet*, 39 La. Ann. 247, 1 South. Rep. 599. The only questions presented for consideration, therefore, are, did the city of New Orleans have the power to make the contract? and, if she had the power, has she executed any restraints imposed upon her? And these will involve an inquiry into the power of the city, in the exercise of its police powers, to make the contract, and into the constitutionality of act 56 of 1884, and the validity of ordinance No. 909, and the legality of the contract. A municipal corporation possesses and can exercise the following powers: (1) Those granted in express words in the charter; (2) those necessarily and fairly implied in and incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. 1 Dill. Mun. Corp. § 89. Among the declared objects for which the corporation of the city of New Orleans was created were to maintain the health and cleanliness of the city, and to provide for the extinguishment of fires. City Charter, Act No. 20 of 1882, § 7. A supply of water is essential and indispensable to accomplish these objects. The limit to the exercise of this power must be that the regulations have reference to the comfort, safety, or welfare of society; and these rights of police regulation, insured to

municipal corporations by their charter, may be from time to time subject to new regulations by the state with a view to the protection of the public safety, morals, and health, provided the corporation is not deprived by such new regulations of any of its essential rights and privileges. *Cooley*, Const. Lim. 148, 708. In the exercise of this right in their proprietary or private character, as distinguished from their public character in their responsibility to the state as part of the machinery of government, municipal corporations do so, not from considerations of state, but for the private advantage of the particular corporation as a distinct legal personality; and as to the exercise of such powers, and property acquired thereby, and contracts made in reference thereto, they are to be considered as *quo ad hoc* private corporations. 1 Dill. Mun. Corp. § 66. The city of New Orleans, by virtue of her inherent police powers, then, had a right to contract with reference to a water supply for the public health, and to extinguish fires; and, having the right, and having made the contract, her responsibility is to be measured like that of any individual in any civil or business corporation. The corporation of New Orleans is not, as urged in argument, the ward of the courts. Her contracts cannot be annulled, except for the same causes that the contracts of agents and fiduciaries, and persons of full age and capacitated, may be declared void; that is, only when she exceeds her legal authority as trustee of the people, or there is some fraud, either direct or by implication, in extravagant and corrupt administration, in which the beneficiaries in the contract were either actively or constructively parties, or for some of the causes specified in *Handy v. City of New Orleans*, 39 La. Ann. 107, 1 South. Rep. 593. In making the contract now attacked, did the city of New Orleans exceed any limitation placed upon her by the exercise of her police power? Her charter is silent as to any restriction. In it there is no regulation of any price as to the water to be supplied, nor is there any restriction as to the quantity or the character of the water. Act 56 of 1884 authorizes the city to contract for either clear or filtered water, and gives the city full discretion as to price, terms, and conditions. The only restriction which could operate upon the contract is contained in section 15 of the charter of the water-works company, which prohibits it from fixing the price of water so that its net proceeds of the sale of water exceed this limit. This court has said that, "where a municipal corporation is authorized to impose a wharfage charge as a compensation for keeping the wharves in a proper condition for the safe and expeditious shipping and landing of merchandise, a court will not undertake to fix any limit to the amount which the municipal authorities may exact for that purpose. The question of the extent to which this right may be exercised is purely administrative." *First Municipality v. Pease*, 2 La. Ann. 538. And in the instant case the city of New Orleans had full power to contract, without restraint as to the price, quantity, or kind of water, and we are not disposed to question the ad-

ministrative discretion vested in the city in this respect. *Mayor v. Cabot*, 28 Ga. 50; *Wells v. Atlanta*, 43 Ga. 76; *Watson v. Turnbull*, 34 La. Ann. 857; *Pickles v. Dry Dock Co.*, 38 La. Ann. 412. We are of the opinion that, independent of any statutory provision subsequently enacted authorizing the city to contract for her water supply, she had full and plenary power to do so under the provisions of her charter. It is alleged, however, in plaintiffs' petition, that the power of the city to make the contract flows from the provisions of act 56 of 1884, and for certain alleged vices in the act it is unconstitutional and void, and conferred no authority on the city to make the contract. The unconstitutionality of the act is not to be implied. The court, if possible, will give the statute effect when it is not clearly unconstitutional. *State v. Shakespeare*, 41 La. Ann. —, 6 South. Rep. 592. It is alleged that the act is unconstitutional, and violates article 29, which says every law enacted by the general assembly shall embrace but one object, and that be expressed in its title. The act is entitled "An act to provide for the supply of water to the city of New Orleans by the New Orleans Water-Works Company, in cases of the municipal taxation of said company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water-Works Company, and to enable the city of New Orleans to contract for the same; to regulate the payment of taxes imposed on said company, contrary to the exemption given in its charter; and to put into effect section 11 of act No. 33 of Acts of 1877, extra session, in instances of refusing or contrary to the exemption therein."

It is evident that the title of the act embraces but one object,—the supply of water to the city of New Orleans,—and authorizes the city to make provisions for the payment of the water, and indicates the object and purposes of the act. Every subdivision of the title relates to and is intimately associated with the object of the act. There is no other object expressed or intended in the title of the act than the main object of supplying the city with water, and paying for it. The sections of the act are directly responsive to the title, and are germane and related to each other. No section of the act contains any object different from the one object embraced in the title. *Edwards v. Police Jury*, 39 La. Ann. 855, 2 South. Rep. 804. The act does not violate article 57, because it does not grant an extra compensation to the water-works company. There was no obligation on the company to supply the city with water at any price or any quantity. The city owed no service for which the compensation was granted. Nor does the act conflict with article 46, as the act does not in any way alter or amend the charter of the company. The act authorizes the city to contract, and designates the water-works company as the party with whom it may enter into the contract. There is no privilege granted to the company. It was not authorized to do any act which it could not already do by its charter; and as the charter of the company was not amended,

renewed, extended, or explained by the act, it does not conflict with article 224. Act 56 affects the city of New Orleans in authorizing it to do a certain act,—to make a contract with a corporation. The provision in article 46 says that the articles shall not apply to the city of New Orleans. To place the construction on the act contended for by plaintiffs would deprive every corporation of its vested rights with which the legislature should authorize the city to contract. It is difficult to see in what manner the act is repugnant to article 57, as there was no debt due by the water-works company to the city which was extinguished or released, or which was authorized to be extinguished or released, by said act. City ordinance 909 is entitled "An ordinance to carry out the section No. 56 of 1884, providing for a future water supply from the New Orleans Water-Works Co., to and for the city of New Orleans and certain institutions, and regulating the use of water and the payment therefor." The ordinance regulated the amount of the supply of water, and fixed the price at \$60 per annum for every fire-plug, fire-hydrant, and fire-well, to continue during the existence of the water-works company's charter. The contract made in pursuance of this ordinance makes it a part of the contract, and is a substantial repetition of it. Act 56 was provisional in its character, and could not have effect except upon certain conditions, which were under the control of the city. It was optional with the city to make a contract of the kind under consideration with the water-works company. If the city had the power to contract and execute a contract in pursuance of that power, no individual taxpayers, if the city kept within the extent of her powers, can question the exercise of that power and set aside the action of the city council authorizing a contract within its legal discretion. There were no contractual relations between the city and the water-works company for supplying the city with water for the purposes of extinguishing fires, cleansing the gutters, and supplying the public schools, markets, and public institutions. The city and the water-works company were free from obligations to each other, and each had the capacity to contract for said purposes. In making the contract to furnish the city with water with the water-works company all the requisites necessary to the validity of a contract were complied with—*First*, the legal capacity of the parties to make the contract; *second*, their consent legally given; *third*, a certain object which formed the matter of agreement; and *fourth*, a lawful purpose. Rev. Civil Code, art. 1779. To set aside the contract, then, there must be error of fact or of law, fraud, violence, or threats. Id. art. 1819. Not any one of these essentials to the illegality of the contract is found. It is said by counsel for plaintiffs that "if we had nothing before us but the charter of the city and the charter of the water-works, with the eleventh section out, there would be some ground to defend a contract of this kind; but as long as that eleventh section is in force, (and it will be in force for fifty years,) the legislature has covered, by posi-

tive enactment, the whole subject of a public water supply for this city, and the powers of the city in reference thereto are necessarily in abeyance."

The effect of the judgment in the case of *City of New Orleans v. Water-Works Co.*, 36 La. Ann. 432, was to annul and eliminate said section from the charter. It was the section which provided for a supply of water to the city. No other section provides for said supply of water, and the section expressly says that "it shall be the duty of said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned, at all times, during the continuance of this charter; and in consideration thereof the franchisees and property of said New Orleans Water-Works Company, used in accordance with this act, shall be exempt from taxation,—state, municipal, and parochial." There was but one agreement to furnish water, for only one consideration, in the section, (the exemption from taxation,) and this, by said decree in the case referred to, was declared illegal, and the whole section was annulled. There was not a partial failure of consideration, but a total and entire failure, because of its illegality. Rev. Civil Code, art. 2031; *New Orleans v. Sugar Shed Co.*, 35 La. Ann. 551. The city of New Orleans cannot repudiate the consideration which she was to pay, and claim all the benefits in her favor. As a general rule, a judgment rendered by a court of competent jurisdiction, directly upon a point at issue, is a bar between the same parties. As we have previously stated, the only point at issue in this case of *City of New Orleans v. Water-Works Co.*, 36 La. Ann., was the exemption from taxation of the property of the company, the legality of section 11 of the charter, and the amount to be restored to the company, which it had paid on the annulled contract. Section 11 was the very section of the charter directly at issue. "But there must be an identity of parties, of capacity, of object, and of cause of action. One of these, at least, is lacking here." *State v. Jumel*, 30 La. Ann. 863.

There is no question presented in this case of the exemption of the water-works company from taxation; nor is the amount allowed said company on its reconventional demand at issue. There is no fact at issue in the case of *New Orleans v. Water-Works Co.*, referred to, at issue in the instant suit. The matter at issue in the instant case is as to the authority of the city to make the contract now existing between the city and water company, the constitutionality of act 56 of 1884, and the validity of the contract made in pursuance thereof. It is not doubted, if act 56 is constitutional, and the contract is within the legislative provision, that it is a valid contract. If the opinion in the case of *City of New Orleans v. Water-Works Co.*, 36 La. Ann. 432, interpreted the legislative contract in the charter of the company with the city of New Orleans, this certainly did not prevent the legislature from authorizing the city to make another contract. The new contract for a water supply differs in many respects from that which was section 11 of the company's charter. The preamble to the act 56, authorizing the city to contract with the wa-

ter-works company, recites the reason for its enactment. The state, in the exercise of her sovereignty, had the undoubted right to act in the matter of the authorization of the city to contract for the purposes embodied in the act. *State v. Shakespeare*, 41 La. Ann. —, 6 South. Rep. 592. The legislature having the power to authorize the city council to enact ordinance 909, the ordinance has the effect of an enactment of the legislature. *Roderick v. Whitson*, 4 N. Y. Supp. 112. It is difficult to understand in what manner the decree in case of *New Orleans v. Water-Works Co.* could estop the legislature from enacting such laws as it decreed necessary for the welfare of the city in authorizing her to make a contract. The city, like a person, having the power to do so, can alter, change, or abrogate her contracts with the consent of the other contracting party. Therefore, if the city and the water-works company's relations were established by said decree, they could, with legislative consent, make another and a different contract. The city was getting her water supply for the price of the amount of taxes owed her by the company. In the exercise of her prerogative she had the contract annulled. That in a new contract she has fixed a different price for her water is a matter which concerns her in the exercise of her administrative functions. It was her own choice, her own act of administration, and we are not called upon to either commend or condemn this exercise of this discretion. The city does not donate the price of the water, as fixed in the contract, to the water-works company. The city uses one-third of the active amount of the water pumped by the company. Edwards' report shows that the value of the water used by the city when she operated the water-works amounted to \$90,000. The pressure was then 15 feet. Now it is 50 feet. Consequently there is a greater supply now than when the city owned the plant, and operated it, and the city pays now \$24,000 less than the valuation at that time. It does not appear that the city pays more for her water supply than any other consumer. The fact is she pays less, and gets her water at reduced rates.

To an impartial mind there can be no doubt but that the city has reaped great advantages from the operation of the water-works by the present company. A large floating and bonded debt has been extinguished, aggregating \$1,516,000. The city is saved an annual deficit, and owns shares in the company valued at over a quarter of a million of dollars, which, it is probable, will increase in value, from which she derives a revenue. She also receives a large and increasing amount from a tax on the property of the company. These advantages resulting to the city from the charter granted to the company would appear to be sufficient for the exclusive privilege for a term of years of furnishing water to the inhabitants of the city. The privileges to the company can scarcely be called a monopoly, because it is doubtful if the city could have allowed any company to undertake the responsibility of furnishing the city without at least a guaranty of some protection, not against competition,

but against annoyances from irresponsible companies, whose existence would pass away on the payment of a price. The water-works company undertakes to perform a function of municipal government, and the city, which owns shares in the company, and is otherwise interested peculiarly, is represented on the board of directors. The water-works company is therefore a public corporation, established and created by the state to do and perform a public work for the benefit of a political subdivision of the state,—a monopoly created for public advantage. We, therefore, are not impressed with the statement made by the counsel that the price paid by the city for her water supply is a disguised donation. Had it even a semblance of such we would not hesitate to say that it was corrupt and extravagant legislation on the part of the city council that authorized the mayor to make the contract, and as such is beyond the legitimate object and purpose of municipal government, and within the rule expressed in *Handy v. City of New Orleans*, referred to.

We conclude that act 56 of 1884 does not violate the constitution of the state, and that ordinance 909, passed by the city council in pursuance of said act, is a valid ordinance, and that the contract made between the city of New Orleans and the water-works company, in pursuance of the power vested in said city by its present charter, and by said act 56 of 1884, and said ordinance, dated 3d day October, 1884, and passed before J. D. Taylor, notary public, on said day, is a legal and valid contract. It is therefore ordered and adjudged and decreed that the judgment appealed from be avoided and reversed and annulled, and it is now ordered that plaintiffs' demand be rejected, the injunction issued herein dissolved and set aside, and the plaintiffs, tax-payers, pay costs of both courts.

POCAF, J., (*concurring*.) Under my understanding of the pleadings the vital issues in this case involve the discussion of the legal effect of the judgment of this court in the case of *New Orleans v. Water-Works Co.*, 36 La. Ann. 432, on the contract between the city and the company under date of October 3, 1884, on ordinance No. 909, in obedience to which the contract was entered into, and on act No. 56 of the legislature of 1884, on which the ordinance was predicated, and, finally, the alleged unconstitutionality of that act of the legislature. The main contention on the first branch of the discussion is that the judgment in question was a bar by estoppel or *res judicata* to the execution of the contract between the city and the water-works company herein sought to be annulled and set aside, and incidentally to the operation of act No. 56, which is invoked as authority for the contract. Without yielding, but adding to, the views expressed in my dissenting opinion in the case reported in 36 La. Ann. 432, I fully recognize the effect of the judgment rendered by the majority of the court in that cause, and hence I do not propose, as duty enjoins me, to ignore or avoid its absolute authority. From the pleadings in that

case it appears that the action of the city was simply and exclusively to recover its taxes for the year 1881 from the water-works company, without any reference to the contract contained in section 11 of act No. 33 of 1877, or to any contractual relations existing between the parties to the suit. The prayer of the petition reads: "Wherefore petitioner prays that the New Orleans Water-Works Company, for account of its shareholders, be duly cited to answer this petition, and, after due course of law, that defendant be condemned to pay petitioner the sum of \$11,484.87, with 10 per cent. per annum interest from March 31, 1881, till paid, with lien privilege and right of pledge on the property herein described," etc. For defense the company urged its exemption from municipal taxation under the provisions of act No. 33 of 1877, and, in case it should be held liable for the taxes claimed, it pleaded in reconvention the value of the water furnished to the city during the year for which the taxes were sought to be enforced. The prayer of the amended answer was in the following words: "Wherefore this respondent, waiving no part of its original answer except as hereby amended, prays that it have judgment in its favor, declaring valid and enforcing said exemption from the taxes of the city of New Orleans of 1881 in this suit sought to be recovered and rejecting plaintiffs' demand; and, if this be refused, then that respondent have judgment condemning the city of New Orleans to pay unto it the sum of \$40,281.87, with legal interest from December 31, 1881," etc. The judgment of the lower court was in favor of the city for \$11,484.87, and in favor of the company for \$40,281.87, and interest. The decree of this court was as follows: "It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the principal of the amount allowed defendant on its reconventional demand from \$40,281.87 to \$11,484.87, and that as thus amended the same be now affirmed, defendant to pay cost of this appeal." As grounds for its decree the court held, in substance, that the exemption from taxation provided for in the act of 1877 was null, and "that, to the extent that this subjection to taxation destroys or impairs the consideration upon which rests the contract of defendant to supply free water to the city, defendant is undoubtedly entitled to relief, but to that extent only." From the consideration of those premises it must appear very clearly that the court, in its decision, was dealing with a well-defined and restricted issue, which it disposed of by interpreting the contested contract as it stood at the time, and that the court did not, as it could not, attempt to fix the contract for the future and for all time to come. Such a pretension would have involved the court into judicial legislation of the most reprehensible character. While the judgment thus rendered could not have been pleaded technically as *res judicata* in a suit between the same parties for taxes of a subsequent year, met by the defense of exemption under the charter of the company, it is undeniable, under well-established jurisprudence, that the defense could have been suc-

cessfully met by the plea of estoppel by *res adjudicata*, predicated on the decision now under discussion, and that the result would have been a similar judgment allowing the city its taxes in the amount according to the assessment and the rate of taxes for that particular year, and allowing a judgment in reconvention and for the same amount to the defendant company. Hence it follows that if the company was before the court in this case, seeking to enforce the provisions of the contract created by act No. 33 of 1877, it would be amenable to the same plea. But is that the case before us? By no means. From plaintiffs' own pleadings it appears that since the rendition of the judgment in question a new contract has been entered into between the city and the company, touching the supply of water by the latter to the city; and the very object of this action is to annul the contract on the ground of its alleged illegality. Assimilating this suit to an action by the company for the enforcement of its contract, which is correct, plaintiffs contend that the previous judgment of this court is a bar by estoppel of *res judicata* to the right of the company "to recover a judgment for the full value of its water supply, irrespective of the amount of taxes," or, in other words, to seek judicial enforcement of the new contract executed in October, 1884. At the incipency of the litigation the city was in fact and in law a party defendant. Hence the suit did not embrace the same parties, either in fact or in the same character and capacity. But in the progress of the litigation the city shifted her position, and now she has practically made herself a party plaintiff, and it may be conceded that the parties are the same in the two suits. But the cause of action and the subject-matter are not the same.

In the previous suit the subject-matter of the litigation was the contract created for the parties by the act of 1877. In the present case the subject-matter is the contract made by the parties for themselves on the 3d of October, 1884, and which had been voluntarily executed by both from that day, at least up to the day that the city shifted her position. In the previous suit the cause of action on the part of the city was the enforcement of her taxes, and on the part of the company its alleged exemption from taxation under the contract as then existing, or, in the alternative, the payment of the value of the water supplied to the city during the year for which the taxes were claimed. In the present case the cause for action on the part of the plaintiffs is the alleged nullity of the contract of October 3, 1884, and the defense rests on its alleged validity and binding force, and in this case the question of taxation or exemption has entirely ceased to be a factor. If the suit in the case in 36 La. Ann. had been between natural persons, involving the construction of an existing contract between them, and had resulted in a judgment annulling or materially modifying the contract, there certainly could have existed no legal impediment in the way of the same parties to have made a new contract on the same subject-matter. Now, if subsequent litigation had arisen between the same parties touching

the construction or validity of the new contract executed by them, it is surely as clear that neither of them could have been met by a plea in bar of estoppel by *res adjudicata* to matters in the new contract not discussed or judicially determined in the previous litigation between the same parties.

I have taken the pains to examine the authorities relied on in support of the application of the plea of estoppel by *res adjudicata* to the defense urged in the present case, but I have found none which militate against the views I have hereinabove expressed. They all tend to establish the familiar principle that a question once judicially determined will estop the further agitation between the same parties of the same question; but they do not extend the rule to the point herein contended for by plaintiffs. In our jurisprudence the rule has been formulated thus: "It matters not under what form, whether by petition, exception, rule, or intervention, the question be presented; whenever the same question recurs between the same parties, even under a different form of procedure, the exception of *res adjudicata* estops." *Pilcque v. Perret*, 19 La. 318; *Sewell v. Scott*, 35 La. Ann. 554. The main reliance seems to be on the case of *Beloit v. Morgan*, 7 Wall. 621. On that point the court said: "On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities, though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and, if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances the judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* itself may be different." It takes no effort to show that the present case entirely lacks one of the essential elements (the same subject-matter) which is necessary to support the plea. The same remark applies to all the cases which I have examined, and particularly to those which are the most in point. *Aurora v. West*, 7 Wall. 82; *Adams v. Board*, 39 La. Ann. 690, 2 South. Rep. 508; *Heroman v. Institute*, 34 La. Ann. 815; and eight Louisiana cases cited in the last decision.

No language used in the decision under discussion, either in the decree or elsewhere, can justify the inference that under its effect the city was compelled to thereafter exact taxes from the water-works company, or, in other words, that she was thereby coerced to abide by the letter of that decision. To ascertain the scope and legal effect of a judgment of the supreme court reference must be made to the decree, whose terms must predominate as the safest guide. "The decretal part of a judgment rendered by the supreme court, and not the opinion or the reasons, afford the proper test to ascertain the matters which

became *res judicata* under the decree." *Succession of Hoggatt*, 36 La. Ann. 337; *Pilcque v. Perret*, 19 La. 324.

It is conceded by plaintiffs that the city could have given her tax receipts to the company in exchange for the latter's receipts for water supply. Hence it follows that the city would have entered into a contract different in some terms from the previous contract as interpreted by this court. Hence I conclude that the judgment in that case was not an absolute bar to the contract now sued on. And the inference is fairly deducible from the whole contention that plaintiffs would not have complained if the contract which they resist had contained the terms fixing the price for the annual supply of water at some \$21,000, which is the average of the annual taxes paid by the company since 1884. I therefore feel convinced that the pith of the complaint is leveled at the extravagance of the contract more than at the power of the city to make the same. But, conceding for the sake of argument that the decision was a legal impediment to the city's action, without special legislative mandate, that authority is not lacking, because it flows directly from the provisions of act No. 56 of 1884. It surely cannot be seriously urged that the legislature is stripped of its power to authorize a contract to have effect in the future by judicial interpretation of a contract, and which at the time had reference to the present and to the past only. A very large proportion of the legislation in all the states is prompted by the decisions of this court, and is intended to remedy some mischief pointed out by or resulting from the utterances of the courts of the country. Examples are, indeed, too numerous to warrant an enumeration of such instances. Now, in dealing with the subject in hand, the legislature must have been impressed with the thought that, through her action, the city had been instrumental in procuring a judicial declaration of the partial failure of the considerations of a contract made by the law-making power itself. The city's demand for taxes was the first attempt made against the autonomy of the contract as framed by the general assembly, and the judgment of the court operated the first breach into it. The judiciary power interposed then no objection to the right of the city to ask a change or a modification of the solemn contract emanating from legislative will, and the judiciary cannot now consistently abridge the unlimited power of the legislature to provide a mode to mend the breach. The law-maker had full warrant to consider that the contract which he had made for the parties came out of the hand of this court in a maimed and mutilated condition. As a result of the judgment rendered, the water-works company was held liable for taxes exigible as cash without the right of compensating therefor the value of its water supplied for the uses of the city. All it could obtain in satisfaction of its annual water supply was a judgment not executory and not collectible within any fixed or determined length of time. Assuredly, the judgment did not do absolute, even-handed justice. In the leading opinion, which was unanimous when rendered, it

was said: "But for the nature of the city's claim being for taxes, compensation would preserve the exact *status quo*. We regret that the city's financial condition prevents the judgment against her from being the immediate equivalent." On the application for rehearing the opinion of the majority contains the following significant language: "Contingencies of this kind were foreseen, but the principle was stamped in the act that, however unequal arithmetically these two sums might be, they should be equal in the contemplation of the statute, and that the one should be the exact equivalent of the other. * * * It would be perfect equity that the one should compensate the other; but the law interposes and declares a tax not compensable." These considerations naturally had great weight on the legislative mind, and they doubtless prompted the enactment of act No. 56 of 1884, whose mission was to remove the legal interposition to the administration of absolute judgment, and to restore "perfect equity" between the parties. A better and a purer motive of legislation could hardly be presented. Hence the object of the statute, as expressed in its title, was "to provide for the supply of water to the city of New Orleans, by the New Orleans Water-Works Company, in cases of the municipal taxation of said company; to authorize provision to be made for the payment of water supplied and to be supplied; to provide for obtaining a supply of clear or filtered water by the New Orleans Water-Works Company, and to enable the city of New Orleans to contract for the same; to regulate the payment of taxes imposed on said company contrary to the exemption given in its charter; and to put into effect section 11 of act No. 33 of Acts of 1877, extra session, in instances of refusing, or contrary to, the exemption therein."

An examination of the provisions contained in the body of the act must satisfy the legal mind that they each and all tend directly and exclusively to the primary object as foreshadowed in the title of the statute, which is practically to restore the perfect equity between the parties which had been disturbed by the city's attack on the contract made by the legislature for the parties in the act of 1884, and by the judgment of this court, rendered in that case. The act does not purport to amend or modify the charter of the water-works company, or to provide for or confer any advantage in the favor of the company. The latter's power to enter into a contract with the city of New Orleans, or any other person, for water supply, is derived from its charter, and it did not need any enabling legislation to that end. But it was considered that the city was in need of legislative permission or authority to mend the breach which she had made, or procured to be made, in the original contract. Hence the authority is therein given. But the mandate was not compulsory; it was simply optional and permissive. Under its authority the city was at full liberty to return to the original contract, by ceasing to exact municipal taxes from the company, or to do what is suggested by plaintiffs themselves, who say: "All that the city had to do

to make the equity perfect was to pass an ordinance directing the treasurer annually to receive the water bill of the water-works in payment of its tax-bill." And she was also given the option, in case she chose to enforce payment of her taxes, to obtain her water supply by paying therefor in another mode. In passing ordinance No. 909 the city elected to adopt the last-mentioned option, and the contract which she now seeks to rescind was the result.

The foregoing analysis of the object and provisions of act No. 56 is of itself an answer to all the objections urged against it on constitutional grounds. As it is shown to embrace but one subject, it does not violate article 29 of the constitution, as charged by plaintiffs. As it gives an option to the city of New Orleans to abide by the original contract for its water supply, or otherwise to provide for the payment thereof, it is not in conflict with article 45, which forbids the general assembly "to authorize any parish or municipal authority to grant any extra compensation, fee, or allowance to a public officer, agent, servant, or contractor." Nor does it violate paragraph 13 of article 46, which prohibits the general assembly from passing any local or special law "creating corporations, or amending, renewing, extending, or explaining the charter thereof." As already shown, the statute does not purport in the least to amend, renew, or explain the charter of the water-works company. Its only reference to the charter is to authorize, or almost to invite, the city to abide by the terms of its contract as therein stipulated. It must be considered as a local or special law concerning a corporation; but, as New Orleans is that corporation, the prohibition does not apply under the terms of the proviso contained in the paragraph, which says: "Provided, this shall not apply to the corporation of the city of New Orleans, * * *." The only amendment ever made to the charter of the defendant company as such resulted from the judgment of this court, in so far as it modified the provisions of act No. 33 of 1877, § 11, which was the contract regulating the water supply to the city. In passing act No. 56 of 1884 the legislature dealt with the charter as it found it then, altered from its original form, and its avowed object was to authorize the city, at its option, to do such acts as were necessary to restore the *status quo* of the parties, disturbed as above set forth. The interpretation placed on the statute by the parties to the contract which it authorizes is not the criterion of its constitutionality. To test the constitutionality of a law by the mode in which the act is executed is surely a novel canon of construction, which courts will be slow to adopt.

As the statute does not propose to release the defendant company "from any indebtedness, liability, or obligation * * * to this state, or to any parish or municipal corporation therein," it is not amenable to the charge of being violative of article 57 of the constitution. It, on the contrary, seeks to enforce the obligation of the company to supply the city with water, either for exemption from taxation, or for adequate compensation otherwise provided

for. It is finally charged that the statute is violative of article 234, which reads: "The general assembly shall not remit the forfeiture of the charter of any corporation now existing, nor renew, alter, or amend the same, nor pass any general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution." As the statute contains no reference to the charter of the water-works company, coupled with the purpose of renewing, altering, or amending the same, it is very clear that the company is not in a condition to be affected by any of the terms of the article.

I therefore conclude that the statute under discussion is constitutional, just, and proper, and that under its provisions the city had ample authority to enter into a contract with the defendant company for its water supply. Having reached that conclusion, the court is powerless to control the city as to the details of the contract. This proposition is fully sustained by the reasons and the authorities contained in the opinion prepared by Mr. Justice McENERY. The price for water supply agreed upon may be excessive, but the contract is not attacked as fraudulent or inspired by corrupt motives, and it is not in fairness amenable to the charge of being a donation, or to the charge of being over \$2,000,000 for water for 43 years in excess of what it should reasonably have been. It is in proof that the average amount of taxes paid annually to the city by the company is \$21,000, and that she receives an annual average as dividends for her stock in the company of about \$14,000, footing up her receipts from that source at \$35,000 annually. Deducting that sum from the cost of water under the contract, (\$68,340,) it appears that the disbursements of the city for her water supply would be \$33,340 each year, a sum much less than the value of a year's water supply, as found by the district judge in the suit of 36 La. Ann. It also appears that under the present contract the water supply of the city would cost, annually, more than \$50,000 less than it is shown by the record to have cost her when she owned and operated the works herself. The contract is therefore not fraudulent or outrageously onerous and unreasonable, so as to warrant judicial interference with its continued existence or execution. I therefore concur in the decree herein made and to be rendered.

BERMUDEZ, C. J., (*dissenting*.) This suit is brought by citizens and tax-payers for the avowed purpose of preventing an increase of the burden of taxation, by an unauthorized and illegal disbursement of a fabulous sum of money, by the city of New Orleans, in favor of the water-works company. They claim that in a controversy between those two corporations in which each had a demand against the other, the city claiming taxes from the company and the company claiming the value of water supplied to the city, for the year 1881, this court interpreted the contract between them under act No. 33 of 1877, and declared

that the company had no right to recover from the city, in any year, any sum for the water supply which it was bound to furnish greater than the amount of city taxes for that year; and they complain that in derogation of the judgment thus rendered an act No. 56 of 1884 was passed by the legislature, under which a contract was entered into by the city of New Orleans and the water-works company, the effect of which would be to have the city of New Orleans to pay to the company, as the value of the water furnished, an enormous amount over and above that which, under the legislative contract of 1887, as interpreted by this court, it would have otherwise to pay. They charge that the act of the legislature is unconstitutional, and that the contract under it is illegal and void, and that, in the absence of such act, the city would be powerless to enter into such an agreement.

The defense set up naturally is the constitutionality of the act and the validity of the contract under it or without it. The city of New Orleans is a party to these proceedings. There is no plea of *res judicata* filed to operate as such in this suit. The plaintiffs and the city claim simply that the judgment in question could not be annulled and abandoned and disregarded so as to justify the act and contract attacked. In the suit mentioned the city claimed taxes as due for the year 1881. The defense was that under the terms of its charter, in consideration of its supplying the city with water, all the property of the company which would otherwise be liable to taxation had been exempted formally from municipal taxation, the condition having been fulfilled; but that, if the exemption was unconstitutional, the contract was broken, lacked consideration, and became null, and that, if the city has the right to demand her taxes, the company is entitled to exact payment of the value of the water it furnished to the city. After a consideration of the facts and of the law having a bearing on the controversy, the court, in a main and unanimous opinion which remained undisturbed, notwithstanding an application for a rehearing, reached a conclusion for the reasons assigned that the city could recover her taxes and the company the value of the water supplied, provided it did not exceed the amount of the taxes.

It is not essential for the purpose of the present controversy to consider the language used in both opinions, as, whatever it be, it is binding on the parties only so far as it may conduce to the justification of the judgment rendered, and is not absolutely exclusive of other determining motives tending in the same direction. A review of the whole matter irresistibly impresses the mind that the judgment rendered is made to rest on the consideration, plausible, just, honest, and proper, that, in the legislative intent, the price or value of the water furnished was to fluctuate according to circumstances, but so as never to exceed the amount of the taxes which might become due on the property of the company for any subsequent year whatever. That judgment settled forever the question of the respective liability of both corporations,—the one for the water sup-

plied, the other for the taxes demandable. Its effect, as is that of all judgments, was to close the door, for all time, to those litigants on the subject of such reciprocal liability the one to the other. The moment that judgment was rendered it became the property of each party, who then acquired the right of using it as an effectual shield for protection against any demand for more than it allowed to each party. It was not a judgment intended merely to settle the question of amounts due for 1881 for taxes and water supply, but one designed to establish firmly for the future, during the term of the existence of the company, that in no case would it ever claim from the city for water supply any amount in excess of that which the city would have the right to demand for taxes due her. The title of ownership which vested to that judgment in the two corporations was one which could not be divested, unless by a mutual legal consent; but, as such consent was a legal impossibility, it follows that the judgment which was thus rendered has never ceased to have its binding force and effect, and that it is fatally destructive of both the act of 1884 and of the contract under it.

It is a recognized principle that, although parties may renounce the benefit of the authority of the thing adjudged, the courts have the prerogative when such renunciation has taken place, and, after ascertaining that the judgment abandoned would be conclusive of the new litigation before them, to refuse to try the issue *de novo*. *Interest reipublicæ ut sit finis litium*. It is perfectly true that the city of New Orleans is a state functionary, created by the sovereign, vested with necessary inherent and other expressly delegated rights, powers, and faculties, but it does not follow that, on that account, the sovereign can divest her of her property, appropriate it to its own use, or give it away, or impair the obligations of her contracts in her favor. From that stand-point the legislature was incompetent to deprive the city of her right of ownership to the judgment rendered in her favor, whereby she was to be relieved from all amount exceeding the taxes due her by the water-works company, and which she might have had to pay had not the judgment expounding the contract been rendered. Surely, if the city could not, with legislative sanction, enter validly into the contract assailed, it was *ultra vires* for her to do so *proprio motu*, under the circumstances of this case, for the plain reason that she was thereby abdicating arbitrarily advantageous privileges and rights belonging to the public, over which she had no control, replacing them by clearly ruinous and crushing obligations.

Those considerations suffice, in my opinion, to affirm the finding of the lower court refusing to apply or enforce the act attacked, and avoiding the contract leveled against.

FENNER, J., (*dissenting*.) This is a suit by tax-payers to procure the judicial annulment of a contract passed between the authorities of the city of New Orleans and the New Orleans Water-Works Company,

by which the city was obligated to pay \$68,340 per annum for her water supply for public purposes during the period of 43 years from the date of the contract. The grounds of nullity alleged are that the contract was fraudulent *ultra vires* and null, as involving a practical donation in disguise to the company by payment to it of \$68,340 per annum for a water supply which, under its charter contract, the company was legally bound to furnish for a sum not exceeding the annual taxes levied on it by the city. When this suit was brought, the city, being then represented by the same authorities which passed the contract, joined the defendants; but, the *personnel* of the city administration having subsequently changed, the city now joins the plaintiffs in invoking a nullity of the contract. The New Orleans Water-Works Company was incorporated by an act of the general assembly of the state, No. 33 of 1877, amended before acceptance by act 43 of 1878. The charter conferred upon the corporation extensive privileges, including the exclusive privilege, or monopoly, of supplying the city of New Orleans and its inhabitants with water, by means of pipes and conduits, for the term of 50 years from the passage of the act.

The eleventh section of the charter (as amended) is as follows: "That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets, and charitable institutions; and that the said company shall place, free of any charge whatever, two hydrants, of the most improved construction, in front of each square, where a main pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires, for watering the streets and cleansing the gutters, and for any other public purpose; that on the squares which do not front on the river the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners. It shall be the duty of the said company, whenever main pipes shall be laid, to supply water for all the purposes herein mentioned at all times during the continuance of this charter; and in consideration thereof the franchises and property of said New Orleans Water-Works Company, used in accordance with this act, shall be exempt from taxation, municipal and parochial." The act was duly accepted by the city and by the water-works company, and was executed without complaint or question for several years. Under the state constitution of 1868, in force at the date of the charter, it was repeatedly held by this court that the legislative department could not validly exempt any property from taxation, either by commutation or in any other manner, unless the property was "actually used for church, school, or charitable purposes." City of New Orleans v. Insurance Co., 28 La. Ann. 756; Manufacturing Co. v. City of New Orleans, 31 La. Ann. 440; City of New Orleans v. Louisiana Sav. Bank, Id. 827; City of New

Orleans v. Bank of Lafayette, 27 La. Ann. 376; City of New Orleans v. People's Bank, Id. 646; City of New Orleans v. Metropolitan, etc., Bank, Id. 648; City of New Orleans v. Railroad Co., 28 La. Ann. 498; City of New Orleans v. Association, Id. 512; City of New Orleans v. Asylum, 31 La. Ann. 292; City of New Orleans v. Louisiana Sav. Bank, Id. 637; State v. Southern Bank, Id. 519. Availing themselves of these adjudications, the city authorities then in power undertook in 1881 to levy taxes on the property of the water-works company, and brought suit to collect said taxes, amounting to the sum of \$11,484.87. In that suit the water-works answered, pleading the statutory exemption as a bar to the city's action; averring that the exemption was the sole consideration of its obligation to furnish free water to the city; and that, if the exemption was denied, it was entitled to recover from the city the value of the water supplied during the year, viz., the sum of \$40,000, for which it prayed judgment in reconvention. In the court of first instance there was judgment in favor of the city for the tax, and in favor of the water-works company for the whole amount of its reconventional demand. The case was then appealed to this court, and our decision therein is reported in 36 La. Ann. 432.

There was and could be no doubt as to the nullity of the legislative exemption from taxation. As to that even the dissenting judge declared that there could be "but one opinion." It had, indeed, been placed beyond controversy under the doctrine of *stare decisis*. The fight was on the question of the effect of that nullity upon the obligation of the defendant to furnish free water. To place beyond dispute the nature of the question involved, and the sharpness and clearness with which it was presented, it is well to quote from the opinions in the case. In the leading opinion it is said: "The position of defendant * * * is that the exemption from taxation was the sole consideration of the defendant's obligation to furnish the city with free water, and that, when the city elected to claim its taxes, it released the defendant from its entire obligation to furnish free water, and became bound to pay for all the water used, even though exceeding, as it does, threefold the taxes." Another opinion was rendered on an application for a rehearing, (page 436,) in which it was said: "The argument * * * resolves itself into a single proposition, *i. e.*, that the eleventh section of the act distinctly and in terms declares the water supply to be the consideration of the exemption from taxation, which declaration the court can neither enlarge, restrict, nor otherwise alter, and the inevitable consequence is that, the exemption having become inoperative, there can no longer be a free water supply of any quantity whatever." This was the proposition discussed and overruled. On the application for rehearing a dissenting opinion was read, in which it was said: "There is and can be but one opinion as to the nullity of the exemption from taxation * * *; but the very reasoning which leads to that conclusion should, in my opinion, carry with it a declaration of the complete nullity of

the contract of which the tax exemption was one of the considerations, unless it can be made to appear that the act provides for or contemplates other and distinct considerations for the stipulated free supply of water." The learned judge, after further discussion, says: "The eleventh section must have been intended to, and it does beyond a doubt, create a complete and independent contract between the city and the company. The contract, as thus shaped and created has reference to no other portion of the act, which is complete as an act without the contract contained in the section,—as complete as the contract itself stands without any reference to any or to all of the other provisions of the act. Hence follows, in my opinion, the irresistible conclusion that, the consideration furnished by one of the contracting parties having utterly failed, the entire contract must fall." These quotations suffice to show the question directly involved in that case, that it was a necessary and the main question, and it was a question propounded by the water-works company itself as the basis of its reconventional demand.

Having thus exhibited the *rem decidendum*, let us next inquire what were the *res decidæ*. Abstaining from further quotations, a reference to the decisions themselves will show beyond doubt that the court held and decided as follows: *First*, that the exemption of the water-works from taxation was unconstitutional; *second*, that this exemption was not the sole consideration of the obligation to furnish free water, but that additional consideration existed in all valuable privileges conferred by the act; *third*, that the failure of the stipulated exemption from taxation was therefore only a partial failure of the consideration for the water supply; *fourth*, that the extent of the failure of the consideration was exactly the amount of the taxes levied by the city; *fifth*, that the city would not be held to pay a greater amount for her water supply for the year than the amount of the taxes collected from the water-works in that year; *sixth*, (on rehearing,) that all the privileges granted by the charter, including the exemption from taxation, being considerations on one side for the free water supply on the other, and only a part of one consideration being withdrawn, equity required that only an exact equivalent should be withdrawn on the other. Hence, while giving the city judgment for her taxes, we at the same time gave judgment in favor of the company against the city for precisely the same amount in payment for water, saying: "It would be perfect equity that the one judgment should compensate the other; but the law interposes and declares the taxes not compensable."

Every proposition above stated was necessarily involved in the issues between the parties, and the decision thereof could not have been reached without considering and determining them. A construction of this decision which confines attention to the particular claim and counter-claim then involved, ignores the construction of the contract then authoritatively made, is narrow and unwarranted, and under the plain terms of the decisions it is extraordinary

that any one should claim that it annulled and wiped out the entire section 11, which was the very thing claimed by the company, and expressly denied by the court. It is impossible to formulate any expression of the doctrine of estoppel by *res adjudicata*, sustained by any judicial or doctrinal authority, which would not forever bar the city of New Orleans, the New Orleans Water-Works Company, and their privies, from questioning the conclusiveness of this decision, and from ever again agitating the questions therein decided. All systems of law and all judges and jurists are unanimous in the firm maintenance of this estoppel as essential to any reasonable or consistent administration of justice. It was formulated in the digest of Justinian, where it is written, "*Res adjudicata pro veritate accipitur*," and, again, "*Exceptionem rei judicate obstat quoties eadem questio inter easdem personas revocatur*." It was imbedded in the common law of England and has been sacredly respected by this court, as well as by the supreme courts of the United States and of the other states. The estoppel of *res judicata* operates in two ways: *First*. If the second suit is based on the same cause of action, is between the same parties, and is for the same object or thing, then the first judgment is a conclusive bar to the whole suit. *Second*. But, where the *res* or thing claimed is different, the cause of action and parties being the same, the first judgment is not a bar to the suit, but, none the less, it operates as a conclusive estoppel as to all questions of law and fact which were necessarily involved and determined in the former controversy. From a mass of authorities sustaining the latter principle the following may be referred to: *Aurora City v. West*, 7 Wall. 96; *Cromwell v. County of Sac*, 94 U. S. 353; *Doty v. Brown*, 4 N. Y. 71; *Outram v. Morewood*, 3 East, 346; *Burt v. Sternburgh*, 4 Cow. 559; *Bouchaud v. Dias*, 3 Denio, 243; *Gardner v. Buckbee*, 3 Cow. 120; *Lumber Co. v. Buchtel*, 101 U. S. 638; *Gould v. Railroad Co.*, 91 U. S. 526; *Beloit v. Morgan*, 7 Wall. 623; *Merriam v. Whittemore*, 5 Gray, 317; *Norton v. Huxley*, 13 Gray, 290; *Burlen v. Shannon*, 99 Mass. 203; *Tams v. Lewis*, 42 Pa. St. 402; *Chamberlain v. Gaillard*, 26 Ala. 504; *Perkins v. Walker*, 19 Vt. 144; *Hayes v. Gudykunst*, 11 Pa. St. 221; *Peterson v. Lothrop*, 34 Pa. St. 223; *Jackson v. Lodge*, 36 Cal. 28; *Danaher v. Prentiss*, 22 Wis. 311; *Barrs v. Jackson*, 1 Young & C. Ch. 585; *Caujolle v. Ferrie*, 13 Wall. 469. The estoppel applies, whether the issue was one of law or fact. *Bouchaud v. Dias*, 3 Denio, 243; *Ferrer's Case*, 6 Coke, 7a; *Aurora City v. West*, 7 Wall. 84. The rule of the civil law is the same. *Thevenin v. Dufour*, Sirey, 31, p. 41; *Saint Leonard v. Bal*, J. du P. 1843, vol. 2, p. 247; *Gleize v. Heritiers Gleize*, J. du P. 1859, p. 514; *Cass*, 13 fev. 1860, (Giudicelli,) Sirey, v. 60, 1, 545; *Cass*, 26 aout, 1873, (Commune de Chaucevigney,) Sirey, v. 74, 1, 294. After discussing all the authorities, the compilers of Smith's Leading Cases announce the rule as follows: "It results from the authorities that an adjudication by a competent tribunal is conclusive, not only in the proceedings in which it is pronounced, but in every other, where the right

or title is the same, although the cause of action (meaning, of course, the *res*) is different." *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 943. Lord KENYON laid down the rules as follows: "If an action be brought, and the merits of a question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different judgment." *Greathead v. Bromley*, 7 Term R. 456. Mr. Bigelow makes the following statement of the rule: "A point once adjudicated by a court of competent jurisdiction may be relied on as an estoppel in any subsequent collateral suit in the same or any other court, when either party, or the privies of either party, allege anything inconsistent with it, and this, too, whether the subsequent suit be upon the same or a different cause of action." *Bigelow, Estop.* 45.

The foregoing was very recently quoted and approved by this court. *Adams v. Board*, 39 La. Ann. 693, 2 South. Rep. 508. Mr. Wells, in his work on *Res Adjudicata*, after an exhaustive discussion of authorities, says: "By the overwhelming weight of authority the question resulted in the rule, that while the issue must be precisely the same, yet the object, subject, and causes of action do not require to be identical; so that if the precise issue of the former suit, necessary to the determination of the controversy therein, be again brought between the parties in the latter action, even though collaterally, yet relevantly and materially, the former decision must conclude the matter from further dispute." *Wells, Res. Adj.* § 304. The supreme court of the United States sustains the same doctrine, saying: "The parties were identical, and the title involved was the same. * * * The court had full jurisdiction over the parties and the subject. Under such circumstances a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* itself may be different." *Beloit v. Morgan*, 7 Wall. 622. We upheld the same doctrine very emphatically in *Heroman v. Institute*, 34 La. Ann. 815, saying: "The estoppel extends to every material obligation or statement, which, having been made on one side and denied on the other, was at issue in the cause and was determined therein." Further quotations from authorities are needless, and those made were perhaps superfluous. They place it beyond dispute that the decision in the 36 La. Ann. case forever concluded and estopped the parties thereto from again agitating the question therein determined in any subsequent action. In any subsequent suit by the city for the taxes of succeeding years the water-works would have been estopped to set up the exemption of its charter. In any subsequent suit by the water-works company for the value of water furnished, it would have been estopped from claiming more than the amount of the taxes levied during the year in which the water was supplied, and the

city would have been equally estopped to deny that she owed the value to the amount of such taxes. Thus the legal *status* of the rights and obligations of the parties under the legislative contract embodied in the charter of the water-works company was definitely and irrevocably fixed. The city was irrefragably entitled to receive annually the supply of water stipulated in the act, and it was bound to pay therefor precisely the amount of taxes levied by it on the property of the company during the same year; and not a cent more could be claimed by the company.

A great part of the majority opinions is taken up with arguments to show that the plea of *res judicata* does not operate as a bar to the present suit. I do not understand any one to contend that it so operates. The principle of *res judicata* is invoked, not as a plea in bar in the present action, but as showing that the decision in 36 La. Ann. would have operated as *res judicata* in any subsequent suit between the parties touching the water supply and taxes for any subsequent year, arising under the eleventh section of defendant's charter, and that it therefore settled irrevocably the rights and obligations of the parties under the charter. This I understand to be conceded, at least in the opinion of Mr. Justice POCHÉ; and, this being so, the question is whether the radical change in those rights and obligations operated by the contract assailed is valid, and within the powers confided to the officers of the city government.

Let us now turn to the contract assailed in the instant suit. In September, 1884, a contract was entered into between the mayor of the city (acting in virtue of an ordinance passed by the city council) and the New Orleans Water-Works Company, whereby, as a consideration for the water supply therein stipulated, the city "engages and contracts to pay unto said company annually the sum of sixty dollars for each and every fire-plug, fire-hydrant, and fire-well, of which there are now 1,139, and which number shall ever be the least measure of the annual sum to be paid to said company; and to pay to said company annually sixty dollars for every additional hydrant, fire-well, or fire-plug exceeding said 1,139, and hereafter attached to said mains or pipes."

Thus it appears that the city bound itself to pay for its water supply the least sum of \$68,340 annually during the whole remaining term of the company's charter, or for about 43 years. It appears that the taxes paid by the company to the city were in 1885, \$20,619.37; in 1886, \$22,093.59; in 1887, \$20,113.60; in 1888, \$21,405.78. Under the charter of the company, as interpreted by this court, these sums fixed the limits of the city's liability for the water supply for the respective years which the company was bound to furnish under its charter. Nothing indicates that the taxes will ever be greater, unless it results from the extension of the water-works, caused by the growth and expansion of the city, in which case the amount to be paid by the city for the necessary additional plugs and hydrants would correspondingly increase. Thus we find that while the city was legal-

ly entitled to have her water supply under the charter for a price of about \$20,000 per annum, this contract obliges her to pay a minimum price of \$68,340 per annum for the water supply stipulated in this contract, being a difference of more than \$2,000,000 for the whole term of the contract.

The first question that inevitably arises under the foregoing statement is, what is the difference between the water supply required by the charter and that stipulated in the ordinance and contract? A comparison of the terms of the charter provisions with those of the ordinance and contract shows conclusively that there is no substantial difference in the obligation imposed on the company by the respective instruments, certainly none that could serve as the slightest support for the enormous excess of price. The evidence shows, with equal conclusiveness, that the water actually supplied since the date of the contract has not materially differed, in quantity or quality, from the supply prior thereto. No serious attempt is made to show any adequate or even approximate additional consideration for the immensely increased price. Indeed, the preamble of the ordinance conclusively shows that none such was contemplated or operated as an inducement to the contract. The preamble is as follows: "Whereas, the city of New Orleans has been, and is, and will be, unable to allow the New Orleans Water-Works Company the fifty years exemption from taxation, being the consideration for a free supply of water contemplated by section 11 of act No. 33 of the Acts of 1877, and the courts having decided that the exemption from municipal taxation granted in said act is not, and shall not be, enjoyed, and therefore, as is also decided, that the city must pay for the water supplied by said company; and whereas, it is best to arrange for a fixed annual price for said water supply, rather than leave the city liable to an annual demand, the amount of which cannot be known in advance, and from which the city cannot be relieved, but is specially authorized and required to provide for the payment therefor; and whereas, the said New Orleans Water-Works Company is willing to accept terms, arranging for a sum to be determined in advance of each year, and which amount can be readily and equitably fixed, according to a mode adopted in other cities, by reference to a number of fire-hydrants, fire-plugs, or fire-wells, now numbering eleven hundred and thirty-nine, (1,139) in this city,—therefore," etc. In the teeth of the decision of this court, the ordinance rests exclusively on the false recital that the city was bound to pay the full value of the water-supply, regardless of the amount of taxes, and the change in the terms of the prior contract is declared to be simply for the purpose of establishing a better mode of fixing the compensation. The pretense that this ordinance was intended as authorizing a new contract, fixing an honest additional price for a fair additional consideration, has no foundation either in its terms or in the evidence in this case. By the effect of this contract the water-works company furnishes substantially the same supply of

water which it was bound to furnish under the terms of its charter. It enjoys a perfect practical exemption from taxation, because the city is bound to furnish it, in advance, with the money to pay the taxes; and, in addition, the company receives a contribution of about \$2,000,000, payable in annual installments of over \$40,000 for 43 years. If this is not a disguised donation, what shall it be called, unless we choose to term it an undisguised donation? For, indeed, the garniture of contract in which it is clothed is too flimsy and transparent to serve as a disguise. It is vain to point to the provisions of the city charter authorizing the city council to provide itself and its inhabitants with pure and wholesome water, and to make contracts for such purpose. No one would be bold enough to contend that those powers cover donations of the money exacted from the tax-payers. Equally vain is it to appeal to the discretion vested in the political authorities of the city to judge as to the advisability of considerations. A donation placed in the form of a contract cannot find protection under any degree of respect due to such pretended discretion. But it is said that this contract is a compromise of the conflicting rights claimed, respectively, by the city and the company. It is not, and it does not pretend to be, a compromise. There were no conflicting rights. The rights of the parties had been finally settled by the decree of this court, which had not even been appealed from, and which nothing shows the company intended or threatened to appeal from. The appeal taken since the institution of this suit is too late to affect the *status* of the case. The last appeal of the company is to act 56 of the general assembly of 1884, passed after the decision rendered by this court. The act is ambiguous in its terms, and it is needless to discuss its provisions and its phraseology. It either authorized this contract, or it did not. If it did not, there is an end of its pertinency. If it did, it clearly violates the following articles of the constitution, viz., article 45, which declares: "The general assembly shall have no power to grant, or to authorize any parish or municipal authority to grant, any extra compensation, fee, or allowance to a public officer, agent, servant, or contractor;" and article 57, which declares that "the general assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this state, or to any parish or municipal corporation therein."

The applicability of these two articles is too patent to need comment. If, under its charter as interpreted by this court, the water-works company was bound to furnish the water annually for a compensation not exceeding the amount of its taxes, how could the legislature authorize the city to pay to such contractor an extra compensation of \$45,000 per annum? And if such was the "liability" of the water-works company, how could it be released and extinguished by substituting therefor a different and vastly less onerous liabil-

ity? Moreover, if the act has this effect, it is clearly an amendment of the charter of the company, because it changes the whole effect and operation of section 11 thereof as interpreted by this court. This is a local and a special law, and the constitution (article 46) declares: "The general assembly shall not pass any local or special law * * * creating corporations or amending, renewing, extending, or explaining the charter thereof." If an act of the legislature which has the effect of changing and radically diminishing the obligations imposed upon a corporation by its charter is not practically an amendment or alteration of the charter, what would be such an amendment? Finally, article 234 of the constitution declares: "The general assembly shall not remit the forfeiture of the charter of any corporation now existing, nor renew, alter, or amend the same; nor pass any general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution." The provisions last referred to are those which aim at monopolies and subject the rights of corporations absolutely to the police power of the state, to be controlled thereby whenever deemed to infringe the "general well-being of the state." The water-works company has never accepted this act, but has declined to accept it. It has contrived to obtain a most important and radical amendment and alteration of its charter rights and obligations, without subjecting itself to these provisions and without imperilling its monopoly. Having never had the slightest ground of complaint except the loss of its exemption from city taxation, it has secured an indemnity for this loss, which converts it into an enormous gain, because the city not only pays to it in advance the money with which to pay its taxes, but adds an annual gift of \$45,000 per annum in addition. Exemption from taxation has no sentimental value, no *pretium affectionis* or *honoris*. It is simple relief from the obligation to pay a certain amount of money. If the city had made provision to take the water bill in discharge of its taxes, or if it had appropriated and paid to the company the amount of the taxes with which to pay them, the charter right of the company would have stood *totus, teres atque rotundus*, without a shadow of infringement.

I have looked at this case from every point of view, and confess my inability to discover any consideration of justice, equity, or law to support this extraordinary contract. I therefore dissent.

Rehearing refused. Appealed to the supreme court of United States on writ of error.

EL MODELO CIGAR MANUF'G CO. v. GATO.
(Supreme Court of Florida. Jan. 7, 1890.)

EQUITY—JURISDICTION—DEMURRER—TRADE-MARKS
—DAMAGES.

1. A general demurrer to a bill as for want of equity, will be overruled if there is any equitable ground of relief stated in the bill, even if there are any number of grounds of special demurrer.

2. Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a peculiar label, symbol, or trade-mark, and no other person has a right to adopt his label or trade-mark, or one so like his as to lead the public to suppose the article to which it is affixed is the manufacturer's.

3. A man may acquire the right of a trade-mark in his own name or the name of any person, but he cannot acquire the right of a trade-mark in the use of his own name to the exclusion of the right of another person by the same name, and whose place of business is in the same place.

4. When a man manufactures his goods at a particular place, he may use the name of that place, in combination with other words, as a trade-mark to distinguish the origin or ownership of his goods, and no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place.

5. A party whose trade-mark has been violated is entitled to recover all profits realized by the wrong-doer from sales of the spurious articles, and also all damages resulting from such violation.

(Syllabus by the Court.)

This case comes here upon appeal and cross-appeal from the circuit court of Duval county.

The bill was filed August 6, 1885, and alleges, among other things:

That the complainant engaged in and commenced the manufacture and selling of cigars at Key West, Fla., in 1875. That complainant used exclusively Havana tobacco at his factory, and that he established among purchasers, dealers, etc., a high reputation for his cigars, and that his cigars still maintain said high reputation. That the climate at Key West is more favorable to the manufacture of Havana cigars than points north of that place. That to identify his cigars among consumers, etc., years ago complainant adopted and used, and still uses upon the boxes in which his cigars are packed, certain marks, names, labels, and pictures, by which his cigars became known to the trade and public. That the quality, etc., of his cigars, in the estimation of consumers, etc., depend upon the locality of manufacture, as well as the quality of tobacco used in making.

That the complainant caused to be stamped or branded on his cigar-boxes the words "Key West," and the words "Key West" printed upon the labels, pictures, and paper, both upon the inside and outside of such boxes, and caused to be stamped or branded upon such boxes, and printed upon the labels, pictures, and paper, complainant's name, "E. H. Gato," or "Eduardo H. Gato."

That by reason of having the words "Key West," and complainant's name, "E. H. Gato," and "Eduardo H. Gato," upon such labels, etc., and upon said boxes, his cigars became readily known among dealers, etc. That in addition to the words, pictures, etc., upon complainant's cigar boxes, complainant, upon certain brands of his cigars, in the manufacture of which he has made a specialty, and on the labels and pictures thereon, has caused to be branded and printed the word "Bouquet," both separate from, and in connection with, the words "E. H. Gato," "Eduardo H. Gato," and "Key West," and that the cigars put up, etc., as aforesaid, have for many years and are now known to

the trade, etc., as "Gato's Bouquet Cigars of Key West," "Gato's Key West Cigars," and "Cigars Bouquet de E. H. Gato, Key West." That on certain other cigars manufactured by complainant he has caused to be branded and printed on the labels, etc., of the boxes, the words "La Estrella," both separate and in connection with the words "Key West," "E. H. Gato," and "Eduardo H. Gato," and that this brand of cigars has become widely known to the market, etc., as "Gato's Estrella Cigars of Key West," or as "Gato's Key West Estrella Cigars," and that both the Bouquet and Estrella brands of cigars made by complainant at his said factory have become favorites in the market among buyers, etc., and are known as cigars of very superior quality, and that said cigars are made of the best Havana tobacco, etc.

That complainant made use of the distinctive words "Bouquet," "La Estrella," and the words "Key West" and "E. H. Gato" and "Eduardo H. Gato," upon the boxes of his cigars and labels, etc., as trade-marks, and to distinguish his cigars in the market, etc., from cigars made and put upon the market by other manufacturers, long before the defendants made use of the said distinctive words upon boxes of cigars, labeled and printed thereon as hereinafter stated and complained of.

That the defendants, or one or more of them, about the year 1882, commenced to manufacture cigars at Jacksonville, Fla., under the name and style of the firm of "El Modelo Cigar Manufacturing Co.," or "Company," and that they from that time have and are still manufacturing cigars on an extensive scale. That defendants use seed tobacco in their business, and make their cigars of seed tobacco, at their factory, which is a much inferior quality of tobacco to the Havana tobacco, in the estimation of dealers, etc., and is in point of fact a greatly inferior tobacco to the Havana tobacco, and well known to all manufacturers, etc.

That the defendants, well knowing the superior qualities of complainant's cigars, and the large and extensive trade therein, and sales thereof which complainant has built up and established in the markets of the country, and among consumers, etc., by his skill, etc., by making his cigars at Key West, where they were represented to be made, and of Havana tobacco, as they were likewise represented to be made, and that complainant had thereby acquired and secured a profitable business in the making and selling of his cigars, and confederating and contriving to injure complainant in his business, etc., in the year 1883, commenced, by the use of divers and sundry contrivances, labels, pictures, names, and words identical with or similar to the aforesaid labels, etc., used and employed by complainant, in such manner and with such combination upon some of the boxes of cigars made by them, to deceive and palm off upon and sell to purchasers, etc., the inferior cigars of the defendants' manufacture, and as for the cigars manufactured by complainant at Key West. That defendants ever since about the year 1883 have deceived, palmed off, and sold continuously to such traders,

etc., the product of their factory, at Jacksonville, as and for the cigars made by complainant at his factory at Key West, to the great damage and injury of complainant.

That the defendants' brand and stamp upon the boxes containing their cigars manufactured at Jacksonville, and print upon the labels, pictures, and paper upon said boxes, the words "Key West" and "G. H. Gato," in conspicuous places upon said boxes, and in form and size of letters identical with or similar to the form and size of letters employed and used by complainant upon his boxes of cigars and labels and pictures thereon, and that the defendants stamp, brand, and print upon the boxes of their cigars, pictures and labels thereon, the words "G. H. Gato" and "Key West," both separately and in combination with each other, and in such manner, form, style, and general appearance to the eye as to readily deceive traders, purchasers, and consumers, and by such means do cause them to take, purchase, sell, and consume the cigars of defendants as and for the cigars of complainant, and with the intent and design so to do. That the defendants used and employed, upon their boxes of cigars the letters and words "G. H. Gato" prior to the time when the person known by that name became a member of said firm, and the defendants so stamped and printed upon the boxes of cigars, and upon the labels and pictures thereon, the said initial letter "G," as to make it appear to the eye, and cause it to be readily read and taken by dealers, etc., for the letter "E," the initial letter of complainant's name; and the defendants have offered and sold, and continue to offer and sell their said cigars, stamped, branded, and printed as aforesaid, and for Gato's Key West cigars, at a price much less than complainant has sold or can sell his cigars without loss, and thereby have deprived, and do continue to deprive, complainant of his reasonable and lawful profits in his said business.

That the defendants have also used and employed, for two years and upwards, and do now use and employ, brand, and print upon their boxes of cigars, made by them at their factory at Jacksonville, the words "Bouquet" and "La Estrella," both separately and in combination with the words "G. H. Gato" and "Key West," so as to appear like and resemble the same words upon the boxes of complainant's cigars, and by such means, and by representing and advertising in newspapers, and by their agents and otherwise, which defendants have done, and now do, the said cigars as "Gato's Key West Cigars," and as "Gato's Bouquet Cigars," and as "Gato's Estrella Cigars of Key West," do, and for a long time, to-wit, for two years and upwards, have palmed off and sold to the trade, and to dealers, and their agents and purchasers from defendants have palmed off, and sold to the trade, etc., defendants' said cigars in large quantities, as and for the complainant's "Bouquet" and "Estrella" cigars, and "Gato's Key West" cigars, and that by the fraudulent practices and means before stated defendants have made and realized large profits which justly belong to complainant.

The prayer of the bill is for discovery,

and accounting of profits, injunction, damages, and general relief.

Decree *pro confesso* was entered for want of answer, etc.

After decree *pro confesso* was entered, the bill was demurred to: (1) That the bill contains no matter of equity whereon this court can ground any decree, or give complainant any relief, as against these defendants.

(2) That the bill, in addition to asking for an injunction, an account of profits, etc., demands damages of the defendants.

The demurrer was overruled as to the first ground, but sustained as to the second ground.

On November 13, 1886, the defendants answered.

The answer admits that complainant is and has been engaged in manufacturing cigars at Key West, and that they have been and are manufacturing cigars at Jacksonville under the firm name of "El Modelo Cigar Manufacturing Co.;" also that they sell a brand of cigars known as their "Bouquet Cigars," yet they offer them in boxes so labeled and branded as not only not to be easily mistaken for complainant's cigars "Bouquet," but entirely dissimilar; and defendants further aver that, as far as the words "Key West" are concerned, they make use of said words indifferently on all the boxes of cigars they sell.

All the other material allegations of the bill are denied by defendants, except as to complainant's "Estrella" brand, and defendant's "Estrella" brand.

On the 28th day of October, 1886, defendants entered a motion to strike complainant's motion for injunction, "on the ground that before said motion was filed these defendants had interposed a demurrer to the bill for want of equity, which had been argued and was being held under advisement by the said court, and had not been disposed of, and upon which the said court has not yet delivered a decision."

On the 18th day of November, 1886, complainant moved for injunction upon motion before then filed.

On the 14th day of December, 1886, complainant filed his replication to the answer.

In support of the motion for injunction, affidavits were filed by complainant, and counter-affidavits by defendant.

On the 10th day of January, 1887, the court granted a writ of injunction, and from the order of the court granting the injunction the defendant appealed, and by order of the court the appeal is to operate as a *supersedeas*; and on the same day the complainant took his cross-appeal from the order of the court sustaining defendants' demurrer to that part of the bill that claims damages of and from defendants in excess of profits realized.

The errors assigned by appellant are:

(1) The overruling of the appellant's demurrer to the bill of complaint of the said appellee, so far as the court overruled the same.

(2) In the decree made on the 10th day of January, 1887, in which it was ordered that a temporary injunction issue, as prayed for in said bill of complaint.

The errors assigned upon cross-appeal by complainant are: "Comes now Eduardo

H. Gato, who prosecutes a cross-appeal in the above-entitled cause, and petitions the said supreme court to reverse so much of the interlocutory decree of the circuit court entered on the demurrer to the bill as declares he, as complainant, cannot recover any damages in the cause beyond profits received by defendants by the infringement of his trade-mark," etc.; "and, as ground of such appeal, says the said circuit court erred in so ruling."

Randall, Walkers & Foster, for appellant. *G. B. Patterson* and *H. Bisbee*, for appellee.

MITCHELL, J., (after stating the facts as above.) The first question to be decided is, did the court below err in overruling the first ground of the demurrer to the bill?

In discussing the demurrer to the bill, counsel for appellants insist that defendants had the right to use the name of G. H. Gato, and that Gato had the right to manufacture cigars, and that G. H. Gato had the right to use his own name in announcing the origin of his cigars, provided no fraud was practiced by him in so doing, and cite the following authorities as sustaining their position: *Partridge v. Menck*, 47 Amer. Dec. 281, and note; *Clark v. Clark*, 25 Barb. 76; *Burgess v. Burgess*, 17 Eng. Law & Eq. 257; *Faber v. Faber*, 49 Barb. 357; *Wolfe v. Burke*, 7 Lans. 151; *Meneely v. Meneely*, 62 N. Y. 427; *Massam v. Cattle Food Co.*, 36 Law T. (N. S.) 848; *Ainsworth v. Walmesley*, 35 Law J. Ch. 352; *Hardy v. Cutter*, 3 O. G. 468; *Carmichel v. Latimer*, 23 Amer. Rep. 481; *Decker v. Decker*, 52 How. Pr. 218; *Gilman v. Hunnewell*, 122 Mass. 139.

Now, we admit the soundness of the legal proposition as laid down supra; but after the complainant, whose factory was located at Key West, had adopted his own name in combination with the words "Key West," "La Estrella," and "Bouquet," and certain brands, labels, and pictures as his trade-marks, the defendants did not, afterwards, have the right to adopt the name of "G. H. Gato," in combination with the words "Estrella," "Bouquet," and "Key West," and certain brands, labels, and pictures, in combination with the name of "G. H. Gato," as their trade-marks, when the words, etc., so adopted by them, so closely resembled the trade-marks so adopted by the complainant as to enable them to palm off upon and induce an ordinary purchaser to buy their cigars for those of the complainant, whereby the defendants might be profited, and the complainant might be injured. *Robertson v. Berry*, Amer. Trade-Mark Cas. 153; *Medicine Co. v. Wenz*, Id. 711; *Tobacco Co. v. Hynes*, Id. 898; *Manufacturing Co. v. Ludeman*, Id. 957; *Oil-Tank Co. v. Scott*, 39 Amer. Rep. 286; *Hier v. Abrahams*, 82 N. Y. 519.

It is now well established that a man may acquire the right of a trade-mark in his own name, or in the name of any person, but a man cannot acquire the right of a trade-mark in the use of his own name, to the exclusion of the right of another person by the same name, and whose place of business is in the same place; yet it is well settled in the law of trade-marks

that when one person uses his own name to identify and distinguish the origin and ownership of his goods, which are manufactured at a particular place, no other person by the same name will be permitted to use his name on his own goods, if under such circumstances as are calculated and designed to injure the trade and business of another. In other words, one man will not be allowed, though his name be the same as that of another person or manufacturer, to represent his goods as and for the goods of another. *Gilman v. Hunnewell*, 122 Mass. 139; *Robertson v. Berry*, 33 Amer. Rep. 337, note 1.

A man may establish his right to a trade-mark in the name of a place, city, or town, and it is well established that when a man manufactures his goods at a particular place, and uses the name of that place in combination with other words as a trade-mark to distinguish the origin or ownership of his goods, no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place. *Canal Co. v. Clark*, 18 Wall. 325; *Congress, etc., Spring Co. v. High Rock, etc.*, Spring Co., 45 N. Y. 291; *Newman v. Alvord*, 51 N. Y. 189; *Manufacturing Co. v. Hall*, 61 N. Y. 226; *Sawyer v. Horn*, 1 Fed. Rep. 24; *Gilman v. Hunnewell*, 122 Mass. 139; *Robertson v. Berry*, 33 Amer. Rep. 337, note 1. Under these decisions it will be seen that the defendants clearly had no right to use the name of the place, Key West, or the name of G. H. Gato, either alone or in combination with the other words, as alleged in the bill to have been used by them.

The defendants by their answer aver that they did not intend to injure the complainant by any contrivance, etc.

But do not the facts and circumstances of the case contradict such averments of the defendants? If they did not intend to injure the complainant, why did they aver in their answer that the atmosphere of Key West was not more favorable for the manufacture and preservation of cigars than at points north of that place, when they had branded their boxes "Key West," and had printed on their letter and bill heads the words "Key West" and "Gato's Fine Key West Cigars," thereby inducing the public to believe that their cigars were manufactured at Key West, when in fact they were manufactured at Jacksonville? And why did they use the name of the junior member of their firm in combination with the words "Key West," "La Estrella," and "Bouquet," the only difference between the name of the said junior member of said firm being the initial letter of his Christian name, "G," the initial letter of complainant's Christian name being "E;" and why did defendant so print the name of the junior member of their firm upon their cigar-boxes that it would readily be taken for the name of the complainant, "E. H. Gato," as for that of said junior member, "G. H. Gato?"

There can, we think, be but one answer to these questions, and that is that the defendants, by their said actions, intended to deceive the public by palming off their cigars as and for those of the complainant, as alleged in the bill.

A general demurrer to a bill, as for want of equity, will be overruled, if there is any ground of equitable relief stated in the bill, even if there are any number of grounds of special demurrer. *Thompson v. Maxwell*, 16 Fla. 775.

The demurrer to the bill in the case at bar is general, and the bill shows on its face that the complainant is entitled to the equitable relief prayed for; wherefore the order of the chancellor overruling the first ground of the demurrer was not erroneous.

In the second place, did the court below err in granting the temporary injunction?

We have before us, as exhibits, (sent up with the record of the case,) empty cigar-boxes of the complainant's *La Estrella* and *Bouquet* brands of cigars, and one of the defendants' *Bouquet* band, and, by placing the two *Bouquet* boxes side by side, the dissimilarity between the two is apparent, and there is sufficient difference between them, we think, to enable an expert in such matters to distinguish the brand of the complainant from that of the defendants without placing the boxes side by side, but the general appearance of the two boxes, and the stamps, brands, pictures, labels, and letters thereon and therein, are so very similar in size, shape, and color that they are calculated to mislead an ordinary purchaser; and whenever this is the case a court of equity will grant a decree restraining a defendant from so simulating the trade-marks of the complainant. *Robertson v. Berry*, Amer. Trade-Mark Cas. 153; *Medicine Co. v. Wenz*, Id. 711; *Tobacco Co. v. Hynes*, Id. 898; *Manufacturing Co. v. Ludeman*, Id. 957; *Oil-Tank Co. v. Scott*, 39 Amer. Rep. 286; *Hier v. Abrahams*, 82 N. Y. 519.

When a trade-mark is calculated to mislead, even if no one has been actually deceived, an intention to deceive will be presumed. *Caire's Appeal*, Amer. Trade-Mark Cas. 116.

And, although a man may not intend to injure another, yet he will not be allowed to adopt the marks by which the goods of such other person are designated, if the effect of adopting them would injure such other person. *Sheppard v. Stuart*, Id. 193; *Hier v. Abrahams*, 82 N. Y. 519; *Williams v. Brooks*, 50 Conn. 278; *Tobacco Co. v. Hynes*, 20 Fed. Rep. 883.

We have not been furnished with any of defendants' boxes of the *Estrella* brand, but the bill alleges that this brand of defendants so closely resembles the *Estrella* (star) brand of complainant that it is calculated to mislead the public into believing the brand of the defendant to be that of the complainant. The demurrer to the bill admits these allegations of the bill, and the defendants virtually admit the truth of the allegations in their answer. They, it is true, deny, in a general way, the allegations of the bill in regard to the said brand so closely simulating complainant's brand, but fail utterly to show wherein their brand does not resemble the complainant's. They admit the manufacture of the *Estrella* brand of cigars at Jacksonsville, but say that the word "*Estrella*" is not "*Estrella*," as alleged in the bill. Is this a denial of the positive allegations of the bill

as to the resemblance between the said two brands? Certainly not. Then why did not the defendants deny the allegations of the bill, if they were not true? They admit the allegations of the bill to be true; that is to say, that they intended to deceive the public, profit by the deception, and to injure the complainant. The omitting of the letter "r," as aforesaid, was but an artifice resorted to by the defendants, under the belief that it would not be detected, but, if detected, it might protect them in a suit for damages by the complainant against the defendants for so pirating his trade-mark. No other conclusion would be consistent with the facts of the case.

The affidavits of *Bishop & Co.* and others filed in the case tend to show that the defendants have palmed off and sold their said cigars as and for those of the complainant, and that the agents of complainant have had to publish notices in newspapers cautioning the public against the deception thus practiced by the defendants. This the defendants have attempted to contradict by filing counter-affidavits, stating that the affiants knew of no such efforts, either on the part of the defendants or their agents, to palm off or use their cigars as, of, and for those of the complainant. This is mere negative evidence, and proves nothing. There was no error in granting the temporary injunction.

This disposes of the errors assigned by appellants, but counsel in their argument further contend that the complainant has been guilty of such laches that he is not entitled to the relief he pays for, and cite 6 *Walt, Act. & Def.* 42, 48; *Beard v. Turner*, 13 *Law. T. (N. S.)* 747.

The rule in England in trade-mark cases is more stringent than in this country, and a lack of diligence there in suing deprives complainant in equity of the right to an injunction or an account. But our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrong-doer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant. *Sawyer v. Kellogg*, Amer. Trade-Mark Cas. 564.

Nor will the acquiescence of any person in the wrongful use of his name estop him from asserting his rights in equity, unless he has notice during such acquiescence of the facts rendering the use of his name wrongful. *Horton Manuf'g Co. N. Y. v. Horton Manuf'g Co. Ind.*, Amer. Trade-Mark Cas. 857.

And the laches of the complainant will not avail as a defense in a proceeding to restrain the use of a trade name when the defendant adopted the name with a fraudulent intent. *Sanders v. Jacob*, Id. 1048.

The complainant was in no such laches as would deprive him of his rights in the premises.

The only remaining question to be considered is, did the chancellor err in sus-

taining the second ground of defendants' demurrer to the bill?

This court held in *Doggett v. Hart*, 5 Fla. 230, that "in cases of accounts, of agency, of apportionment, of general average, of contribution, of waste and of partnership, where chancery once entertains a suit upon grounds legitimately cognizable in that court, it will proceed to adjudicate other matters of which it has only incidental cognizance, in order to avoid a multiplicity of suits."

"Another rule," says Mr. Story, (1 Story, Eq. Jur. § 64k), "respects the exercise of jurisdiction when the title is at law, and the party comes into equity for a discovery, and for a relief, as consequent on that discovery. In many cases it has been held that where a party has a just title to come into equity for a discovery, and obtains it, the court will go on, and give him the proper relief, and not turn him round to the expenses and inconveniences of a double suit at law. The jurisdiction having once rightfully attached, it shall be made effectual, for the purposes of complete relief. And it has accordingly been laid down by elementary writers of high reputation that 'the court, having acquired cognizance of the suit for the purpose of discovery, will entertain it, for the purpose of relief, in most cases of fraud, account, accident, and mistake.'"

In the case at bar the bill prays for discovery, an accounting of profits, injunction, damages, and general relief, and the only ground of objection to the bill raised by the second ground of defendants' demurrer is that the bill prays damages.

That a man whose trade-marks have been infringed upon, as in this case, is entitled to compensation for the infringement, is unquestionable; and it strikes us that it makes no difference whether the compensation to which the complainant is entitled is called "profits" or "damages." What is an accounting, but the method by which to ascertain the complainant's damages or compensation for the wrong and injury done him by the defendants?

That the complainant is entitled to damages, see *Hostetter v. Vowinkle*, 1 Dill. 329; *Pitts v. Hall*, 2 Blatchf. 229; *Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Graham v. Plate*, 40 Cal. 593; *Marsh v. Billings*, 7 Cush. 322; *Stonebraker v. Stonebraker*, 33 Md. 252; *Blackwell v. Wright*, 73 N. C. 310.

A party whose trade-mark has been violated is entitled to recover all the profits realized by the wrong-doer from sales of the spurious article, and also all damages resulting from such violation. *Graham v. Plate*, 40 Cal. 593; *Peltz v. Eichele*, 62 Mo. 171; *Marsh v. Billings*, 7 Cush. 322; *Milling Co. v. Robinson*, Amer. Trade-Mark Cas. 904; *Hostetter v. Vowinkle*, 1 Dill. 329; *Pitts v. Hall*, 2 Blatchf. 229.

The owner of a trade-mark is entitled to nominal damages for the violation of his trade-mark, although it is not shown that he has sustained actual damages, and although the defendant's articles are not inferior in quality to his own. *Blofeld v. Payne*, 4 Barn. & Adol. 410, 1 Nev. & Man. 353; *Thomson v. Winchester*, 19 Pick. 214;

Rodgers v. Nowill, 5 C. B. 109; *Conrad v. Brewing Co.*, Amer. Trade-Mark Cas. 316.

The decree of the court below granting injunction is affirmed, but the order sustaining defendants' demurrer to that part of the bill that claims damages, in excess of profits realized, is reversed, and the cause remanded for further proceedings consistent with this opinion; the appellant, El Modelo Cigar Manufacturing Company, to pay all costs of the suit.

ON REHEARING.

MAXWELL, J. Appellants are not satisfied with the decision in this case, and they now come with application for a rehearing, based on mistakes of the court in the opinion rendered.

The first mistake complained of is in relation to a statement of the court respecting allegations of appellants in regard to climatic and atmospheric conditions in Key West, as adapted to the manufacture and preservation of cigars. The court asked in argument, why did appellants "aver in the answer that the atmosphere of Key West was not more favorable for the manufacture and preservation of cigars than at points north of that place," etc.? So far as we can see, this is but hypercritical, in that the word "aver" was used instead of the word "deny." Whether it was an averment or denial made no difference as to the question then under discussion, of intention to injure complainant by the use of simulative words and brands.

The next ground for a rehearing is that "there is no allegation in the bill or answer, nor is there any proof, that G. H. Gato was the junior member of the firm of the El Modelo Cigar Manufacturing Company, yet the court, in its opinion, asked, why did they use the name of the junior member of their firm in combination with the words 'Key West,' 'La Estrella,' and 'Bouquet?'" With all due respect to counsel, this seems simply frivolous. G. H. Gato was spoken of as the junior member of the firm because in the list of four partners his name appeared last. But whether he was a junior or other member did not affect the question involved in the use of his name; the impressive fact being that his name was used, instead of any other of the four, or of the firm name, to direct attention to the brand of cigars.

The third ground for rehearing is that there was mistake of the court in reference to the La Estrella brand of cigars, in saying that the defendants "admit the allegations of the bill to be true; that is to say, that they intended to deceive the public, profit by the deception, and to injure the complainant." The paragraph of the opinion in which this sentence occurs, taken altogether, is such as to render the sentence susceptible of reference to the admission of defendants under their demurrer to the bill. In this view, the statement is correct. But without regard to that, and even if the mistake is a substantive one, it cannot affect the conclusion of the court, for there is still the Bouquet brand not touched by this mistake, which furnishes sufficient ground for that conclusion.

A rehearing is denied.

SAVANNAH, F. & W. RY. CO. v. DAVIS.

(Supreme Court of Florida. Jan. 10, 1890.)

RAILROAD COMPANIES—RIGHT OF WAY OVER PUBLIC LANDS—TRESPASS—LIMITATION OF ACTIONS.

1. Where a railroad company fails to comply with the provisions of the act of congress granting the right of way to railroads through the public lands of the United States, the company has no right to run its road through the land of a homesteader who had complied with the terms of the homestead law, although the homesteader had not at the time received his patent from the government; for the homesteader's claim is, under such circumstances, superior to and not subordinate to that of the company, and if the company runs its road through his land it becomes a trespasser, and is liable to the homesteader in an action for damages.

2. A railroad company that has not complied with the terms of the act of congress granting to railroad companies the right of way through the public lands is not in a position to assail the title of a homesteader found in possession of land through which the company desires to run its road.

3. An action for trespass upon real property must be commenced within three years, otherwise it is barred by the statute of limitations; and a charge that in a continuing trespass the statute does not begin to run at the time the cause of action accrued, but that the action might be brought at any time during the continuance of the trespass, and that the plaintiff could recover damages for the whole time, whether the suit was commenced in the time prescribed by the statute or not, is erroneous.

4. Where there is a continuing trespass, the party injured is entitled to recover any damages he may sustain in consequence of such trespass, at any time within three years before the commencement of suit, and he can bring successive suits against the defendant as long as the trespass is continued.

(Syllabus by the Court.)

Appeal from circuit court, Suwannee county; JOHN F. WHITE, Judge.

B. B. Blackwell, for appellant. J. S. White, for appellee.

MITCHELL, J. The appellee (plaintiff below) declared against the defendant railway company in trespass *quare clausum fregit*, describing the land as the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 29, township 5 S., of range 14 E., situate in Suwannee county. The declaration alleges the cutting of timber and corn on the land growing, the digging up of the earth, etc.

The defendant railway company pleaded:

(1) Not guilty.
(2) That the plaintiff was not seised and possessed of the land as the time of the alleged trespass.

(3) That the alleged trespass complained of by the plaintiff was not committed within three years next before the commencement of this suit.

(4) That the defendant is a corporation duly organized under the laws of the state of Florida, and authorized to build, construct, and operate a railroad in said state, and that said land in the declaration mentioned belonged to the United States at the time of the said entry complained of by the plaintiff, and that such entry was for the purpose of constructing and operating its railroad.

The plaintiff joined issue on the several pleas, the issues were submitted to a jury, and they found for the plaintiff and assessed the damages at \$600, and the case is here upon appeal from the order of the

circuit court overruling motion for new trial.

The following errors are assigned:

(1) In refusing to grant a new trial.
(2) In refusing to give to the jury the first and second instructions asked for by defendant, and in qualifying the third instruction.

(3) In charging the jury that a corporation may be a trespasser by ordering such an act done as makes the doer a trespasser.

(4) In charging the jury that if the original trespass was committed by the Live Oak & Rowlands Bluff Railroad Company or the Plant Investment Company, and that such company was the agent of defendant, the defendant was liable as fully as though the entire trespass was committed by the defendant.

The evidence in the case conduces to show that the plaintiff moved upon the land described in the declaration in December, 1879, and that the land at the time belonged to the United States. That the plaintiff, on the 27th day of January, 1882, filed his application in the United States land-office at Gainesville, for a homestead entry upon said land, and that he made his final proof, and obtained his final receipt under such homestead entry, May 31, 1886.

That the preliminary survey through said land was made in the fall of 1881, and that the company's line was permanently located about the month of May, in the year 1882, and that the preliminary line through the land became the permanent line, or nearly so. That the road was completed through said land in July, 1882, and that it had been operated by the defendant from the completion thereof to the commencement of this suit.

It is insisted by the appellant railroad company that under the act of congress of March 3, 1875, granting the right of way to railroad companies through the public lands of the United States, it had the right to enter the land described in the declaration at the time it did enter upon the land, and that any right the complainant had was subordinate to that of the railroad company under said act; and in support of this position cite the case of Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. Rep. 336.

But the decision in said case does not support this proposition to the extent insisted upon. The decision in the case of Van Wyck v. Knevals arose under the act of congress of July 23, 1866, granting to the state of Kansas, for the use and benefit of the St. Joseph & Denver City Railroad Company, alternate sections of land along the line of said company, to aid in constructing a road from Elwood, Kan., westwardly, via Marysville, in the same state, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, etc.

The third section of this act provides that the lands granted "shall inure to the benefit of said company, as follows: When the governor of the state of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the secretary of

the interior shall issue to the said company patents for so many sections of the land hereinbefore granted," etc.

The fourth section declares "that, as soon as the said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest." 14 St. at Large, 211.

The company accepted the act, and filed with the secretary of the interior a map of the line of its road.

Mr. Justice FIELD delivered the opinion of the court in said case, and, in construing said act of congress, says: "The grant is one *in present*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed.' When that route is thus established, the grant takes effect upon the sections by relation as of the date of the act of congress. In that sense we say that the grant is one *in present*. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification."

"The inquiry then arises, when is the route of the road to be considered as 'definitely fixed,' so that the grant attaches to the adjoining sections? The complainant in the court below, who derives his title from the company, contends that the route is definitely fixed, within the meaning of the act of congress, when the company files with the secretary of the interior a map of its line, approved by its directors, designating the route of the proposed road. On the other hand, the defendant, (the appellant here,) who acquired his interest by a subsequent entry of the lands and a patent therefor, contends that the route cannot be deemed definitely fixed, so that the grant attaches to any particular sections, and cuts off the right of settlement thereon, until the lands are withdrawn from market by order of the secretary of the interior, and notice of the order of withdrawal is communicated to the local land-offices in the districts in which the land-offices are situated."

"We are of opinion that the position of the complainant is the correct one. The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the secretary of the interior and accepted by that officer the route is established. It is, in the language

of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent."

The same principle is also laid down in the following cases: Railroad Co. v. U. S., 92 U. S. 733; Grinnell v. Railroad Co., 103 U. S. 739; Schulenberg v. Harriman, 21 Wall. 44; Wood v. Railroad Co., 104 U. S. 329; Taboreck v. Railroad Co., 2 McCrary, 407; Yosemite Valley Case, (Hutchings v. Low,) 15 Wall. 77.

In each of the cases cited above the railroad company took the necessary preliminary steps to comply with the act of congress under which the grant was made; that is, the company filed with the secretary of the interior a map designating the permanent or "fixed" route of the proposed road, made by the surveyors of the company, and adopted by its directors, which was accepted by the secretary. The several acts of congress under which these grants were made required such filing of maps, etc.

The act of March 3, 1875, granting to railroads the right of way through the public lands of the United States, in the first section provides "that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

The fourth section of the act provides "that any railroad company desiring to secure the benefits of this act shall * * * file with the register of the land-office for the district where such land is located a profile of its road." 18 St. at Large, 482.

To entitle the defendant railroad company to the benefits of this act, it was required to comply with the provisions of the same, but, so far as the evidence shows, the defendant company has done nothing evincing an intention to comply with such provisions, and the question is, by what right did it enter upon the land in question, as it did enter?

It did not enter under the act of congress granting the right of way over the public lands, because it did not comply with the terms of the act. It had no title to the land, and it had no right to enter thereon. When it did so enter, it did so as a trespasser, and made itself liable to the plaintiff in such damages as he could prove.

If the company had complied with the requirements of the act by filing with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, and had filed with the register of the land-office at Gainesville, Fla., in the district where the land is located, a profile of its road, then it would be in condition to claim the benefits of said act: provided, no other claimant had in the mean time—that is, before the company permanently located and adopted its line—acquired a title to the

land superior to that of the company, if it had any.

Counsel for defendant (appellant here) insists that the persons who accept the bounty of the general government, in the way of a homestead, accept it subordinate to the general grant of 1875.

Admitting the correctness of this proposition, and still the fact remains that to make the right of the homesteader subordinate to the general grant, and to confer upon the railroad company the rights and powers claimed by it, it must have complied with the provisions of the act granting it the right of way over the land. To carry out the doctrine contended for by the defendant railroad company, after a homesteader has complied with all the requirements of the homestead laws, after he has filed his claim, made final proof, and received a patent for his land, a railroad company has the right under the act of March 3, 1875, without taking a single step entitling it to the benefits of said act, to enter upon the homesteader's land *ad libitum*, to damage his land, to destroy his crops, and the homesteader is remediless, because his claim is subordinate to the act of March 3, 1875. We can give our assent to no such doctrine. When the homesteader has complied with the terms of the bounty of the government, he has a right in his homestead that the laws will protect. His claim is only subordinate to that of a railroad company when that company has so complied with the law as to make the homesteader's claim subordinate to its own. Failing itself to comply with the terms of the grant of the right of way to railroad companies, the company has no right to assail the title of anyone. The evidence, we think, clearly establishes the fact that, at least three months before the defendant railroad company permanently located its line through the land described in the declaration, the plaintiff made his homestead entry, and that he thereby acquired an interest in the land that the railroad company was bound to respect.

The railroad company further insists that the right of the homesteader is only an inchoate right, which may never ripen into a perfect title or a greater right.

Admitting this proposition to be true, it does not confer upon the company the rights contended for here. It does not occupy such a position that it can raise such a question.

The thirteenth paragraph of the court's charge is, in substance, that if the grievance complained of was a continuing trespass, the statute of limitations did not begin to run when the cause of action accrued, but that the action might be brought at any time during the continuance of the trespass, and that the plaintiff could recover damages for the whole time, whether the suit was commenced in the time prescribed by statute or not. This charge, we think, was erroneous. The statute (McClell. Dig. p. 733, § 10) provides that actions of trespass upon real property can only be commenced within three years. The suit before us was commenced July 7, 1887, and the declaration alleges that the defendant broke and entered the plaintiff's close on July 1, 1882, and alleges a continuous

trespass upon his land by the defendant from the date of the alleged entry to the commencement of the suit. On the day of such entry by the defendant an action accrued to the complainant, and he could have brought successive suits against the defendant so long as the trespass continued. 1 Add. Torts, § 385, and cases there cited.

But the rule laid down in the cases cited *supra* does not authorize the plaintiff to recover in an action for trespass committed upon his land by the defendant, regardless of time, simply because it was a continuing trespass, nor do we know of any law authorizing such recovery. All claims of the plaintiff against the defendant for trespass upon plaintiff's land were barred by the statute within three years, and the plaintiff could not recover damages which he sustained more than three years before he commenced suit. But if there was a continuing trespass, and the evidence tends to show that there was, the plaintiff was entitled to recover any damages he sustained in consequence of such trespass at any time within three years before the suit was commenced.

The amount of the judgment rendered was \$600, and the evidence, we think, shows conclusively that the damages sustained by the plaintiff, resulting from the acts of the defendant, amounted to only \$500. This is the estimate placed upon the damages by the plaintiff himself, and he should be bound by it, and the defendant also should be bound by it, because there is no evidence to show that plaintiff's estimate was not correct. Plaintiff estimates the damages for destruction of timber and cord-wood on the right of way at \$130, corn destroyed, \$30, and rails and pasture destroyed at \$20,—making, in all, \$180. This amount the plaintiff clearly was not entitled to, because the destruction of the property occurred when the defendant first entered upon the plaintiff's land, and hence it was barred by the statute. But as it may be that the defendant, by its acts and implied promises of settlement, induced the plaintiff to postpone the commencement of his suit until a large part of his claim was barred, and as the plaintiff, under the evidence, was certainly entitled to some damages in consequence of the defendant's continuing trespass, and as we do not think, under all the circumstances of the case, that damages to the amount of \$320 would be excessive, and also for the purpose of saving the expense of further litigation, we will give the plaintiff the option to save his judgment for \$320, and interest thereon from the rendition of the same, if he will enter a *remittitur* of \$280 as of the date of said judgment. The order will be that the judgment stand as of the date it was rendered, if the plaintiff enter the *remittitur* indicated, but, failing to do this, within 30 days after the mandate of this court is received by the clerk of the circuit court, the judgment is reversed and new trial granted.

There are other questions raised to other parts of the court's charge, and refusals to charge as requested by defendant, but we do not consider it important to consider them.

SCOTT, Sheriff, v. MILTON *et al.*
(Supreme Court of Florida. Jan. 21, 1890.)

APPEAL-BOND—AMOUNT.

Where an appeal is taken by a sheriff under the act of February 17, 1833, (McClell. Dig. p. 841, §§ 8, 9,) from an order directing him to pay over money to a plaintiff in execution, and the penalty of the appeal-bond is less than the amount of the sum and costs ordered to be paid, the appeal will be dismissed on the ground of the insufficiency of the bond.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; JAMES F. McCLELLAN, Judge.

D. L. McKinnon, for appellant. Liddon & Carter, for appellees.

RANEY, C. J. Appellees have moved to dismiss the appeal on the ground that the appeal-bond is insufficient in amount, and not in accordance with the law regulating appeals.

The facts are, in substance, that the appellees moved in the circuit court for a rule against appellant, as sheriff of Jackson county, to compel him to pay over to them \$75.19, their *pro rata* share of the proceeds of personal property levied upon under certain writs of attachment, and sold by him under an order of court. The sheriff answered, setting up the prior rights of other claimants to the said sum so held by him, and, the cause coming on to be heard, the court rendered judgment to the effect that he pay over to the appellees *pro rata* the sum stated, to be credited upon their executions, and that appellees recover of him the cost of the proceeding, taxed at \$6.31, to be levied of his goods and chattels, lands and tenements, and that execution issue for the same.

From this judgment an appeal was entered; the bond given being in the penalty of \$75.19, and conditioned for the payment to the appellees of said "judgment or order and costs" in case the same should be confirmed by this court.

The second and fourth sections of the act of February 17, 1833, entitled "An act regulating appeals in certain cases not heretofore provided for by law," (sections 8, 9, p. 841, McClell. Dig.; §§ 8, 9, p. 448, Thompson Dig.,) provide (section 2) that, "in all cases in which a rule of court or other summary order to any of the officers of court and their securities or deputies is, in effect a judgment for the payment of money or other thing, the party aggrieved may prosecute his, her, or their appeal or *certiorari* in the following manner: * * * Appeals and writs of error shall lie to the supreme court from the circuit courts, as in other cases;" and (section 4) "in such cases [in which such order shall be made in future] the said parties may proceed, as aforesaid, to prosecute their said appeals, writs of error, or *certiorari*, upon giving bond, as aforesaid, and taking their appeal within ten days [thirty by virtue of chapter 3008, Act of February 27, 1877, section 2, p. 840, McClell. Dig.] after the adjournment of the court, and their writs of error and *certiorari* as in other cases provided for by law."

The third section of the same act was as follows: "That in all such cases as those described in the second section of this act, heretofore decided, in which the order of

the court has not been fully enforced, the writ of error or *certiorari* may be taken within six months after the passage of this act, the party serving out such writ of error or prosecuting such appeal giving bond and security to perform the judgment of the court to which the appeal is taken, or in which the writ of error or *certiorari* is prosecuted." Duval's Compilation, 111.

This section is not to be found in Thompson's or McClellan's Digest of the statutes, and its absence is explained in a note on page 448 of the former work, by the statement that it was "temporary, and has expired."

The statute of February 10, 1832, regulating appeals in common-law actions, is to be found on page 446 of Thompson's, and page 840 of McClellan's, Digest, in the same chapter with the above second and fourth sections, and requires that the party appealing, if defendant, shall give bond "in a sum sufficient to cover the amount for which judgment has been given, * * * together with costs;" and conditioned that the appellant, if defendant, shall pay the debt, damages, or condemnation and costs, in case the judgment of the circuit court shall be affirmed by the supreme court. *Montgomery v. Knox*, 22 Fla. 575.

It is apparent that the penalty of the appeal-bond is not sufficient to cover the sum for which judgment has been given, together with the costs, as required by the provision of the act of 1832, as to the amount of an appeal-bond, which provision counsel for appellees contends controls in the case.

It is evident from the title of the act of 1833 that it was passed to cover cases which were understood not to be within the act of 1832; and it is also clear that the case before us is within the act of 1833, and, being so, the question is, what amount of bond does the last-named act require to be given? The view of counsel for appellees is that the amount is controlled by the act of 1832, meaning, we understand, that the other act in effect adopts that provision of it. This was doubtless the view of Judge THOMPSON and the committee of examiners of his work, which was published in 1847, and includes the laws passed and in effect up to and inclusive of January 6th of that year; for, reading the second and fourth sections as they appear in that digest, as well as in Judge McCLELLAN's, published in the year 1881, and including the laws of that and prior years then in force, no other construction is natural or reasonable; and, as shown above, it is expressly stated in the former work that the third section of the act of 1832 was temporary, and had expired, which indicates their view to have been that this section was never meant to regulate in any manner the bond to be given "in future" cases, under the fourth section, and that the words "upon giving bond as aforesaid," in the fourth section, did not refer to it.

That this has been the view of the profession and the practice since the publication of Thompson's Digest, to say nothing of the evidence it gives as to former years, we do not doubt; and, though we think there is room for seriously questioning the proposition that the third section did not

stand as the permanent definition or explanation of the words "upon giving bond as aforesaid," of the fourth section, though only temporary, in so far as cases previously "decided, * * * and not fully enforced," were concerned, yet our opinion is that even upon this view the act of 1833, considered independently of the former act, required a bond sufficient to cover the amount of the order and costs. In a case like this no smaller bond would be sufficient to secure a performance of the judgment of this court, if it affirmed the order appealed from.

It is apparent upon the face of the act of 1833, as it is, and has been decided, of the other act, (*Simmons v. Spratt*, 22 Fla. 370, 372,) that there is no appeal under it without giving a bond; or, in other words, the bond was not required to make an appeal otherwise given operate as a *supersedeas*. A full answer to the argument that the legislature did not intend to make an officer already bonded give so large a bond is that the second section expresses the understanding of the legislature that it was dealing with such officers, and yet the statute made the requirement of a bond indicated above. In making this requirement it shows that it did not intend that the official bond should operate, either in whole or in part, as an appeal-bond in such cases. The presence of these requirements is also a satisfactory response to anything that may be said as to the officer's acting in his official capacity, or not being personally interested. Although the officer may hold the money as such, he is deeply interested in paying it to no one but him who is rightly entitled to it; and the statute has required, whether it be construed to adopt the act of 1832 or not, that there shall be a bond sufficient in amount to cover the entire recovery, both judgment and costs, which the officer may seek to question and stay the enforcement of by an appeal.

Without meaning to disturb a long-settled practice, our opinion is that, under either view to be taken of the act of 1833, the bond is insufficient in amount, and that the appeal should be dismissed, and it will be so ordered.

Succession of LEHMANN.

(*Supreme Court of Louisiana*, Nov. 13, 1889.)

EXECUTORS—SALE UNDER ORDER OF COURT—RIGHTS OF PURCHASER.

1. Inquiry touching the illegality of an executor's appointment cannot be raised by a purchaser of property of the succession at judicial sale, under an order of court apparently regular, and for the purpose of discharging debts of the deceased, and costs of administration.

2. While actually exercising the office of executor, he must perform its duties, and the illegality of his appointment will not vitiate his acts.

3. Purchasers at succession sales are not bound, at their peril, to inquire, when the property is advertised by an executor, whether the will appointing him, which is valid on its face, is voidable.

4. When a succession is in the hands of an executor, and in process of liquidation, the interest of the heirs being merely contingent, they need not be consulted or heard before an application for sale is made, as a condition precedent to the validity of the title of a purchaser.

5. When the proceeds of a sale made by an executor to pay debts, are not greatly disproportionate to the debts, the sale will not be annulled.

6. Acts of procurement under private signature become authenticated when attached to and form parts of judicial proceedings, or are incorporated in an authentic act.

(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

F. N. Butler, for appellants. *Alfred Grima, C. F. Claiborne, and Jerome Mennier*, for appellees.

WATKINS, J. Three of the purchasers of immovable property at succession sale resist a rule, taken upon them by the testamentary executor, to compel their compliance with the terms of adjudication and acceptance of title. Their objections are: (1) That the testament of the decedent is absolutely null, because she had not attained the full age of 16 when it was made; "and therefore the appointment of the executor in said will, and all proceedings founded on same, as well as the confirmation of said executor, are null and void." (2) That there are heirs of the deceased who are absent from the state, and not represented therein, who have an interest in contesting the validity of said testament, and who are not made parties to the proceedings ancillary to sale. (3) That the amount of property sold was considerably in excess of the debts of the succession, and the sale was unwarranted and illegal. In addition to the foregoing defenses, which are common to all the respondents, Mrs. Adele Domecq urges that the piece of property which was adjudicated to her was previously purchased for the deceased testatrix through "certain judicial proceedings" in the civil district court, and that title was passed before a notary, in which the vendors were ostensibly represented by attorneys in fact, whose procurations were not authentic in form, and did not furnish complete evidence of their signatures. For all of these reasons, they insist that the proffered titles are not good.

1. In regard to the first objection, the facts are these: Louise Mathilde Lehmann died, leaving a will, in which she instituted Widow E. H. Lehmann her universal legatee, and appointed Paul Lacoste testamentary executor. The will was duly probated, and letters testamentary were issued to the testamentary executor. An inventory was taken, and the property appraised at \$4,500. On showing to the court the existence of about \$3,000 of debts due by the deceased in addition to the cost and expenses of administration, and that he had no funds to pay same, the executor represented that a sale of the movables and so much of the immovables of the estate as would meet and pay the same, should be made; and the judges so ordered. In the petition of the executor the universal legatee joined, alleging that she possessed no means with which to pay the debts and charges against the succession. Conceding, for argument, that the testament is null for want of capacity of the infant testatrix to make it, this objection goes to the capacity of the testamentary executor only. Then we have to answer this question: Can a purchaser of succe-

sion property at judicial sale, made under an order of court, on the joint petition of a testamentary executor and universal legatee, showing an apparent necessity therefor, in order to meet and discharge the debts of the deceased, and the cost and expense of administration, urge the nullity of the testament appointing the testamentary executor as a reason for her non-acceptance of the tendered title? We think not; for it has been held that "inquiries touching the legality of a syndic's appointment are irrelevant" in an injunction suit by the heirs of an insolvent against an execution of a 12-months' bond. Say the court: "While actually exercising the office, he must perform its duties; and the illegality of his appointment will not vitiate his acts." *Cloutier v. Lemee*, 33 La. Ann. 307.

It has been held to be "elementary that the mere illegality of the appointment [of an administrator] will not vitiate the acts done under it." Say the court: "This is so true that the law will not allow a suspensive appeal from a decree appointing such officers; but declares that such decree shall have immediate effect, notwithstanding the appeal, and therefore regardless of the legality or illegality of the appointment." In re Estate of Aitemus, 32 La. Ann. 387; Succession of Dugart, 30 La. Ann. 268; *Turner v. Hill*, 21 La. Ann. 543; *Gradulgo v. Moore*, 10 La. Ann. 670; *Dorsey v. Vaughan*, 5 La. Ann. 158; *Beard v. Gresham*, Id. 161; Code Prac. arts. 580, 1059.

Not only is this general proposition sustained by ample authority, but it has been applied to this particular class of cases; for in *Green v. Baptist Church of Shreveport*, 27 La. Ann. 563, the case was stated thus: "Plaintiff claims that her birth destroyed their father's will; that the executor became thereby without power to act; and that the sale made by him conveyed no title. It is in evidence that Robert Green died insolvent. It is admitted that the proceeds of the property went towards the payment of his debts. *Prima facie*, the title acquired by the first purchaser was a good one. The property had been sold under an order of a competent court made at the instance of one apparently authorized to apply for it. The records of the country showed that the executor was exercising the functions of his office at the time he asked for the order of sale. Purchasers are not bound, at their peril, to inquire, when property is advertised for sale by an executor, whether anything has occurred outside of court to destroy the will under which he is acting." It is equally true that the purchaser is not bound to institute inquiries into the validity of the will appointing the executor, nor into the capacity of the testatrix to make the will, when it is valid on its face. In *Succession of Condon*, 28 La. Ann. 755, the court said of a purchase of succession property who was ruled to accept the proffered title: "It is well settled that under such circumstances the purchaser gets a good title, all incumbrances being transferred from the thing sold to the proceeds, which are under the control of the court. Appellant has raised objections, and discussed matters in which he has no interest." The

defendants in this suit occupy the same situation. The testamentary executor was appointed in a testament which was apparently valid, and which was formally executed and probated. An order of court was petitioned for by him, and the universal legatee named in the will, and same was granted by the judge directing a sale of the property of the succession to pay its debts and charges. Thereunder a sale was made, and the property adjudicated to the defendants in separate parcels. The vice in the will might divest the title of the universal legatee to the residuum of the proceeds of sale, but the consequent illegality of the executor's appointment cannot affect the title of property sold, and constitutes the purchaser one in bad faith.

2. In this case it is a fact conceded that the deceased left no forced heirs; and it is only contended that there are some collateral relations, who are absent from the state, and unrepresented therein, and who were necessary parties to the proceedings antecedent to the sale. It is not suggested that absent heirs have any higher rights than those who are present or represented, nor that collaterals have any higher rights, or are entitled to other notice than are forced heirs. They stand on a level. We said in *Succession of Hood*, 33 La. Ann. 466: "When a succession is in the hands and under the control of an executor or of an administrator, and is in process of liquidation, the interest of the heirs, minors or majors, being merely contingent, *deducto oere alieno*, neither must be consulted or heard before an application is made by the succession representative as an essential condition precedent for the validity of an order of sale to pay debts." This doctrine is sanctioned in repeated decisions of our predecessors, and is settled law. Heirs of *Brown v. Jacobs*, 24 La. Ann. 530; *Carter v. McManus*, 15 La. Ann. 676; *Vincent v. D'Aubigne*, 19 La. Ann. 528; *Succession of Hebrard*, 18 La. Ann. 496; *Davidson v. Davidson*, 28 La. Ann. 269. Hence the mere absence of the collateral heirs of the decedent did not affect the validity of the sale. If a sale of succession property could not be affected without the presence and concurrence of the collateral kindred of a deceased insolvent, the recourse of his creditors would be poor indeed.

3. The third ground of defendant's objection is not well taken. The proceeds of sale are not seriously disproportionate to the debts of the deceased, and the costs and expenses of administration. The total proceeds of sale are \$5,035, and the debts and charges are \$3,595.24. The excess of proceeds is \$1,490. In the estimate of expenses of sale, the cost of advertisement is not taken into account, nor are the future costs of final account and settlement. How was the executor to know that the property would bring at sale \$600 over and above its appraisal, as it did? He could not. Under the circumstances, the excess is trivial, and does not vitiate the sale. *Succession of Dumestre*, 40 La. Ann. 572. 4 South. Rep. 328, is not applicable. In that case the value of the property sold was \$21,000, and the debts aggregated \$10,000, or less. Minors had a half interest in the property. We viewed it as a partition proceeding in disguise, with-

out the prescribed forms of law having been attended to, and that its covert purpose was to divest illegally the title of the minors.

4. The complaint of the acts of procuration is not well founded. According to defendant's own judicial admission in her answer, the decedent's deed was the offspring of certain judicial proceedings, through which her title was evolved. They certainly authenticated the powers of attorney, and same cannot now be questioned.

The judgment appealed from is erroneous. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that plaintiffs' rule be made absolute at defendants' cost in both courts.

ARMANT v. NEW ORLEANS & C. R. Co.

(Supreme Court of Louisiana. Dec. 16, 1889.)

EXECUTORS — APPOINTMENT — CORPORATIONS — STOCKHOLDERS — DIVIDENDS — PRESCRIPTION.

1. The decree of the court of competent jurisdiction, appointing a testamentary executor who has duly qualified, stands *prima facie* valid, and an exception to the capacity of the executor, not putting at issue the regularity of his appointment and qualification, but based on grounds extraneous to the probate proceeding, throws on the executor the burden of proving them, and, in absence of proof, the exception is properly overruled.

2. Dividends declared on stock in a corporation, like irregular deposits in bank, are payable on demand, and until demand and refusal prescription does not begin to run against the person entitled.

3. Where the stock of an expiring corporation is merged into the stock of a new one, organized as its successor, acquiring its franchisees and assuming its obligations, a provision inserted in the charter of the new company, forfeiting dividends not claimed within three years from the time when declared, is not binding upon the old stockholders, except from the time when, expressly or by implication, they consent thereto by assuming the quality of stockholders in the new company. An old stockholder, who has been ignorant of his rights and of the transfer, and who claims his dividends as soon as informed of their existence, cannot be affected by such provision except *in futuro*.

(Syllabus by the Court.)

Appeal from district court, parish of Orleans; RIGHTOR, Judge.

John M. Bonner, for appellant. Semmes & Legendre, for appellee.

FENNER, J. An exception was filed to the right of plaintiff to stand in judgment as testamentary executor, on the grounds that the will under which he was appointed is invalid; that, if valid, it is not shown that it has not been completely executed; and that, as there are no debts due by the succession in this state, there is no necessity for an executor or administrator. The exception does not deny that the plaintiff has been regularly appointed, and qualified as executor, under the decree of a court of competent jurisdiction. Such a decree must be treated as *prima facie* valid; and even if it were conceded, *argumenti gratia*, that defendant, a mere debtor of the succession, could attack it in this collateral way, yet, as the grounds of the attack are matters extraneous to the probate proceeding, the burden of proof would lie on him, and he has offered no evidence whatever on the subject.

ON THE MERITS.

The suit is brought to recover dividends for many years on 36 shares of stock in the defendant company. The ownership of the stock in decedent is fully proved, and it is also proved that the dividends have been declared, have never been paid, and stand as due on the books of the company. The prescription of three and of ten years is pleaded. Dividends on stock are like irregular deposits of money in a bank, payable only on demand, and, until demand and refusal, prescription does not begin to run against the person entitled. *De St. Rome v. Cotton Press*, 20 La. Ann. 381; *Brown v. Pike*, 34 La. Ann. 576; *State v. Railroad Co.*, 6 Gill, 363; *Railroad Co. v. Hickman*, 28 Pa. St. 329; *Bank v. Gray*, (Ky.) 2 S. W. Rep. 168.

The defendant finally invokes the provision of its charter, passed in 1882, declaring, "Any dividend not called for within three years from the date of its being made payable shall revert to the company." Defendant is, in effect, the successor of the former corporation bearing the same name, whose charter expired in 1883. The stock of the new company was issued to the old company, and distributed among its stockholders in lieu of their stock in the latter, and the new company assumed all the debts and obligations of the old, of whatsoever nature. The provision above quoted was not contained in the charter of the old company, and of course the new company could not destroy, abridge, or forfeit rights acquired by the stockholders of the old, without their consent. The provision, therefore, cannot affect dividends which had accrued under the old organization, and which the new company bound itself to pay.

It is claimed, however, that, as concerns the dividends declared by the new company, the provision must be enforced. We consider that the provision is binding on all stockholders of the old company who consented to the merging of their stock into the stock of the new company, from the time of such consent, whether given expressly or by implication from acts adopting the change. We hold that by bringing this action for dividends declared by the new company the plaintiff and those represented by him give such consent, and will be bound hereafter by all valid provisions of the charter; but it fully appearing that they were ignorant of the existence of their rights, and of all the proceedings had, until shortly before the institution of this suit, we cannot hold that the consent shall retroact in such manner as to operate a forfeiture of rights of the existence of which they were ignorant. Judgment affirmed.

MCGUFF v. STATE.

(Supreme Court of Alabama. Dec. 17, 1889.)

RAPE — INDICTMENT — VERDICT — EXAMINATION OF PROSECUTRIX — EXCLUDING WITNESS FROM COURT-ROOM — COMPETENCY OF WITNESS — CONFESSIONS.

1. Under Crim. Code Ala. § 3789, which provides for the punishment of "any person who has carnal knowledge with any female under ten years of age, or abuses such female in the attempt to have carnal knowledge of her," an indictment is sufficient which charges that defendant "did car-

nally know or abuse in the attempt to know, * * * a girl under the age of ten years."

2. A general verdict of "guilty," on an indictment which charges offenses of the same character disjunctively, as allowed by Crim. Code Ala. § 4885, is not reversible error, nor ground for motion for new trial.

3. A verdict of "imprisonment for life" need not specify the place of confinement, where that is provided for in the statute under which defendant was convicted.

4. The refusal to exclude a witness from the court-room during the examination of another witness is discretionary with the trial court, and not reviewable on appeal.

5. A child, $7\frac{1}{4}$ years of age, is a competent witness, where it appears, on her examination by the judge, that she has an intelligent comprehension of the belief that falsehood is not only morally wrong, but will be severely punished in the future.

6. If courts have power to compel a personal examination of the prosecutrix in prosecutions for rape, it is a matter of judicial discretion, not reviewable on appeal.

7. Where confessions appear to be voluntary, and are admitted in evidence without objection, it is proper to refuse to give instructions which, in effect, deny the right of the jury to consider them at all.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge.

The indictment in this case charged that the defendant, John McGuff, "did carnally know, or abuse in the attempt to carnally know, Cora Bishop, a girl under the age of ten years." On the trial, issue being joined on the plea of not guilty, as charged in the indictment, the jury returned a verdict in these words: "We, the jury, find the defendant guilty as charged in the indictment, and fix the penalty at imprisonment for life;" and the court thereupon sentenced him to the penitentiary for life.

The defendant moved the court to put the witnesses for the prosecution under the rule, and the court thereupon required all of them to retire except C. C. Bishop, the father of the said Cora, who was allowed to remain. The defendant asked that he be excluded during the examination of the child, and stated to the court, as the ground of said motion, "that the testimony would show that said Cora had made different statements as to the matter, and that her testimony, on which the state relied, had been extorted from her by her father under the lash, and that she was still under the influence of that duress." The court overruled the motion, and allowed said Bishop to remain, and he sat within eight or ten feet of said Cora during the whole of her examination as a witness; to which ruling and action of the court the defendant duly excepted.

The child on being introduced as a witness for the prosecution, the defendant objected to her competency, "on account of her tender years;" and, being thereupon examined by the court touching her competency and capacity, she said "that it is wrong to tell a lie; that she would be burned in flames if she told a lie; and that she would go to Jesus when she died if she done good all her life." She stated, also, on cross-examination by defendant's counsel, "that she did not know when she would be burned in flames, nor in what flames." She said at first that she did not know who had told her this, but then said her aunt had told her, and that her mother

had told her; that they had told her before she was summoned as a witness in this case; "that she was sworn to tell the truth;" "that if she would tell the truth, and be good, she would go to Jesus when she died; that it was right to tell the truth; that she would be burned up for telling stories; that she did not know if any one had told her what to swear; and that she was seven and one-half years old." The court held her competent as a witness, and permitted her to testify, and the defendant thereupon excepted to this ruling by the court.

The child, having testified to the circumstances attending the assault, further stated that the defendant gave her a nickel, and threatened to kill her, if she told what he had done; that she went back to her father's house, and asked for her purse to put the nickel in; that her father asked where she got it, and whipped her because she would not tell; that she then said the defendant had given it to her, and, on the defendant's denial, her father whipped her again for telling a falsehood; that she afterwards walked back to the field, and picked cotton the rest of the evening. The child's mother, who made an examination of her person that night, testified as to the extent of her injuries; and her grandmother, who examined her several days afterwards, gave similar testimony; while several physicians, examined as medical experts on the part of the defendant, gave testimony which tended to impeach their statements. The defendant asked the court "to appoint a committee of competent physicians to examine the person of the said Cora, in order that they might testify as to the evidences of injury, if any, received by her," and he duly excepted to the court refusing to appoint such committee.

The defendant requested the following charges in writing, and duly excepted to their refusal by the court: (1) "The jury cannot consider any confessions they may believe the defendant made, unless they find from the other evidence, beyond all reasonable doubt, that the defendant is guilty as charged in the indictment." (2) "Unless the jury believe from the evidence, outside of any confessions they may believe the defendant made, (if they believe he made any,) beyond all reasonable doubt, either that the defendant had carnal knowledge of said Cora Bishop, or that he injured her sexual organs in the attempt to have carnal knowledge of her, they cannot find him guilty."

Matthews & Daniels, for appellant.
W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. 1. The indictment is found under section 3739 of the Criminal Code, which provides that "any person who has carnal knowledge with any female under ten years of age, or abuses such female in the attempt to have carnal knowledge of her, must, on conviction, be punished, at the discretion of the jury, either by death, or by imprisonment in the penitentiary for life." Crim. Code 1886, § 3739. The indictment charges in proper form that the defendant "did carnally know, or abuse in the attempt to carnally know, Cora Bishop, a girl under the age of

ten years." It follows the form prescribed by the Code by literal compliance, and is therefore sufficient. *Myers v. State*, 84 Ala. 11, 4 South. Rep. 291.

2. It is objected that the verdict of the jury should have specified which of the disjunctive offenses charged in the indictment the defendant was convicted of, and that a general verdict of guilty is erroneous and proper ground for reversal of the judgment. The offenses, thus charged disjunctively, are of the same character, and subject to precisely the same punishment. They could therefore be charged in the same count in the alternative. *Crim. Code* 1886, § 4385; *Horton v. State*, 53 Ala. 488. Where this form of indictment is authorized, we have uniformly held that a general verdict of guilty is not ground of error, or for motion in arrest of judgment. *Johnson v. State*, 50 Ala. 456; *Cawley v. State*, 87 Ala. 152.

3. The jury had the discretion, under the statute, to fix the punishment either by death, or by imprisonment in the penitentiary for life. They adopted the latter alternative, fixing the penalty at "imprisonment for life," without specifying the place of imprisonment. The court properly sentenced the defendant to imprisonment in the state penitentiary for and during his natural life. The statute fixed the place, and it could not have been elsewhere. *Crim. Code* 1886, §§ 3739, 4492; *Gunter v. State*, 83 Ala. 96, 3 South. Rep. 600.

4. The refusal of the court to put the witness Bishop, the father of the injured girl, under the rule, by compelling his withdrawal from the court-room during the child's examination, was a matter within the sound discretion of the trial court, and is not subject to our review on appeal. *Ryan v. Couch*, 66 Ala. 244; 1 *Greenl. Ev.* (14th Ed.) § 431.

5. It is objected that the witness Cora Bishop, upon whose person the alleged abuse was practiced, was incompetent on account of her tender years, and her inability to comprehend the nature and binding obligation of an oath. She is shown to have been between seven and eight years old at the time she was examined. There is no particular age at which a witness may, in all cases, be pronounced legally competent or incompetent to testify. This would be unwise, not only because children differ greatly in powers of observation and memory, but because such a rule would practically "proclaim immunity to certain offenses of a serious nature against the persons of children, which it is next to impossible to establish without receiving their account of what has taken place;" as the one here under consideration. 1 *Best, Ev.* (Morgan's Ed.) § 151. This is especially true in view of the frequency of rapes upon very young children to which writers on medical jurisprudence have often taken occasion to call attention, which has been accounted for, not alone by the comparatively less danger of exposure and conviction attributable to the mental and moral deficiency of such children as witnesses, but "by the comparative ease with which a child's resistance may be overcome, and by its entire ignorance of the nature and consequence of the sexual act." 3 *Whart.*

& *S. Med. Jur.* § 217. These facts are eminently proper to be considered by courts in the formulation of a correct rule of evidence on this subject. This court has accordingly followed, in substance, the rule laid down in *Brasier's Case*, 1 *Leach*, 199, 1 *East*, P. C. 443, where it was held that there was "no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and implety of falsehood, which is to be collected from their answers to questions propounded to them by the court." *Kelly v. State*, 75 Ala. 21; *Morea's Case*, 2 Ala. 275; *Wade's Case*, 50 Ala. 164; *Carter's Case*, 63 Ala. 52; *Beason's Case*, 72 Ala. 191; *Rap. Crim. Pr.* § 298. If the promise to tell the truth, in other words, is made under an immediate sense of the witness' responsibility to God, and with a conscientious sense of the wickedness and danger of falsehood, this would seem to be all that is requisite for the accomplishment of justice. 1 *Greenl. Ev.* (14th Ed.) §§ 328, 368. The examination of the witness by the circuit judge disclosed on her part a very intelligent comprehension of the belief that falsehood was not only morally wrong, but would be severely punished in the future. She was clearly competent to testify, showing, as she did, neither intellectual nor moral deficiency which would disqualify her, and there was no error in receiving her testimony.

6. We do not doubt the correctness of the court's ruling in refusing to compel the infant to submit to an examination of her person by medical experts, on motion of the defendant made at the trial. Such a practice has never prevailed in this state, and, if adopted as matter of right in all cases of prosecution for rape, the temptation to its abuse would be so great that it might be perverted into an engine of oppression, to deter many modest and virtuous females from testifying in open court against the perpetration of one of the most barbarous and detestable of all crimes. We have repeatedly held that a conviction for rape may be sustained on the uncorroborated testimony of a prosecutrix, which excludes the idea of any necessity for corroboration by an examination of her person either by medical experts or others. In *Barnett v. State*, 88 Ala. 40, 3 South. Rep. 612, we accordingly held there was no error in the trial court's refusal to advise the jury not to convict unless the testimony was corroborated by an examination of her person by medical or other experts, and that her refusal to submit to such examination would subject her evidence to discredit. "However forcible," we observed, "such a suggestion may be, under some circumstances, as an argument to a jury, the law does not require it."

It is true that in divorce cases the courts of this country and of England, as also of Scotland and France, have exerted their jurisdiction to compel the parties to suits to submit to a surgical examination or inspection of the person, in order to ascertain the fact of incurable impotence, when made the ground upon which the dissolution of the bonds of marriage is sought.

This is limited to the necessity of the particular case, and is permitted only to prevent the miscarriage of justice. 2 Bish. Mar. & Div. (6th Ed.) §§ 590-599; Anon. 35 Ala. 226; Devanbagh v. Devanbagh, 5 Paige, 554, 28 Amer. Dec. 443, and note, p. 450. So, in a recent case, cited by appellant's counsel, in an action of damages for permanent injury to the plaintiff's eyes, no medical expert having testified, it was held error in the trial court to refuse to make an order, on defendant's request, to compel the plaintiff to submit to an examination by a medical expert who had been called as a witness, and was then present in court ready to testify. Railroad Co. v. Thul, 29 Kan. 466. There are many similar decisions, made in modern civil actions for physical injuries, where the courts, in proper cases, have compelled the plaintiff, or injured person, to submit his person to the inspection of experts in order to ascertain the nature and extent of such injuries. 1 Thomp. Trials, § 859; Schroeder v. Railroad Co., 47 Iowa, 379; Sibley v. Smith, 46 Ark. 275; White v. Railway Co., 61 Wis. 536, 21 N. W. Rep. 524; Hatfield v. Railroad Co., 33 Minn. 130, 22 N. W. Rep. 176; Railroad Co. v. Childress, 9 S. E. Rep. 602.

The authority and soundness of these cases need not be challenged, although some courts in this country have declined to follow them. They are cases where the court had jurisdiction of the parties to a litigated case pending before it, who were invoking the assistance of its arm in aid of their civil rights. In this case the witness is no party to any civil suit, but has been summoned at the instance of the state, to testify in a criminal prosecution against an alleged violator of the law. It may be well doubted, in cases of rape and cognate offenses, whether the court has the power to make an order compelling the inspection of the private person of a prosecutrix in the event of her refusal to submit to such examination. If such right exists at all, we should hold it to be a matter of judicial discretion with the trial court, to be exercised only in cases of extreme necessity, and not a subject of review on appeal to this court. There being other corroboration of the local marks of violence in this case, made soon after the injuries, no such necessity is made to appear. The proposed examination by medical experts, moreover, not having been made until more than a month after the occurrence, could not be expected to afford any very useful results. 3 Whart. & S. Med. Jur. § 212. The refusal of the court to grant this motion was free from error.

7. The confessions of the defendant appear to have been made voluntarily, and they were allowed to go to the jury as evidence without objection. It was for the court to determine their admissibility, and this action could not have been reviewed by the jury, although it was within the exclusive province of the jury to determine the weight to which they were entitled as evidence. The charges requested by the defendant, in effect, denied to the jury any right to consider these confessions as competent evidence in forming their verdict. Their admissibility, as voluntary or involuntary, could not be raised in this way,

and the court properly refused to give these charges. Long v. State, 86 Ala. 36, 5 South. Rep. 443; Nolen v. State, 46 Amer. Rep. 255, note; Redd v. State, 69 Ala. 256. We discover no error in the record, and the judgment is affirmed.

MCKELTON V. STATE.

(Supreme Court of Alabama. Dec. 13, 1889.)

WITNESS—COMPETENCY.

A boy 14 years of age, who states upon his examination that he knows that it is wrong to lie, but did not know that he would be punished if he swore to a lie, is not a competent witness.

Appeal from circuit court Tuscaloosa county; S. H. SPROTT, Judge.

Defendant, Charly McKelton, was indicted for burglary, and, being convicted, he appeals.

W. L. Martin, Atty. Gen., for the state.

MCCLELLAN, J. On the trial below the defendant objected to the examination of one Henry Williams as a witness against him, on the ground of incapacity. Being examined by the court, the witness testified as follows: "I am going on fourteen years old. I do not know who made me. I do not know what will be done with me if I lie and steal. I know it is wrong to lie and steal, but I do not know what will be done with me if I steal. I did not know that they would send me to jail if I swore a lie. I do not know what will become of me when I die, if I swear to a lie. I know it is wrong to tell a lie, but did not know I would be punished for it." On this showing as to the capacity of the witness, the court allowed him to testify, and the defendant duly excepted.

We think this ruling of the court erroneous. The rule is that persons who have no comprehension of the nature and obligation of an oath, and are incapable of appreciating their responsibility for its violation, should not be admitted as witnesses; and this without regard to the cause from which the defect has arisen, and hence without reference to the age of the witness. The witness Williams, though he had attained an age at which the mind is usually sufficiently developed to understand the sanctity of an oath, and to know the consequences of false-swearing, clearly did not have the requisite capacity. 1 Greenl. Ev. §§ 365-367; State v. Morea, 2 Ala. 275; Carter v. State, 63 Ala. 52; Beason v. State, 72 Ala. 191; Wade v. State, 50 Ala. 164; McGuff v. State, 88 Ala. —, ante, 35.

The judgment of the circuit court is reversed, and the cause remanded.

BARNES V. STATE.

(Supreme Court of Alabama. Jan. 7, 1890.)

RAPE—EVIDENCE—EXCLUSION OF WITNESS FROM COURT-ROOM.

1. In a prosecution for rape statements made by defendant several months before the offense was committed, tending to show his carnal passion for prosecutrix and his belief that she would not yield to his desire are admissible.

2. Evidence that prosecutrix's husband was jealous of her, or jealous of her and defendant, or

objected to prosecutrix's being with defendant or other men, is inadmissible to support defendant's claim of prior intimacy with her, it being merely conjectural as to that fact.

3. Evidence that the husband of prosecutrix told witness of the alleged injury, and went with him to the place where the husband said it had happened, that witness did not know it was the place or that the husband knew it was, and that they found there no indications of a struggle, is inadmissible, the *locus in quo* not being properly identified.

4. The exclusion of a witness from the courtroom is within the discretion of the presiding judge, and not reviewable.

5. Where complaints were made by prosecutrix to her husband after the alleged injury, it is permissible for the state to prove the particulars by him.

Appeal from circuit court, Fayette county; S. H. SPROTT, Judge.

Indictment for rape. The defendant, James B. Barnes, was indicted for a rape on Mrs. Adeline Ballard, his wife's sister, convicted, and sentenced to the penitentiary for life. The testimony of prosecutrix showed that the offense was committed on August 23, 1888, near defendant's house, where she had been all day helping to discharge household duties for her sister, who was sick in bed; and on her way home in the evening, while in the public road, the defendant interrupted her, carried her aside into the woods, and forcibly ravished her. The defendant admitted that he had had sexual intercourse with the prosecutrix at the time and place named, but said that she met him thereby by appointment, and consented to the act; and further, that he had had intercourse with her on several occasions previous to the one here specified. The prosecution introduced George Ballard, the husband of the prosecutrix, and the defendant objected to his examination, "because, the other witnesses having been put under the rule, the court had excused him, and allowed him to remain in the court-room; and because he was the husband of the prosecutrix, and his testimony could only be hearsay." The court overruled the objections, and the witness testified to a complaint made to him by his wife on the second night after the commission of the alleged offense, they having slept at defendant's house the night before. Defendant asked said witness, on cross-examination, "if he was not at that time, and had not been before, jealous of his wife and the defendant;" also if on a certain day at defendant's house, when one Stewart sat down near Mrs. Ballard, "he (witness) did not order said Stewart to get up, and not to sit so near his wife." The court excluded each part of this evidence, on motion, and the defendant excepted. The defendant offered to testify, and also to prove by the mother of the prosecutrix, that on the morning of the said 23d August, while he and the prosecutrix were together at the spring near the house, where she was washing clothes, her mother came up, "and told him to go to the house, and said that George Ballard would be mad if he saw them together;" and he excepted to the exclusion of this evidence. John McCarver, as witness for the defendant, testified, in substance, that on the next morning after the rape was said to have been committed,

George Ballard, the husband, told him of it, and they went together to the place where he said it was committed; that the ground was hard and had some leaves and trash on it, and he could not see any sign of a struggle; that he did not know it was the place where the rape occurred, and did not know that the party who pointed it out knew. Thereupon the solicitor moved to exclude this evidence from the jury, because the place examined was not sufficiently identified as the place where the rape occurred. The court sustained the motion, and the defendant excepted.

Nesmith & Sanford, for appellant. W. L. Martin, Atty. Gen. for the State.

McCLELLAN, J. The testimony of the witness Sid Adams was properly admitted. It tended to show the desire of the defendant to have carnal knowledge of the prosecutrix, as well as his belief that she would not yield to his wishes, and it was relevant as affording the jury a basis for the inference that he had gratified his passion in the manner charged in the indictment. Such evidence, of itself, is entitled to little weight, especially when the declarations deposed to were made a great length of time before the alleged offense; but the mere lapse of time will not render them incompetent. Thus, on a trial for murder, it was held to be proper to prove that the defendant, two or three years before the homicide, had said of the deceased, "There is a man I cannot get along with." *Evans v. State*, 62 Ala. 6; 2 Tayl. Ev. § 1209. Evidence of the defendant's carnal passion for the prosecutrix on a charge of rape is strictly analogous to unfriendliness and hostility in a prosecution for murder. In the latter case, declarations of hostility, not amounting to threats, made at any time prior to the offense, are clearly admissible. *Hudson v. State*, 61 Ala. 333; *Johnson v. State*, 87 Ala. 39, 6 South Rep. 400.

The defendant was, of course, entitled to prove prior acts of undue intimacy between himself and the prosecutrix as furnishing a predicate for the presumption of consent on the occasion of the alleged crime, and we do not understand that the court below denied him this right in any degree. Evidence that the husband of the prosecutrix "was jealous of her," or "jealous of her and the defendant," and objected to her being with the defendant, or with the witness Stewart, in its strongest aspect for the defense, could only show that he suspected her of improper conduct or undue intimacy with those parties, and we are unable to conceive a case which would authorize the proof or disproof of a material fact by evidence of the mere conjecture or suspicion of its existence.

There was no error in excluding the testimony of the witness McCarver, to the effect that the place which he supposed or had been informed was the scene of the alleged offense disclosed nothing to indicate a struggle. The locality described by him was in no way identified as that at which the crime had been committed.

It is the settled doctrine of this court, that the discretion of the presiding judge as to the exclusion of witnesses, or any particular witness, from the court-room

during the progress of the trial is not revisable. *McGuff v. State*, 88 Ala. —, ante, 35, and cases cited.

The evidence of the husband of the prosecutrix, as to the fact that his wife made complaint to him in regard to the alleged offense, and as to the circumstances under which the complaint was made, was clearly competent. *Leoni v. State*, 44 Ala. 110; *Lacy v. State*, 45 Ala. 80; *Griffin v. State*, 76 Ala. 29; *Barnett v. State*, 83 Ala. 40, 3 South. Rep. 612.

We discover no error in the record, and the judgment of the circuit court must be affirmed.

SHELL V. STATE.

(*Supreme Court of Alabama*. Dec. 13, 1889.)

HOMICIDE—DYING DECLARATIONS—IMPEACHMENT—SELF-DEFENSE.

1. Where it appears, on a trial for homicide, that, on the evening before deceased's death, witness found him rational, as witness thought; that he then spoke of dying, said he had no hope of recovery, and wanted witness to attend his funeral, and write his obituary, the dying declarations of deceased are admissible in evidence, though the attending physicians testify that two days before death he was getting irrational, and that this would increase until death, and, in the opinion of one, he had been irrational for two or three days before death.

2. Statements made by deceased on his sick-bed are competent evidence to contradict his dying declarations, though inadmissible as such.

3. An instruction which hypothesizes the extreme view in favor of defendant, and asserts that even then he could not be acquitted on the ground of self-defense, if he could have retreated and avoided the necessity of striking the fatal blow, is faulty, where the hypothesis does not show that defendant could safely have attempted to escape without increasing his peril.

4. A request to instruct that if defendant asked deceased about a certain accusation without an intention to provoke a difficulty, and that if, on deceased's reiteration, a scuffle ensued under circumstances which might reasonably induce defendant to believe that he would lose his life or suffer great bodily harm, and that he had no reasonable way to retreat, if he then struck the fatal blow, he was not guilty, is misleading as to what constitutes such great bodily harm as will justify the taking of life.

Appeal from circuit court, Etowah county; JOHN B. TALLY, Judge.

The indictment in this case charged that the defendant, Tom Shell, "unlawfully, and with malice aforethought, killed George Sargent, by stabbing him with a knife." On the trial, issue being joined on the plea of not guilty, the defendant was convicted of manslaughter in the first degree, and sentenced to the penitentiary for a term of 10 years. It was shown that the difficulty between the parties occurred at the mill of the deceased, on the night of December 19, 1887. That the defendant had been told that day that the deceased had charged him with the larceny of some eggs and other things, and went to the mill, in company of one Mayo, for the declared purpose of asking about it. That the deceased acknowledged that he had made the said charge, and repeated it. That the defendant called him a liar, and they immediately engaged in combat. The light was extinguished during the fight, several other persons being present, one or more of whom participated in the fight; and, when

another light was procured, it was found that the deceased was badly cut on the neck. The defendant was also cut about the face or neck, but by whom it was not proved, and he denied that he cut the deceased. It was shown, also, that the deceased "was walking about the next day, and moved his family to another house, a distance of one mile and a half;" but blood poison supervened, and he died on the night of January 7, 1888. Two practicing physicians, who were called in about five days before the death of the deceased, testified, on the part of the state, that blood poisoning had then ensued, and that the wound was in such a condition that they could not do anything with it; that they prescribed morphine; that two days afterwards, when they saw him again, "the morphine and the effects of the blood poison made him mind flighty, his speech incoherent, and tended to make him irrational;" and one of them further testified that these effects would necessarily increase until death ensued, and that, in his opinion, "Sargent was not rational for two or three days before his death." The state afterwards introduced one Mabbitt as a witness, "who was a minister of the gospel, and who testified that he went to see Sargent the evening before his death, and thought he was then rational; that Sargent talked about dying, and said he was going to die; that he had no hope of getting well, and had no fears of the future; that he was satisfied to die, and wanted witness to attend his funeral, and to write his obituary." On this testimony the state offered to prove, as dying declarations, statements made by the deceased to said witness, as to the circumstances attending the difficulty; and the court admitted them, against the objection and exception of defendant. The defendant afterwards offered to introduce, "but not as to dying declarations, evidence of statements made by Sargent while on his bed sick, which tended to contradict the dying declaration introduced by the state," and he duly excepted to the exclusion of the evidence by the court.

The court gave the following charge to the jury, at the instance of the state: "If, from a survey of all the evidence, the jury should find and believe, beyond all reasonable doubt, that the defendant called on the deceased, at the saw-mill, for no other purpose than inquiring about the rumor as to what deceased had said about him, and asked deceased as to what he said about him; and that deceased admitted having said that defendant had stolen eggs, and said it again; and that defendant then said, 'You are a liar;' and that deceased thereupon struck the defendant; and if the jury should further find that the circumstances were such as to reasonably impress the defendant, and did so impress him, that it was necessary to strike the fatal blow, in order to save himself from the loss of life or the infliction of great bodily harm; and if the jury should further believe, beyond such reasonable doubt, that the defendant could have retreated, and avoided the necessity of striking the fatal blow,—then he cannot be acquitted on the ground of self-defense." The defendant excepted to

this charge, and requested the court to give the following charge in writing: "If the jury believe from the evidence that Shell, when he asked Sargent about charging him with stealing eggs, did so with no intention to provoke a difficulty; and that Sargent repeated the charge in substance; and that Shell said it was a lie; and that the parties then grabbed each other, and scuffled; and that, after this, the appearances and circumstances surrounding the defendant were such as to produce in his mind a reasonable belief that he was about to lose his life, or to suffer great bodily harm, and that he had no reasonable way to retreat,—then defendant could cut or strike Sargent in defense of his life, or to save his person from great bodily harm; and if the jury believe from the evidence that defendant cut Sargent under such circumstances, then the law says he is not guilty, and the jury should so find by their verdict." The court refused this charge, and the defendant thereupon excepted.

Denson & Tanner, for appellant. *W. L. Martin*, Atty. Gen., for the State.

STONE, C. J. Deceased received his death wound December 19, 1887, and died January 7, 1888. The dying declarations of deceased were introduced in evidence against the defendant, and, as we think, the circuit court did not err in receiving them. If the testimony be believed, they were made under a sense of impending death. *Hussey v. State*, 87 Ala. 121, 6 South. Rep. 420; 3 Brick. Dig. 226, § 663 et seq.

Defendant offered evidence of statements made by deceased after he had received the fatal blow, "which tended to contradict the dying declaration introduced by the state," but stated it "was not offered" as a dying declaration. This evidence, on objection, was ruled out, and defendant excepted. There are many reasons why dying declarations should be received and weighed with great caution. *First*. They are necessarily wanting in that greatest test of the credibility of oral testimony, cross-examination. *Second*. The jury are without the opportunity of observing the temper and manner of the declarant. *Third*. Such testimony is generally given by relatives and friends of the deceased, who had watched by his bed-side, and bias in his favor is to be expected. *Fourth*. All narrations of other men's sayings should be scrutinized with care, because what men say is so liable to be misunderstood. This is shown in the fact that when two or more witnesses, no matter how respectable, attempt to repeat a conversation that was heard by each, very marked differences will frequently be observed in their several narratives. *Fifth*. Many persons, even in serious conversation, assert as facts those things of which they have only strong convictions, but have no knowledge derived from the senses. Well may we, in the language of the judges and text-writers, say that such evidence is received from necessity, and to prevent the escape of offenders who commit the awful crime of murder. 1 Greenl. Ev. §§ 156, 162; 2 Best, Ev. § 505; Wood, Pres. Ev. §§ 115, 118.

The question raised by this record has not been heretofore considered in this court. In

Maine v. People, 9 Hun, 113, and in *Wroe v. State*, 20 Ohio St. 460, it was decided that such testimony was not admissible. The ground on which the ruling was placed was that to receive the evidence would be to allow the testimony derived from the deceased as a witness to be impeached by other variant declarations made by him, without affording him an opportunity to deny or explain what was offered to be proved as a means of contradicting him. In the cases of *People v. Lawrence*, 21 Cal. 363; *Battle v. State*, 74 Ga. 101; and *Felder v. State*, 23 Tex. App. 477, 5 S. W. Rep. 145, the ruling was to let in such testimony. The opinion in the Case of *Lawrence*, supra, was delivered by Justice FIELD, now of the supreme court of the United States, then chief justice of California. Speaking of the ruling of the trial court which had refused the evidence, he said: "It does not appear from the record on what ground the court based its ruling, and we are unable to perceive any which is at all tenable. The rule is general that the credit of a witness may be impeached by proof that he has made statements contrary to what he has testified. There is, it is true, a condition to the application of the rule with reference to verbal statements; that the attention of the witness must be previously called to the particular occasion and circumstances under which the supposed contradictory statements were made, in order to give him an opportunity of making any explanation of the matter which he may have. But this preliminary condition, it is clear, cannot be complied with, where dying declarations are offered in evidence, except in very rare cases. Such declarations are generally made to the physician or friends of the deceased, in the absence of the party against whom they are offered, who, of course, has no opportunity of cross-examination, or of directing the attention of the deceased to any alleged contradictory statements made by him. Declarations of this character are received with the greatest caution. They are admissible on the ground of necessity; but * * * though the condition of the person making the declarations in the last hours of life, under a sense of impending dissolution, may compensate for the want of an oath, it can never make up for the want of a cross-examination. There would be no justice, therefore, in any rule which would deprive the accused, under such circumstances, of the right to impeach the credit of the deceased by proof of his having made contradictory statements as to the homicide and its cause." Mr. Wharton (Crim. Ev. § 298) gives his sanction to this principle. Speaking of the ruling in *Wroe's Case*, 20 Ohio St. 460, he says it was of doubtful propriety. So Bishop (1 Crim. Proc. § 1209) says such contradictory statements are admissible, citing *People v. Lawrence*, from which we have quoted. In *Moore v. State*, 12 Ala. 764, *DARGAN, J.*, delivering the opinion, it was held by this court that when dying declarations, made at different times, are in evidence before the jury, and are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, or whether either, is to be believed. The same doctrine was asserted in *McPherson v. State*, 9 Yerg. 279.

See, also, *Hurd's Case*, 25 Mich. 405; *Knapp's Case*, 26 Mich. 112; *Rosc. Crim. Ev. 31*. Surveying the whole field, we think the circuit court erred in refusing to admit the evidence offered.

There was an exception reserved to a charge given at the instance of the state, and to the refusal to charge as requested by defendant. Each of these charges is subject to criticism. They are unduly long, and are, therefore, to a mind untrained in legal learning, difficult of comprehension. The charge given hypothesizes what we suppose was the extremest view taken in favor of the defendant, and asserts that, even on that hypothesis, if "the defendant could have retreated and avoided the necessity of striking the fatal blow, then he could not be acquitted on the ground of self-defense. This charge is probably faulty in instructing the jury, in the case supposed, that it was the defendant's absolute duty to retreat, if he could thereby have avoided the necessity of striking the fatal blow. The parties appear to have been engaged in close combat, and there is not enough hypothesized to show that defendant could safely have attempted escape. He was not required to escape, or to attempt it, if the conditions were such by that, by so doing, he would increase his peril, real or apparent. *Carter v. State*, 82 Ala. 13, 2 South. Rep. 766. We must not be misunderstood. There is no testimony found in the record tending to show Sargent had a weapon, or attempted to use one, unless it arise out of the fact, of which there is some testimony, that during the combat the defendant received a cut on his jaw. If Sargent was without a weapon, and was simply engaged in a fist-cuff fight, that, without more, would not, in the eyes of the law, justify the defendant in taking his life. It might, in some conditions, and in the absence of formed design, reduce the homicide to manslaughter, but nothing more. Says Wharton, (1 Crim. Law, § 494:) "A mere assault, not directed at life or chastity, or other high right, cannot excuse homicide. Hence, if a deadly weapon be not used by the assailant, or other circumstances do not exist to indicate a felonious attempt, for the assailed to take life is at least manslaughter."

There is scarcely enough testimony shown to justify the giving of the charge asked by the defendant. We have shown above what is meant by the phrases "danger to life," or "exposure to grievous bodily harm," which will excuse the taking of life when there is no other reasonable mode of escape. We think the charge was calculated to mislead, on the inquiry of what in law constitutes grievous bodily harm, exposure to which will justify the taking of life, the other conditions being present. What we have said will be a sufficient guide on another trial.

Reversed and remanded.

TOOLE V. STATE.

(*Supreme Court of Alabama*. Dec. 16, 1889.)

LOCAL OPTION—NOTICE—BURDEN OF PROOF—EVIDENCE—PRESUMPTION.

1. By Sess. Acts Ala. 1886-87, p. 671, (an act to prohibit the sale, giving away, etc., of intoxicating

liquors in Calhoun county,) it is provided (sections 1, 2, 3, 4) that on certain conditions an election may be had to ascertain the wishes of the people as to prohibiting the sale of intoxicating liquors in the county, and that if a majority of the votes be for prohibition it shall be the duty of the probate judge to record the result in his office, and to give notice for 30 days, by publication in all the newspapers published in the county, that a majority of the qualified voters voted for prohibition; and it is further provided (sections 5, 6) that after the expiration of said 30 days' notice it shall be unlawful to sell, give away, or otherwise dispose of intoxicating liquors in said county, and any person violating this provision shall be guilty of a misdemeanor, etc. *Held*, that the publication of the notice of the result of the election in all the papers designated was a condition precedent to the operation of sections 5 and 6, and that the burden of proving such publication was on the state.

2. As there is no provision in the statute for the making or recording of an order of publication, or for the recording of the notice, the record of such order and notice is incompetent and immaterial to prove the publication of the notice.

3. There is no presumption arising from the fact that it was the duty of the judge to have such notice published; that it was in fact published.

Appeal from city court of Anniston; W. F. JOHNSTON, Judge.

The indictment in this case was found in April, 1889, and charged that the defendant, Harry Toole, "did sell spirituous, vinous, or malt liquors without a license, and contrary to law." On the trial it appeared that the prosecution was founded on an alleged violation of the local law applicable to Calhoun county, approved December 7, 1886, and entitled "An act to prohibit the sale, giving away, or otherwise disposing of, spirituous, vinous, or malt liquors, or intoxicating bitters, or patent medicines, having alcohol as a base, in Calhoun county." Sess. Acts 1886-87, p. 671. This statute contains 10 sections, the first of which provides that, on the filing of a petition by 50 or more resident householders and freeholders of the county, praying for an election to ascertain the wishes of the people as to prohibiting the sale of intoxicating liquors in the county, it shall be the duty of the judge of probate to order an election for that purpose. The second section provides for notice of the election, the appointment of inspectors, etc.; and the third section, that the election shall be governed by the general election laws. The fourth section provides how the casting of votes for and against prohibition shall be made, and then adds: "When the votes so cast are returned and counted by the board of supervisors, as now required by law, if it be found that a majority of all the votes cast and so counted in the county are for prohibition, then it shall be the duty of the probate judge to record the result in his office, and to give notice for 30 days, by publication in all the newspapers published in the county, that a majority of the qualified voters, who voted at said election, voted for prohibition." Section 5 provides: "That after the expiration of said thirty days' notice, it shall be unlawful for any person, firm, or corporation to sell, give away, or otherwise dispose of, any spirituous, vinous, or malt liquors, or intoxicating bitters, or any brand of bitters or medicines with sufficient alcohol or spirituous liquors therein to make a man drunk,

within the county of Calhoun." Sec. 6. "That any person or persons who shall violate the provisions of the preceding section (5) shall be guilty of a misdemeanor, and on conviction shall be fined," etc. The seventh section makes it a misdemeanor for any person to sell or give away any spirituous liquors on the day of the election, or within two days next preceding. The eighth section declares exceptions as to wines sold for sacramental purposes, domestic wines, etc. Sec. 9. "That this act shall be so construed that if an election is held, in pursuance of its provisions, during the year 1887, the prohibition provided for by the fifth and sixth sections of this act shall not take effect till after the 30th day of April, 1887; and that the probate judge of Calhoun county shall not issue to any person or persons a liquor license from the 1st day of January, 1887, for a longer period than the 30th day of April, 1887." The tenth section relates only to other prohibitory laws, declaring that they shall not be affected by the provisions of said special statute.

On the trial, as the bill of exceptions shows, the state introduced a witness who testified that in the summer of 1888 he bought a glass of lager-beer from the defendant within the limits of the county, and then announced, in answer to an inquiry by defendant, that the state proceeded for a violation of said local law. The defendant then moved "to exclude said evidence from the jury because it had not been shown that the election provided for in said act had been held, or that its result was in favor of prohibition." The state then offered in evidence a transcript, duly certified, from the records of the probate court, showing (1) a petition for an election, signed by more than 50 citizens, which was filed on the 28th day of December, 1886; (2) an order for an election founded on said petition; (3) the return of the supervisors as to the result of the election, showing 1,422 votes in favor of prohibition and 1,009 against it, filed February 19, 1887; (4) an order of the probate judge, dated February 19, 1887, for the publication of notice of the result of the election in all the newspapers of the county; and (5) a notice, or form of notice, of result of prohibition election," signed by the probate judge, and dated February 26, 1887. The defendant objected to the admission of this transcript as evidence, and of each paper contained in it, and especially to the notice, because it was not shown that said notice had ever been published as required by said special statute. The court overruled the objections, and the defendant excepted. This being all the evidence, and a jury having been waived, the court rendered judgment finding the defendant guilty as charged; to which judgment and rulings he duly excepted.

H. C. Tompkins and Gordon McDonald, for appellant. *W. L. Martin*, Atty. Gen., for the State.

McCLELLAN, J. Among the questions prominent in this case, as presented by the record and by admissions at the bar are those which involve the construction of the act to prohibit the sale of liquor in

Calhoun county; in respect to the notice required by section 4 of that act; the effect the omission of that notice has on the provisions of sections 5 and 6; and whether, if the statutory requirement of notice is imperative, compliance with it had to be shown by the state on the trial of this case; and, finally, whether such compliance was shown.

The language of the statute, in the particulars under consideration, is entirely free from ambiguity. There can be no misunderstanding of its provisions as to what notice should be given, by whom it should be given, or the manner of giving it. In such cases there is no room for construction, the only legitimate function of which is to evolve the true meaning of the law-makers to bring certainty out of doubtful expressions, and to replace ambiguity with clearness. If the expressions employed involve no uncertainty, they speak for themselves; and the purpose they evince cannot be thwarted by any considerations that may enter the minds of judges affecting the wisdom or policy of the enactment. Hence, it is not for this court to say with respect to the matter in hand, that when the legislature required publication in "all the newspapers published in the county" they did an unwise thing, by putting it in the power of one newspaper to defeat the requirement, at least, if not the whole law, and therefore that they must be held to have intended something other than that which they have clearly expressed. Whether it was the part of wisdom for the legislature to anticipate that the papers would publish the notice, rather than that they, or any one of them, would from improper motives refuse to do so, we need not decide. Certain it is that such provisions are not new to the laws of this state. Several of our general statutes predicate important proceedings on the publication of certain notices in the newspaper or newspapers of particular localities; and it has never been suggested, even, that such notices could be pretermitted because, forsooth, the newspaper proprietors might refuse to publish them. The law is thus written in plain terms; and we are not authorized to take from, or add to, or change those terms in any particular by construction. *Carlisle v. Goodwin*, 68 Ala. 137; *Reese v. State*, 78 Ala. 13; *Coffin v. Rich*, 71 Amer. Dec. 559, 563.

It is to be next considered what the effect of the requirement of publication was on the prohibitions of the statute. Was it directory merely, or mandatory? And was compliance with it a condition precedent to the criminality of the acts specified in section 5? With regard to an enactment which requires a certain thing to be done, or done in a particular manner, without an express declaration of the consequences of non-compliance, it will be found, generally, correct to say that nullification is the natural and usual result of disobedience, and that the thing required must be done in the particular manner. *Endl. Interp. St. § 433; Commissioners v. Gains*, 3 Brev. 396; *Best v. Gholson*, 89 Ill. 465. And while the propriety of treating statutory provisions, under certain circumstances, as directory merely, is fully recognized, it

is a power which verges so closely upon legislative discretion as to be exercisable by the courts only with reluctance, and in extraordinary cases. *Koch v. Bridges*, 45 Miss. 247. Another general rule may be deduced from the mass of adjudications on this subject; that is, that statutes are to be construed as directory merely, and as admitting of departure from compliance with their terms only in conservation and furtherance of their supposed spirit and purpose. *Proprietors v. Jones*, 36 N. J. Law, 206. And as the legislature can in no case be held to have intended to perpetrate a private wrong, or to work out an undue advantage to any individual, or to lodge power to affect such results, in the discretion of officers charged with the performance of prescribed duties, it is said enactments will never be construed to be directory when "the act or omission can by any possibility work advantage or injury to any one affected by it." *Koch v. Bridges*, supra; *Best v. Gholson*, supra. This reference to some of the abstract principles pertaining to the matter under discussion may be concluded with the generalization that provisions which require a thing to be done at a certain time or in a particular manner will be interpreted as directory when the courts can see and know that it may be done, so as to fully accomplish every substantial purpose of the law-makers, at or within some other time, or in some other mode, than that pointed out by the statute, and that an imperative construction will be adopted whenever any right would be preserved by strict compliance with, or, by possibility, prejudiced, defeated, or denied by a departure from, the letter of the enactment. These considerations apply, more especially at least, to statutes which do not by their terms indicate the legislative purpose as to whether or not strict compliance is to rest in the discretion of those charged with their execution. Conceding for the moment that the provisions involved here are of this class, and that we must determine the point by a consideration of their general scope and character, rather than from the language which expresses them, it would seem that the result must be against the exercise of this discretion in the matter of compliance. It is unquestionably against all public policy, and all abstract conceptions of justice, that the citizen should be punished for an act not *malum in se*, of the criminal nature of which he is utterly ignorant when it is committed. It is true, that he may not plead ignorance of the laws of his country in justification, or even in mitigation, of acts violative of those laws. But this doctrine is founded on necessity, not upon any theory of the natural justice of the rule; and the fact that it exists is no reason for emasculating a provision which is intended to replace the harsh, and not infrequently most unfounded, presumption of knowledge, by a more humane and just rule, of guilt only after notice of the illegality of the thing done. The purpose to make this substitution, so to speak, may well be imputed to the legislature, with respect to a highly penal statute, which left their hands without being a complete law, and depended

for its final effect upon the subsequent action of the people of Calhoun county,—action of which, in all theory at least, there is not that propriety of holding the citizen to a knowledge which obtains to a thing done by all the people, met together in general assembly. It is easily conceived how the failure to give the precise notice required by the act might result to the injury of individuals in that county, whether residents there or transients. The notice was a natural and reasonable requirement. It had a beneficent office to perform in the scheme of prohibition.

The *prima facie* presumption, as we have seen, is that the provision requiring it was intended to be executed according to its terms. The courts cannot see that the legislative purpose could be met as well without compliance, nor that no right would be prejudiced or injury effected by its omission. It would seem therefore, that, guided solely by the purpose of the legislature, as gathered from a general view of the statute, we should reach the conclusion that the requirement that a certain notice should be given is imperative. But whatever doubt might attend upon a conclusion so attained is dispelled when regard is had to the particular words employed. The notice is required in plain and unambiguous terms, as shown above, to be given in a certain way, for 30 days. The succeeding section provides that "after the expiration of said thirty days' notice" the act for which appellant was convicted should be unlawful. No other provision of this statute makes a crime of that act. The language imports criminality only in a certain event. That event is not the vote of the people favoring prohibition. It is not the entry of that result as a record in the office of the probate judge. It is the perfection of the notice of that result by publication in all the newspapers of the county for 30 days. Before that was done the act charged was not a crime. Here, also, is the absence of that ambiguity which alone authorizes resort to construction. "Compliance with the particular provision is made in terms a condition precedent to the validity or legality of what is done," or to speak more aptly, to the illegality of the act charged; and non-compliance is fatal to legality in the one instance, and to criminality in the other. *Endl. Interp. St.* § 431. The case is on all fours to those referred to in the text cited, in which it is held that where the deed of a married woman was to take effect "when" the certificate of her acknowledgment of it was filed, or where it was provided that no appeal should be entertained "unless" certain rules were complied with, or where the doing of a thing was prohibited "until" another had been done, (as here the doing of the thing charged is allowed until another has been done;) or where certain certificates were transferable "only" in a prescribed manner,—the omission of the statutory requirement is fatal. *Jolly v. Handcock*, 7 Exch. 820, 22 Law J. Exch. 38; *In re Dickinson*, 51 Law J. Ch. 736; *Stayton v. Hulings*, 7 Ind. 144; *Bank v. Laird*, 2 Wheat. 390.

Another view: As we have said, this statute did not come from the hands of its

makers as a complete law. Its operation was made to depend on certain things to be done by the probate judge and people of Calhoun county. The presumption which holds all the people of the state to a knowledge of their own acts in general assembly, for such is the theory, can have no application to the acts of the people of a county, and of the county officers, intended to affect, not only themselves, but all the people of the state within their borders. The power to do these acts, and thus put the statute into operation, is certainly in some sense the delegation of legislative functions. It is justified and taken out of constitutional inhibitions upon the same grounds that the grant of legislative powers to municipal corporations is held to be constitutional; that the statute is a police regulation, of local application, in respect to which it is proper that local judgment should control. *Cooley, Const. Lim.* 147, 148. The authority to a municipality, strictly so-called, or to a county, or any other local subdivision of the state, to thus breathe life and force into a statute otherwise dormant, is usually, if not always, hedged about by specifications as to how the locality is to act, and impart efficacy to the regulations. Among such specifications, the most frequent, perhaps, is that which requires notice to be given that the action which has this important effect has been had to the end that not alone the community itself, and all members of it, but all other citizens of the state, and the public generally coming into the locality, may be apprised of the law to which they must conform. These provisions for notice are the substitutes, as to such local matters, for the presumption the law indulges as to knowledge of general statutes. The reason for them is the same in the case of a county proceeding under a law like the present one and in the case of a town proceeding under its charter or a special law. They are intended to accomplish the same purpose. They meet the same necessity. We can conceive no reason for giving them a different interpretation in the case of the county than would be applied to them with respect to a town. We accordingly hold that the notice required by this act stands upon the same footing, in the relation it bears to the operative force of the statute, with notices of the adoption of ordinances required to be given by municipal corporations. As to these latter, the doctrine is thoroughly established that the publication required is a condition precedent to the validity of ordinances, and that the burden of proving such publication is on the party seeking to enforce them. *Hoor & B. Mun. Ord.* §§ 52, 53, 187; *Des Moines v. Gilchrist*, 67 Iowa, 210, 25 N. W. Rep. 136; *Ormsby v. Louisville*, 4 Amer. & Eng. Corp. Cas. 342; *Verona's Appeal*, 108 Pa. St. 83; 4 Wait, Act. & Def. p. 610, § 7; *Higley v. Bunce*, 10 Conn. 435; *Schwartz v. Oshkosh*, 55 Wis. 490, 13 N. W. Rep. 450. And this doctrine, applicable, as we hold, to all statutes providing police regulations for a given locality, subject to the action of the locality in accepting or rejecting them, in the manner provided by the statutes themselves, obtains, also, with respect to a general

law of the state, containing a provision that it shall take effect from its publication in a certain number of newspapers. In such case the act does not go into operation until there has been strict compliance with this requirement. *Welch v. Batter*, 47 Iowa, 150. Though a requirement to the effect that an act shall be published in the newspapers of certain towns by the secretary of state, without any indication of legislative purpose that its operation should not be postponed, or that its penalties should not be imposed, until after such publication, is directory, and non-compliance with it would not invalidate the enactment. *State v. Click*, 2 Ala. 26.

We do not consider that section 9 of the act, which contains provision with reference to the issuance of licenses to sell liquors, exerts any influence on sections 4, 5, and 6. On the contrary, we apprehend that section 9 proceeds on the assumption that all requirements of the law essential to its complete efficacy have been complied with; and its restrictions on the power to issue licenses depends upon the fact that "the prohibition provided for by the fifth and sixth sections" has been put into operation according to the terms of the act.

In considering the question of whether there was any proof of compliance with the law in the matter of notice, we may at once discard the alleged order for such notice entered by the probate judge, and also the copy of the notice, or form of notice, transcribed and certified from the books of that office. There is no authority in the statute for the order, or for its record, or for the record of the notice. They have no legal status or existence, and occupy no higher plane, as evidence in this case, than would the certificate of an individual that he had made the order, and drawn up a form of notice, and had entered both the order and notice on a book kept by him. Moreover, they have no tendency whatever to prove the fact in issue, which is that the notice was published for 30 days in all the newspapers of the county. The court erred in admitting copies of this order and notice as certified by the probate judge.

There are two controlling reasons for our non-concurrence in the contention of the appellee that the presumption of law, that a public officer has performed a duty imposed on him, avoids the necessity for other evidence of compliance with the requirements that notice should be given. We understand the rule to be, in this regard, that where an officer undertakes to discharge a public duty, enters upon its performance, and does in fact, in some manner or to some extent, discharge it, the law will presume that his acts in that behalf are free from irregularity; but this presumption can never extend to the doing of an independent, material, and substantive act, so as to hold the thing done merely because it ought to have been done, and it was the duty of the officer to do it. 2 Whart. Ev. §§ 1318, 1319; *U. S. v. Ross*, 92 U. S. 281. Again, the fact here involved, and sought to be rested on the presumption of the performance of duty, lies, in the final consummation, beyond the line of official duty. The act depends upon its efficient

completion, upon actual publication of a notice in certain newspapers. We might assume that the judge of probate did everything possible for him to do under the act, and yet, without the further assumption that the proprietors of the papers referred to published the notice given them by the probate judge to publish for 30 days, we could not reach the conclusion that the requirement of the statute had been complied with. There is no principle of law upon which courts can indulge the presumption that private persons have performed a material act so as to dispense with affirmative evidence of the fact.

We conclude that the publication of the notice of the result of the election held under this act, for the time and in the manner required by it, was a condition precedent to operation of sections 5 and 6 that the burden was on the state to show that said notice had been given; and that it failed to produce any evidence to establish the fact. This view renders the consideration of other points presented by the record unnecessary.

The judgment of the city court is reversed, and the cause remanded.

SEGARS V. STATE.

(*Supreme Court of Alabama.* Dec. 17, 1889.)

CRIMINAL LAW—APPEAL.

Defendant, who was jointly indicted with another for selling intoxicating liquors without a license, cannot complain of the admission of alleged improper evidence against his co-defendant, who was acquitted, which evidence in no way affected defendant.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

The indictment in this case charged, in a single count, "that Louis Segars and Phillip Segars sold spirituous, vinous, or malt liquors, without a license, and contrary to law." The defendants being jointly tried, and a jury having been waived, the following bill of exceptions was reserved: "The defendant being jointly indicted and tried with Louis Segars, the state introduced one Dunford as witness, whose testimony tended to show that at Pratt Mines, in said county, within twelve months before the finding of the indictment in this case, the defendant and Louis Segars kept a store, and that he, witness, had purchased from Phillip Segars, at said store, wine on several occasions, sometimes by the bottle and sometimes by the drink; that he did not recollect ever to have bought wine from the defendant while Louis Segars was present and saw him buy it, but his recollection was that Louis was about the store; that he could not say that Phillip and Louis were partners, nor which was proprietor, or which (if either) was clerk; that both attended to the business, but Phillip seemed to attend mostly to it, and the store was generally called 'Segars' Store.' The state asked the witness if he had ever bought any spirituous, vinous, or malt liquors, at said store, from Louis Segars. To this question the defendant objected, as being irrelevant; that the state had charged the defendants with one joint act, and they could not, under the indictment, be prose-

cuted for two separate and distinct acts. The court overruled the objection, and the defendant excepted. The witness then testified that, on several occasions, he had bought from said Louis, in said store, a white kind of liquor, which was intoxicating, but did not know what it was; and that he could not remember that on any of these occasions said Phillip was present, or knew of his buying it. Said witness further testified on cross-examination, that he did not know what kind of wine it was he bought; that it had a red or dark color, and he paid 25 cents per bottle for it, that he always bought it from Phillip, and never from Louis, nor Louis and Phillip together; that the defendants were not partners, so far as he knew, and he did not know who owned or ran the store; that Phillip seemed to be the principal man; that he did not recollect ever seeing Louis around when he was trading with Phillip, nor Phillip about when he was trading with Louis; that he never bought any red-colored liquor from Louis, nor any white liquor from Phillip, and never bought any kind while both were present; and that the white liquor made him somewhat intoxicated. This being all of the evidence, the defendant demurred to the evidence, as not being sufficient to sustain the indictment. The court overruled the demurrer, and defendant excepted. The court rendered a verdict finding said Louis not guilty, and said Phillip guilty; to which finding said Phillip excepted."

Lea & Green, for appellant. *W. L. Martin*, Atty. Gen., for the State.

STONE, C. J. Two defendants, Phillip Segars and Louis Segars, were jointly indicted for selling spirituous, vinous, or malt liquors without a license. The case, by consent of defendant, was tried by the court without a jury. The finding and judgment of the court were that defendant Phillip was guilty, and that defendant Louis was not guilty. The appeal is prosecuted by Phillip, the convicted. Testimony was introduced against Louis, against his objection, and to the admission of which he reserved an exception. If he had been found guilty, possibly this would have been error. But this testimony in no way affected Phillip, and he had no right to object to it. Louis alone could be injured by it, and being acquitted, if an error, Phillip cannot complain of it. We have, then, the simple case of two being indicted for a misdemeanor, of a class which admits of two or more guilty participants in one and the same offense, one of whom was acquitted and the other convicted. The testimony against Phillip was uncontroverted, and was conclusive, while the testimony against Louis did not satisfy the mind of the trial judge.

The theory of the present prosecution, as its implications tend to show, was either that the two defendants were jointly interested in the store and in its sales, or that one was the proprietor and the other his salesman. If the first hypothesis was the true one, then a sale by either in the line of their trade would fix the guilt of each; if the latter, then a sale by the salesman, with the authority, approbation, or

acquiescence of his employer, would justify the conviction of each. Offenses of this kind, though perpetrated by one act, are separate offenses, and punished separately. The fruitless, though illegal, attempt to fix guilt on Louis, is no error available to Phillip, whose guilt is uncontroverted. This case is distinguishable from *Elliot v. State*, 26 Ala. 78; and *McGehee v. State*, 58 Ala. 360, in that the indictment does not charge two separate offenses, and there was no conviction of separate offenses. If the separate testimony introduced against Louis had not been received, no one could question Phillip's rightful conviction. Being, at most, only offensive to the rights of the former, and doing him no injury, it affords Phillip no stronger ground of complaint than he would have had without such attempt.

Affirmed.

COOPER v. STATE.

(*Supreme Court of Alabama*. Dec. 18, 1899.)

CRIMINAL LAW—EVIDENCE—INSTRUCTIONS—MOTION IN ARREST—APPEAL.

1. On a trial for burglary, it is proper to exclude testimony that the prosecuting witness had made statements out of court that he might have been mistaken in thinking that defendant was the burglar, and that the testimony of one of defendant's witnesses on a former trial had shaken him up considerably, as these declarations of his thoughts and impressions could not have been inconsistent with his evidence on the trial.

2. Where there is evidence that defendant had a defective foot, and that tracks made by the burglar showed a similar deformity, an instruction that the jury could not find defendant guilty from this fact alone is properly refused, as it singles out one criminating circumstance, thus tending to mislead and confuse the jury, and necessitating an explanatory charge.

3. An instruction that it is as much the duty of the jury to acquit in case of reasonable doubt as it is their duty to convict in case of moral certainty of defendant's guilt is properly refused, as it is a mere argumentative and comparative generalization of the duty of jurors, having a tendency to confuse rather than enlighten them.

4. A motion in arrest of judgment based on the fact that the jury took with them in their retirement the indictment, on which was indorsed a verdict of guilty rendered by a former jury, but which fact did not appear of record in the court below, is properly overruled.

5. The action of the trial court in overruling defendant's motion for a new trial will not be reviewed by the supreme court.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

The indictment in this case charged that the defendant, Will Cooper, "with intent to steal, broke into and entered the dwelling-house of F. G. Ferguson." On the first trial the defendant was convicted; but the judgment was reversed by this court, and the cause remanded. *Cooper v. State*, 86 Ala. 610, 6 South. Rep. 110. On a second trial, as the bill of exceptions shows, F. G. Ferguson testified, on the part of the prosecution, that his dwelling-house in Birmingham was broken and entered into on the night of December 16, 1888; that he was awakened by a noise made in his room, and saw a man moving about, whom he chased through the house, but who escaped; that, on examination of the house, he found that the back door had been left

open, and discovered in the hall, which was covered with a linen cloth, and also on the back porch, muddy foot-prints, the night being rainy; that the prints made by the left foot were peculiar, turning inward, showing no impression made by the toes; that the defendant had for some time been visiting a servant girl at his house, who occupied a room over the kitchen in the rear of the house, which communicated with the house through a door in the back hall; that he arrested the defendant at his house on the night of January 19, 1889, and charged him with the burglary, but defendant asserted his innocence; that the defendant, on his preliminary examination before a committing magistrate, "voluntarily removed his left shoe, and walked across the floor; that he walked with a limp; that his left foot turned inward, the big toe seemed to turn up, and the others made no impression on the floor." Continuing, the witness said: "I told him about the tracks made by the burglar, and said I'd bet he had two or three toes off his right foot; to which he replied he had as many toes on his right foot as I had. I then said that it was the left foot; and he replied that was another matter." The witness then testified, on cross-examination: "Defendant had been at my house several times before the burglary. I had talked with him, and was familiar with his features. I did not recognize the burglar's features as those of the defendant. On the night of the burglary, I did not think of its being defendant who came into my room, and did not think of it until some time afterwards. What led me to suspect him was what the girl said to my wife, who repeated it to me. She and the defendant had a misunderstanding of some kind several days before the defendant's arrest, and she has since married another young man. Defendant came to my house several times after the burglary, and I saw no difference in his conduct. I talked with him about the burglary, and saw no change in his appearance or countenance while I talked to him about it." The bill of exceptions then adds: "On motion of the state's solicitor, the court excluded the following evidence of said witness on cross-examination: 'I admitted to defendant's attorney, after the first trial, that I might have been mistaken in thinking that the defendant was the burglar; and I also stated to Mr. S. M. Woods that when I heard his testimony on the former trial it shook me up considerably.'" To the exclusion of this testimony the defendant excepted. S. M. Woods, who was a market gardener near Birmingham, and in whose employment the defendant was at the time of the burglary, testified to the defendant's good character and good habits, and that the defendant stayed at his house the night on which the burglary was committed; and E. G. Woods, his son, testified substantially the same thing. The defendant requested the court to give the following charges in writing, and duly excepted to the refusal of each: (1) "The facts, if proved, that the defendant has a defective foot, and that the tracks made by the burglar at Capt. Ferguson's house showed a similar deformity, will not authorize the jury to

find the defendant guilty, unless there is other evidence before them, which, taken in connection with the similarity of the foot-prints, convinces them to a moral certainty that he is the person who committed the crime." (2) "Even if the evidence before the jury should convince them that the tracks made at the house by the burglar were made by a person who had a defective left foot, and that defendant has a similar defect, they cannot find him guilty from this fact alone; and, unless there is other evidence of guilt, they should acquit the defendant." (3) "It is as much their duty as jurors to acquit the defendant, if from the evidence they have a reasonable doubt of his guilt, as it would be to convict him if they believe to a moral certainty that he is guilty; and if, from the evidence, they are not satisfied beyond a reasonable doubt that he is guilty, they would be as false to their obligation as jurors if they were to convict him, as they would be should they acquit him if the evidence convinces them of his guilt to a moral certainty." After conviction, the defendant submitted a motion for a new trial, and also a motion in arrest of judgment, because the jury took with them in their retirement the indictment in the case, on which was indorsed the verdict of guilty rendered by the jury on the former trial. The court overruled each of these motions, and the defendant thereupon excepted.

Jos. G. Crews, for appellant. *W. L. Martin*, Atty. Gen., for the State.

McCLELLAN, J. There was no evidence in the case, nor could there have been any, as to what the witness Ferguson thought in regard to the guilt of the defendant, nor as to the impression made on his mind by the testimony of S. M. Wood on the former trial. There was nothing before the court, therefore, to which the statements of Ferguson, that he "might have been mistaken in thinking the defendant was the burglar," and that the testimony of Wood "on the other trial shook me up considerably," could have been contradictory, and they were properly excluded. The only ground upon which such testimony is ever received is that it shows statements made by the witness out of court which are inconsistent with, and therefore tend to weaken, his evidence on the trial. That reason for their admission does not exist in this case, and could not have existed, since any evidence with which these declarations were inconsistent would itself have been immaterial and inadmissible.

The first and second charges set out in the record call attention to one criminalizing circumstance shown by the evidence, and involve an instruction to the jury that this fact or circumstance of itself is not sufficient to authorize a conviction. It is the settled doctrine of this court, that the refusal of such charge, although it may be true, as a legal proposition, that guilt is not inferable from the one fact postulated, is free from error. They tend to mislead and confuse the jury, and necessitate an explanatory charge; and "the court never errs in refusing a charge requiring explanation." *Adams v. State*, 52 Ala. 379; *Buchanan v. State*, 55 Ala. 154. Moreover,

these charges are argumentative, and their refusal may clearly be justified on this ground. *Hussey v. State*, 86 Ala. 34, 5 South. Rep. 484.

The third charge requested by defendant sought to impress on the jury the duty of acquittal in the event of their entertaining a reasonable doubt of guilt, by a reference to what their duty would be in the absence of such doubt, and to instruct them that acquittal is as imperative in the one case as conviction would be in the other. This is a mere argumentative and comparative generalization of the duty of jurors, having a tendency to confuse rather than to enlighten them; and while its abstract propositions are doubtless correct, and clear to the trained legal mind, the court committed no error in refusing to give the charge.

The action of the court in overruling defendant's motion for a new trial is not reversible. *Tyree v. Parham*, 66 Ala. 424; *Trammell v. Vane*, 62 Ala. 301; *Bedwell v. Bedwell*, 77 Ala. 587.

The motion in arrest of judgment was predicated on facts which did not appear of record in the court below. It was properly overruled on this ground, if not also on others. *Sparks v. State*, 59 Ala. 82; *Brown v. State*, 52 Ala. 345; *Blount v. State*, 49 Ala. 381.

We discover no error in the record, and the judgment of the criminal court is affirmed.

GILMAN *et al.* v. JONES *et al.*

(*Supreme Court of Alabama*. Dec. Term, 1888.)

For majority opinion, see 5 South. Rep. 785.

STONE, C. J., (dissenting.) I do not think Jones shows such an interest in the litigation or subject-matter of the suit as relieves him of the imputation of maintenance. To have that effect, I hold that he must have had a pecuniary or property interest. Mere benefit or assistance to some other independent enterprise he was prosecuting is not enough. Few, if any, contracts would be made, if the contracting parties did not each believe they were thereby securing to themselves some profit, benefit, or pleasure.

ALDRIDGE *et al.* v. STATE.

(*Supreme Court of Alabama*. Dec. 18, 1889.)

BURGLARY—INDICTMENT—OWNERSHIP OF PREMISES.

Where an indictment for the burglary of a store lays the ownership of the premises in "W. H. B., business manager" of a private corporation, while the evidence shows that the store belongs to the corporation, the variance is not cured by the fact that the manager also used the store as a post-office, with which the corporation had nothing to do; the presumption being, in conformity to the custom of the country, that he carried on the post-office as licensee of the corporation, and not as its tenant.

Appeal from circuit court, Lee county; *JESSE M. CARMICHAEL*, Judge.

Indictment of Henry Aldridge and others, under Crim. Code Ala. § 3786, which provides: "Any person who, either in the night or day time, with intent to steal or

to commit a felony, breaks into * * * any shop, store, * * * in which any goods, merchandise, or other valuable thing is kept for use, sale, or deposit, * * * is guilty of burglary." The indictment was in a single count, and charged that defendants "broke into and entered a building, to-wit, a store-house of Wilburn M. Bass, business manager of Beulah Co-operation Store of Beulah Alliance, in which a valuable thing, to-wit, goods or merchandise, was kept for use, sale, or deposit, with the intent to steal." On the trial, as is shown by the bill of exceptions, there was evidence tending to show that the store-house charged to have been broken into was the property of a private corporation, to-wit, the Beulah Alliance; that Wilburn M. Bass was a salaried officer or agent of said corporation, and was the business manager of the same, and as such was in possession and control of said store-house at the time of the alleged breaking; that said Bass had been in the exclusive possession and control of said building for 14 months; that, as a member and stockholder of Beulah Alliance, he was part owner of said building, and that he had a post-office therein, with which the Alliance had nothing to do. Upon such evidence the defendants asked the following charges in writing, and duly excepted to the refusal of each: "(1) If the jury believe from the evidence that W. M. Bass was in possession of and held said building or store-house as an agent or officer of the Beulah Alliance, a private corporation under the laws of Alabama, they cannot convict the defendant on this trial. (2) If the jury believe from the evidence that W. M. Bass was a salaried officer or agent of the Beulah Alliance, which is a private corporation, and that at the time of the alleged breaking he was in possession of the said store-house in this capacity, then they cannot convict the defendants for breaking into the store-house of the said W. M. Bass, although he may have been the business manager of the said corporation." These were the only exceptions reserved by the defendants.

W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. The defendant was convicted of the burglary of a store-house in which goods and merchandise were stored. Crim. Code 1886, § 8786. The objection urged is an alleged variance between the averment of ownership in the indictment and the proof of such ownership. The indictment lays the ownership in one "Wilburn M. Bass, business manager of Beulah Co-operation Store of the Beulah Alliance." The evidence tends to show that Bass was the salaried agent of the Beulah Alliance, which was a body corporate, and that he had charge of the store as the servant of the corporation. It also tends to show that he used the store as a post-office,—a business with which the Alliance had no connection. Whether this occupancy was by mere license or otherwise does not affirmatively appear from the evidence.

Where premises, belonging to a corporation, are occupied by a naked agent or servant of the corporation, the rule is that the ownership must be averred to be in the

corporation, and not in the agent; and the corporate name and character of the owner must be stated. *Clark, Crim. Law, § 872; Emmonds v. State, 87 Ala. 12, 6 South. Rep. 54; 2 Archb. Crim. Pl. & Pr. (Pom. Ed.) 1093-1101; 2 Amer. & Eng. Cyclop. Law, 682, 683; 2 Bish. Crim. Law, (3d Ed.) §§ 137, 138.*

The use of the store-room for receiving and distributing the United States mails does not appear to rise to the dignity of a tenancy, estate, or other ownership in the premises; and this collateral business, being carried on in the mode known to be customary in this country, there is no presumption that there was a letting of the premises to Bass for this purpose, but rather a license; and this fact would not disturb the ownership of the corporation, or its constructive possession through Bass as their agent. *2 Archb. Crim. Pl. & Pr. (Pom. Ed.) 1098, note; 2 East, P. C. c. 15, § 14, pp. 501, 502.* The allegation of the indictment, moreover, is that his occupancy was in the capacity of an agent of the Beulah Alliance, not of the federal government, and this negatives the idea of a tenancy or ownership in himself personally. The alleged breaking, in other words, is into a store-house as such, not into a post-office. The court erred in refusing to give the two charges requested by the defendants.

Reversed and remanded.

ETRESS V. STATE.

(*Supreme Court of Alabama. Dec. 19, 1899.*)

CARRYING WEAPONS—EVIDENCE.

As the act of carrying a concealed weapon is continuous, the introduction of evidence of possession and concealment at different times, covered by the one continuous act, does not put the state to an election of the particular moment of the offense for which it will proceed to prosecute.

Appeal from county court, Shelby county; *R. W. Cobb, Judge.*

The indictment in this case charged that the defendant carried a pistol concealed about his person. On the trial the state introduced one Vincent as a witness, who testified that one day, within 12 months before the finding of this indictment, while riding in the road, on his wagon, with a load of wood, he met the defendant at Abbott's shop in said county, shook hands with him, and talked for a few minutes; that he was then going to the Shelby Iron-Works, about one mile distant, and defendant said he would remain at the shop until his return; "that he saw, while talking to the defendant, something in the breast pocket of his coat, which he took to be a pistol, though he could not swear it was." The defendant then asked the court to require the solicitor to elect the time and place for which he would proceed, and excepted to the overruling of his request, which was in the nature of a motion. The witness then testified that on his return, about an hour afterwards, "defendant got into the wagon with him, and drove off towards home; that the defendant, when they were about a quarter of a mile away from the shop, exhibited to him a pistol in his hand, which was the first time witness

had seen it, to know that it was a pistol; that defendant, while riding in the wagon, sat facing him part of the time, and at other times with his left side towards witness; and that he did not see any pistol during that time." The defendant objected to the introduction of this evidence on the ground that it was at a different time and place from the first stated by the witness. The court overruled the objection, and the defendant excepted. The defendant asked the court to charge the jury "that if they believed from the evidence that defendant had a pistol at the time Vincent saw him at the shop, while on his way to Shelby Iron-Works, with a load of wood, and that it was not concealed from ordinary observation, they must find him not guilty." The court refused this charge, and instructed the jury, of its own motion, "that, if they believed from all the evidence that at any time on that day, and on that occasion, the defendant carried about his person a pistol concealed from ordinary observation, then he would be guilty as charged." The defendant excepted to the charge given by the court, and the refusal to give the charge requested by him.

W. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. The act of carrying a concealed weapon is, *ex vi termini*, continuous in its nature. *Smith v. State*, 79 Ala. 257. An act of this character may be shown by testimony of the fact of possession of the weapon concealed from ordinary observation at any time during the continuance of it; and the introduction of evidence of such possession and concealment at different times, covered by the one continuous act, does not present a case on which the state should be put to an election of the particular moment of the offense for which it will proceed. *Owens v. State*, 74 Ala. 401. The rulings of the county court were in accordance with these principles, and its judgment is affirmed.

PENNY v. STATE.

(*Supreme Court of Alabama*. Dec. 20, 1889.)

EMBEZZLEMENT.

Defendant hauled several bales of cotton to a gin-mill for the owner of the cotton. One of the bales he marked with his son's name, and he also took the receipt for it in the same name. Afterwards, on being questioned as to the number of bales he had taken to the mill, he turned the receipt over to the owner. *Held*, that defendant was not guilty, within Code Ala. 1886, § 3795, which requires that to prove embezzlement defendant must be shown to have fraudulently converted it to his own use, or fraudulently secreted it with intent to convert it to his own use.

Appeal from circuit court, Tuscaloosa county; S. H. SPROTT, Judge.

C. Gantzhorn and T. L. Beatty, for appellant. *W. L. Martin, Atty. Gen.*, for the State.

CLOPTON, J. The first count of the indictment charges the larceny, and the second count the embezzlement, of a bale of cotton, the property of a private person. Defendant was convicted on the second count, which is tantamount to an acquit-

tal of the offense of larceny. Embezzlement being a statutory offense, to constitute it the statutory elements must concur. The second count of the indictment is founded on section 3795 of Code 1886. Before the offense with which the defendant is charged is made out, it must be shown that he was the agent or servant of the owner of the cotton; that it came into his possession by virtue of his employment; and that he has embezzled or fraudulently converted it to his own use, or fraudulently secreted it with intent to convert it to his own use.

Assuming the facts to be as testified by the state witnesses, and not regarding the statements and explanations of defendant, they are: The owner of the cotton employed him to haul seven bales from his gin-house to a factory at Cottondale, about ten miles distant, and deliver them to the manager of the factory. By virtue of his employment he took possession of and carried the seven bales to the factory, taking one bale the first load, and two at each succeeding load. He delivered the seven bales to the manager of the factory, taking the receipt for the bale first hauled in the name of his son, Lane Penny, which bale was marked, after leaving the gin-house, with the letters "L. P.," and for the other six bales he took receipts in the name of the owner. On being questioned, shortly after he finished hauling, as to the number of bales he had carried, he replied, "only six," but, on being pressed, admitted he had carried seven. Soon after this he delivered all the receipts to the agent of the owner. On these facts defendant requested the court to give the affirmative charge in his favor.

"Conversion" has been defined to be "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." *Conner v. Allen*, 33 Ala. 516, *Thweat v. Stamps*, 67 Ala. 96. It is not pretended that there was any secretion, waste, destruction, or wrongful taking of the bale of cotton. Defendant hauled and delivered it as directed by the owner. The only acts done by him, not in accord with his duty, were marking the bale and taking a receipt therefor in the name of his son. These acts do not of themselves, constitute an exercise of dominion in exclusion of the owner's rights, nor an appropriation to defendant's own use and beneficial enjoyment, nor withholding from the possession of the owner, nor an alteration of the condition of the cotton. The receipt may have armed defendant with power to exercise dominion, and to withhold the cotton from the possession of the owner. It may be the assertion of an inconsistent claim or right, but the acquisition of such power and the assertion of such claim or right do not constitute a conversion of the cotton itself. To complete a conversion, the assumed power must be exercised to the alteration of its condition, or to the exclusion of the owner's rights. Defendant's taking the receipt, and marking the bale, as was done, may be evidence of an intent to claim and appropriate the cotton to his own use;

but the mere intent is not sufficient. Delivery of the receipt to the owner was an abandonment of such purpose.

The court erred in refusing to charge the jury that, if they believed the evidence, they must find defendant not guilty.

Reversed and remanded.

MONTGOMERY v. STATE.

(Supreme Court of Alabama. Dec. 20, 1889.)

INTOXICATING LIQUORS—CONSTITUTIONAL LAW.

Under Const. Ala. art. 4, § 2, providing that "each law shall contain but one subject, which shall be clearly expressed in its title," the provision of Act Feb. 5, 1885, entitled "To constitute the town of Blountsville and vicinity, in Blount county, a separate school-district," which prohibits the sale of intoxicating liquors within the district, is unconstitutional, as it is not cognate, pertinent, or germane to the subject expressed.

Appeal from circuit court, Blount county; JOHN B. TALLY, Judge.

Inzer & Ward and Dickinson & Hall, for appellant. *W. L. Martin*, Atty. Gen., for the State.

MCCLELLAN, J. By an act approved February 5, 1885, certain territory extending four miles north and south, and three miles east and west, and including the town of Blountsville, was made a separate school-district. The title of the act is "To constitute the town of Blountsville and vicinity, in Blount county, a separate school-district." The provisions of the act, down to the seventh and last section, are such as pertain to the establishment of a school-district, and to the management, control, and maintenance of schools therein, though the fourth section, which authorizes the levy of a special tax, is probably obnoxious to the constitution, (*Schultes v. Eberly*, 82 Ala. 242, 2 South. Rep. 345,) and are referable to and properly covered by its title. Section 7, however, prohibits the sale, etc., of liquor within the district, and makes an infraction of its provisions a misdemeanor, punishable by a fine of not less than \$100, payable only in currency, to the trustees of the district, as a part of the school funds thereof. The appellant was charged with a violation of this section, and on the trial, which resulted in his conviction, reserved exceptions which present for our consideration the constitutionality of the prohibitory and penal section of the act. It is contended that this part of the statute is offensive to that provision of section 2, art. 4, of the present constitution, which declares that "each law shall contain but one subject, which shall be clearly expressed in its title." The settled construction of this clause is that while it will not be so exactly enforced as to cripple legislation, or to require the title of a bill to specify every provision of the statute, but that, on the contrary, it is permissible to insert those matters which, though they may not be specifically expressed in the title, are proper to the full accomplishment of the object which is expressed, or are naturally suggested by, or connected with, that object; yet matters which are not so suggested by the title, or not so connected with the subject expressed as to appear to follow as a natural and legitimate comple-

ment thereto, or which do not appear to be proper to the accomplishment of the indicated purpose, or pertinent or germane to that purpose, cannot be constitutionally embraced in the act. *Ballentyne v. Wick-ersham*, 75 Ala. 533; *Stein v. Leeper*, 78 Ala. 517.

The expressed purpose of the act under consideration was to constitute certain territory a separate school-district. This implied simply that the locality in question—which had theretofore, perhaps, constituted in part several school subdivisions, or, it may be, only a fraction of a greater subdivision, and as such had been governed, in the matter of public instruction, by general laws—should thereafter be of itself a district for school purposes, and as such should be regulated by the provisions of the special act as to its participation in and disbursement of school funds, and the conduct and management of its schools. It did not imply the establishment of schools where there had been none before, but only the segregation of the particular locality from other divisions, and its embodiment in a distinct and compact form for more convenient administration. The subject expressed did not suggest a necessity for police regulations in the new district, which had not before existed in the subdivisions from which it was taken. The prohibition of the liquor traffic was no more proper to the new district than it had been to the old, and no more a complement to the avowed purpose of the special act than it had been to the general laws before applicable to school matters in the locality. Prohibition, therefore, was not cognate, pertinent, and germane to the subject expressed; and it may well be doubted whether a single member of the general assembly, who voted on this bill, advised of its contents solely by its title, ever for an instant conceived one of its purposes to be the prohibition attempted to be established by its last section. Clearly this provision was not suggested by the title. It would not present itself to a mind seeking information from the title as a matter proper to the full accomplishment of the purpose to carve out a separate school-district including the town of Blountsville. It is therefore, we conclude, a subject alien to the title of the act, not expressed, indicated, or foreshadowed thereby, nor pertinent or germane thereto; and the provision for it falls under the ban of the constitutional requirement above quoted.

This is radically unlike the case of *Ex parte Moore*, 62 Ala. 471, upon which reliance is had in support of the judgment of conviction. In that case the title of the act was "to incorporate" a municipality. "Under this caption," says the court, "it was permissible to embrace and declare the purpose, powers, and duties of the municipal corporation. Sanitary and police regulations are among the customary powers of such corporations," and it was held that a section of the act which prohibited the sale of liquors in the town, being intended to secure its peace and good order, was cognate and referable to the title. The principle announced can have no application to such a provision in an act whose title expresses a purpose wholly

foreign to police regulation. The case of *Ashurst v. State*, 79 Ala. 276, in which a similar provision in the charter of a manufacturing corporation was sustained, is not in point, because the act there involved was passed before the requirement under consideration was incorporated into the constitution. Section 7 of the act in question is void. The indictment specifically charges a violation of that section, and the evidence makes a case which is not violative of any other law. The appellant can never be convicted under that indictment, or for the act disclosed by the testimony, and he will therefore be discharged.

SMITH V. STATE.

(Supreme Court of Alabama. Dec. 20, 1889.)

MURDER—EVIDENCE—INSTRUCTIONS—JURY—WITNESS.

1. Where the record shows no error in drawing and summoning the jury, the presumption is that the officers charged with such duty duly performed it.

2. On a trial for murder, evidence that defendant, immediately after inflicting the death wound on the deceased, pursued and shot at another who was present and took part in the altercation, is admissible, not only as a part of the *res gestæ*, but as tending to show the hostile spirit under which defendant acted.

3. A witness cannot be impeached by proof of particular acts as facts, either criminal or immoral.

4. On a trial for murder the court properly refused to charge that if the jury believe that there was a general row, which occurred at the house of a witness, in which she and several others participated, the jury cannot convict of murder in any degree. The fact that a homicide occurred in a *melee* does not necessarily reduce it below the crime of murder.

5. On a trial for murder occurring in a *melee*, it is error to refuse to charge the jury that, "if they believe from the evidence that deceased was of a violent and blood-thirsty character, they are to take such evidence into consideration in determining the degree of the defendant's guilt, provided they find him guilty."

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

Henry Smith was indicted, jointly with Joe Gill, for the murder of J. D. Connelly, by shooting him with a pistol; and, being tried separately, was convicted of murder in the first degree, and sentenced to death. No objection was raised in the court below either to the indictment or to the jury, and there was no motion in arrest of judgment. The testimony adduced on the trial, as shown by the bill of exceptions, showed that the homicide occurred on the evening of January 17, 1888, at the house of one Mary Goodwin, where the deceased and one John Spears were sitting by the fire, when the defendant and Joe Gill came in. Spears testified, on the part of the prosecution, that he shook hands with the defendant and Gill when they came in, but he and Gill soon became involved in a slight altercation, when Gill called out, "Shoot him, Henry;" that the defendant thereupon drew his pistol, but Mary Goodwin rushed in between them; that the defendant immediately fired, the ball striking witness in the right hip; that the defendant then turned towards the deceased, who threw up his hands, saying, "Don't shoot me, Henry, I have done you no harm, nor said

any;" that the defendant then fired again, shooting the deceased in the breast, and a third time as the deceased fell from his chair, striking him in the thigh; that he (witness) immediately ran out of the house, and the defendant shot at him again when he had gotten about 30 yards distant. The defendant objected to the witness testifying that defendant shot at him after Connelly fell, and while pursuing him outside of the house. The court overruled this objection of the defendant, and he thereupon excepted. A similar objection was made and overruled to a part of the testimony of Mary Goodwin, and an exception was duly reserved. The defendant, testifying in his own behalf, stated that "Spears first advanced upon Gill with a knife making threatening gestures; that Gill called out, 'Shoot him, Henry, he is going to kill me,' and he (defendant) immediately fired at Spears, who at once ran out of the door; that, as he turned to watch Spears, he discovered deceased within three or four feet of him, advancing on him with a drawn axe; that he then fired at Connelly, who at once fell; that he then leaped out of the door, fearing an attack from Spears, and remained out a few minutes, then returned to the house, and left in a short time in company with Gill." The defendant offered in evidence "a showing which had been admitted by the state, subject to legal exceptions," as to the testimony which W. Edwards and others, if present, would give relative to the character of said Connelly, Spears, and Mary Goodwin. The prosecution objected to the admission of a part of the statement, which was in these words: "That Mary Goodwin is a woman of no chastity, bad, and dissolute; that she kept a house of ill-fame at the time of the shooting; that she and Spears were living together at the time of the killing; and that Spears had deserted his family, and had taken up his abode with her." The court sustained the objection, excluded the evidence, and the defendant duly excepted. The defendant requested the following charges in writing, and duly excepted to the refusal of each: (1) If the jury believe from the evidence that there was a general row, fuss, or *melee* at the house of Mary Goodwin, and that the defendant, deceased, Gill, Spears, and Mary Goodwin all engaged in mutual combat, they cannot convict the defendant of murder in any degree." (2) "If the jury believe from the evidence that the deceased was of a violent and blood-thirsty character, they are to take such evidence into consideration in determining the degree of the defendant's guilt, provided they find him guilty."

Carmichael & Thach, for appellant. *W. L. Martin*, Atty. Gen., for the State.

STONE, C. J. Questions affecting the drawing and summoning of the jury which tried the defendant in this cause have been pressed upon our consideration. No objection was raised on either of these grounds in the trial court, and the record fails to show an error or irregularity in the matters complained of. "Act to expedite the trial of capital cases in Jefferson county," approved February 11, 1889, (Sess. Acts, 324.) We cannot presume error in

the matter of drawing the petit juries for the courts, or for the different weeks of the term, nor that the sheriff failed in diligence in summoning the persons drawn as jurors. Public officers are presumed to act faithfully in the discharge of their official duties, and whoever complains of any irregularity, unless it be the omission of some duty which should, and yet does not, appear of record, takes upon himself the burden of proving their irregularity. *Guesnard v. Railroad Co.*, 76 Ala. 453; 3 Brick. Dig. p. 264, §§ 163-165; *Phillips v. State*, 68 Ala. 469.

According to the testimony for the prosecution, the shooting of Spears, and of Connelly, the deceased, grew out of one altercation, and was one continuous transaction. And the pursuit of Spears by defendant, firing at him as he ran, immediately after inflicting the death wound on Connelly, was not only part of the *res gestæ*, but tended strongly to show the hostile spirit under which he was acting. Speaking on a kindred subject, the general court (supreme court) of Virginia, in *Heath's Case*, 1 Rob. (Va.) 735, 743, said: "The fact of the shooting, as being a part of the circumstances and of the *res gestæ*, ought not to have been precluded from being given in evidence to the jury, although such evidence might itself have tended to prove a distinct felony committed by the prisoner." *Whart. Crim. Ev.* § 31; *Walters v. People*, 6 Parker, Crim. R. 15. There was no error in receiving this evidence.

There was an admission by the state that certain witnesses, if present, would give certain testimony. This admission, however, was with the reserved right to object to any part of the testimony that was illegal. Part of the testimony was ruled out on the objection of the state. There was no error in this. Witnesses cannot be impeached by proof of particular acts, as facts, either criminal or immoral. Character, or the estimation in the community in which the witness is held, is a legitimate means of impeaching or sustaining him, and neither on direct nor on cross-examination can the testimony go further than to ascertain such character or reputation and the means of knowing it. This excludes all knowledge of facts which the impeaching or sustaining witness may have, with the qualification that, being one of the community, he may take into the account his own estimate of the reputation of the witness, who is attempted to be impeached or sustained, but cannot consider any facts of which he may have knowledge. *De Arman v. State*, 71 Ala. 351; *Moulton v. State*, 88 Ala. —, 6 South. Rep. 758.

The first charge hypothesizes that there was a general row at Mary Goodwin's house, and that she participated in it. There is no proof in the record that she took any part, except an attempt to prevent the shooting. This rendered the charge abstract, and required its refusal for that reason, if for no other. 3 Brick. Dig. p. 113, § 106; *Williams v. Barksdale*, 58 Ala. 288. But it is otherwise faulty. A homicide perpetrated in a row is not necessarily reduced below the crime of murder.

Charges are often asked in the following form: That the jury, in making up their ver-

dict, may consider certain testimony or parts of testimony. Such charges are frequently, if not generally, asked as a species of answer to some point urged in argument. As a general rule, to which there are few exceptions, they should be refused. When the testimony in a cause is made up of several facts or circumstances, all bearing more or less on the question of defendant's guilt, our rulings are that such charges should be refused, for two reasons. *First*, that their tendency is to give undue prominence to those parts of the testimony on which the ruling is invoked; and, *second*, that they, at best, are but an argument to the jury. *Murphy v. State*, 55 Ala. 252; 3 Brick. Dig. pp. 111, 112, §§ 83, 84; *Hussey v. State*, 96 Ala. 34, 5 South. Rep. 484. We have no wish to qualify this general principle. There is, however, a limited, exceptional class of cases, which does not fall within the principle of the rule stated, and therefore does not fall within the rule. Testimony is sometimes admissible only for a specific purpose,—such as the peaceable character of a defendant, who is accused of a crime involving violence; or testimony impeaching or sustaining a witness; or testimony of previous threats, communicated or uncommunicated, made by the person on whom the injury was inflicted; or testimony proving or disproving the character of the person alleged to have been injured for turbulence, violence, or blood-thirstiness. In such cases, it is but right that the jury should be told to what extent this exceptional testimony should be weighed by them. In the last two of the cases supposed, if the jury finds the defendant guilty, the character of the deceased for violence or blood-thirstiness may be considered by them in determining the degree of the homicide. This, because in altercations with persons of such character, doubts are more readily indulged, and prompter defensive measures may become necessary, than would be permitted between persons of peaceable habits. "On all doubtful questions as to who was the aggressor, the violent or blood-thirsty character of the deceased, if such be his character, enters into the account. More prompt and decisive measures of defense are justified, when the assailant is of known violent and blood-thirsty nature. But this principle is confined to defensive measures. It furnishes no excuse or palliation for aggressive action." *De Arman v. State*, 71 Ala. 351, 361.

The second charge asked, simply declared the proper scope and function of the testimony, as applied to this case, and should have been given, whether asked by the prosecution or the defense. For this error the judgment of the criminal court must be reversed.

Reversed and remanded.

ARCHER v. WHITING.

(Supreme Court of Alabama. Dec. 18, 1899.)

GARNISHMENT—SET-OFF—CONSTRUCTION OF BY-LAWS.

1. Where defendant is in the employ of the garnishee under a contract for one year, but by agreement is allowed to draw his salary a week in

advance, and the answer of the garnishee, giving a statement of the dates on which defendant drew his salary, shows that he did not always draw his salary in advance, but sometimes after it was earned, and that, too, since service of the garnishment, a charge that if the jury believe the evidence they must find for the garnishee is erroneous.

2. Where the agreement is that defendant's salary is to be paid by the garnishee weekly in advance, a debt which defendant owes the garnishee cannot be used as a set-off, unless there is some agreement by which the debt is to be paid out of defendant's salary.

3. Under a by-law of a corporation providing that "the directors shall elect from their number a president, vice-president, and such other assistants as are necessary, said assistants to hold their office at the pleasure of the directory," the president is not included in the term "assistants."

Appeal from circuit court, Mobile county; WILLIAM E. CLARKE, Judge.

This was a garnishment proceeding. The appellant, Archer, recovered a judgment against a firm, of which J. W. Whiting was a member, in May, 1885, and on that judgment made affidavit, gave bond, and had the garnishment in this case served on the People's Savings Bank on July 20, 1885. In response to this writ of the garnishment, the garnishee, People's Savings Bank, filed its answer in writing December 16, 1885. On motion of the plaintiff, the court made an order requiring the garnishee to answer further in open court, and continued the cause for such answer. In obedience to this order of the court, the garnishee, by agreement of counsel, filed another further answer in writing to certain questions propounded to it by the plaintiff, on June 14, 1888. The answers were contested, and issue thereon was duly made. These answers show that the defendant, Whiting, was elected president of the garnishee corporation; that said position is an annual salaried office; that its term is one year from the date of each annual election; that Whiting was first elected to that office on February 5, 1884, to fill the unexpired office of one Peter Stark, and that he had been elected to that office either on the 1st or 2d of July of each year since. The third by-law of the garnishee, which pertains to the election of officers, is in the following language: "The directors shall elect from their number a president, vice-president, and such other assistants as are necessary, said assistants to hold their office at the pleasure of the directory. The directors shall fix all salaries, and require such bonds for the faithful performance of duties as they may deem best." When Whiting was first elected on February 5, 1884, the amount of his salary was not fixed; but, by a resolution of the board of directors adopted February 9, 1884, the salary of the president was fixed at \$200 per month from the 1st of February, 1884. On November 19, 1884, said Whiting asked the consent of the board of directors to be allowed to draw his salary a week in advance, which consent was granted by the board. Upon his re-election on July 1, 1886, his salary was increased to \$3,000 per annum; and upon his re-election on July 1, 1887, his salary was again fixed at \$3,000 per annum. On July 31, 1885, 11 days after the service of the writ of garnishment on the People's Savings Bank, the board of directors of the garnishee, at the request

of Whiting, adopted a resolution to the effect that the garnishee enter into a written contract with Whiting to the effect that, so long as he should remain the president of the bank, it will pay him weekly, in advance, his salary as such president; provided, that the bank may at any time, upon one month's notice to him, revoke this resolution, and cancel such contract; and on the same day the terms of said resolution were embodied in a written instrument, and was signed and executed by Whiting and a duly-authorized agent of the bank. Attached to the answer of the garnishee, in response to a demand by the plaintiff, there were statements showing the dates at which J. W. Whiting drew his salary. It was contended by the plaintiff that these statements showed that Whiting did not always draw his salary in advance, but sometimes after the same had been earned, and that, too, after the service of the garnishment. The answer of the garnishee also alleged that when the writ of garnishment was served on it Whiting was indebted to the bank in the sum of \$7,982.61, for which they held specified collaterals as securities. This amount had been reduced, when the second answer was filed, to a balance of \$7,170, by the proceeds of such collaterals. But the answer further states that there was no contract between Whiting and the bank that the salary of the former should be subject or should not be subject to the satisfaction of this indebtedness of his to the bank; but, on the contrary, the bank had not attempted to nor had it retained any part of his salary on account of this said indebtedness. Upon this evidence, the court charged the jury, at the request of the garnishee, that, "if the jury believe the evidence, they must find for the garnishee." The plaintiff excepted to this charge, and now appeals from the judgment rendered by the court, and assigns the same as error.

J. Little Smith, for appellant. *Clarke & Webb and Pillars, Torrey & Hanaw*, for appellee.

SOMERVILLE, J. If the garnishee, at the time of service of the garnishment, or at the time of making the answer, or at any time intervening between these two periods, was indebted to the defendant, Whiting, or if there was then existing a valid and binding contract by which such indebtedness would accrue in the future, this debt, unless exempted from legal process, was subject to garnishment, and the garnishing creditor would obtain a lien on it from the time of the service of the summons on the garnishee. Code 1876, §§ 3268, 3269; Code 1886, §§ 2945, 2946. The test must be, as uniformly and many times settled, whether the bank, as garnishee, owed the defendant such a moneyed demand as could justly have been the basis of a recovery in an action of debt or *indebitatus assumpsit*.

If such a contract existed for a definite time, not by its terms dissolvable at the pleasure of one or both parties, it is perfectly manifest that no change or modification could be made in the terms of such contract, so as in any manner to destroy the acquired lien of the garnishing creditor, or otherwise prejudice his rights. Fow-

ler v. Williamson, 52 Ala. 16; Wap. Attachm. 365. And if any part of the garnished debt was paid by the garnishee to the debtor in attachment, during the pendency of the garnishment proceeding, such payment was at the risk of the garnishee, and can avail nothing against the garnishing creditor, if he is ultimately held liable on his answer. Skipper v. Foster, 29 Ala. 330; Drake, Attachm. (6th Ed.) §§ 452, 453.

It is perfectly competent for an employer to stipulate with an employe, by *bona fide* agreement, that he will pay his wages weekly or monthly, or for any other reasonable time, in advance; and such agreement, when free from fraudulent collusion, will be upheld by the court; and, so long as these payments are made in advance, no debt can accrue for wages or salary due to such employe, and hence the employer cannot be held liable as garnishee under such state of facts. Alexander v. Pollock, 72 Ala. 137; Callaghan v. Manufacturing Co., 119 Mass. 173; Worthington v. Jones, 23 Vt. 546.

The questions arising in the present case can be solved by the proper application of the foregoing principles. Taking the facts as set out in the garnishee's answer as *prima facie* correct, it is a fair inference, from all the evidence, that the implied agreement between Whiting and the bank was that, after his election on July 1, 1885, as president of that institution, he was to be employed for the period of one year at an annual salary of \$3,000, with the privilege of drawing such salary by the week, and each week in advance. We do not construe by-law numbered three in the record to have the effect of rendering the office of president a position held at the mere pleasure of the board. It is only "assistants" who might be employed to aid the president in carrying on the business of the bank who are declared to hold their positions at the pleasure of the board. The use of the word "other" in describing "assistants" means no more than other persons employed as assistants to the president and vice-president. There is no room here for application of the rule of construction that general words are to be restrained to things of the same kind with those particularized, under the principle of *eiusdem generis*.

The memorandum entered on the minutes of the board of directors on November 19, 1884, to the effect that Whiting had asked the consent of the board to be allowed "to draw his salary a week in advance," which was granted, was competent evidence of the fact of mutual assent to this feature of the contract; and, having been made before the service of the writ of garnishment, which was on July 20, 1885, would prevail against the lien of such writ, provided the installments of the salary were actually collected in advance. The privilege of so collecting, in other words, must have been asserted before a debt accrued. But if allowed to remain uncollected until a debt shall have become due, though but for a single day, such debt would at once become subject to the lien of the garnishment; and any subsequent election of the same officer for another term would implicitly confer the same privilege as to the ex-

ercise of this right, unless the terms of the contract as to the time of collection were changed.

The written contract of employment made between the bank and Whiting on July 31, 1885, after the service of the garnishment, could not affect the terms of the contract already existing between them, as implied by Whiting's election as president on July 1, 1885, to the prejudice of the garnishing creditor's rights. That election, as we have seen, was for the term of one year, at a compensation of \$3,000 per annum, with the implied privilege of drawing such salary in advance in weekly installments. But this is no reason why this modification might not operate on any subsequent term of Whiting's presidency, after the lapse of the one extending between July 1, 1885, and July 1, 1886. It would, unless fraudulent, control the terms of the employment after the last mentioned date. Alexander v. Pollock, 72 Ala. 137, and cases cited; Drake, Attachm. (6th Ed.) § 594. A contract, as we have said, may lawfully be made to pay wages in advance, and the amount cannot be reached by garnishment; for, as has been justly observed, this "would be, in effect, the attachment and forced sale of the debtor's personal services, condemning him to involuntary servitude for the payment of his debts." 2 Wade, Attachm. § 473, p. 295, and cases cited in note 15. But the observation again becomes pertinent that the privilege of collecting his salary in advance would be waived by Whiting, unless promptly claimed and exercised by him, and if waived for a single day, so as to create a debt due, the lien of the pending garnishment would at once attach, and the amount thus becoming due would presumptively be subject to such lien, so as to cut off the right of payment to the debtor; and we further hold that no debt for weekly services would become due except in one of the following contingencies: (1) Either the services for the given week must have been performed, or (2) the option to draw the amount in advance must have been asserted by a request to pay.

The set-off interposed by the bank, as garnishee, against Whiting, cannot, in our judgment, be sustained on the facts. If Whiting had sued the bank for his salary, this set-off would have been no defense on the ground of an implied agreement by the bank not to claim it. The agreement, as above stated, was to pay an annual salary, and to pay weekly in advance, if desired; and the evidence shows that it was paid without any consideration of the set-off. The necessary, fair, and honest implication is that the set-off, based, as it was, on an old debt due by a partnership of which Whiting was a member, was not to be claimed against this agreed compensation for his services. The very motive which induced its payment in advance, and a fact which would tend to rebut the charge of fraudulent collusion, may have been the implied need of the money for the maintenance of the debtor. Hall v. Magee, 27 Ala. 414; Wap. Attachm. 367.

It follows from these views that the circuit court erred in giving the charge requested by the garnishee. Reversed and remanded.

PRENTISS et ux. v. PAISLEY et al.

(Supreme Court of Florida. Jan. 13, 1890.)

BILL OF REVIEW—HUSBAND AND WIFE—CONTRACTS OF WIFE—PERSONAL JUDGMENT.

1. A bill of review, for error of law apparent upon the record, will lie, although the decree sought to be reviewed is a final decree, consequent upon a decree *pro confesso*, for failure of the defendant to plead.

2. Where the bill does not justify the final decree following the decree *pro confesso*, a bill of review for error apparent upon the record is a proper remedy for relief in the court rendering such decree, and an appeal the remedy through the appellate court.

3. A married woman is by the common law incapable of making a contract that will bind her personally, either in law or equity; and for this reason there cannot, in the absence of legislation changing the common law, be a judgment or decree against her personally for the recovery of money, as distinguished from a decree charging her separate equitable estate, or other property, with the payment of money. No exception to this rule is created by the existence of a marriage contract between husband and wife giving her the right to control and manage her separate estate and property the same as if she had remained unmarried.

4. A married woman is personally liable for her civil torts, including such frauds as do not grow out of, or are not directly connected with, or a part of, a contract which she has undertaken to make.

5. Wherever coverture avoids a contract which a wife has attempted to make, it likewise bars a personal recovery against the wife on the ground of the fraud connected therewith; and the bar cannot be overcome by suing her in an action *ex delicto*.

6. It is error to decree a recovery of money of or against a married woman personally, in a suit in equity instituted to set aside a contract for the sale of land on the ground of fraud, and to recover the amount of a cash payment made thereon by the complainant.

7. The marital relation does not of itself disqualify a husband from acting as the agent of his wife with reference to her separate estate.

8. The person in whom the legal title to property is vested in trust for a married woman is a necessary party to a bill seeking to charge the property with the payment of money paid to her.

(Syllabus by the Court.)

Appeal from circuit court, Marion county; J. J. FINLEY, Judge.

Miller & Spencer, for appellants. S. D. McConnell and W. H. Ingram, for appellees.

RANEY, C. J. This is an appeal from an order denying an injunction and dismissing a bill of review.

The bill of review, considered as one for error of law apparent upon the face of the record, is maintainable. The term "record," as used in connection with such bills, means the pleadings and decree in the cause as to which the complaint is made. Whiting v. Bank, 13 Pet. 6; Shelton v. Van Kleeck, 106 U. S. 532, 1 Sup. Ct. Rep. 491. Looking at the Paisley decree, complained of, we perceive one of its features to be a personal recovery against Mrs. Prentiss, and the pleading or bill shows the claim to be for a money demand growing out of a contract; the sum recovered being the amount of a cash payment alleged to have been made on a contract for the sale of land, in which the complainant charges he has been defrauded.

A married woman is by the common law incapable of making a contract that will

bind her personally, either in law or equity; and for this reason there can be no personal judgment or decree of recovery against her. Goss v. Furman, 21 Fla. 406; Randall v. Bourgardez, 23 Fla. 264, 2 South. Rep. 310; Dollner v. Snow, 16 Fla. 86; 1 Bish. Mar. Wom. § 601; Pilcher v. Smith, 2 Head, 208; McQuaid v. Fontane, 24 Fla. 509, 5 South. Rep. 274; Choppin v. Harmon, 46 Miss. 304; Bank v. Williams, Id. 618; Cary v. Dixon, 51 Miss. 593; Mallett v. Parham, 52 Miss. 921; Bank v. Partee, 99 U. S. 325; Wallace v. Rippon, 2 Bay, 112; Rodemeyer v. Rodman, 5 Iowa, 426; Lewis v. Perkins, 38 N. J. Law, 133; Pents v. Simonson, 13 N. J. Eq. 232; Pier-son v. Lum, 25 N. J. Eq. 390. Several of the above authorities are to the effect that where she has been given authority by statute to make personal contracts the proceedings must show the existence of the special circumstances as to or under which the power has been conferred or may be exercised; and others of them adjudicate that, when it is sought to charge her property with liability, the bill, or other proper pleading, must show the character of her estate in the property sought to be charged, in order that the court may know that it is chargeable. The decree assailed does not adjudicate a charge upon any particular estate or property of Mrs. Prentiss, but the feature of it in question is a personal recovery. If it be that a personal judgment or decree may be rendered against a married woman licensed as a free trader under our statute of March 11, 1879, (McClell. Dig. 756, 757,) it is sufficient on this point to say that Mrs. Prentiss is not sued as such.

A married woman is personally liable for her wrongful civil acts or actual torts, including frauds not growing out of, or founded upon, or directly connected with, or a part of, or the means of effecting, a contract which she has undertaken to make; and she may be sued jointly with her husband in respect to such acts, or separately, if she survives him. His liability for her torts is a result of the mere fact that by the common-law rules a suit cannot be maintained against the wife alone during coverture. If, before or pending the action, she dies, the right of action against him falls. Whenever her coverture avoids the contract, it is likewise a bar to a personal recovery for the fraud; and this cannot be overcome by suing *ex delicto*. 2 Bish. Mar. Wom. §§ 254-256, 261, 263; 1 Bish. Mar. Wom. §§ 842, 905-908; Owens v. Snodgrass, 6 Dana, 229; Smith v. Taylor, 11 Ga. 20; Kowing v. Manly, 49 N. Y. 192; Association v. Fairhurst, 9 Exch. 422; Wright v. Leonard, 11 C. B. (N. S.) 258; Capel v. Powell, 17 C. B. (N. S.) 743. As to when a tort will be deemed the wife's, and when the husband's, *vide* 1 Bish. Mar. Wom. § 905, and 2 Bish. Mar. Wom. §§ 257-260. The fraud in the case before us, in so far as it is imputable to the wife, is not one sounding in tort, but is a part of, and directly connected with, the contract for the sale of the land, and hence not one as to which there is a personal money liability, or can be such a personal decree or judgment, as to her.

The bond for title executed by Prentiss

and wife not being a basis for the money recovery against Mrs. Prentiss personally. (Norton v. Turvill, 2 P. Wms. 144; Dollner v. Snow, supra; 1 Bish. Mar. Wom. § 842,) the order of the chancellor was erroneous. Still it is proper, in view of possible future proceedings, to notice another feature of the proceedings before remanding the cause. The Paisley bill states, in effect, that the land involved in this controversy was included in a deed of trust made by Dr. Butte, the former husband of Mrs. Prentiss, to Mrs. Simmons, and providing that the land could not be conveyed by Mrs. Butte, but could be conveyed by the trustee upon the written request of Mrs. Prentiss. The bill of review represents that on July 11, 1885, prior to the marriage between Mrs. Butte and Prentiss, they entered into a marriage contract, whereby the latter agreed to relinquish and surrender to the former his right to control and manage her separate estate and property described in the above deed of trust, which is dated August 23, 1883, and any other separate property then owned, or that she might thereafter own, and that he would suffer and permit, and it authorizes her, without let, hindrance, molestation, or interference on his part, to hold, occupy, "exert," and enjoy the absolute, unqualified control and management of all such property owned or to be owned by her, with all the rents, issues, and profits, and all the receipts and income therefrom by sale, mortgage, lease, or otherwise, as fully and absolute, and as free from his debts, as if she remained single and unmarried; he surrendering and relinquishing all his marital rights, and also the management and control of her property as her husband, under the laws of this state, and it being stipulated that she does not part with the right to dispose of the interest surrendered to her by Prentiss.

These allegations would not have the effect to create any exception to the doctrine announced above as to the money decree, and the only further observation necessary to be made as to them now is: If it be that a cash payment was made to Mrs. Prentiss, or to her husband for her, with her consent or as her authorized agent, which relation he could sustain to her. (Tresch v. Wirtz, 34 N. J. Eq. 124; Baum v. Mullen, 47 N. Y. 577; Pentz v. Simonson, supra,) and under the circumstances of the case, as they may be shown to exist, the land involved, or her other property, if she have any, can be charged with such payment, the trustee is, as suggested by counsel for appellants, a necessary party to any proceeding seeking to charge any property included in that trust. (Lewis v. Yale, 4 Fla. 418; Dollner v. Snow, supra.) Whether or not her property is so chargeable is a question we do not feel called upon to discuss, in the absence of both proper pleadings and necessary parties.

Though the decree assailed is one absolute upon a decree *pro confesso*, we think a bill of review for error apparent is a proper remedy. Stribling v. Hart, 20 Fla. 235; Maynard v. Pereaute, 30 Mich. 160. The purpose of a bill of review for error apparent is to have the court rendering the decree

give the same relief that the appellate court might under the same circumstances. Evans v. Clement, 14 Ill. 206. Where the bill does not justify the final decree which has been taken upon a decree *pro confesso*, relief may be had from the appellate court on an appeal. (Hart v. Stribling, 21 Fla. 136;) and the same may be secured through a bill of review from the court rendering the decree.

The decree appealed from should be set aside. If Paisley shall desire to amend his bill, he should be permitted to do so, and, as a consequence, his decree should be vacated, and his cause proceed on the bill as it may be amended; but, should he elect rather to stand upon his decree, modified to the extent of the personal money recovery against Mrs. Prentiss, his decree should be modified merely as to such relief against her.

The cause will be remanded for proceedings not inconsistent with this opinion.

FERNANDEZ v. CITY OF NEW ORLEANS.

(Supreme Court of Louisiana. Jan. 6, 1890.)

MUNICIPAL CORPORATIONS—INDEBTEDNESS—INTEREST.

The city of New Orleans owes legal interest on claims against her, only where there is money in the municipal treasury out of which the same can be paid, and where, notwithstanding demand, she refuses to pay; particularly is such the case when it has been agreed that payments shall be made as soon as it may be properly ordained for.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; KING, Judge.

B. K. Miller, for appellant. Sam. L. Gilmore, for appellee.

BERMCDEZ, C. J. The only question presented in this controversy is whether the plaintiff is or not entitled to interest on his claim for \$10,876.13 against the city, which interest the lower court declined to allow. The claims which the plaintiff presses arose under contracts made in 1884 and 1886 by the city and the Brush Electric Light & Power Company, in which it was stipulated that the amounts to become due were "to be paid in equal and monthly installments, in cash current money, on the first day of each and every month, or as soon thereafter as such amounts may be properly ordained for, in the usual manner." It appears that accordingly appropriations were made monthly to meet such engagements, and the comptroller was directed to warrant on the treasurer in payment of the same, whenever there shall be money in the city treasury to the credit of the appropriated fund, proper ordinances being adopted in furtherance. The testimony shows that there has never been any money in the treasury, or money collected which ought to have gone into it, out of which the claims could be legally paid, and also that no demand was made for payment to the city. In order to determine whether the plaintiff is entitled to the interest, it becomes necessary to ascertain if the city is or not in default. The law says that "the damages due for delay in the performance of an obligation to pay money are called interest," (Rev. Civil Code, art.

1935;) and that the penalty is forfeited only when he who has obligated himself is in default, (article 2126.) Hence it is that legal interest runs on a claim, only when payment is demandable and exigible.

In the present instance, the agreement as to payment was that the amounts due were to be paid in equal and monthly installments on the first day of each and every month, or as soon thereafter as such amounts may be properly ordained for in the usual manner. Those who deal with municipal corporations are bound to know, at their peril, what are the rights vested in them, and in what manner and under what circumstances the power conferred can be exercised. Dill. Mun. Corp. § 457. The electric company, from whom the plaintiff derives the claims which he preserves, therefore well knew that, under Act 30 of 1877, which must be read into the contract, no city officer could issue any warrant for payment of money, unless against money already in the treasury of the corporation. It is true that the city council has passed ordinances for the payment of several items constituting the claim of the plaintiff; but the council has been careful, in each and every ordinance, to direct payment of the same, whenever there shall be money in the city treasury to the credit of the appropriated fund. The comptroller could issue a warrant, and the treasurer could pay the same, only in the contingency that there would be money in the municipal coffers out of which the same could be satisfied. It did enter in the consideration of the contract that the amounts would be paid monthly, or as soon as the amounts would be properly ordained for, in the usual manner. The contract meant: The city will pay in the month following, if there is money in the treasury, and, if there is none, as soon after that time of payment as there shall be money in the treasury on which a warrant can be drawn legally. The ordinances were therefore very guarded, and, as they are relied on by the plaintiff, they conclude him.

It is therefore clear that when the company, in whose place the plaintiff stands, contracted with the city, it did so on the faith that it would be paid out of expected revenues to be appropriated for its payment, and merely acquired rights to be paid out of such fund, contingent upon its being realized and paid into the treasury, and upon a warrant being drawn therefor only when actually deposited there. *Association v. New Orleans*, 33 La. Ann. 571; *Fire Engine Co. v. New Orleans*, 39 La. Ann. 982, 3 South. Rep. 177.

Since there has not been any money in the treasury on which warrants could have been drawn, how can it therefore be said that the city is in default? It is evident that the city could have been considered guilty of a breach of contract, only if there had been funds in the treasury, and if a demand by plaintiff to be paid out of it had been declined by the city. Had there been funds, and had the city refused, there would have been a delinquency, and, as a penalty for failing to perform her obligation, the city would have been liable for judicial interest to the plaintiff as damages. Under the showing made, the city was not

in default, and the plaintiff cannot recover the interest claimed.

Judgment affirmed.

CITY OF NEW ORLEANS v. CLARK et al.
(*Supreme Court of Louisiana*. Jan. 6, 1890.)

INTOXICATING LIQUORS—LICENSE.

1. While persons transacting business both as wholesale and retail dealers are liable to license in each capacity, the evidence in this case does not satisfy us that defendants carry on a wholesale business within the meaning of the law.

2. The proviso in the license act to the effect that retail grocers who sell liquors in less quantities than five gallons shall pay additional license, as provided in section 11 of the act, cannot be applied, because section 11 regulates several distinct kinds of business, with different systems of license, none of which embraces the business of defendants, and therefore it furnishes no certain rule applicable to the latter.

3. Hence the only rule applicable is that found in the clause fixing the additional license at "not less than fifty dollars."

4. This construction does not make the license unconstitutional for want of graduation, because the business of retail grocer, of which this additional business only forms part, is, as a whole, duly classified, and the addition of a fixed sum to each class does not destroy the graduation.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

W. B. Sommerville, for appellant. *J. McConnell*, for appellee.

FENNER, J. This case involves a controversy as to the amount of license due by defendants to the city under the license ordinance of 1889, which is a transcript of the state license law. Act 101 of 1886. The points of the controversy are two: (1) Whether defendants, who have paid license as retail grocers, are liable for an additional license as wholesale grocers; (2) the amount of license due by them as retailers of liquors in less quantities than five gallons.

1. We have decided that merchants who transact business both as wholesale and retail dealers are liable to a license in each capacity. *City of New Orleans v. Koen*, 33 La. Ann. 323. We see no reason to disturb the finding of the district judge that the evidence in this case does not establish that defendants carry on a wholesale business within the meaning of the ordinance or the statute.

2. The law contains the following proviso: "Provided, that if any distilled, vinous, malt, or other kind of mixed liquors be sold in connection with the business of retail merchant, grocer, restaurant, oyster-house, confectionery, or druggist, in less quantities than five gallons, the license for such additional business shall be as hereinafter provided for in section 11 of this act: provided, further, that no license shall issue to sell liquors in less quantities than five gallons for less than \$50." Defendants admit that they sell liquors in less quantities than five gallons, and concede their liability for a license of \$50 for this additional business. The city claims that the license must be regulated according to section 11 of the act, and, if we could find any means of applying such regulation, we should enforce it. But, referring to sec-

tion 11 we find that it regulates three classes of business, each by a different system of graduated licenses, viz.: (1) The business of "keeping a hotel;" (2) the "business of bar-room, cabaret, coffee-house, cafe, beer saloon, liquor exchange, drinking saloon, grog-shop, beer-house, beer-garden, or other place where anything to be drunk or eaten on the premises is sold, directly or indirectly;" (3) the business of "persons * * * engaged in the sale of soda-water, mead, confections, cakes, etc., exclusively." Now, defendants do not keep an hotel; they do not keep a soda-water and confectionery establishment; and it is positively proved that they do not keep a cabaret, bar-room, or any other class of establishment nominated in the section, and that nothing "to be drunk or eaten on the premises is sold, directly or indirectly." There is no better reason for requiring defendants to pay the license exacted of a bar-room than to pay that exacted from a soda-water and confectionery shop; and, as to the latter, the highest license imposed is \$50. No consideration of reason, policy, or morals suggests a preference between the several classes of licenses provided for in section 11. When, therefore, we obey the direction of the statute, and refer to section 11, we find there no certain rule by which to regulate defendants' license. We therefore fall back on the other provision, which unambiguously declares that it shall not be less than \$50, and approve the finding of the district judge in fixing it at that amount. The suggestion of the city, that this would have the effect of making the licenses unconstitutional for want of graduation, is not correct. This additional business is only part of defendants' business as retail grocers, the license on which business as a whole is duly graduated, and the addition of \$50 to each class in cases where liquors are sold does not destroy the graduation.

Judgment affirmed.

Rehearing refused.

CITY OF NEW ORLEANS v. ORLEANS R. CO.
(*Supreme Court of Louisiana. Jan. 6, 1890.*)

MUNICIPAL CORPORATIONS—TAXATION—BONUS.

1. A contract between a municipal corporation and a railroad company, by which the latter pays a bonus for the franchise therein conferred by the city, cannot be construed as conferring an immunity from the payment of a license on its business by the company, in the absence of an express stipulation to that effect in the contract.

2. No exception of a particular institution is to be implied from the payment of a bonus, as that would be to set up judicial implications against an express exercise of the taxing power.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

F. N. Butler, for appellant. *W. B. Somerville*, for appellee.

POCHE, J. The defendant corporation appeals from a judgment enforcing the claim of the city of New Orleans for a license of \$250 for the privilege of conducting the business of operating and running a street railroad for the transportation of passen-

gers within the limits of the city for the year 1888. Its grounds of resistance are: (1) The unconstitutionality of Act 101 of 1886, under which the city predicates its rights to enforce the license under discussion, on the ground that the statute does not rate or grade licenses in compliance with the provisions of article 206 of the constitution. (2) That, by the terms of its contract with the city of New Orleans, the company had acquired its right to operate its road for and in consideration of the sum of \$10,000, payable in five equal annual installments, and that thereby the city had exhausted its power to lay any further tax on the defendant's franchise.

The identical defenses were set up in the case of the New Orleans City & Lake R. Co., decided adversely to the defendant by this court last year, and reported in 40 La. Ann. 587, 4 South. Rep. 512. On the present appeal the defendant does not press the first point of its defense, as hereinabove stated; but its counsel solicits consideration of our views on the second point of the controversy, and suggests that our conclusions on the question are antagonized by several decisions of the highest authority and respectability, which he submits for our consideration.

We have carefully examined those decisions, and we found in them no utterance or principle announced at variance with our reasoning in the case assailed as erroneous, but a great deal to establish and to confirm the correctness of our conclusions, to which we shall adhere. We shall now refer to the cases relied upon.

The case of *Gordon v. Tax Court*, 3 How. 133, (15 Curt. Dec. 338,) presented the attempt of the state of Maryland to levy a tax on the stockholders of a bank for their stock, in the face of a previous act of the legislature, which had accepted a bonus from the bank in lieu of taxation, and the supreme court of the United States held the state to its contract. The syllabus reads: "Where the legislature of a state accepted from banking corporations a bonus as a consideration for the franchise granted, and pledged the faith of the state 'not to impose any further tax or burden upon them during the continuance of their charters under this act,' held, that a tax upon the stockholders, by reason of their stock, was a violation of this contract, and the tax was illegal."

The following extract from the syllabus of decision in *Bank v. Knoop*, 18 How. 376, (4 Abb. Nat. Dig. 372,) is sufficient to show that the case has no bearing on our present discussion: "The legislature of a state, if not restrained by its constitution, may make a valid and binding contract with a banking corporation, by a provision in its charter that no more than a specified amount of taxes shall be levied on its property during a term of years, and a succeeding legislature has not power to pass a law impairing the obligation of such contract."

The issue decided in the case of *Bank v. Skelly*, 1 Black, 436, is sufficiently stated in the following extracts from the head-notes of the decision: "The charter of a bank is a franchise which is not taxable, as such, if a price has been paid for it, which the legislature has accepted with a declaration

that it is to be in lieu of all other taxation." The italics are ours, and the words thus emphasized actually demonstrate the striking difference between that and our case.

In the case of *Railroad Co. v. Sabin*, 28 Pa. St. 242, the supreme court of Pennsylvania recognized in very clear language the legal difference between a "bonus" and a "tax," which underlies our decision now under discussion, when it said: "It sometimes happens that a bonus is demanded and received from a bank or other corporation at the granting of its charter, and afterwards all that class of corporations are expressly subjected to another rate of taxation. No exemption of a particular institution is to be implied from the payment of the bonus, for that would be to set up judicial implications against an express exercise of the taxing power."

In our case we are called on to set up a judicial implication of the exemption from the license for which there is not the slightest stipulation in the contract by which the company acquired a removal of its expired franchise, simply for the reason that the contract stipulated the payment of a bonus for a valuable franchise for a term of twenty-five years." It is a principle clearly deducible, from the very decisions quoted by defendant's counsel, that no corporation can claim immunity from taxation or from a license because it paid a consideration for its charter or franchise, in the absence of a stipulation on the part of the state or other taxing power that the bonus was received in lieu of any further or future taxation. We therefore conclude that our former decision must remain untouched, and that this case was correctly decided below.

Judgment affirmed.

STATE V. MAY.

(*Supreme Court of Louisiana. Jan. 6, 1890.*)

RAPE—ASSAULT WITH INTENT TO COMMIT.

On an indictment for rape, a verdict of "guilty of an assault with intent to commit rape" is authorized by section 1053, Rev. St., and is responsive to the charge, its meaning and effect being to find the defendant not guilty of rape, but guilty of the attempt.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. John Baptist.

Gervais Leche and *Walter H. Rogers*, Atty. Gen., for the State. *Chas. A. Baquie*, for defendant.

FENNER, J. Defendant was indicted for rape, and the verdict of the jury was: "Guilty of an assault with intent to commit rape." Such verdict is authorized by section 1053, Rev. St., which provides that when a person is indicted for any crime or misdemeanor "the jury shall be at liberty to return as their verdict that the defendant is not guilty of the crime or misdemeanor charged, but is guilty of an attempt to commit the same," etc.

The defendant complains, on motion in arrest, that the verdict is not responsive to the charge, and does not comply with the statute, in that it does not pass upon

his innocence or guilt, of the crime charged. This is a quibble. The meaning and effect of the verdict are to find the accused not guilty of the crime charged. Mr. Wharton lays it down as a fundamental rule that "a verdict of guilty on one count, saying nothing as to the other counts, is equivalent to a verdict of not guilty as to such other counts." 3 Whart. Crim. Law, § 3180. The same principle clearly applies to this case. Judgment affirmed.

SUCCESSION OF BOBB.

(*Supreme Court of Louisiana. Jan. 6, 1890.*)

WILLS—REVOCATION.

A subsequent will, showing by its whole tenor that it was intended to contain all the testamentary dispositions of the deceased, revokes a prior will, in so far as it contains dispositions incompatible with those contained in the will last made.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

Bayne, Denegre & Bayne, for appellants. *Henry C. Moller* and *Gurley & Mellen*, for appellee.

POCHE, J. The question involved in this controversy grows out of the decision of this court in the same succession, reported in 41 La. Ann. 247, 5 South. Rep. 757. In that case the main question under discussion involved the proper distribution of the residuum of the property after the payment of debts and the satisfaction of special legacies under the will of the deceased, dated December 15, 1884. On that point the decision of the court was to the effect that the residuum of the estate had not been disposed of by the testatrix, and that it should go to her heirs at law in equal shares. On the part of Mrs. Josephine Hamilton and of Mrs. Lucie E. Reeder it was there contended that, under a proper construction of the will, they had been instituted residuary legatees, and that as such they were entitled to the residuum of the succession. Subsequently to the rendition of our judgment the same parties opposed the distribution of said residuum by the executor under the terms of our decree, on the ground that by the dispositions of a will of the deceased of date of March 11, 1884, which they had in the mean time caused to be probated, they were entitled, as residuary legatees, to the balance of the funds in the hands of the executor. Their opposition was met by Mrs. A. H. Crichton, one of the four heirs at law of the deceased, by (1) an exception of estoppel by *res judicata*; (2) in the alternative, the defense that the will of the 11th of March, 1884, in so far as it tended to institute residuary legatees, had been revoked by the will of December 15, 1884, which had been probated, and had been recognized by opponents themselves as the only and last will of the deceased, and which contained no such disposition. Opponents prosecute this appeal from a judgment which dismissed their oppositions.

1. By agreement between the parties, the record of the case previously decided by this court is made part of the transcript in

the present controversy. From that record it appears that the will of March 11, 1884, was offered in evidence in the previous case, and in argument here, both in brief and orally. Certain dispositions in that will were held up by opponents' counsel as indicating the intention of the testatrix to institute the then and the present opponents as her residuary legatees. And in determining the issue there tendered the court considered together the clauses in the two wills which were set up by opponents as containing the intention of making a testamentary disposition of the whole estate. It was conceded on all sides, and it was considered by the court, that the clause of the will of December 15, 1884, which was the main subject of discussion in our opinion, was somewhat ambiguous, and hence the court was invited and requested by opponents' counsel to invoke the meaning of the corresponding clause in the will of March 11, 1884, as a guide to properly interpret the will of the testatrix touching the residuum of her estate. The argument was pointed and strenuous that any doubt on the subject resulting from the language used in the will of December would be quickly dispelled by reference to the corresponding clause in the will of March, 1884. Referring to that clause, opponents' counsel said in their brief: "This language is, to our minds, clear, and in accord with the construction given by the court, [*a quo*.] The other wills made by Mrs. Bobb—one made during the same year, and the other made a year before—substantially agree with the will probated." Now, this assertion is either true in law and in fact, or the corresponding clauses in the wills of March and of December, 1884, clashed with each other on the subject of the residuum of the estate. As stated, both wills were before the court, and both were construed in the decision of the mooted question. If the clauses of the respective wills agreed on the subject, the decision of the court must be construed as holding that the residuum was not disposed of by either will. If they clashed, and were therefore incompatible, or entirely different, the decision of the court must be construed as meaning that the disposition in the prior will had been revoked by the disposition on the same subject contained in the "posterior testament." Civil Code, art. 1693. And it is clear that under either horn of the dilemma the present opponents, who were opponents there, contending for the same relief, invoked under the posterior testament, propped and supported by an invoked construction of the prior will, must be estopped from again presenting the identical issue for judicial determination.

2. It is true that in its opinion the court makes no reference to the prior will, and restricts the discussion of the posterior or last testament; but the record shows that both wills were before the court, and the fact is that in dealing exclusively with the will of December 15, 1884, the court considered that as the sole will of the deceased, and that from its whole tenor, as compared with the previous wills, it appeared clearly to have been intended by the testatrix to have been made in lieu, and to have been substituted in the place, of all other

and prior wills made by her, all of which had been thus and thereby revoked and annulled.

3. We are satisfied, from inspection of all the proceedings had in this succession, and from a comparison of the various wills with each other, that such is the case, and that such was the understanding of all parties, from the incipency of the differences and troubles which have grown out of this succession. Hence it was that these opponents, while they offered the prior wills in evidence in the first suit, and sought to fortify their position by means of such wills, as guides for construction of the last will, never thought of seeking to probate the will of March 11, 1884, until they had reaped all the advantages of special legacies from the posterior testament, and until it had been judicially determined that they could not, in addition, be recognized as residuary legatees under its terms. We therefore conclude that their oppositions were properly dismissed.

Judgment affirmed.

IVERS v. RYAN.

(*Supreme Court of Louisiana. Jan. 6, 1890.*)

MALICIOUS PROSECUTION — RENT — PROVISIONAL SEIZURE.

1. The principle has been definitely and well settled that an action cannot be assimilated to and treated as a malicious prosecution, and the plaintiff therein held liable for exemplary damages, unless it discloses a want of probable cause.

2. The judgment of the court, in such suit, dissolving a writ of provisional seizure, is final and conclusive as to the illegality of its issuance.

3. In such case the defendant in the rent suit is limited to the recovery of actual damages, in case the proof shows that plaintiff therein had probable cause for resort to the writ.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

E. N. Whittemore, for appellant. *E. Skinner* and *W. R. Richardson*, for appellee.

WATKINS, J. The plaintiff was the defendant in the suit entitled *Phillip Ryan v. Mrs. Dolhonde*, in the first city court of the city of New Orleans, in which demand was made for arrearages of rent, and her effects were provisionally seized. On the trial thereof the writ was dissolved, but the judgment condemned the defendant to pay the sum of \$15.60, and the cost of the main demand, and the plaintiff to pay the cost of the provisional seizure. Soon after this judgment was rendered this suit was brought, for \$2,500 damages, remunerative and exemplary. The items are as follows, viz.: (1) Actual damages, for attorney's fees, \$25; (2) loss of time in attending court and annoyance, \$475; (3) exemplary or vindictive damages, \$2,000,—\$2,500. The case was tried by a jury, and there was a verdict and judgment for \$225 in plaintiff's favor; and the defendant has appealed.

An examination of the statement of facts and the record of the suit in first city court shows the latter was "filed on the 12th of April, 1888, and demand was made for \$32, as the balance of rent due, and a writ of provisional seizure was issued, and a con-

structive seizure was made of the tenant's household effects, which were found in a house in a different neighborhood, to which she had removed on vacating the leased premises. On the first trial there was judgment in favor of the plaintiff for \$13 only, but on the new trial the allowance was increased to \$15.60. The two decrees are in other respects the same.

The plaintiff was a tenant of defendant's premises, No. 363 Tchoupitoulas street, by the month; each month of tenancy ending on the 4th of the month. On April 5, 1888, \$13 rent was tendered by the plaintiff, and same was by defendant refused; and his refusal was accompanied by a demand made on her to vacate the leased premises. She remained in possession until the 9th of April; and, having made another ineffectual tender of \$13, she removed from the premises, at the same time making a third tender of that sum, and returned the keys of the house, which were accepted. At the time of this occurrence the rent was, and for months previous it had been, \$13 per month; and this the plaintiff paid promptly.

While, under this state of facts, a provisional seizure was unjustifiable in law, as the contract of lease had actually terminated before suit was brought, and the tenant had tendered all that was due thereunder, and had removed from the leased premises, yet she owed her former landlord something for the time she continued to occupy the house after the rent expired. In the judgment of the city court there is an allowance on that score of \$2.60. It is apparent that the plaintiff in that case had probable cause for a resort to the writ, as his claim was not wholly groundless; for it is easy to see how he and his counsel might have made a mistake in regard to the continuance of the lease by tacit reconduction, resulting from the tenant's continued occupancy of the leased premises. The effect of recognizing the applicability of this principle is the disallowance of all the plaintiff's demands except for actual damages incident to the provisional seizure of her furniture. *Barrimore v. McFeely*, 32 La. Ann. 1182.

The principle has been definitely settled that an action cannot be assimilated to and treated as a malicious prosecution, and the plaintiff therein held liable for exemplary and punitive damages, unless it was wholly groundless,—without probable cause; for, though a plaintiff bear ill will or malice towards the defendant, a cause of action for such damages does not exist, if there be grounds for the suit. *Coleman v. Insurance Co.*, 36 La. Ann. 92; *Roos v. Goldman*, Id. 133; *Dearmond v. St. Amant*, 40 La. Ann. 374, 4 South. Rep. 72; *Grant v. Deuel*, 3 Rob. (La.) 17; *Digard v. Michaud*, 9 Rob. (La.) 387; *Penny v. Taylor*, 5 La. Ann. 714; *Gould v. Gardner*, 8 La. Ann. 11; *Barton v. Kavanaugh*, 12 La. Ann. 332; *McCormick v. Conway*, Id. 53; *York v. Chilton*, 4 La. Ann. 377; *Kearney v. Holmes*, 6 La. Ann. 377; *Transit Co. v. McCarren*, 13 La. Ann. 214; *Talbert v. Stone*, 10 La. Ann. 537.

The decision of the judge of the city court is final and conclusive as to the illegality of the issuance of the writ of provisional

seizure. *Cretin v. Levy*, 37 La. Ann. 183; *Roos v. Goldman*, 36 La. Ann. 133.

The defendant in the rent suit is entitled to no damages except counsel fees incurred in relation to the dissolution of the writ of provisional seizure. *Cretin v. Levy*, 37 La. Ann. 182. *Transit Co. v. McCarren*, 13 La. Ann. 214; *Barrimore v. McFeely*, 32 La. Ann. 1182. The seizure of her furniture consisted merely in the appointment of a keeper, who was stationed at the door of the house or apartment which contained it. No part of it was removed therefrom. It was bonded and released almost immediately. No actual damages could have been suffered on that score, under the circumstances.

We think an allowance of \$25 is a liberal compensation for attorney's fees in that suit, and to that amount judgment should be reduced. It is therefore ordered and decreed that the judgment appealed from be amended and reduced to \$25, and, as amended, same be affirmed, and the plaintiff and appellee taxed with costs of appeal.

GUINAULT V. LOUISVILLE & N. R. Co.

(*Supreme Court of Louisiana. Jan. 6, 1890.*)

REMOVAL OF CAUSES—PRACTICE.

1. Under the removal of causes act, the right of removal is determined on the face of the petition as matter of law.

2. The facts alleged are taken as true, and cannot be contested in the state court.

3. If disputed, their truth may be put at issue in the United States court on a motion to remand.

4. The law does not provide for verification of the application by affidavit.

5. Perhaps an affidavit is unnecessary, but, if otherwise, the affidavit of the attorney for a foreign corporation is sufficient.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

W. E. Murphy, for appellant. *Bayne, Denegre & Bayne*, for appellee.

FENNER, J. In May last this case was before us on appeal from an order of removal to the United States circuit court. 6 South. Rep. 850. We then found the application for removal defective, in that it did not affirmatively contradict the allegation in the original petition of plaintiff, to the effect that defendant was a citizen of and domiciled in the state of Louisiana, and we therefore reversed the order, and remanded the cause, reserving to defendant the right to remedy this defect. Defendant thereupon filed a new petition for removal, wherein it is alleged, not only that it is a citizen of Kentucky, but that it is not a citizen of Louisiana, and has no domicile therein. On this petition the judge *quo* granted a new order of removal, from which the present appeal is taken.

The fact that, under the laws of this state, defendant has appointed a resident agent upon whom process may be served, does not affect the question of its domicile and citizenship. We considered and determined this point very recently in the case of *Paving Co. v. City of New Orleans*, 6 South. Rep. 794, (not yet officially reported.)

The same point, as applicable to the re-

removal of causes, has been repeatedly adjudicated by the federal supreme court. *Railroad Co. v. Koontz*, 104 U. S. 10; *Goodlett v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254.

The right of removal is determined on the face of the application, as matter of law. The facts alleged must be accepted, *pro hac vice*, as true. They cannot be contested in the state court. If they are disputed, the United States court, to which the cause is removed, is the proper forum to settle the controversy, where the truth of the fact may be put at issue on a motion to remand. *Railway Co. v. Dunn*, 122 U. S. 517, 7 Sup. Ct. Rep. 1262.

The application and bond complied with all requirements of the law, and the judge *a quo* performed his simple duty in granting the order of removal.

The objection that the petition for the removal is only verified by the affidavit of counsel has no force. The law does not provide specially for any verification by affidavit; and, if affidavit be essential, in absence of any provision to the contrary, the authority of the attorney to make it would be presumed and held sufficient.

Judgment affirmed.

CITY OF NEW ORLEANS v. CARONDELET & CANAL NAV. CO.

(*Supreme Court of Louisiana*. Jan. 6, 1890.)

CANAL COMPANIES—DUTY TO BUILD LEVEES.

1. No contract and no law imposes on the defendant company the particular duty of building levees along the banks of its canal.

2. Whether or not, as the operator and custodian of a canal, it is bound under general law to restrain its waters within the banks, and is answerable for damages occasioned by their escape, responsibility for such damages would be the sole sanction of such an obligation, and the city would not be authorized to build an expensive system of levees along its banks, and claim from defendant the cost thereof.

(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

Francis B. Lee, for appellant. H. D. Ogden and Charles Louque, for appellee.

FENNER, J. The city's demand rests on the following allegations, viz.: (1) That the defendant company, by virtue of its charter and the franchise conferred upon it by the state, has assumed the obligation of maintaining the banks of the canal Carondelet in such condition as to prevent the waters thereof from overflowing and injuring adjacent property; (2) that the defendant had failed to perform this obligation, and that, in 1886, the city, in order to protect its inhabitants, had expended \$18,709.33 in repairing and building revetments and levees along said canal, which work was necessary to prevent overflow of its waters; (3) that the work so done was what the defendant was under obligation to do, and was useful and necessary to defendant, and saved it from the responsibility which it would have incurred for injuries which the overflow would have occasioned, and that, therefore, defendant is bound to reimburse said expenditure.

An exception of no cause of action was

filed in the lower court, and was, as we think, properly maintained. The plaintiff's pleadings set forth the various legislative acts and other proceedings under which the defendant derived its rights and obligations. They have heretofore been considered by this court, and a succinct history of them will be found in our opinion rendered in *Singer's Case*, 39 La. Ann. 478, 2 South. Rep. 102. They exhibit no contractual relation between the defendant and the city of New Orleans. They contain no stipulation *pour autrui* in favor of the city. They neither express nor suggest any obligation on the part of defendant to build levees along the banks of its canal so as to prevent overflows.

The canal Carondelet communicates directly, through the bayou St. John, with Lake Pontchartrain, whose waters, in times of storm, have, from time immemorial, flooded the region through which this canal passed. When this canal was built it passed through an unbroken swamp. It appears on the face of the act of 1805, the original charter, that the corporation was authorized only "to enter in to and upon all and singular the land and lands covered with water, where they shall deem it proper to carry the canals, navigation," etc. Surely such grant did not contemplate the building of levees; and no subsequent alteration has imposed such obligation. It thus appears that defendant had not agreed to assume this obligation, and that no express provision of law had imposed upon it the particular duty of building levees along its canal. We can discover no source of any obligation for failing to do so, unless it arise from a breach of those general duties imposed on all persons, and which are treated of in our Code, under the title, "Offenses and Quasi Offenses."

Article 2317 provides that "we are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." If it were admitted that the owner or custodian of a canal was bound to keep its waters from escaping, and would be answerable for damages occasioned by such escape, would that authorize a third person, not threatened with any personal damages, to build expensive levees along the canal, and claim the cost thereof, on the ground that, if they had not been built, the waters would have escaped, and would have damaged others, which damage the custodian would have been bound to repair? There is no authority sustaining such a right. The case quoted of *Police Jury v. McDonogh*, 10 La. Ann. 395, rested especially on the ground that the law of the state and the police regulations of the parish imposed upon defendant the particular duty of building the levee; and it was therefore held that, as the police jury had built the levee which defendant was bound to build, it was entitled to recover the value of the work. The difference between the cases is too obvious to require further comment.

We must not be understood as holding that, under the particular features of this case, the defendant would be bound for

damages resulting from overflows of its canal resulting from the flooding by the lake; but, if it were, the city's case would be unmaintainable. Judgment affirmed.

Rehearing refused.

STATE V. COOK.

(Supreme Court of Louisiana. Jan. 6, 1890.)

WOUNDING—INDICTMENT—JOINDER OF COUNTS.

1. Under an indictment charging the offense of inflicting a wound less than mayhem, under Act 17 of 1888, amending Rev. St. § 794, it was the duty of the trial judge to give the jury instruction as to the true meaning and significance of the word "maliciously" as it occurs in that statute, and in this respect nothing more was required.

2. When two or more crimes result from a single act, but one indictment will lie, but the different offenses may be separately charged in distinct and different counts, in the same indictment.

(Syllabus by the Court.)

Appeal from district court, parish of Assumption; WALTER GUION, Judge.

W. E. Howell, for appellant. Walter H. Rogers, Atty. Gen., for the State.

WATKINS, J. This appeal presents for consideration three questions: (1) The refusal of the trial judge to give to the jury a requested special charge; (2) his declination to grant a new trial; (3) annulling a motion in arrest of judgment.

The indictment charges in one count that the accused willfully, feloniously, and of his malice aforethought did shoot and wound one Allen Warren with a dangerous weapon, with intent to kill and murder him; and in another count it charges that the accused, in and upon the said Allen Warren, feloniously, willfully, and maliciously did inflict a wound less than mayhem, with a dangerous weapon. Upon the trial, the jury pronounced a verdict of guilty, and in general terms the judge sentenced the accused to imprisonment at hard labor in the penitentiary for four years, and from that sentence and decree he appeals.

1. Counsel requested the court to charge the jury as follows, viz.: "That, in order to find the accused guilty under the second count of the indictment, malice must have been proved beyond a reasonable doubt; and the word 'malice,' as used in section 794 of the Revised Statutes as amended by Act No. 17 of the general assembly of 1888, must be understood and interpreted by the same definition as is set forth by the law-writers of approved authority under the head of 'murder;' and unless such malice is proven as would have made the offense murder, had death ensued, the accused cannot be convicted."

This charge the judge declined to give, in terms, but in lieu thereof he gave the jury the following instructions, viz.: "That the accused could not be convicted under the second count of the indictment unless [the jury] should find, beyond all reasonable doubt, that Allen Warren had been shot and wounded by the accused, and that the accused had acted willfully and maliciously in so doing; that by the word 'maliciously' was meant with evil intent and design, and with the intent to injure, and

not accidentally or lawfully; that it was not necessary that [the jury] should find, in order to convict, that had death ensued the accused would only have been guilty of murder."

Act 17 of 1888 amends section 794 of the Revised Statutes by making it read thus: "Whoever shall willfully and maliciously, with a dangerous weapon, * * * inflict a wound less than mayhem," etc. The amendment consists in the addition of the words "willfully and maliciously" to the original statute. The indictment, in the second count, distinctly charges a wounding less than mayhem, in the words of the amendment. It is therefore quite apparent that the charge given to the jury was pertinent and appropriate.

The question in regard to which the judge was required by the law to give the jury instruction was the meaning and true significance of the word "maliciously," as it occurs in the act under which the indictment was found, and to this question his charge was responsive. It was his duty to do that, and it was not his duty to do more. We think he properly refused to charge that unless such malice is proven as would have made the offense murder, in case death had ensued, the accused cannot be convicted; because that would, in all probability, have been a misleading instruction, as there was no question of an attempt to murder raised by this count of the indictment or the law. For it has been frequently held that a judge should refuse to charge an abstract proposition of law which has no bearing on the case upon trial, whether that proposition be correct or incorrect. *State v. Riculfi*, 35 La. Ann. 770; *State v. Garic*, Id. 970; *State v. Hamilton*, Id. 1043; *State v. Ford*, 37 La. Ann. 443; *State v. Labuzan*, Id. 489; *State v. Daly*, Id. 576; *State v. Durr*, 39 La. Ann. 751, 2 South. Rep. 546.

2. The second bill of exceptions appertains to the judge's refusing to grant the accused a new trial, which was based solely on the ground that the verdict of the jury was contrary to law and evidence. It is elementary that we have no jurisdiction to review the facts on which the verdict depends. *State v. Nelson*, 32 La. Ann. 845; *State v. Selly*, 41 La. Ann. 143, 6 South. Rep. 571. If the verdict is contrary to law, the errors complained of should be set out fully and distinctly in the motion, so that the lower judge may be advised of what they are alleged to be, and in order that we may judge of the correctness and propriety of his ruling thereon. Hence we have often held that we could not examine and pass upon the ruling of a judge in refusing to grant a new trial, when the only ground assigned was that the verdict of the jury is "contrary to law and evidence."

3. The third bill of exceptions is grounded upon the refusal of the judge to sustain a motion in arrest of judgment. The motion is somewhat involved in its verbiage, and somewhat difficult of analysis, but the purport is this: That the indictment in one count charges the accused with shooting with intent to murder, and in a second count it charges him with inflicting a wound less than mayhem; that these two offenses are charged to have been commit-

ted upon one and the same person, and upon the same day; and that said charges are the result or consequence of one act.

Hecomplains that the indictment charges two separate and distinct offenses, under two separate and distinct statutes, (sections 791, 794, Rev. St.,) and for the breach of each of which there is a separate and distinct penalty attached; and no judgment can be rendered thereunder, because, if any crime was committed at all, it resulted from a single act, and was the breach of one single statute, and could not and does not constitute a breach of two separate statutes. It is further to the effect that, if said verdict be carried into effect, he would virtually have been twice tried and punished for the commission of the same act, and his liberty would have been twice put in jeopardy, contrary to the provision of article 5 of the constitution.

The sense of the motion is that the record discloses an error in this, viz.: That the indictment, in two counts, charges two separate and distinct offenses, as flowing from a single act, and that, as the accused cannot be twice tried for the same offense, it is obnoxious to the quoted constitutional provision.

In support of this proposition we are cited to the case of *State v. Augustine*, 29 La. Ann. 119. In that case the court said: "The question presented by this appeal is whether, when a party steals a wagon, and horse harnessed in it, and is indicted, tried, convicted, and sentenced for the larceny of the wagon alone, he can be afterwards prosecuted for the theft of the horse. The horse and wagon being harnessed together the taking of them was a single act, and constituted but one fact. We think that under these circumstances there was but one theft. To hold otherwise would be to permit an unlimited number of indictments to be predicated upon one single fact,—one taking." After detailing the particulars, the court expresses the opinion "that, where two or more crimes result from a single act or fact, but one indictment will lie." The court cited in support of its theory section 1055 of the Revised Statutes, the sense of which is stated to be "that no person tried and acquitted of an offense can be tried for another different offense arising from the same state of facts." We have quoted at length from that opinion for the purpose of showing that its full force may be conceded, and the validity of the indictment under consideration maintained. The effect of that opinion is that, when two or more crimes result from a single act, but one indictment will lie, or, as the defendant's counsel puts it, the accused cannot be twice tried, or his liberty be twice put in jeopardy; but it does not result therefrom that the two or more crimes which result from the same act cannot be cumulatively charged in one indictment, in several counts.

This question was definitely settled in *State v. Green*, 37 La. Ann. 382, in which an indictment, containing two counts, charged the accused with two distinct offenses as arising out of one act, and which was founded upon the identical sections of the Revised Statutes under which the district attorney framed the bill in the instant

case. In that case we said: "It is too clear for argument that both offenses could grow out of the same act. Hence it follows that they are kindred offenses, and belong to the same generic class, and jurisprudence has crystallized the rule that such offenses may be charged in the same indictment, provided they be incorporated in separate counts." Cited in support of that opinion are *State v. Malloy*, 30 La. Ann. 61; *State v. Depass*, 31 La. Ann. 487; *State v. Johns*, 32 La. Ann. 812; *State v. Gilkie*, 35 La. Ann. 53.

In one of those cases (*State v. Johns*) the accused was charged with two distinct offenses, as arising out of one single act, under sections 791, 794, Rev. St., and the indictment was held to be vicious because it contained but one count. But the counsel for the defendant insists that because there was but one verdict, and the judge imposed but one sentence, the indictment must be construed accordingly; but the validity of the indictment must be determined, as a matter of fact, from an examination of its provisions only. It is within the discretion of the judge to sentence the accused under each of the two charges, as he was authorized to have done under a general verdict of guilty. Such was the course pursued by the district judge in *State v. Robinson*, 40 La. Ann. 730, 5 South. Rep. 20, and we approved his action.

We have taken the pains to examine this question with special care, for the purpose of showing that our jurisprudence thereon is plain and free of doubt, and that the indictment is valid, and consistent therewith. Judgment affirmed.

STATE ex rel. PEMBLE, President Police Jury, v. BUCKNER, Judge.

(*Supreme Court of Louisiana*. Jan. 20, 1890.)

RULE AGAINST DELINQUENT TAX COLLECTORS—STATUTES—REPEAL.

1. As a rule, a statute without negative words will not repeal the particular provisions of a former one, unless the two are irreconcilably inconsistent.

2. When the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute, treating the subject in a different manner, and not expressly contradicting the original act, will not be considered as intended to affect the more particular or positive provisions, unless it is absolutely necessary to give the latter such a construction, in order that its words may have any meaning at all.

3. The act of 1873, No. 102, which provides that a rule by the district attorney against a defaulting tax collector shall be tried at chambers when it cannot be tried in term-time, has not been repealed or amended in that respect.

4. Acts 96 of 1882, and 85 of 1888, have merely shortened the time of notice from 10 days, provided in the act of 1873, to 3 days.

5. The purpose of the law is to accelerate the trial, at all times, of proceedings against delinquent collecting revenue officers, for the greater protection of the *fisc* of the state.

6. It is the ministerial duty of the district judge to try such rules at chambers when they cannot be heard and determined in term-time.

(*Syllabus by the Court.*)

Mandamus.

W. R. Rutland, for relator.

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the defendant

judge to try at chambers a rule taken by the district attorney against a defaulting tax collector. The district judge returns that, although the law provides for a summary proceeding, it does not state that such proceeding shall be tried out of term-time at chambers, and that the rule cannot be heard and determined unless in regular term-time.

Act 102, of 1873, p. 181, is to the effect that the judges of the several district courts in this state, outside of the parish of Orleans, shall have authority to try at chambers rule upon any delinquent or defaulting tax collector and sureties, as provided by law, and that it shall be their duty, on the application of the district attorney, within 10 days, to proceed, in a summary manner, to try and determine the same. Sections 1, 2. In 1882, by Act No. 96, § 76, the legislature, considering that the delay of 10 days was too long, shortened it to 3; and in 1888, by Act No. 85, § 78, provided likewise.

Laws are repealed or amended either expressly or impliedly. As a rule, a general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. The reason and philosophy of the rule is that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute, in general terms, or treating the subject in a different manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter such a construction in order that its words may have any meaning at all. Sedg. St. & Const. Law, (Ed. 1874,) p. 98; *State v. Kitty*, 12 La. Ann. 805; *St. Martin v. New Orleans*, 14 La. Ann. 113.

There is nothing in the acts of 1882 and 1888 from which it can be, to any extent, deduced that when the legislature enacted them it intended to do away with that portion of the act of 1873 which required the trial of rules against tax collectors at chambers when it could not take place during term-time. Those acts were not designed to repeal, *unofiatu*, all previous legislation, but to affect only anterior inconsistent laws, and left unimpaired laws on the same subject-matter. Far from complying with the act of 1873, they are in perfect harmony with it, and must therefore co-exist, and be construed together. Section 54 of the act of 1888, to which the district judge alludes, does not sustain his course. It gives to a tax collector the right to proceed summarily, by rule against a person assessed, as well during vacation as in term-time. It is not legislation relative to proceedings against delinquent tax collectors; and, if it were, it would warrant, expressly, such proceedings at chambers. It regulates only proceedings against a person assessed. Indeed, if the legislature wills that such party shall be proceeded against summarily, even during vacation, how much more reason is there that a delinquent tax collector should be brought to account as summarily and promptly as practicable, in order

to protect and save as much as possible the public revenue and the state treasury.

The defendant judge relies also on the ruling in the case of *Police Jury v. Manning*, 16 La. Ann. 182; but it does not bear out his position. The law left a district judge a discretion to try cases of expropriation either in term or during vacation, although they were to be heard and determined summarily, while under the act of 1873 it is made his duty to try rules against defaulting tax collectors during vacation, when the same cannot be tried during term-time. The previous court well said that the purpose of the law in permitting the trial of such rules either in terms or between terms, in court or in chambers, was celerity, (*Police Jury v. Brookshier*, 31 La. Ann. 739;) and the present court, in a kindred case, has said that the law regulating the relations between the state and the gathering of her revenues is of extreme gravity, and must be strictly enforced, (*State v. Gullbeau*, 37 La. Ann. 718.)

The law leaves no discretion to a district judge as to the time when such rules must be tried. If the court is not in session, the district attorney has a right to demand, and it is the ministerial duty of the judge to order, that the rule be tried at chambers, after three days' notice.

It is therefore ordered that the *mandamus* herein asked be made preemptory.

CLINE V. CRESCENT CITY R. CO.

(*Supreme Court of Louisiana*. Jan. 20, 1930.)

COSTS ON APPEAL—PRINTING BRIEFS.

Outlays for printing the brief required by the rules of the supreme court are not charges susceptible of being taxed as costs of appeal, which the party cast is condemned to pay.

(*Syllabus by the Court*.)

Rule for taxation of costs. For opinion on the merits, see 6 South. Rep. 851.

B. R. Forman, for appellant. *J. M. Bonner*, for appellee.

BERMUDEZ, C. J. The plaintiff, having recovered a judgment taxing the costs of appeal against the defendant company, claims that she is entitled to receive, as part thereof, the amount expended by her for the printing of the brief required by the rules of this court, and which was used in this case.

The costs which a party may be judicially condemned to pay are made up, with the charges which accrue in the course of the proceedings, in favor of the clerk and the sheriff; and, if any, the disbursements of the successful party to the suit, necessarily incurred for the prosecution or defense of the same, and which are allowed, by some positive provision of law, to be taxed on the docket of the court. Primarily, the costs are always due by the plaintiff to the officers of the court, who must make all required advances, subject, however, to a right of reimbursement by the defendant, when mulcted in same. Hence it is that, in his *Law Dictionary*, Abbott defines "costs" to be a pecuniary allowance, made by positive law, to the successful party to a suit, or distinct proceeding within a suit, in consideration of, and to

reimburse, his probable expenses. It is therefore an allowance by positive law; that is, by a tariff, or some statutory provision, or authorized rule of court, specifying the nature and amount thereof. Article 552, Code Prac., which refers to costs before courts of original jurisdiction, however, says that the costs to be paid by the party cast include not only the taxed costs, but also the expense incurred in taking testimony by commission, and the compensation allowed for their services to such experts, auditors, or judicial arbitrators as may have been appointed in the suit, and also the costs of copies of notarial acts, of judgment, and other copies of the record of public officers necessary in the cause. Sometimes fees allowed to curators *ad hoc* are taxed as costs in the case. The Code of Practice is silent as to what shall be the costs in the supreme court; but section 756, Rev. St., specifies what charges the clerk of that court is authorized to make in cases before it. Under the heading of "Proceedings before the Supreme Court" there is to be found article 908, Code Prac., under which the defendant here was condemned to pay the costs of appeal; but it does not state that among these shall be included those of brief printing. It has been held several times that the costs which are taxable in a judicial proceeding do not embrace attorney's fees; no doubt, because the services of each attorney are to be compensated by the party by whom he has been employed. It is true that article 145, Code Prac., authorizes courts to enact, respectively, rules establishing the mode of proceeding before them in all cases not provided for by the Code, provided the same be not contrary to the rules there prescribed; but this provision does not confer the power of determining what shall constitute costs in a case, and of having the same taxed to the party cast, over and above those which the law may have specially provided for. The rules of this court require, under the authority of that article, as a mode of proceeding, a printed brief, in the interest of the parties litigant, to assist it in the examination and determination of controversies; but they do not authorize the taxing of the cost of the printing of the same among the costs of the suit. This has never been done. There is, indeed, no more reason to have the party cast pay the costs of putting in print the argument of opposite counsel than there would be to have him to pay for the oral argument. In the absence of any positive law, or of any authorized rule or line of precedents, supporting the pretension of the plaintiff, this court cannot recognize it, without usurping the powers vested in another branch of the government.

It is therefore ordered that the rule herein be dismissed, with costs.

STATE V. SCHUCHARDT.

(Supreme Court of Louisiana. Jan. 20, 1890.)

MUNICIPAL CORPORATIONS — REGULATION OF CONSTRUCTION OF BUILDINGS.

1. The power of a municipal corporation to control the owners of property in the mode or manner of constructing their buildings, within certain

designated limits, is not one of the incidental or implied powers which such corporations may exercise in the absence of express legislative authority.

2. The exercise of such power must be authorized by the legislature, either by special legislation or by means of a charter, which, in such matters, is the measure of the authority to be exercised.

3. A legislative mandate authorizing a municipal corporation to prevent the reconstruction in wood of old buildings, within certain limits, does not include the mandate to prevent the repairing with shingles the roofs of buildings originally covered with similar materials.

4. Hence a prosecution under such an ordinance cannot be maintained.

(Syllabus by the Court.)

Appeal from recorder's court, parish of Orleans; GUY DREUX, Judge.

T. McC. Hyman, for plaintiff. Sambola & Ducros, for defendant.

POCHE, J. Defendant appeals from a sentence to a fine by a recorder's court for the violation of a city ordinance, which was enacted in 1888, for the purpose of establishing fire limits for the city of New Orleans. The section of the ordinance involved in the case reads as follows: "That it shall not be lawful, and all persons are forbidden, to increase or add to the dimensions of any building already erected, under the pretense of repairing, or cause the same to be done, within the limits described in sections 12 and 4 of this ordinance, or to repair the roof of any such building, or cause the same to be done, except by using in such repairs non-combustible materials." The charge against the defendant was that in July, 1889, he caused the roof of a house which he owned, within the fire limits, to be repaired with shingles. The facts alleged in the charge were substantiated by the evidence, which showed, at the same time, that from the date of its original construction the house, which was a frame building, had always been roofed with shingles.

The point made in defense is that the section of the ordinance herein sought to be enforced is *ultra vires* for want of legislative sanction, or authority in the city council to enact the same. The source of authority invoked by the city attorney is the eighth paragraph of the eighth section of the city charter, known as "Act No. 20 of 1882," which provides: "The council shall also have power * * * to determine within what limits wooden buildings shall not be erected, and to prevent the reconstruction in wood of old buildings within such limits." It is very clear, and it is conceded on both sides, that the object of this legislation is to do away, as much as possible, with wooden buildings in that portion of the city described and known as "Fire Limits," with the view of diminishing the danger and the occurrence of large and destructive conflagrations. One portion of the paragraph is intended to prohibit the construction in the future of wooden buildings within certain prescribed limits; and the law-maker, having no intention to delegate the power of removing or demolishing wooden buildings in existence previous to the adoption of such an ordinance, contemplated, by the means of the latter portion of the paragraph, to em-

power the city council to forbid the reconstruction of wooden buildings within the limits to be designated by the council.

But the question presented for discussion is whether the power conferred by the latter part of the paragraph includes the authority to forbid necessary repairs to such buildings with the same kind of materials used in the original construction. If "repairs" and "reconstruction" were synonymous terms, the power would undoubtedly be included; but a very wide difference exists between the meaning of the two terms, and, besides, the ordinance does not only forbid the repairs of the building, but even of a portion of the same. In the legislative enactment no reference is made to repairs, and the power therein conferred is in terms restricted to the prohibition of the reconstruction of a former wooden building with the same similar materials. The reconstruction of a building presupposes a previous destruction or demolition of such building; and in such a case the operation could in no sense be deemed or said to be a repairing of such building, for the repairing of a building must, in the very nature of things, presuppose the contemporaneous existence of the building. Hence it follows that the sole object contemplated by the law-maker was to authorize the city council to prohibit the reconstruction in wood, within the limits to be by it prescribed, of buildings originally built of wood, and existing as such at the date of the ordinance, but which might subsequently be destroyed by fire or otherwise, or which might be thereafter demolished by the owners. But, acting under that legislative mandate, which avowedly was its only authority in the premises, the council went a great step further, and it proposed to forbid the repairing of the roofs of such buildings, except by using in such repairs non-combustible materials. Hence came the present prosecution of this defendant for having replaced, on the roof of his building, old shingles by new ones. Evidently, the danger from fire was not increased by that operation; and therefore it cannot be argued that he acted in violation of either the spirit or the letter of the statute, from which the city could derive its sole power in the premises. It is therefore clear that the prohibition contained in the city ordinance was not contemplated by the law-maker, as it is greater than, and materially different from, the only power or authority which he intended to delegate or confer.

Now, the power in a municipal corporation to control the owners of property within its limits in using or building their property, in the manner different from their inclination, desire, or convenience, cannot be ranked among the implied and incidental powers which such corporations may exercise in the absence of express legislative mandate. It is a useful power, presumably necessary, to provide for the greatest good of the greatest number; but it is at the same time a power in derogation of common right, and, unless it be expressly conferred, it will never be presumed to exist. *Succession of Irwin*, 33 La. Ann. 68, and authorities therein cited. "Except

as to incidental power, and which need not be, though they usually are, mentioned in the charter, the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. And the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them, thus applying substantially the same rule that is applied to charters of private incorporations." *Cooley*, Const. Lim. 233.

We consider, and we therefore hold, that so much of the ordinance under consideration as is intended to prohibit the owners of a wooden building within the fire limits of the city from repairing the roof thereof with the same materials with which it was covered at the date of the passage of the ordinance is null and void, as being *ultra vires*, and hence that it cannot be enforced by the courts.

It is therefore ordered that the judgment appealed from be annulled, avoided, and reversed, and that the charge propounded against the defendant be dismissed, at the costs of the city in both courts.

Succession of GAST.

(*Supreme Court of Louisiana. Jan. 20, 1890.*)

APPEAL—TRANSCRIPT—TIME OF FILING.

When the return-day for filing a transcript has been extended, and the transcript is filed after the expiration of the extension, the appellant is not entitled to the three days of grace which follows a return-day.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

On motion to dismiss.

F. McMahon, for appellant. *Gus. A. Breaux*, for appellee.

MCENERY, J. The appeal in this case was made returnable on the first Monday in November, 1889. On the 5th day of November, on the application of the appellant, a delay of 30 days was granted to file the appeal. The transcript of appeal was filed on the 9th of December, 1889, after the expiration of the 30-days extension. No days of grace are allowed when the time is extended for bringing up the appeal. *Succession of Quin*, 37 La. Ann. 391. It is therefore ordered that the appeal be dismissed.

STATE V. LUBIN.

(*Supreme Court of Louisiana. Jan. 6, 1890.*)

CRIMINAL LAW—APPEAL—OFFICER'S EXTORTION—INDICTMENT.

1. An objection, made for the first time on appeal, that a pleading made below had been presented too late, cannot be considered by the appellate court, for the reason that the question therein involved had not been submitted to or decided by the trial judge.

2. In a prosecution under section 863, Rev. St., which provides for the punishment of "any judge, justice of the peace, sheriff, coroner, constable, or other civil officer," for oppression or extortion under color of his office, it is essential to charge and prove that the accused was an "officer," as designated in the statute.

3. The omission in an indictment or information of such an averment is a defect of substance, which is not waived by pleading to the indictment or cured by the verdict. Hence the defect can be set up in a motion in arrest of judgment.

(Syllabus by the Court.)

Appeal from district court, parish of Orleans.

Charles A. Baquie, for appellant. Gervais Leche, Dist. Att., and The Attorney General, for the State.

POCHE, J. Defendant appeals from a conviction under an information charging that he had "exacted and extorted, under color of his office, the sum of three dollars," and from a sentence to a fine of \$301. His complaint is from the ruling of the trial judge in rejecting his motion in arrest of judgment, which was based on the omission of the pleader to state or mention in the information that the accused held any office at the time that he is charged with having extorted money under color of his office. The judge held that the defect of the information was one of form, and not of substance, and that, therefore, the objection came too late after the jury had been impaneled. On appeal, the state makes the point that the motion in arrest, having been filed more than four days after conviction, was not presented within a reasonable time, and that, therefore, it should not be considered. But as this is not one of the proceedings which takes place or originates in this court, we have no other power to review it but under our appellate jurisdiction. And the record shows that the objection now urged was not made below, and that, therefore, no ruling was made thereon by the trial judge. Hence we cannot consider the point made here for the first time. In the case of *State v. Romano*, 37 La. Ann. 98, this court took occasion to reaffirm the pre-existing rule on this question, and which was formulated thus: "The appellate court cannot consider and determine questions of law which were not submitted to and passed upon by the trial judge." *State v. Arthur*, 10 La. Ann. 265; *State v. Bass*, 12 La. Ann. 862. In the cases quoted by the attorney general in support of the principle which he invokes, the point had been submitted to and disposed of by the trial judge. *State v. Fritz*, 27 La. Ann. 360; *State v. Cotten*, 36 La. Ann. 990.

On the merits of the motion in arrest, the question presented for solution is to determine whether the defect complained of is one of form or of substance. The statute on which the prosecution is predicated reads: "Any judge, justice of the peace, sheriff, coroner, constable, or other civil officer, who shall be guilty of oppression or extortion in the administration or under the color of his office, shall, on conviction, suffer fine or imprisonment, or both, at the discretion of the court." Rev. St. § 868. From the plain language of the statute, it is very clear that it is of the very essence of a prosecution thereunder that the accused must be charged and proved to hold one of the offices therein designated. Under that statute, it is too clear for argument that one who is not a "judge, justice of the peace, sheriff, coroner, constable, or

other civil officer" cannot be guilty of oppression or extortion under color of his office. Now, in the information under discussion, the district attorney used the following language: "That one Pierre Lubin, late of the parish of St. John the Baptist, on or about the 17th day of August, in the year of our Lord 1889, with force and arms, in the parish aforesaid, and within the jurisdiction, etc., did unlawfully exact and extort, under the color of his office, the sum of \$3." The information is throughout entirely reticent as to what office, if any, the accused held at the time that he exacted and extorted money. It is thus very apparent that the information lacked an essential ingredient, without which no crime was charged and no conviction could be legally obtained. We are clear in the conviction that the omission was not of the kind which is cured by joinder of issue and by verdict. The omitted averment is a matter of substance; hence we hold that it was not waived by pleading to the information or cured by the verdict. *State v. Palmer*, 32 La. Ann. 565; *State v. Durbin*, 20 La. Ann. 408; *State v. Edson*, 10 La. Ann. 229; *State v. Stiles*, 5 La. Ann. 324. We therefore conclude that the information was essentially and fatally defective, and that the motion in arrest of judgment should have prevailed.

It is therefore ordered that the verdict and sentence appealed from be annulled and set aside, that the information presented in this case be quashed, and that the defendant be discharged.

STATE ex rel. WILLIAMS v. JUDGE TENTH JUDICIAL DISTRICT.

(Supreme Court of Louisiana. Jan. 6, 1890.)

JUDGMENTS — VACATION — WRIT OF PROHIBITION.

1. A court cannot entangle its powers so as to bring them to a dead-lock.
2. The court which has rendered a judgment has exclusive jurisdiction over a suit to annul it.
3. An order staying proceedings rendered on an application for a respite does not strip the lower court, which rendered it, of jurisdiction over a suit by creditors to annul it, coupled with a prayer for conservatory process.
4. The only object of such seizure would be to secure the property of the applicant for the common good of all the creditors.
5. Prohibition does not lie to prevent such court from hearing and determining such suit, over which it alone has jurisdiction.

(Syllabus by the Court.)

S. A. Hull and J. C. Pugh, for relator. Respondent, pro se.

BERMUDEZ, C. J. This is an application for a prohibition. The relator complains that, although the respondent judge has, in this application for a respite, granted him a stay of proceedings against his creditors, said judge has, on the petition of certain parties claiming to be his creditors, and who are entitled to neither privilege nor mortgage, authorized the issuance of an attachment directing the sheriff to seize and detain all his property. The charge is therefore, that, by reason of the previous order staying proceedings, the district court divested itself of all jurisdiction over

all suits, actual or contingent, against the relator and his property, and that the judge of said court exceeded the bounds of his authority, and usurped jurisdiction, when he entertained the petition of certain creditors for an attachment. The district judge elaborately returns that the order did not divest him of jurisdiction; that, under grave averments made by his creditors, charging the illegality of said order, and fraudulent practice by the applicant, the purpose of which was to dispose of his property to their prejudice pending the proceedings following the order, he was authorized to entertain a petition for the nullity of the whole order made on the application for a respite, and to award conservatory remedy, to preserve meanwhile the property of the applicant for the benefit of all the creditors, as their common pledges.

The question to be determined presently is not whether the decree on the petition for a respite was or not legal, or whether the order for an attachment should be annulled; but it is, simply, whether, after granting the order staying proceedings, the district judge could or not entertain a suit in nullity of said order, and by appropriate remedy prevent the applicant for a respite from disposing fraudulently of his property, to the prejudice of his creditors.

Conceding that the order staying proceedings was such as the law authorized, it is clear that it could produce no greater effect than a similar order in insolvency proceedings. Section 1790, Rev. St., provides that, "when issuing the order for the meeting of the creditors, the judge shall order that all the proceedings, as well against the person as against the property of the debtor, be stayed." Section 1816 is to the effect that "all the suits which may have been brought anterior to the failure shall be transferred to the court in which the insolvent debtor shall have presented his schedule and shall be continued against his syndic." In both cases, respite and surrender, the order is designed to protect as well the applicant and his property as his creditors, by maintaining provisionally the *statu quo*. It operates like an extraordinary injunction, to which the law attaches the exceptional effect of arresting proceedings pending before courts other than that before which the application, either for a respite or for a cession, is made, and is not intended to prevent the institution of future suits, either against the applicant or his property, in proper cases.

In cases of surrender the pending suits do not abate, but must be transferred to the court seized of the insolvency proceedings. *State v. Ellis*, 41 La. Ann. 44, 3 South. Rep. 55.

In the early case of *Pecquet v. Golls*, 1 Mart. (N. S.) 438, it was held that creditors could proceed against one who had obtained a respite, and meditated a removal, to have him arrested, and his goods seized and placed in *gremio legis*. In the later case of *Jeffries v. Iron-Works*, 15 La. Ann. 19, the then supreme court held that creditors of an insolvent had the right, by a direct action, to seek the nullity of the order or writ accepting a surrender of prop-

erty by an insolvent by contradictory proceedings in the same court.

Indeed, not only had the court jurisdiction, but it was the only one which could have and had authority to annul one of its judgments. Code Prac. art. 608; Hen. Dig. p. 746, par. 2.

The Code (Rev. Civil Code, art. 8008.) declares that "when the creditors refuse a respite the cession of property ensues, and the proceedings continue as if the cession had been offered in the first instance." Section 1806, Rev. St., et seq., recognize in creditors, in the cases stated, the right to proceed judicially, in the manner and form prescribed, to have their debtor arrested and punished, in different ways.

It is right and proper, particularly in cases of respite, that creditors, notwithstanding the order staying proceedings, should retain the privilege of protecting themselves, in proper cases, not only by the arrest of their debtor, but also by the seizure of his property for their common good.

By the application for a respite the ownership and possession of the property of the applicant was not divested from him, and did not pass to his creditors, as in cases of surrender. They both continue in him at least until the meeting of the creditors has been held.

A court cannot entangle its powers so as to bring them to a dead-lock.

Were the creditors, in consequence of the order staying proceedings, stripped of the right of self-protection, and they paralyzed, the result would be that a debtor in bad faith could, under the shield of the law, take advantage of the intervening delay, and fraudulently dispose of his property, in various ways, to their injury. It is therefore plain that creditors have a right to sue their debtors, and notwithstanding the order staying proceedings, and on the proper showing, secure his property, and have the preliminary order, and sometimes the final orders and decrees themselves, annulled.

The authorities referred to by the relator have no bearing. There is no attempt in this case, as was sought to be done in those to which our attention is called, to attack collaterally the proceedings, or to nullify them by the authority of another tribunal. The action in this case is decreed, and is brought before, the same court that made the preliminary staying order.

In acting as he has done, the district judge has not transgressed, but has kept himself within the bounds of his jurisdiction.

It is therefore decreed that the preliminary restraining order herein made be rescinded, and that the application for a prohibition be refused, with costs.

BARTHE V. CITY OF NEW ORLEANS *et al.*

(*Supreme Court of Louisiana. Jan. 6, 1890.*)

MALICIOUS PROSECUTION—ABANDONMENT OF INJUNCTION.

1. In an action for damages for a malicious prosecution, an exception of no cause of action will be maintained if it appears from plaintiff's own petition, and from the judgment set up as his

acquittal, that the prosecution was not actuated by malice or without probable cause.

2. But if, in the same petition, the pleader cumulates a demand for damages against the same parties, for an injunction alleged to have been wrongfully obtained, he discloses a cause of action by alleging that the plaintiff in injunction had voluntarily abandoned his writ, and had discontinued his action.

3. The voluntary abandonment of an injunction has the same legal effect as a judgment rendered contradictorily, and decreeing the injunction to have been wrongfully obtained.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; KING, Judge.

Branch K. Miller, for appellant. T. M. C. Hyman, Asst. City Att'y., for the City. F. N. Butler and Semmes & Legendre, for H. Larquele.

POCHE, J. In a suit for \$10,000 damages against the city of New Orleans, Henry Larquele, John Trisconi, and Pierre Ader, *in solido*, for alleged false imprisonment and malicious prosecution of plaintiff as keeper of a private market, his action was dismissed on the ground that his petition disclosed no cause of action. Hence the only question which this appeal presents is one of law or of pleading.

His petition sets forth two distinct complaints. One of his grounds is that he was prosecuted before a recorder, and sentenced by the latter to pay numerous fines for the repeated violation of the city ordinance which prohibits private markets within a radius of six squares from a public market. He then avers that, on appeal to this court, the several judgments rendered against him by the recorder were reversed and set aside, on the ground that his private market was not situated within the prohibited distance, under a proper construction of the city ordinance therein sought to be enforced. He charges that the numerous affidavits made against him were so made under the special authorization and direction of the mayor, therein acting as the instigation and in the interest of the other defendants, who were then the lessees of all the public markets of the city of New Orleans. His other ground of complaint is that, while the various prosecutions above mentioned were being pressed against him, the city of New Orleans, still acting at the instigation and in the interest of the aforesaid lessees of the public markets, sued out and obtained an injunction, under date of July 28, 1888, restraining him from carrying on his private market at a certain designated place, on the ground that the same was within six squares of a public market; and that notwithstanding the decision of this court by which it had been settled that his market was not within the prohibited distance, which decision became final on January 7, 1889, and had been rendered on December 17, 1888, the injunction thus obtained against him was maintained in force until the 15th of February, 1889, when the city discontinued its suit. Plaintiff finally charges that, during the pendency of the injunction proceedings, a rule was taken against him by the defendants for an alleged disobedience of the injunction aforesaid, in consequence of which he was sentenced to imprisonment

for 10 days, and actually incarcerated for 6 days, for all of which he claims damages in the sum of \$10,000.

1. In testing the sufficiency of the pleadings in an action for damages growing out of the prosecution of Barthe for a fine or imprisonment before the recorder, we find it settled in jurisprudence that malice and want of probable cause in the instigation of the prosecution are essential averments. Those allegations are contained in plaintiff's petition, but, in averring the termination of the prosecution in his favor, he refers to the decision rendered in the case in his favor by this court, which is reported in 41 La. Ann. 46, 6 South. Rep. 531. Turning to that cause, we find that the pivotal issue on which the case was tried was as to the mode of measuring the distance within which the city ordinance prohibited private markets from a public market. On the part of the city and of the lessees of the public markets, the contention was that the distance should be measured on air-line; whereas, Barthe, the defendant therein, and plaintiff here, contended that the distance was to be measured by the route which persons would walk. His contention prevailed, and the case went in his favor.

But the point under discussion involved a difference of opinion based on a nice distinction, and the error found against the city and the market lessees did not implicate them with malice, or prove that they had no probable cause for the prosecutions which they had instigated against Barthe, as an offender under the city ordinance, as they erroneously, but honestly, construed it. The fact, as shown by that decision, that the members of this court, entirely disinterested, divided on the question, is a very significant suggestion that the prosecutors, like the dissenting justices, were not actuated by malice, or acted in the matter of the prosecution without probable cause.

In the case of Godfrey v. Soniat, 33 La. Ann. 915, the defendants were sued in damages for a malicious prosecution. It was in proof that Godfrey had been acquitted of the charge brought against him, and his contention was that his discharge was proof of malice and of want of probable cause; but this court held otherwise, and ruled that all the circumstances under which the charge had been made should be considered in determining the issue of malice *vel non*. In that case the following rule was announced: "The mere fact that the accused, under a criminal prosecution, has been acquitted, does not entitle him to damages against the prosecutor, and he should recover none, when the evidence shows that there was a probable cause for the prosecution, and no malice on the part of the prosecutor."

And in the case of Plassan v. Lottery Co., 34 La. Ann. 246, in which the decision of the court hinged upon similar pleadings and circumstances, the rule was affirmed in the following language: "In a suit for damages for malicious prosecution, the presumption of want of probable cause following from the acquittal or discharge on preliminary examination of the accused can be successfully rebutted by evidence show-

ing that the party provoking the prosecution acted on information reasonably calculated to cause and lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion of, the guilt of the party accused."

For the purposes of this discussion, it is fair and proper to consider the decision invoked by the plaintiff, as his allegation of the termination of the prosecution in his favor, as forming part of his pleadings, and from that decision, as one of his allegations, flows the conclusion that the prosecution is not alleged to have been actuated by malice, or instigated without probable cause. Hence we hold that the complaint on that branch of the case is deficient, and that it cannot be the legal basis of a claim for damages.

2. But the same principle does not apply to or control that part of the demand which is predicated on the damages alleged to flow from the wrongful issuance of the injunction against Barthe. The pivotal allegation on that branch of the pleadings is that the injunction obtained by the city and its abettors was voluntarily abandoned, and its suit discontinued on its own motion. On that score the rule is firmly imbedded in our jurisprudence to the effect that the dissolution of an injunction is *prima facie* evidence that damages have been sustained by the defendant in injunction. *Florance v. Nixon*, 3 La. 289; *Hudson v. Plunket*, 4 La. 524; *Whitehead v. Tulane*, 11 La. Ann. 302. In the latter case the ruling was as follows: "In an injunction suit, where there is judgment of nonsuit, on the plaintiff's being called and not appearing, the injunction bond is forfeited." In the case of *Conery v. Coons*, 33 La. Ann. 372, the following rule was adopted: "The dissolution of an injunction is *prima facie* evidence of an injury sustained by the party enjoined, and entitles him to actual damages." See, also, *Barrimore v. McFeely*, 32 La. Ann. 1179; *Decoux v. Lieux*, 33 La. Ann. 392; *Estopinal v. Peyroux*, 37 La. Ann. 477; *Wentz v. Bernhardt*, Id. 636; *Canal Co. v. Touche*, 38 La. Ann. 388. In the last case just quoted the rule was promulgated thus: "The dismissal of an injunction suit on an exception is equivalent in law to a judgment decreeing the injunction to have been wrongfully obtained. An action in damages following such a judgment, by the defendants in the injunction suit, involves but one question, and that is the quantum of damages to be allowed."

If the rule applies to a case in which the injunction was disposed of by means of an exception, it will certainly, and with greater force, support a claim for damages in a case which terminates by the voluntary abandonment of the plaintiff in injunction. His action can be reasonably construed as an admission or confession that the writ had been wrongfully obtained.

The city and its alleged abettors can find no relief, on this branch of the case, in the contention that our decision in the case reported in 41 La. Ann. —, 6 South. Rep. 531, justifies the presumption that the writ was not obtained with malice or without probable cause. Even if the rule could apply to a case of injunction,—which seems

not to be the case under our well-settled jurisprudence,—it appears from the pleadings that while the decision in question was rendered on the 17th of December, 1888, the injunction was maintained and enforced until the 15th of February, 1889. The contention of appellees' counsel, that the inaction of the city, and its failure to shape its course on the decision of this court, cannot, under the pleadings, be considered as elements of damages, because they are not specially alleged, is not well founded. After the recitals hereinabove referred to, the petition contains the following averments: "That said prosecutions before said recorder, and all the proceedings relating thereto," said *suit* and injunction, said imprisonment, in loss of time, *loss of business*, distress of mind, the wanton and reckless and unlawful and malicious invasion and *violation of petitioner's rights*, have caused him actual damages to the extent of ten thousand dollars." (Italics are ours.)

It would seem that the fact of the inaction of the plaintiffs in injunction, after the decision of this court which radically stripped their injunction of all possible legality or justification, is the most aggravating circumstance in the whole proceedings; and it must be considered as the strongest cause of action on the part of the defendant in injunction, whose business continued to be paralyzed long after the rendition of a judgment by the court of last resort, which had settled the question of its legal and legitimate character. Our conclusion is that that branch of the demand is amply supported by the pleadings, and that the judgment appealed from must be amended accordingly.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, in so far as it dismisses plaintiff's action for damages on account of the injunction sued out against him by the city of New Orleans and the other defendants; that the exception of no cause of action as to that part of the demand be overruled; and that the case be remanded for trial on that branch of the case. And it is further ordered that the judgment appealed from be affirmed in so far as it dismisses plaintiff's demand for damages on account of the alleged malicious prosecution before the recorder; costs of appeal to be taxed to defendants and appellees, all other costs to abide the final determination of the cause.

Rehearing refused January 20, 1890.

STATE ex rel. FRERET v. KING, Judge.
(Supreme Court of Louisiana. Jan. 26, 1890.)
MANDAMUS—To JUDICIAL OFFICERS—APPELLATE COURTS.

1. *Mandamus* does not lie to compel a district judge, who has affirmed a judgment sustaining a plea to the jurisdiction, to pass upon the merits of the controversy in the suit brought before the lower court. Such merits are not before him for review on an appeal from a judgment on the plea by the inferior tribunal.

2. An appellate court tries cases before it only in the manner and to the extent that they were tried below.

(Syllabus by the Court.)

B. R. Forman, for relatrix. Respondent, *in pro. per.*

BERMUDEZ, C. J. This is an application for a *mandamus*. The relatrix complains that the district judge illegally refuses to pass upon the merits of a controversy pending before him on appeal from a city court; that his duty is to determine the matter at issue in said litigation; and that his failure to do so is a denial of justice. The district judge returns that he has determined the only matter brought up for review, by affirming the judgment rendered below; and he refers in amplification to the reason assigned by him, in writing, conclusive to his decree.

It appears that relatrix, claiming to be the owner of certain real property occupied by one Balfour, instituted, before a city court, proceedings to eject him therefrom, and that in defense he claimed to have a lease thereto for one year more, at \$32 per month, and thereupon pleaded to the jurisdiction of the city court. After hearing, the defense was sustained, and this suit dismissed. The plaintiff then appealed to the district court; and the defendant judge, to whom the case had been allotted, concluded, after hearing, to affirm the judgment appealed from.

It is settled by repeated rulings of this court, that whenever, in an ejectment suit, the defendant sets up a lease, the city court has jurisdiction to determine of the existence and extent of such lease, and to take or not jurisdiction over the merits of the controversy, according to circumstances. *State v. Skinner*, 33 La. Ann. 146; *State v. Voorhies*, 34 La. Ann. 1142; *State v. Judge*, 37 La. Ann. 380. This court cannot be called upon to determine now whether the city court decided correctly or not when it held that it had no jurisdiction, or whether the district court erred or not in affirming the judgment complained of. A party dissatisfied with the judgment of a city court refusing to take jurisdiction is not left without a remedy. He can appeal from such judgment, if the case is appealable, and have it reviewed by the appellate tribunal, which would be bound to affirm, or reverse, and then remand.

When such a court has passed upon such matter, it has exhausted its powers, and it cannot be asked to determine the merits of the controversy, in any contingency, when such are not before it on the appeal. *State v. Monroe*, 39 La. Ann. 665, 2 South. Rep. 215.

A district court is both an appellate court and a court of original jurisdiction, vested in each instance with marked, distinct attributions. The powers which it exercises as the one it cannot exercise as the other. *State v. Voorhies*, 41 La. Ann. 540, 6 South. Rep. 821.

An appellate court tries cases before it only in the manner and to the extent that they were tried below. Code Prac. arts. 598, 895, 1129. In case of a reversal, in a suit like the instant one, it could not pass upon the merits of the litigation, for the reason that the merits have not been determined below, and would have to remand. In case of affirmance, there would be no merits to be determined, as by its

judgment the district court would simply say that the city court was right in declining jurisdiction. Should the party concluded by the affirmed judgment sustaining the plea to the jurisdiction still remain dissatisfied, he would not be remediless. If the city court has no jurisdiction, the district court would surely have, as one of original jurisdiction; and it would be its duty to pass upon the merits of the ejectment suit. The district judge is therefore beyond reproach.

It is therefore ordered and decreed that the application herein for *mandamus* be refused, with costs.

WESTINGHOUSE ELECTRIC CO. v. WESTERN ASSUR. CO. OF TORONTO.

(*Supreme Court of Louisiana. Jan. 6, 1890.*)

INSURANCE—THE CONTRACT—APPORTIONMENT OF LOSS.

1. Where several policies are taken out in different companies, without any relation to each other, on the same property, they are independent contracts, and the policy in one company cannot be received in evidence to explain or vary what is contained in the other.

2. When property is valued at \$90,000, and an insurance effected on 1-36 of said amount, and there is a total loss, the company is responsible for the amount insured, \$2,500, upon which it received a premium. The policy cannot be construed to mean that the insurer is liable only for 1-36 of the loss.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; **MONROE, Judge.**

Harry H. Hall, for appellant. *Farrar, Jonas & Kruttschnitt*, for appellee.

MCENERY, J. This is a suit to recover from the defendant company insurance to the amount of \$2,500 on the plaintiff's property.

The facts are as follows: In the year 1887 the Southwestern Brush Electric Light & Power Company of New Orleans employed Charles L. Uhlhorn, insurance broker, to place \$90,000 of insurance upon their plant. This \$90,000 of insurance was placed at various times, for various amounts, in various companies; the policies being substantially of the same form and effect as the extracts from the hereinafter set forth policies. Prior to the 26th of March, 1888, \$30,000 of the insurance expired by limitation, and was not renewed. On the 26th of March, 1888, plaintiff in this cause, the Westinghouse Electric Company, under a *fi. fa.* from the circuit court of the United States, levied upon all the property insured belonging to the Southwestern Brush Electric Light & Power Company. Fifty thousand five hundred dollars of the then existing insurance was continued, pending seizure upon the property, by proper indorsements by the companies on each policy. The other \$9,500 of existing insurance was not renewed, because the companies holding policies refused to renew while the property was under seizure. On the 1st of May, 1888, under the *fi. fa.* aforesaid, the whole of the property insured was adjudicated to the Westinghouse Electric Company, plaintiff in this cause, and the then existing \$50,500 of insurance was continued in favor of the Westinghouse Electric Company, as

owners of the property, by proper indorsements, such as those which appear upon the policy sued on in this cause. The following is the manner in which the risk was described in the policies making up the \$50,500 of insurance thus continued in favor of the Westinghouse Electric Company: Springfield Insurance Company: "Against loss or damage by fire to the amount of \$2,500 on one thirty-sixth of each of the following items: On their brick-slatted building, situated on Dryades street, between Union and Gravier streets, in the city of New Orleans, and known as the 'South-eastern Brush Electric Light & Power Company,' \$6,000. On all machinery, engines, boilers, appurtenances, and appliances used in said work, and contained in the above-described building, \$84,000, with privilege to make necessary alterations and repairs. Other concurrent insurances permitted without notice, until required." Phoenix Insurance Company: "Against loss or damage by fire to the amount of \$2,500, or 25-900 of each of the following items." (Balance same as above.) Home Insurance Company, New Orleans: "Against loss or damage by fire to the amount of \$26,000, as per form attached." (Balance same as above.) Hamburg & Bremen Insurance Company: "Against loss or damage by fire, to the amount of \$3,500, on 7-180 of each of the following items." (Balance same as above.) Home Insurance Company of New York: "Against loss or damage by fire to the amount of \$3,500, being 35-900 in the following risks and amounts." (Balance same as above.) Western Insurance Company of Toronto: "Description contained in original policy made part of this statement." On July 16, 1888, the property was totally destroyed by fire.

Due notice of loss was given to all the companies, and proofs of loss in due form of law were transmitted to the defendant on the 6th of August, 1888. Controversy having arisen about the amount of the loss, arbitrators were appointed by both parties, and on the 16th of August, 1888, the loss was adjusted by the unanimous report of these arbitrators at the sum of \$75,413.75, of which \$71,763.70 was the loss adjusted upon the machinery, and \$3,650 was the loss adjusted upon the building. Thereupon the plaintiff demanded payment of the defendant of the full amount of the policy, the sum of \$2,500, which sum defendant refused to pay, and this suit was brought. The defendant denies liability until the award contained in the condition of the policy has been complied with. The above statement of facts disposes of the objection.

The defendant sets up specifically that the liability cannot be greater than 1-36 of \$75,413.75, the actual value of the property destroyed and loss sustained. The defendant appeals. The plaintiff has filed a motion to amend by increasing the judgment to \$2,500.

The policy is as follows: "This policy of assurance witnesseth that, in consideration of the sum of fifty dollars net, the Western Assurance Company does by these presents cause the Southwestern Brush Electric Light and Power Company and their le-

gal representatives to be assured twenty-five hundred dollars on 1-36th of the following risk and amounts, as per printed form attached to this policy: The Southwestern Brush Electric Light and Power Company, on their brick-slatted building, situated on Dryades street, between Union and Gravier streets, in the city of New Orleans, and known as the 'Southwestern Brush Electric Light and Power Company,' \$6,000. On all machinery, engines, boilers, and appurtenances and appliances used in said works, and contained in above-described building, \$84,000." There were other policies in different companies taken out on the same property for various amounts. The form of these policies were offered in evidence, and admitted, over the objection of defendant, on the ground that they were *res inter alios acta*, and irrelevant. Each policy was a distinct, separate, and independent obligation, and it had no reference whatever to any other. The obligation in one could not explain the doubts and uncertainties, if they existed, in the other. This evidence, therefore, was improperly admitted. The insurance was 1-36 of a risk valued at \$90,000. The policy is plain and unambiguous in language, and evident in meaning. The plaintiff insured with the defendant company property to the value of \$2,500, for which risk he paid a premium of \$50. The language employed will not admit of any other construction. There was a total loss of the property insured, and the defendant is responsible for the amount of the insurance effected on the property, and upon which it received a premium. Any other interpretation of this policy would be to destroy the object and purpose of this policy to indemnify the assured for the loss sustained. In the policy there is no stipulation that the assured shall bear any portion of the loss.

The judgment appealed from is therefore amended so as to allow plaintiff \$2,500 as indemnity for the loss; in all other respects it is affirmed. The defendant to pay costs of appeal.

Succession of CORRIGAN.

(Supreme Court of Louisiana. Jan. 6, 1890.)

PARTITION—JUDGMENT—CLERICAL ERROR—PLEADING—WILLS—RES ADJUDICATA.

1. A judgment rendered, in a partition suit, in favor of plaintiffs, who are thereby correctly named, and against the only defendant therein, who is incorrectly named in part, is a valid and binding judgment against the party alleged to be co-owner, and asked to be, and who was, cited. A rule taken to correct the clerical error committed, although superfluous, may be made absolute, even after the judgment of partition has been executed by the sale of the property held in indivision.

2. An answer filed in a case after a final judgment has been therein regularly rendered and signed is entitled to no notice.

3. Exceptions of estoppel and *res judicata* are well founded to a suit brought to annul a will after the plaintiff therein has freely acknowledged the capacities of the legatees, and after those have been judicially recognized as such by a judgment contradictorily rendered, which has been executed without opposition, which has passed beyond review.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Posey, Ker & Durigneaud, for T. Ryan, appellant. *Sambola & Ducros* and *E. J. Meval*, for appellee.

BERMUDEZ, C. J. It is difficult to announce briefly the nature of the compound proceedings in which the judgment appealed from was rendered. The main object in view may, however, be stated to be the homologation of a partition, and the distribution of the proceeds of sale of real estate, in furtherance of the will of the deceased. It appears that the surviving husband of the deceased and a child of age, claiming to own, the former one-half, the latter one-fourth, of certain real estate, not susceptible of a convenient division in kind, brought suit against their co-proprietor, Thomas Ryan, another child of the deceased, owner of the remaining fourth. He was cited, and failed to answer. A default was then taken, and subsequently confirmed, against him, decreeing the sale of the property, and the distribution of the proceeds of sale as prayed for. The property was advertised and sold, the proceeds being deposited with the notary for distribution. At this stage, Thomas Ryan filed an answer in the partition proceedings, and brought suit to annul his brother's will, to which exception is now taken. On the refusal of Thomas Ryan to approve and sign the act of partition prepared by the notary, the surviving husband and his co-plaintiff took a rule on him to homologate the proposed distribution. As defenses, he urged that the judgment of partition was a nullity, as it had not been rendered against him, but against Stephen Ryan; that he had filed an answer to the petition in the case, which had not been passed upon; that he had instituted a suit to annul the will of his mother, which was pending. The plaintiff in rule then took a rule on Thomas Ryan to show cause why the judgment of partition, containing the clerical error charged, should not be corrected *nunc pro tunc* by substituting the name "Thomas" to that of "Stephen," therein found. The rule to homologate, that to correct, and the exceptions to the suit for the nullity of the will were cumulated, and tried together. The district court made the rules absolute homologating the partition, correcting the error, and sustained the exceptions, dismissing the suit to annul. Thomas Ryan appeals.

1. The first question to be considered is whether or not the judgment decreeing the partition is a valid judgment, binding on Thomas Ryan. It appears beyond doubt that the plaintiff in that suit, namely, the husband and one of the two heirs of the deceased, alleged ownership in common of certain pieces of real estate with Thomas Ryan, the other child of the deceased, by a previous marriage with Stephen Ryan, deceased; that they asked that Thomas Ryan be cited; that the citations issued to and were served on Thomas Ryan; that Thomas Ryan was the only defendant in the suit; that the default was taken against "the defendants;" and that judgment on confirmation was rendered in favor of the plaintiff against the defendant, naming

him as "Stephen" Ryan, instead of "Thomas" Ryan, decreeing the partition by sale by an auctioneer on certain terms, and distributing the proceeds, one-half to the surviving husband, one-fourth to his co-plaintiff, one of the two heirs of the deceased, and one-fourth to the only other heir, who was Thomas Ryan, but who was named as "Stephen" Ryan,—his father's name. There is evidence to show that this was a clerical error, as no one but Thomas Ryan could have been, and was, the defendant. It is manifest that, had the judgment been simply one in favor of plaintiff and against defendant, without giving any name, it would have been a valid and binding judgment, for the plain reason that by reference to the petition it would have been most easily ascertained who the plaintiffs and the defendants were. *Id certum est, quod certum reddi potest*. Now, instead of omitting the names, the judgment was rendered in favor of plaintiffs, naming them correctly, and against the defendant, naming him, incorrectly, "Stephen" instead of "Thomas" Ryan. A judgment is always read by the light of the proceedings. Referring to the petition, it would have been easy to determine that a clerical error had been committed, because the defendant named in the judgment as "Stephen" could not have been any one but Thomas Ryan, who was the only defendant in the case. Naming the defendant in the judgment was not an essential requisite, as the judgment would have been valid against him without his being named at all therein. It therefore follows that the mention of the names was superfluous, and that the judgment must be read as against Thomas Ryan, the only defendant named in the petition, asked to be cited, and summoned to answer.

The rulings invoked by Thomas Ryan (*Formento v. Robert*, 27 La. Ann. 445; *Shelly v. Dobbins*, 31 La. Ann. 530) show that a judgment which contained an improper name, the insertion of which is the result of inadvertence, may be corrected by a rule taken and tried contradictorily. They acknowledge, therefore, the validity of said judgment, as a judgment which would not, on the face of the papers, have been valid, could not be corrected at all, but would have to be ignored as a nullity patent on the record. In the first case, the judgment had been rendered against J. N. R., instead of F. J. R. In the other, it had been rendered against P. L. and M. W. *in solido*, instead of P. L. and M. S. Execution having issued as though the judgment had correctly named the parties condemned to pay, proceedings were taken to arrest the same. The judgment of the lower court in the first case sustained a rule to quash the execution, and in the second case dissolved the execution issued. On appeal the first judgment was affirmed, and the second reversed; the right of the appellee to have the clerical error corrected being reserved. Pretermittting any opinion as to the correctness of these rulings, it is apparent that the cases in which they were made and the instant one are essentially dissimilar, in this: that the execution of the writs in both cases had been arrested, while in the present controversy there was no writ

at all, but only a judgment directing a sale, and that the carrying out of that judgment was not at all obstructed by Thomas Ryan, who allowed it to be executed, and who was, as he still is, a resident of the parish in which the judgment was rendered and executed. It is a well-settled principle that no action lies against a judgment voluntarily executed or acquiesced in by the debtor, (Code Proc. art. 567,) or when the debtor has been guilty of laches, (Id. art. 612; *Norris v. Fristoe*, 3 La. Ann. 646; *Swain v. Sampson*, 6 La. Ann. 799.) It is upon this principle that the Code of Practice provides that a party against whom a judgment has been rendered without his having been cited cannot demand its nullity when such party was present in the parish, and yet suffered the judgment to be executed without opposing the same. Code Prac. art. 612. In the present instance it appears from the record that the property ordered to be sold to effect a partition was advertised by the designated auctioneer as property belonging to the succession of the deceased, and as ordered to be sold by the judgment in partition rendered in the matter. The defendant was, and still is, a resident of the parish of Orleans, in which the judgment was rendered and executed. He has not shown that good conscience was opposed to the execution of the judgment, and that he could not have averted its execution. *Norris v. Fristoe*, 3 La. Ann. 646; *Swain v. Sampson*, 6 La. Ann. 799. He was certainly guilty of fatal laches, and cannot be relieved.

2. The next question is whether or not the plaintiffs have the right to have the judgment corrected *nunc pro tunc*. This inquiry is solved by the mere statement that, as the particular judgment was valid and binding on its face, it was strictly unnecessary to correct the clerical error committed in drawing it up, and that, under the very authorities relied on by the defendant in rules, the judgment could have been corrected summarily, but contradictorily. *Utile per inutile non vitiatur*. It is hardly necessary to say that, as the judgment was valid, the answer filed by Thomas Ryan, long after its rendition and signature, is entitled to no notice whatever.

3. The last question remaining for consideration relates to the exceptions filed by the husband and one of the two heirs to the petition of Thomas Ryan for the nullity of the will. The averments of the petitioner brutally asperses the character of his deceased mother, by accusing her of adultery, and attempting to brand her daughter and his sister as an adulterous bastard,—the whole on the ground that when her pretended second marriage was celebrated Stephen Ryan, his father, was living. The exceptions pleaded are estoppel and *res judicata*. The record shows that at the taking of the inventory the surviving husband and the daughter, who brought the suit in partition, assumed those qualities, as well as that of the legatees under the will of the deceased, and that Thomas Ryan was present at the taking of the inventory, voluntarily signed the act, recognizing both in those capacities, although true it be that he protested. But this pro-

test was not as to the capacity assumed by the husband and daughter. It was restricted to the alleged fact that a piece of real estate and some money not mentioned in the inventory should have been included in it. It also shows that although, in the petition for a partition, the plaintiffs therein had fully asserted their respective capacities and pretensions under the will of the deceased and the law, and although Thomas Ryan was duly cited, and had every opportunity to charge counter the claims of the plaintiffs, he did not gainsay them, but allowed a judgment by default to be confirmed and executed against him without opposing the same. The judgment thus rendered contradictorily with him recognizes the capacities and pretensions of the plaintiff's petition; and, as it has not been appealed from, and was signed much more than a year ago, it has acquired the force and effect of a sovereign judgment, and concludes Thomas Ryan absolutely. It is good that the mouth of the defamer be closed.

It is therefore ordered and decreed that the judgment appealed from be affirmed, with costs.

BRINKMAN V. HUYGHE.

(Supreme Court of Louisiana. Jan. 6, 1890.)

NEW TRIAL—REMOVAL OF JUDGE—PARTITION—JURISDICTION.

1. The trial of a cause having been commenced, and a portion of the evidence taken, when the sitting judge was displaced by the appointment of his successor, a question was raised by the defendant as to his right to require a trial *de novo*. *Held*, that the reintroduction of the testimony that was adduced before the judge *ex officio* was all the defendant could require.

2. The plaintiff, being the adjudicatee of certain property at a judicial sale, to effect a partition thereof among the heirs of a deceased person, and having received an authentic act thereto, is the holder of a just and translatable title, and entitled to a judgment in a petitory action against a possessor without title.

3. The second district court of the parish of Orleans had jurisdiction, in 1878, to order a partition of property of a succession between the widow and heirs of a deceased person, under administration therein.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Alfred Goldthwaite, for appellant.
Bayne, Denegre & Bayne and *Buck, Dinkelspiel & Hart*, for appellee.

WATKINS, J. This suit is the sequel of a protracted litigation between these parties, which has been the subject of numerous adjudications by this court. 1 South. Rep. 300, 303. It is a petitory action, in which the plaintiff claims the ownership of a piece of real estate, and the buildings and improvements thereon, situated at the corner of First and Division streets in this city, by virtue of an act passed before Octave Morel, notary public, on the 17th of June, 1878, in pursuance of an adjudication made by P. J. Spear, auctioneer in the suit of Robert E. Huyghe v. Albert C. Huyghe et al., in the late second district court of the parish of Orleans, in certain partition proceedings.

The defendant's counsel first filed three exceptions: (1) No cause of action; (2) prematurity of action; (3) no jurisdiction. They having been overruled, he answered, and pleaded the general issue. On the trial there was judgment in favor of the plaintiff, decreeing him to have been the legal owner of the property in controversy since the 17th of June, 1878, with the improvements thereon, and that the property was acquired by him by the act of sale set out in the petition. It further decrees that defendant do surrender the possession, and pay to the plaintiff the rents and revenues of the property at the rate of \$30 per month for each and every month since November 2, 1878, until the delivery of possession, with interest. Defendant has appealed.

1. The brief of defendant's counsel contains a concession which virtually disposes of the first two exceptions. It is as follows: "The exceptions to the petition of no cause of action and prematurity of action had been filed under what was supposed to be the jurisprudence of the state at that time. The partition suit in which Brinkman acquired title was an original suit in the late second district court for the parish of Orleans. The cases of *Boutte v. Boutte*, 30 La. Ann. 181, and *Buddecke v. Buddecke*, 31 La. Ann. 572, were the latest expressions of this tribunal, and were relied upon by the pleader to sustain his exceptions. The case of *Levy v. Hitsche*, 40 La. Ann. 500, 4 South. Rep. 472, was not decided until May, 1888, after this case had been continued until December, 1888, in the court *a quo*." The inference is that since the opinion was rendered in *Levy v. Hitsche*, there can be no question as to the jurisdiction of the second district court of the parish of Orleans in the matter of the partition suit and proceedings through which plaintiff's title was derived. Therefore the exceptions were correctly overruled. It is perhaps worthy of observation that the ground assigned in defendant's motion for the prematurity of this action is that same was instituted before plaintiff had discharged the judgment she had obtained against him for the rents and revenues of the property during the period of its occupancy. *Huyghe v. Brinkman*, 37 La. Ann. 240. But Brinkman availed himself of a suggestion and reservation of this court made in the case, (38 La. Ann. 836,) and enjoined the execution of that judgment, in order to obtain a stay of proceedings until his rights could be ascertained and determined. *Mrs. Huyghe* sought to arrest these injunction proceedings by *mandamus*, but that relief was refused. *State v. Judge*, 39 Ala. Ann. 99, 1 South. Rep. 300. All of these opinions clearly indicate that the rights of the parties litigant touching the title as well as the rents of the property must find solution in this form of action.

2. It appears from the record that the case was taken up for trial on the 28th of April, 1888, Judge Tissot presiding; and considerable testimony was taken before the same judge. Again, on the 10th of May, 1888, the trial was proceeded with; and additional testimony was taken before the same judge. On the 11th of December, 1888, the case was again called for trial, the

same to be proceeded with as an open case, before Judge ELLIS; he having in the *interim* superseded Judge TISSOT. At this juncture, and before proceeding with the trial, counsel for the defendant objected to the trial as of an open case, and insisted upon a trial *de novo*, because of the change in the *personnel* of the court; but this objection was overruled, and counsel reserved a bill of exceptions. The counsel for plaintiff then offered and filed in evidence anew the parol and documentary evidence that had been previously offered in evidence. The argument pressed here in support of the defendant's right to a trial *de novo* is that counsel had framed his answer with a view to the jurisprudence respecting the jurisdiction of the second court, as it was prior to the decision of *Levy v. Hitsche*, and that the fault, if fault there was in doing so, was in no wise attributable to the defendant personally, and, as the case is one of great hardship, she ought not to suffer the consequences thereof. The record shows that the defendant's answer was filed on the 25th of November, 1887, some months prior to the decision of *Levy v. Hitsche*, it is true; but the record fails to show that counsel demanded the right to a trial *de novo* for the purpose of reforming his pleadings, or of supplementing his answer, nor did he tender any supplemental answer, disclosing any new or additional defense or title to the property in the defendant. A trial *de novo* did not imply any such thing, necessarily. The case counsel relies upon, *Ealer v. Freret*, 11 La. Ann. 455, does not go to that extent. At the beginning of the trial of that case before the retiring judge all the testimony had been introduced, evidence closed, and a portion of the argument heard. When his successor commenced the hearing, plaintiff's counsel opposed any further proceedings, and demanded that the testimony should be offered anew. This request was refused by the judge *a quo*, and this court held his ruling erroneous. But the spirit of that decision was complied with by plaintiff's counsel in this, in offering anew on the last trial all the testimony that was offered and filed on the first. We think the judge properly overruled the defendant's objection.

3. On the merits, the sole question for us to determine is whether the plaintiff acquired a good and valid title to the property in dispute by virtue of the adjudication at public auction, in the partition proceedings above recited, on the 17th of June, 1878. The judge below thought he did, and so decided. In *Huyghe v. Brinkman*, 38 La. Ann. 836, the possessory action, on its second hearing in this court, the leading and important facts, as appertaining to the source and character of the defendant's possession of the property, as owner, antecedent to his surrender thereof under a prior decree of this court, are recited. They are extracted from the same record that is now before us. Those pertaining to Brinkman's title are as follows, viz.: That he purchased the property at a partition sale made between the heirs of Robert Huyghe, the former husband of the defendant, who continued in possession after his death. This sale and adjudication occurred on the 1st of June, 1878; and

the partition proceedings were duly homologated, notwithstanding the defendant's opposition thereto. Thereupon a formal title was executed in the presence of Octave Morel, notary, on the 17th of July, 1878, and delivered to plaintiff, as purchaser. He then procured a writ of ejectment, and dispossessed the defendant. Huyghe v. Brinkman, 34 La. Ann. 831. Subsequently, Mrs. Huyghe was restored to possession by a decree of this court. Huyghe v. Brinkman, 37 La. Ann. 240. This title of the plaintiff, Brinkman, is perfect in form, and recites all the necessary elements of a valid sale; and he is shown to have paid a large portion of the price in cash, and to have executed notes for the residue. It is in form an authentic act, and three of the heirs of the deceased signed it. It possesses all of the *insignia* of a just title, in the sense of Rev. Civil Code, arts. 8484-8486. The defendant, Mrs. Huyghe, was a party to the partition proceedings, and litigated her rights in the second court with the plaintiff by opposing their homologation, and otherwise. To those proceedings Brinkman was a stranger, and only became connected therewith as the adjudicatee of the property. The partition sale was made in pursuance of a judgment of the second court; and the decree of the same court homologating the partition proceedings, in terms declared "that the act of partition passed before Octave Morel, notary public, on the 12th of July, 1878, be, and the same is hereby, declared to be as binding to all parties to this suit as if same had been signed by the defendant in the above rule, Mrs. Widow Anne Huyghe." All of the proceedings were taken and determined in the Succession of Robert Huyghe, deceased, and contradictorily with and against his widow and heirs. The second district court for the parish of Orleans had undoubted jurisdiction of the Succession of Huyghe, and of the partition suit and sale; and its judgment and decree therein rendered were valid, legal, and binding. Since the decision of this court in *Levy v. Hitsche*, 40 La. Ann. 500, 4 South, Rep. 472, this has not been an open question.

Our conclusion is that the plaintiff has a good and valid title to the property in dispute, and that the judgment appealed from is correct.

Judgment affirmed.

Rehearing refused February 10, 1890.

MCCLENDON v. BRADFORD.

(Supreme Court of Louisiana. Jan. 6, 1890.)

PRINCIPAL AND AGENT—DEED—CONSIDERATION.

1. An agent cannot acquire an interest adverse to his principal. If he purchases property of which he has the management, and which belongs to his principal, he must be considered as holding it as constructive trust for his principal. He cannot deny the title of the principal to the property of which he has the agency, nor can he dispute the capacity of the principal to sue.

2. A counter-letter, retained by the agent who sells property for his principal, showing that a less sum was received than that actually expressed in the deed, has no effect against the principal, not

a party thereto, who sues to recover the price of the property.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; KING, Judge.

Singleton, Browne & Choate, for appellant. *W. S. Parkerson*, for appellee.

McENERY, J. The plaintiff sues, as the administratrix of her husband's succession, to recover from the defendant the sum of \$8,000, the value of certain lands illegally sold by defendant as the agent and attorney of said succession. The defense is a general denial, the prescription of five and ten years. He specially denies that the plaintiff is the administratrix of the succession of McClendon, and has any authority to bring this suit. He also alleges that he purchased the scrip with which the land was located at the succession sale of Rosanna Harris, for the benefit of the firm of R. H. & J. L. Bradford, of which the defendant was a member; that patents for said land issued to said firm, who had a right to dispose of said land; and that said firm sold the same, and is in no way accountable to the succession of McClendon for the proceeds of the sale.

The following facts are conclusively established by the record: R. H. Bradford, an attorney at law and land agent, and the brother of the defendant, had for collection, in scrip, the land claim against the federal government of the heirs of Rosanna Harris and J. B. McClendon, each for 640 acres. In 1870 the defendant formed a partnership with his brother, R. H. Bradford; and this firm undertook the collection and location of the scrip for the succession of McClendon, which had become the owner of the same through the purchase by J. B. McClendon, in his life-time, of the interest of the heirs of Rosanna Harris. Although it is denied with vigor and earnestness, and with apparent sincerity, we are satisfied, from the correspondence of the defendant with the heirs of Rosanna Harris, the widow McClendon, and her attorney, O. P. Amicar, that he had been informed of the purchase of the Rosanna Harris claim by J. B. McClendon, and that said land firm, R. H. & J. L. Bradford, engaged to obtain the scrip, and locate the same, for one-half thereof, for the succession of McClendon. The contract of R. H. Bradford with the heirs of Rosanna Harris and J. B. McClendon was for 25 per cent. The authority of said firm went no further than to locate the scrip. It had no authority to sell the land selected, and upon which the scrip was located. The selections were made in Nebraska, and the land sold by the defendant for five dollars per acre; patents for the same having issued to the firm of R. H. & J. L. Bradford, in pursuance of their purchase of the land claim of Rosanna Harris at succession sale. The claim of McClendon was satisfactorily adjusted and accounted for to the succession of McClendon by the defendant. There has been protracted delay in settling the Rosanna Harris land claim, caused in some measure by the parties in interest failing to communicate with each other, and the failure on the part of the succession of McClendon

to furnish proof of ownership of the Rosanna Harris claim, so that patents for the selected land could issue to said succession.

Under these circumstances, it was but natural for the defendant to become impatient. This firm has expended labor, time, and money in the prosecution of the claim; and, to save his firm these expenditures, he no doubt thought it expedient to purchase the claim of Rosanna Harris at the succession sale. But as the agent and attorney, at first, of the heirs of Rosanna Harris, and afterwards of the succession of McClendon, the land firm of R. H. & J. L. Bradford could not acquire any title adverse to the interest of either. The title they obtained to said Rosanna Harris land claim, and through which they had obtained patent, issued to them as the owners of the same, must inure to the benefit of the parties whom they represented. It was a constructive trust, which they held for the benefit of their principal. *Ringo v. Binns*, 10 Pet. 270; *Michoud v. Girod*, 4 How. 503; *Meeker v. York*, 13 La. Ann. 18; *Downard v. Hadley*, 18 N. E. Rep. 457.

The deed in the record shows that the land was sold by defendant for five dollars per acre. A counter-letter was retained by R. H. & J. L. Bradford, stating that the land sold for a less sum than that expressed in the deed as its price. This was offered in evidence by defendant, and rejected. This letter could have no effect against the succession of McClendon, which was a stranger to the sale. This suit is for the purpose of obtaining the price of the property illegally sold, and the firm of R. H. & J. L. Bradford cannot be heard to allege a different price from that stated in the deed. There is no evidence in the record that the land was worth any more or less than that for which it was sold. The price stated in the deed must therefore be accepted as the value of the property.

Since the demand made upon the defendant, and the institution of this suit, the necessary time for prescription has not run.

There is no error in the judgment appealed from, and it is therefore affirmed.

Rehearing refused February 10, 1890.

SHERWOOD v. HIS CREDITORS.

(Supreme Court of Louisiana. Jan. 6, 1890.)

LIMITED PARTNERSHIPS—INSOLVENCY.

1. In insolvency proceedings to wind up the business of an insolvent commercial partnership, a partner *in commendam*, who claims to be a creditor of his copartner, does not occupy a different and better position than a full or active partner, and hence he cannot be allowed to enforce a pledge, granted to him by his copartner, on the latter's former share of the partnership property.

2. His rights as a creditor of his partner individually must be subordinated to those of creditors of the partnership.

3. In liquidating an insolvent commercial partnership, the only difference between a partner *in commendam* and an active partner consists in the former's immunity from liability for the debts of the concern beyond the sums which he has agreed to furnish by his contract.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Frank N. Butler, for appellant. *Rice & Armstrong*, for appellee.

POCHE, J. This appeal involves the discussion of the validity of a pledge granted by the insolvent to Francis Martin, his partner *in commendam*, on all of the insolvent's share in the partnership property, to secure an indebtedness of \$5,000. The contest is between the partner *in commendam*, as a creditor of the insolvent individually, and the creditors of the partnership. The partner *in commendam* prosecutes this appeal from a judgment which refused to recognize and enforce his rights of pledge.

The pertinent facts are as follows: A pre-existing partnership, carrying on the business of manufacturing doors, blinds, sash, etc., under the style and name of the "Enterprise Sash, Door & Blind Factory," and composed of Alexander Smith, Francis Martin, and Philip W. Sherwood, was dissolved in the early part of November, 1887 and Sherwood bought out Smith's interest in the concern for \$5,000 cash, which he paid with money loaned him by Martin. Immediately thereafter Sherwood executed an act of pledge of his two-thirds interest in the factory in favor of Martin, to secure his indebtedness of \$5,000 to the latter. On the same day the two entered into a copartnership, under an authentic act, with Martin as a partner *in commendam*, to continue the same kind of business, under the same style and name as heretofore. In the new business, Sherwood contributed his undivided two-thirds interest in, and Martin his third of, the factory, with a stipulation of equal shares in profits and losses, limiting Martin's losses to his contribution. On the 19th of April, 1888, Sherwood made a surrender of the partnership assets, and a syndic was appointed on June 5, 1888. Martin's claim, under its terms, and in accordance with the act of pledge, having matured, he obtained an *ex parte* order on June 12, 1888, for the sale of Sherwood's interest in the concern, which had been pledged to him. Before a sale could be effected, his proceeding was enjoined by the syndic on numerous grounds, one of which was that as Martin was a partner his pledge was of no effect towards the creditors of the partnership. The syndic having thereafter proceeded to a sale of all the assets of the concern, he presented an account, on which he placed Martin as an ordinary creditor only. By way of opposition, Martin urged his rights of pledge on the proceeds of two-thirds of the partnership assets. Whereupon Shakspeare, Smith & Co., creditors of the partnership, opposed Martin's right of being considered as a creditor of the partnership at all on the ground that he was only a creditor of Sherwood individually. The various oppositions and the injunction proceedings were consolidated, and tried together, resulting in judgment by which the syndic's injunction was perpetuated, Martin's pledge was denied and rejected in so far as it could affect the rights of the creditors of the partnership, his opposition dis-

missed, and the opposition of Shakspeare, Smith & Co. maintained.

From the foregoing statement of facts, tested under well-settled principles of law and of jurisprudence, it is apparent that the judgment thus rendered is correct in every particular. The fallacy of appellant's contention consists in his assuming the attitude of a third party, or of a stranger, in dealing with the insolvency proceedings of Philip W. Sherwood, for the purpose of winding up the business of the concern known as the "Enterprise Sash, Door & Blind Factory." It is elementary in commercial law, as well as under the provision of the Civil Code, that "the partnership property is liable to the creditors of the partnership, in preference to those of the individual partner." Article 2823. And for such purposes the partner *in commendam* is no better position than an active partner. As a member of an insolvent partnership, his only immunity consists in the restriction of his liability for the debts of the concern to the amount which he had agreed to furnish by his contract. Civil Code, art. 2442.

A partnership with a partner *in commendam* may exist in every association known as partnerships, and it cannot be treated as a separate division of partnerships. Id. art. 2840; *Ulman v. Briggs*, 32 La. Ann. 660; *Marshall v. Lambeth*, 7 Rob. (La.) 471. Hence it follows that, in determining the rights of Martin in and to the partnership assets as a creditor of Sherwood, he must be treated with the same measure which would be meted out to a simple commercial partner, whose share in the concern is liable for partnership debts, and whose claims as a creditor of his partner must be subordinated to the claims of creditors of the partnership. *Gueringer v. Creditors*, 83 La. Ann. 1279.

As soon as the partnership between Sherwood and Martin was formed, their respective previous and individual interests or shares in the factory were vested in the ideal being known as the "partnership;" and no portion thereof could again become the property of the partners, but the residuum after the payment of the partnership debts. *Succession of Pilcher*, 89 La. Ann. 362, 1 South. Rep. 929. Hence the district judge was correct, not only in holding that the pledge set up by Martin on the previous interest or share of Sherwood in the concern could not be enforced to the detriment of the creditors of the partnership, but that, as he was only a creditor of Sherwood, he had, as such, no right to participate in the distribution of the proceeds of the partnership assets. His only recourse is on the residuum which might accrue to his debtor after the full liquidation of the partnership. As he had no pledge which he could enforce adversely to the creditors of the concern, it follows that he had no legal right to wrench the property from the possession of the syndic for the purpose of effecting a sale of the same independently of the insolvency proceedings. Hence the injunction sued out to stay his proceeding was properly perpetuated.

Judgment affirmed.

Re-hearing refused February 10, 1890.

BARTHE v. LARQUIE et al.

(Supreme Court of Louisiana. Jan. 6, 1890.)

CONTENT—VIOLATION OF INJUNCTION BY ONE NOT A PARTY—FALSE IMPRISONMENT.

1. One not a party to a suit in which an injunction has issued, and to whom such injunction is not directed, cannot be held in contempt, or be punished for the violation of the writ, although the act prohibited be illegal in itself.

2. A party punished by imprisonment, under such circumstances, is illegally condemned, and he has a right of action against those at whose instance, and for whose benefit, the order of imprisonment was made and obtained.

FENNER, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Action by E. J. Barthe against Henry Larquie and others for false imprisonment. There was a judgment for defendants, and plaintiff appeals.

B. K. Miller, for appellant. *Semmes & Legendre* and *Frank M. Butler*, for appellees.

POCHE, J. This is an action in damages, in the sum of \$15,000, for false imprisonment, the order for which is alleged to have been instigated and procured by the defendants, and made for their benefit. Plaintiff appeals from a judgment which dismissed his suit on an exception of no cause of action.

The substantial and pertinent allegations of his petition are to the effect that in the suit entitled *City of New Orleans v. Bernard Barthe* an injunction had issued in July, 1888, prohibiting the defendant therein from carrying on a private market at No. 149 Terpsichore street, in this city, on the ground that said market was within the prohibited limits from a public market; that on the 14th of September, 1888, plaintiff, who was then keeping a private market at the place hereinabove designated, was arrested on a process for contempt of court by reason of his alleged violation of the injunction issued as hereinabove stated, and that for said reason he was sentenced by the judge of the court whence the injunction had emanated to imprisonment for the term of 10 days, which he served. He avers that the process resulting in his imprisonment had been maliciously, unlawfully, and wantonly procured by the defendants, who were then the lessees of all the public markets of the city of New Orleans, and that said process was obtained and was issued for their special benefit. And he finally charges that, being in no way or manner a party to the pending suit in which the injunction had been sued out, he was not amenable to said writ, and that his imprisonment for contempt thereunder was therefore unwarranted and unlawful.

We have not been favored with a brief on the part of defendants' counsel, and we have not had the advantage of being furnished with a statement of the reasons which led the district judge to the decree rendered by him in this case. We are therefore left to surmise and conjecture in our search for the grounds of law on which the judgment could be rested; and we are constrained to conclude, after a thorough

study of the case, and an exhaustive examination of the authorities within our reach, that the judgment can find no sanction either in law or in equity. The question presented is apparently new in our own jurisprudence, in which we find no cases directly in point. But the judgment which would hold that plaintiff's petition in this case discloses no cause of action for damages involves the proposition that one who has been held in contempt, and imprisoned for the violation of an injunction not addressed, or directed to, or served on him, and issued in a case to which he is not a party, is without redress under the law, or that the parties on whose instigation and procurement, and for whose benefit, the process was inaugurated and conducted, cannot in law be held responsible for their acts in the premises. We hasten to say that we cannot subscribe to such a doctrine. The only authority in our law for the imprisonment of any person as a result of an injunction previously granted is to be found in article 308 of the Code of Practice, which reads: "If one *against whom* the injunction is directed violate the same, or refuse to obey, the court may either cause to be destroyed whatever may have been done in contravention to the injunction, if it be practicable, or they may punish him by an imprisonment not exceeding ten days." (*Italics are ours.*) The grant of power from the sovereign to punish in such a case is conditioned in a manner to restrict its exercise towards one against whom the injunction is directed; and courts are clearly powerless to extend such a power, by implication or by any other means, beyond its well-defined limits. All laws, in derogation of common rights, and, above all, affecting the freedom or liberty of the citizen, must be strictly construed.

It is a fair construction of the writ of injunction issued against Bernard Barthe that, within the meaning of the court, the keeping of a private market at No. 149 Terpsichore street was forbidden by the city ordinance then in process of execution, and that, until otherwise decided by the courts, it was illegal for plaintiff in this case, or any one else, to open and attempt to carry on a private market at that place. And it is quite certain that by his attempt in the premises plaintiff, E. J. Barthe, had become amenable to prosecution, and to punishment by fine or imprisonment, under the provisions of the city ordinance. But how could he be held in contempt and punished for the violation of the process of the court, which was not directed to him? In the case of *State v. Judge*, 34 La. Ann. 741, this court held that an injunction emanating from a court having no power to grant it is an absolute nullity, and that the condemnation of the defendant for contempt falls, with the injunction, the moment such nullity has been pronounced. *A fortiori* must it be apparent that an injunction, not described, to a party who is condemned in contempt for its violation, is an absolute nullity *quoad* the party thus dealt with. And hence it follows that the condemnation thus pronounced, and the imprisonment thus ordered, are unjustifiable and unwarranted in law. Both are therefore torts, for which the perpetrators

thereof are and must be held responsible. Such responsibility flows from the textual provisions of article 235 of the Civil Code. This doctrine has been enforced in our sister states, under the principles of the common law. The circumstances and proceedings in the case of *Johnson v. Von Kettler*, 66 Ill. 65, are strikingly similar to the case in hand, and the decision therein made is of itself ample authority for the views which we have just announced. The appellee in that case, together with his wife, who was the administratrix of an estate, were imprisoned for contempt in not complying with an order which had been previously entered against the administratrix, requiring her to pay out a certain sum of money. In an action by the husband for false imprisonment, against the party at whose instance the condemnation in contempt had been pronounced, it was held that the defendant was liable in damages for the arrest and imprisonment of the husband, for the reason that he had procured the same, and because the court was without jurisdiction to render an order against the husband, as he was not a party to the mandate previously directed to his wife, the administratrix. To the contention that the husband was amenable to the order because he administered jointly with his wife, the supreme court of Illinois answered: "Assuming that the position taken by counsel can be maintained, and that appellee received the assets of the estate in the capacity of administrator, still it was as indispensable, before he could be put in default for non-payment of the claims against the estate, that he should first be required, by an order 'lawfully made,' to pay such claims as though he had been the actual administrator. There was in fact no order on appellee to pay the claim of the creditor. The only cause specified in the statute, in this regard, for which he could be imprisoned, was for the non-compliance with an order of court after the proper demand had been made on him to do so. It is difficult to comprehend on what principle a party can be committed for not complying with an order of court, when none has been entered against him. The proposition itself is absurd, and need not be elaborated. It is not sufficient that an order was entered against the administratrix. The appellee was no party to that proceeding, on the record or otherwise." See, also, *Spice v. Steinruck*, 14 Ohio St. 213; *Haus v. Kohlar*, 25 Kan. 640. The principle under which a party who has procured such a process, or for whose benefit it had been issued, is liable in damages to one who has thereby been illegally or unjustly imprisoned, is equally well settled by jurisprudence. *Vaughn v. Congdon*, 56 Vt. 111; *Cody v. Adams*, 7 Gray, 59; *Diehl v. Fricster*, 37 Ohio St. 473; *Webber v. Kenny*, 1 A. K. Marsh. 255; *Fenelon v. Butts*, 53 Wis. 344, 10 N. W. Rep. 501; *Hallock v. Dominy*, 7 Hun, 52.

We are clearly of the opinion that plaintiff's petition does disclose a cause of action, and that his right to recover damages must be determined by a trial on the merits. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed; and it is

now ordered that the exception of no cause of action, herein interposed by defendants, be overruled and dismissed, and that this case be remanded for trial on its merits, according to law and to the view herein expressed. Costs of this appeal to be taxed to appellees. All other costs to abide the final determination of the cause.

FENNER, J., (*dissenting*.) This is an action for false imprisonment. It clearly appears on the face of the petition that though defendants are charged with instigating the proceeding, yet the imprisonment for which damages are claimed was effected in execution of a judgment of the civil district court, which found plaintiff guilty of a contempt, and sentenced him to the punishment. On this point the petition is unambiguous. I quote the allegations: That "plaintiff was arrested on a process for contempt of court, which said contempt was treated as consisting and made of a violation of an injunction issued in a suit against one Bernard Barthe, and to which plaintiff was in no respect a party; that under said process petitioner was, by the judge of the civil district court, in which said suit was pending, found guilty of said contempt, and for the same sentenced to an imprisonment in the parish prison for the period of ten days."

Upon these allegations the judge *a quo* sustained an exception of no cause of action, and, as I think, correctly. Defendant cannot be mulcted in damages for simply submitting to the court the question whether or not the plaintiff had committed a contempt of its authority. The finding and sentence of the court would be a complete bar to an action for malicious prosecution of a civil suit; and I think it equally bars this suit for false imprisonment.

It is claimed that this finding and order of the court were absolute nullities, because article 308 of our Code of Practice only authorizes punishment for disobedience of an injunction when committed by "one against whom the injunction is directed." But article 131 confers upon courts the much broader authority to "punish all contempts of their authority" by fine and imprisonment. This power is not confined to parties to cause; and I can well conceive that a third person might knowingly and intentionally so act with reference to something prohibited by its injunction as to constitute "a contempt of its authority." The judgment finding plaintiff guilty of contempt was one within the jurisdiction of the court, rendered on a question which it was bound to determine, which was unappealable, and which has never been annulled or set aside by any appeal to the supervisory jurisdiction of this court. Its validity cannot be questioned collaterally; and it should stand as valid until set aside by competent authority, as was done in the case of *Liversy and Hero*, (State v. Judge, 34 La. Ann. 741.) But, if it were conceded that the judgment was an absolute nullity, yet, having been rendered by a court of general jurisdiction, I think it still operates a competent protection to defendants.

It seems to me self-evident that, if the nullity were so absolute that it could not

protect defendants, who merely suggested it, still less could it avail as a protection to the judge who rendered and caused it to be executed; and, if plaintiff had a case for damages here against the defendants, he has a better case against the learned judge who incarcerated him. But it is now well settled that, while judges of inferior courts, vested only with limited and special jurisdiction, are held answerable at law to all persons injured by their acts in excess of their jurisdiction and power, a contrary rule prevails with reference to the judges of superior courts of general jurisdiction. This distinction was fully considered and enforced by the federal supreme court in the case of *Bradley v. Fisher*, 13 Wall. 335, and the reasons on which it is based are well expounded by Mr. Cooley in his work on Torts. Page 419. This removes the case from the operation of the authorities quoted in the majority opinion. In *Johnson v. Von Kettler*, 66 Ill. 63, the judicial order rejected as a protection was rendered by a county court; in *Spice v. Steinruck*, 14 Ohio St. 213, by a justice of the peace; in *Diehl v. Friester*, 37 Ohio St. 473, by a probate court. These are all, generally and presumably, inferior courts of limited jurisdiction, and do not fall under the protection granted to courts of general jurisdiction. The civil district court is a court of the broadest and most general jurisdiction, and, under the well-settled principles above referred to, the orders and decrees rendered by its judges, in the exercise of judicial power and of jurisdiction which is invoked by litigants, and which, rightly or wrongly, they decide that it possesses, form a complete shield against a civil action of account thereof, for the judges themselves, for the officers executing the orders, and for the parties invoking them. It need hardly be said that actions for wrongful issuance of conservatory process rest on absolutely different principles.

For these reasons, I dissent from the opinion and decree.

Rehearing refused February 10, 1890.

CITY OF NEW ORLEANS V. FIREMEN'S INS. CO.

(Supreme Court of Louisiana. Jan. 21, 1890.
41 La. Ann.)

MUNICIPAL CORPORATIONS—TAXATION—PENALTIES—CONSTITUTIONAL LAW.

1. The power conferred by the legislature on the city of New Orleans in one act to impose a license tax, united to the power conferred in another to enforce the collection of any and all taxes due to any political corporation, carry with them, necessarily, the power to impose just such a penalty as may be imposed by state laws; and it further authorizes the city council to adopt the state license law as its own.

2. The intention of the framers of the constitutional article (218) conferring on municipalities the same power, in connection with matters of taxation, as is conferred upon the state, was to bring about harmonious and uniform action therein.

3. The grant of full power to tax carries with it authority to use all means to accomplish the object; and the imposition of penalties, after due notification of the non-payment of taxes, is a legitimate means of collecting revenues.

4. Article 46 of the constitution, prohibiting

the general assembly from passing any local or special law fixing the rate of interest, exclusively applies to contests between individuals. Taxes are not debts.

5. Different provisions of the constitution must be construed together and harmonized. The limitations contained in article 46 cannot be considered as in any way interfering with the legislature's unlimited control of the chartered rights and powers of the city of New Orleans.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

Braughn, Buck, Dinkelspiel & Hart, for appellants. *W. B. Somerville*, Asst. City Atty., for appellee.

WATKINS, J. This is a proceeding by rule against the defendant for the recovery of the amount of its city licenses of \$550 for the year 1887, with 2 per cent. per month interest from the 1st of March, 1887, and a like sum for the year 1888, with like interest, from the 1st of March, 1888. The answer of the defendant is substantially embodied in one phrase, viz.: "That the imposition of any greater interest, by way of penalty or otherwise, by the city of New Orleans, [than five per cent.,] is illegal, and in violation of article 46 of the constitution." It does not contest the capital. There was a judgment in favor of the plaintiff for the sum of \$1,100 for licenses for the years 1887 and 1888, with 2 per cent. per month interest from the 1st of March, 1888. In her answer to the appeal, the city asks an increase of the judgment so as to give interest on the amount of the license of 1887 from the 1st of March, 1887, as claimed. It is admitted that the license ordinances of the city, for 1887 and 1888, were copies of the state license law of 1886. It being act 101 of that year. Section 25 of that act is relied upon by the city treasurer for the collection of 2 per cent. per month interest. It is in these words, viz.: "That all unpaid licenses shall bear interest at the rate of two per cent. per month from the 1st day of March," etc. But the contention of defendant's counsel is, that "a municipal corporation can impose no penalties unless by positive legislative permission or grant," and they insist that such permission has not been given the plaintiff in this instance, and hence the municipal ordinance in question is null. On the other hand, the contention of plaintiff's counsel is that the corporation was given the power by the legislative Act No. 119 of 1882, and, if that is not true, ample power was conferred by the terms of the city charter, viz., section 63, Act 20 of 1882. We regard Act 119 of 1882 as an enabling act, for "the political corporations of the state," and that its sole object was to empower such corporations to "enforce the collection of any and all taxes due to them, within such time and in the manner provided by existing state laws." It is purely and simply a remedial law, pertaining to the collection of taxes, and does not purport to confer upon said corporation any legislative authority whatever. Section 63, Act 20 of 1882, confers upon the city council the power to "impose an annual license tax on trades, professions, and callings," but it makes no mention of either penalty or interest. But, while it is perfectly true that there is no

special mention made of either penalty or interest, we incline to the opinion that the power conferred in one act to impose a license tax, united to the power conferred in the other to enforce the collection of "any and all taxes" due to any political corporation, carries with it, necessarily, the power to impose just such a penalty as may be imposed by state laws; and it further authorizes the city council to adopt the state license law as its own. We entertain no doubt of the fact that such was the intention of the framers of the constitutional article (218) which confers upon municipalities the same power, under the sanction of the legislature, of course, in connection with matters of taxation, as is conferred upon the state. Such was doubtless the object had in view by the legislature in passing Act 119 of 1882, cited supra. This view is well borne out in the opinion of the court in *Slack v. Ray*, 26 La. Ann. 674, in which this language is employed, viz.: "The grant of full power to tax carries with it authority to use all means necessary to accomplish the object; and the imposition of penalties, after due notice, for non-payment of taxes, is a legitimate means of collecting revenue." The contention of defendant's counsel, that article 46 of the constitution, prohibiting the general assembly from passing "any local or special law fixing the rate of interest," is tantamount to a prohibition against such a rate of interest as is contained in the license law and ordinance under consideration, when applied, or sought to be applied, to the corporation of New Orleans, is untenable. We regard it as clearly and exclusively applicable to contracts between individuals and especially those appertaining to matters of indebtedness; and it has been frequently decided that taxes are not debts. *Reed v. His Creditors*, 89 La. Ann. 121, 1 South. Rep. 784.

But different provisions of the constitution must be construed together and harmonized, and in so doing we find, in the same article above cited, a provision excepting the city of New Orleans from the operation and effect of the limitations thereby imposed, and explicitly conferring upon the general assembly full authority to deal with her chartered rights and power at will. The judgment is correct in all respects, except with regard to the interest on the amount of the 1887 license. This should be changed so that it should be computed from the 1st of March, 1888, the date of defendant's default. It is therefore ordered that the judgment appealed from be so amended that the 2 per cent. per month interest on the sum of \$550 due by the defendant, for license of 1887, shall be computed from the 1st of March, 1887, and as thus amended the same be affirmed.

CITY OF NEW ORLEANS v. PONTCHARTRAIN R. Co. et al.

(*Supreme Court of Louisiana. May, 1889. 41 La. Ann.*)

MUNICIPAL CORPORATIONS—LICENSE TAX.

1. Article 217 of the constitution has no reference to domestic corporations.

2. License taxes must be graduated, and therefore need not be equal and uniform.

3. Where the license tax levied by the city does not exceed that levied on the same occupations in the city by the state, it is valid, even if the state should have invalidated her own license tax by illegal discrimination between persons pursuing the same business in different subdivisions of the state. Such objection must be urged against the state's tax and contradictorily with her.

4. The penalty of 2 per cent. per month imposed by the city on delinquent licenses, being the same as that imposed by the state, is legal.

Appeal from civil district court, parish of Orleans; KING, Judge.

Harry H. Hall and Bayne, Denegre & Bayne, for appellants. *W. B. Somerville*, Asst. City Atty., for appellee.

FENNER, J. This suit involves a contestation as to the constitutionality and legality of the license taxes levied on the defendants by the city of New Orleans under her ordinances Nos. 2035 of 1887 and 2861 of 1888. The answer of defendants sets up various grounds of illegality and unconstitutionality, but all have been abandoned in this court except the following:

1. It is charged that the license taxes claimed are not graduated, and are not equal and uniform, as to all corporations transacting the same kind of business, being thereby violative of article 217 of the constitution. A reference to article 217 will show that it applies exclusively to foreign corporations, and not to domestic ones, such as the defendants. The other objections to the mode of graduation and want of equality and uniformity are met and silenced by our recent decisions on these questions. *State v. Bank*, 41 La. Ann. —, 6 South. Rep. 582; *State v. Insurance Co.*, 40 La. Ann. 464, 4 South. Rep. 504; *Police Jury v. Marrero*, 38 La. Ann. 897; *State v. Schonhausen*, 37 La. Ann. 42; *State v. O'Hara*, 36 La. Ann. 94; *State v. Chapman*, 35 La. Ann. 76.

2. The next objection is that the license taxes imposed by the city are invalid because there was no valid state law levying licenses on such corporations. Article 208 of the constitution provides that "no political corporation shall impose a greater license tax than is imposed by the general assembly for state purposes." This provision has been construed to mean that, when the state levies no license on a particular business, the city can exact none. It is not denied that the general assembly has levied a license on the occupation of defendants, and that the city exacts no greater sum for its own license. But it is said that the provision of the state license law on this subject is invalid, because it has made an unconstitutional discrimination between persons pursuing the same occupation in cities having population exceeding 50,000 and in those having a less population. If there be any merit in such an objection to the validity of the license imposed by the state, it must be urged when the state seeks to enforce her license, and contradictorily with her. It is very clear that it has no application to the license imposed by the city, which makes no such discrimination, and which has not levied a greater license than that imposed

by the general assembly on these defendants.

3. The final objection is that the ordinance of 1888 allows a penalty of 2 percent. per month on delinquent licenses. We have quite recently affirmed the validity of this penalty. *City of New Orleans v. Insurance Co.*, 41 La. Ann. —, ante, 82. But the defendants claim that they have discovered a statute prohibiting such a charge, which has escaped our attention. They refer to section 9 of Act 48 of 1871, amending section 21 of the city charter of 1870. But a reference to the two laws shows that the amendment embraces taxes only, and not licenses; that it limits penalties on delinquent taxes to 10 per cent. per annum, but leaves those on delinquent licenses untouched. The state imposes the penalty of 2 per cent. per month on her delinquent licenses, and the city simply adopts the same, conforming therein to the authority vested in her by Act 119 of 1882, which vests the political corporations with all the means of enforcing their taxes which are provided in state laws, among which are included the right to exact the same penalties for delinquency.

Judgment affirmed.

STATE ex rel. CITY OF NEW ORLEANS v.
NEW ORLEANS & N. E. R. CO.

(*Supreme Court of Louisiana*. Jan. 6, 1890.)

FEDERAL COURTS — FEDERAL QUESTION — ABATEMENT—SUIT PENDING—MANDAMUS.

1. Both the parties to the suit being citizens of Louisiana, it cannot be removed unless there is some federal question involved. Conceding that the defendant's charter is a protected contract in the sense of the United States constitution, and that the ordinance sought to be enforced is such a law as may impair its obligation, yet the facts do not sustain such contention.

2. It has frequently been held in the supreme court, as well as in the circuit courts of the United States, that the pendency of a suit in a state court is no ground for a plea in abatement to a suit upon the same matter in a federal court. This being a recognized rule of federal jurisprudence, it should be adhered to in our own court, as matter of judicial reciprocity.

3. This is a suit by *mandamus*, under the provisions of Act 138 of 1888, for the purpose of coercing the defendant's compliance with one of its obligations to and in favor of the city of New Orleans, and which is contained in section 2 of city ordinance No. 7483, A. S.; it being an ordinance granting said railroad company the right to construct, operate, and maintain, by steam, a railroad for the transportation of freight and passengers, from a designated point on the shore of Lake Pontchartrain to a point designated on the shore of the Mississippi river, within the limits of the city of New Orleans; and also granting it the right to occupy a portion of the river front, on certain conditions stipulated therein. The contention on the part of the city is that she granted the railroad company the right to occupy for its purposes and uses that portion of the levee, *batture*, and wharf, beginning at Port street, and extending down the river to Montegut street, a distance of 1,000 feet, and the right to erect and maintain thereon, at its own expense, such ferry facilities, wharves, piers, machinery, and other structures as shall be necessary and convenient for the transaction of the business of the company; but that, in consideration therefor, the railroad company obliged itself to keep said wharves which had been constructed by the city, and occupied by it, at such point as might be designated, and to pave Levee street, from Louisiana to Poland street, with square blocks of granite.

This last obligation is the one sought to be enforced by the city. There was a judgment in the court *a quo* in favor of the respondent, which is reversed, and the *mandamus* made peremptory.

FENNER, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

Francis B. Lee, for appellant. Robt. Mott, and H. H. Hall, for appellee.

WATKINS, J. This is a proceeding, by way of *mandamus*, against the New Orleans & Northeastern Railroad Company, for the purpose of coercing its compliance with one of its obligations to and in favor of the city of New Orleans, and which is contained in section 2 of ordinance No. 7483, A. S., adopted by the city council on the 9th of December, 1881; it being an ordinance granting said railroad company the right to construct, operate, and maintain by steam, a railroad for the transportation of freights and passengers, from a designated point on the shore of Lake Pontchartrain to a point designated on the shore of the Mississippi river, within the limits of the city of New Orleans, and also granting it the right to occupy a portion of the river front, on certain conditions stipulated therein. The interpretation placed upon the contract rights and obligations of the parties, respectively, as flowing from said ordinance, on the part of the city attorney, is that the city granted the railroad company the right to occupy, for its purposes and uses, the portion of the levee, *batture*, and wharf, beginning at Port street, and extending down the river to Montegut street, a distance of 1,000 feet; and the right to erect and maintain thereon, at its own expense, such ferry facilities, wharves, piers, machinery, and other structures as shall be necessary and convenient for the transaction of the business of the company; but that in consideration thereof the railroad company obliged itself to keep said wharves in repair; to replace the wharves which had been constructed by the city and occupied by it, at such points as might be designated; to pave Levee street from Louisa to Poland street with square blocks of granite, the laying of this pavement to be commenced immediately after it obtains possession of said 1,000 feet of levee front and *batture*, and to be completed within one year thereafter. That the ordinance provided that the grant concerning the wharves and levees is not to go into effect until the consent of the wharf lessees is first obtained. The petition alleges that 1,000 feet of levee front and wharves was released to the railroad company by the wharf lessees on the 18th of May, 1887, and that it obtained possession and control of the same at that time, but has made no attempt to comply with the stipulations of its contract, notwithstanding the delay within which the work of paving was to be completed, expired several months prior to the institution of this suit. Before the delays for answering had expired, the defendant filed a petition for removal of the suit to the United States circuit court, and, same having been refused, it filed an exception of *lis pendens*. On the following day the

respondent filed an answer or return,—first fully reserving all of its rights under its motion to remove and plea of *lis pendens*,—in which Act 133 of 1888 is assailed as unconstitutional and void, in that, if enforced, it would impair the obligations of respondent's charter contract, and the provisions of the constitution of the United States; and, in the alternative, a general denial is pleaded. The judge *a quo* overruled the plea of *lis pendens*, maintained the constitutionality of the law, and, on the evidence, decided that "as the respondent did not * * * acquire or accept possession under ordinance 7483, A. S., and as the possession which it enjoys is not the character of possession contemplated by that ordinance, the obligation to pave cannot be enforced." He discharged the rule *nisi*, refused a peremptory *mandamus*, and the relator has appealed.

OF THE MOTION TO REMOVE.

1. Both the parties to this suit being citizens of Louisiana, it cannot be removed unless there is some federal question involved. Defendant's counsel's contention in this regard is two-fold, viz.: *First*. That city ordinance 4783, A. S., imposes on the railroad company certain onerous "conditions for the privilege of doing that which it had a right to do" under its charter without the sanction of the city, and to that extent its contract would be impaired if said ordinance be enforced. *Second*. That Act 133 of 1888, under which the *mandamus* proceeding was instituted, impairs the obligation of said company's contract with the city as found in said ordinance 4783, A. S., and with the state and city, as found in its legislative charter, (Act 106 of 1871,) by altering and changing the remedies existing at the inception of said contracts for the enforcement of the obligations thereof; defendant's contention in respect to the latter being that at the time said contracts were entered into its obligations thereunder could only be enforced by suit for compensatory damages for non-performance thereof, and this statute authorizes the enforcement of specific performance by *mandamus*, and that the addition of this remedy impairs the contract obligations of its charter and city ordinance. Counsel for the city replies that, if defendant's charter is a protected contract in the sense of the United States constitution, and the ordinance is such a law as may impair its obligation, yet the facts do not sustain defendant's contention: (1) Because its charter only authorized the company to enter the city by way of Lake Pontchartrain, and extend its tracks to a point below Canal street not nearer to the Mississippi river than Claiborne street; (2) because the city ordinance, for the first time, conferred on the defendant any riparian right, or right to occupy any portion of the levee or *batture* on the river front.

An attentive examination and careful comparison of the charter and ordinance have perfectly satisfied us of the correctness of this assertion. The charter confers no riparian right whatever, and, in this respect, the ordinance 4783, A. S., is its sole dependence. Such being the case, Act 133 of 1888 does not impair in any way the de-

fendant's charter obligations, and ordinance 4783, A. S., does not impose any conditions upon the exercise of a previously granted charter right. The motion to transfer was therefore properly refused by the judge *a quo*. But it appears from an exemplification from the records of the United States circuit court that, subsequently to this refusal, the respondent caused a certified copy of the record of the court *a quo* to be filed therein, but on the hearing of a motion of relator to that effect the cause was remanded. It is *in statu quo*.

2. The ground of the respondent's plea of *lis pendens* is the pendency of another suit for the same object, before the United States circuit court, entitled *City of New Orleans v. New Orleans and Northeastern Railroad Company*, (No. 11,375.) Our law declares that "the same cause cannot be brought before two separate courts, though they be possessed of concurrent jurisdiction, except by discontinuing the suit first brought, before the answer is filed." Code Prac. art. 94. It appears that the suit above referred to was first filed in the civil district court, and was numbered therein 16,444, and was subsequently transferred to the circuit court, and was therein transformed into an equity proceeding, and given the present number, 11,375. That suit had for its object to coerce the railroad company to comply with its contract made in pursuance of ordinance 7483, A. S., and particularly with the provisions of section 2, which confers on the company the right to occupy and use portions of the levee and *batture* between Port and Montegut streets, and obliges it to erect thereon certain wharves, piles, etc.; to replace certain wharves constructed by said city; and to pave Levee street with square granite blocks. The averment is made therein that "the company has failed to commence or prosecute the construction" of said works, and its prayer, *inter alia*, is that it shall "be ordered to pave, at its own expense, with square blocks, Levee street from Louisa to Poland streets;" but there is no allegation in the petition to the effect that the wharf lessees had ever released to and in favor of the railroad company the levee front and existing wharves, at the place indicated and set apart, and which release was stipulated in ordinance 7483, A. S., to be a condition precedent to its taking possession thereof, and without which release the company was not in default, and the city without a right of action *pro tanto*.

The failure of the plaintiff in that suit to set out specifically such a release was made a matter of special defense in that cause, after it had been transformed into an equity cause in the United States circuit court. That suit was filed in January, 1886, and it was removed in May following. The release of the wharf lessees was not granted until the 18th of May, 1887, subsequent to the filing of defendant's cross-bills and answer in the equity case. It is clear that that suit was premature, and afflicted with an incurable defect, which would have defeated it in that respect, and resulted in a judgment for the defendant. In addition, we have

the defendant's own admission that Act 133 of 1888 confers the right on the city to enforce specific performance by *mandamus*, and that such right was not, therefore, conferred by ordinance. These are most material differences in respect to the legal means of enforcing the city's rights, and there is in the conflection of the pleadings a corresponding difference. But it appears from an exhibit that is annexed to the record, that the United States circuit court has remanded that suit to the civil district court for want of jurisdiction of that court, and that the interference has ceased to exist. It also appears, by another exhibit, that said suit was dismissed as of nonsuit, after it was so remanded. This the city attorney had the undoubted right to do, under the circumstances of the case.

In *Schmidt v. Braunn*, 10 La. Ann. 26, our predecessors decided this identical question, and held: "*Litis pendentia* is not necessarily a peremptory exception. It is disposed of by the termination of the suit mentioned in the plea. Such was the case in the present instance."

In *Adams v. Lewis*, 7 Mart. (N. S.) 401, this question was agitated and decided, and the court said: "First, it is said that, the suit being pending in another court, he has no longer any control over it, and could not dismiss it. But, though he could not dismiss the suit, he might renounce all advantages under it. The place where he made the inconsistent demands cannot affect his right of deciding between them. It is sufficient if he does so before the court where one of the causes are pending, to enable that court to proceed with the claim to which he gives a preference. All that it should require is that the election be made in such a manner as would prevent the plaintiff's taking advantage of the contrary demand."

These decisions are, to our minds, conclusive of the present controversy on the subject. We have taken the pains to discuss it *as res nova*, because it was not fully considered in *Mix v. His Creditors*, 39 La. Ann. 626 2 South. Rep. 391, as it was not distinctly an issue therein, on account of defendant's answer. In that opinion we merely cited *Stanton v. Embrey*, 93 U. S. 553, and *Gordon v. Gilfoil*, 99 U. S. 169, in support of the *dicta* that, on the question of *litis pendentia*, the federal jurisprudence was in consonance with our own. But that the purport of those opinions may not be misunderstood we quote from them. In the former the court say: "Suppose it were otherwise, still it is insisted by the defendant in error that the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in a circuit court, or in the court below, even though the two suits are for the same cause of action, and the court here concurs in that proposition." In the latter, at page 178, the court say: "But it has been frequently held that the pending of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a federal court." This being a recognized rule of federal jurisprudence, it should be adhered to in our own

court as a matter of judicial reciprocity. The plea was correctly overruled.

3. On the merits, the first question that occurs for examination and decision is whether or not the respondent acquired possession of the *batture*, levee, and wharves by the ordinance 7483, A. S.; and the second is whether the character of its possession is such as was contemplated by that ordinance,—for it is upon the solution of these two propositions that the issue depends. The defendant's counsel formulates in his brief this statement, viz.: "But underlying all these minor objections is the well-ascertained fact that the defendant has not taken possession of the 1,000 feet of river front under ordinance 7483, A. S., which sought to impose the obligation of paving; but it took possession under the ordinance 2245, which did not impose paving, and with the distinct agreement embodied in that ordinance and its attendant contract that the question of liability should be held in abeyance, and should not be in any manner affected by the qualified possession under this ordinance 2245." Or, in other words, "that the possession of the one thousand feet of river front and *batture* described in section 2 of ordinance 7483, A. S., was to be undisputed, in order that the obligation to pave should become effective and executory on the part of the defendant." The proof is that the respondent's occupancy commenced in August and September, 1887, and on the 18th of May, 1887, the wharf lessees executed a release in which was stated, viz.: "That whereas, ordinance No. 7483, A. S., provides that no grants therein made of wharves or wharfage facilities, etc., shall go into effect without the consent of the wharf lessees: now, therefore, in pursuance thereof, * * * they hereby consent that the wharf privileges and grants made in said ordinance No. 7483, A. S., shall at once go into effect." That is clear, concise, absolute, and unmistakable in terms. This release is made under and in conformity with the conditions stipulated in ordinance 7483, A. S., and was intended to and did put its provisions into operation. Not until that release was executed, and immediately after it was executed, the respondent took formal possession of said *batture*, levee, wharves, and other terminal facilities and franchises on the Mississippi river front.

The second section of the ordinance No. 7483, A. S., provides that the respondent "shall have the right, and the same is hereby confirmed, to occupy, for its purposes and uses, that portion of the levee, *batture*, and wharf * * * beginning at Port street, and [extending] a distance of one thousand feet down the river to Montegut street, and to erect and maintain thereon, at its own expense, such ferry facilities, wharves, piles, machinery, elevators, yards, tracks, depots, stations, sheds, and other structures [as] shall be necessary and convenient for the transaction of its business," etc., "provided, * * * that the said company shall replace the wharves constructed by the city, and occupied by said company, at such point as may be designated by the administrators of commerce and improvements and city surveyor, and shall pave Leveestreet with square

granite blocks from the extremity of the paving on that street, or from Louisa street to Poland street; and the city of New Orleans shall be entitled to remove all the cobble-stones now on said street; * * * and the square block pavement on Leveestreet shall be commenced immediately after said company obtains possession of the one thousand feet of river front and levee conceded and allowed to them by this ordinance, and continue and finish the same within one year." That section concludes with the final proviso "that no privilege or grant concerning or referring to the wharves and levees herein granted shall go into effect until the consent and permission of the wharf lessees be had and obtained," etc.

The provisions of that section of the ordinance seem to be quite as clear, and equally as free from ambiguity, as the written release of the wharf lessees is. The query, then, is, in what respect does ordinance No. 2245, Council Series, alter, amend, modify, or change the terms and conditions of the grants and privileges contained in section 2 of ordinance 7483, A. S., just quoted, ante? In order that we may be concise, and commit no error, or make no mistake, we quote it in its entirety, viz.:

"Mayorality of New Orleans, City Hall, April 30th, 1887.

"(No. 2245, Council Series.)

"Whereas, there is now existing a litigation between the city of New Orleans and the New Orleans and Northeastern Railroad Company, as appears by the suit of the city of New Orleans against the New Orleans and Northeastern Railroad Company, No. 11,375, on the docket of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, which is not likely to be terminated in a short time; and whereas, there are now no sufficient wharves in front of the depot property of said railroad company, and below Port street, in the third district of New Orleans, and it is desirable that wharves should be constructed there; and whereas, the said New Orleans and Northeastern Railroad Company are willing to construct wharves on the river front below Port street, and advance the necessary outlay of money for that purpose on certain conditions, notwithstanding the pending of the said suit, which is not to be affected thereby; and whereas, the consent of the wharf lessees, as required in paragraph three of section two of ordinance No. 7483, A. S., has been obtained:

"Section 1. Be it ordained by the city council of New Orleans that the mayor be, and he is hereby, authorized and directed to enter into a contract by notarial act with the New Orleans and Northeastern Railroad Company for the construction and maintenance of wharves on the river front, from the prolongation of the lower property line of Port street to the prolongation of the upper property line of Montegut street, in the manner and under and within the terms and conditions contained in the said ordinance No. 7483, A. S., relative to the occupation and the use of said river front provided by said ordinance No. 7483, under the following conditions, to-wit: (1) The said New Orleans and North-

eastern Railroad Company shall rebuild, without unnecessary delay, not to exceed four months, at any other place within the third district of this city as may be designated by the city council of New Orleans, new wharves equal in extent, square for square, as per measurement of the city surveyor, to replace the wharves which are or may be on said river front at the time the said New Orleans and Northeastern Railroad Company takes possession of the same. (2) That should the right to the use of said space of river front and the said wharves thereon be adjudicated and decreed as not conferred on the said railroad company, then and in that case the next wharf lessees shall, out of the funds for new wharves provided in their contract with the city, repay said railroad company the entire amount and value of all wharves constructed by them.

"Sec. 2. Be it further ordained that, should the right to said space of river front and said wharves to be constructed between Port and Montegut streets be adjudicated and decreed as not legally conferred on said railroad company, then, and in that case, the whole amount of money outlaid by said railroad company shall be paid out of the first money to be appropriated to new work in the construction of wharves in New Orleans, under a renewal of the present lease, or any other lease that may hereafter be made of the wharves; and the city of New Orleans subrogates the said railroad company to its rights against any wharf lease to have such appropriation of new work, and in default thereof the city of New Orleans shall pay said moneys to the said railroad company.

"Sec. 3. Be it further ordained that it shall be specially stipulated in said contract that nothing in this ordinance shall in any way relieve the said railroad company of any obligations imposed by the provision of said ordinance No. 7483, A. S., or in any way impair or prejudice the rights of the city of New Orleans now in contestation in the suit of the City of New Orleans v. said Railroad Company, No. 11,875, on the docket of the circuit court of the United States for the fifth circuit and eastern district of Louisiana; nor shall the rights of said railroad company, as set forth by said suit No. 11,875, be prejudiced in consequence of this ordinance and the said notarial agreement, which shall be according as the said case may be determined, and as the rights of said railroad company may be adjudicated and decreed therein on final decree in the appellate court, which said suit shall proceed to a final termination thereof for the purpose of fixing the rights of the parties thereto; nor shall this agreement be offered in evidence or referred to in said suit.

"Adopted by the council of the city of New Orleans, April 26, 1887."

The ground that this ordinance was intended to and did cover may be summarized thus, viz.: (1) Whereas, suit No. 11,875, supra, is not likely to be terminated in a short time. (2) That there are no sufficient wharves in front of the depot property of the respondent. (3) That the respondent is willing to construct wharves on the river front below Port street, and

advance the necessary outlay of money for that purpose, notwithstanding the pending of said suit. (4) That the consent of the wharf lessees has been obtained in accordance with section 2 of ordinance No. 7483, A. S. (5) That the mayor is authorized to enter into a notarial contract with the respondent for the construction and maintenance of wharves, etc., in the manner and under the written terms and conditions contained in said ordinance No. 7483, A. S., relative to the occupation of said river front, under the following conditions, viz.: (6) The respondent shall build certain new wharves to replace those taken possession of by the company. (7) That should the right to the use of said space of river front, and said wharves thereon, be decreed and adjudicated as not legally conferred on said railroad company, then, and in that case, the next wharf lessees shall repay the said railroad company the entire amount and value of all wharves, etc. (8) That should the right to said space of river front and said wharves be adjudicated and decreed as not legally conferred upon said railroad company, then, and in that case, the whole amount of money outlaid by said railroad company shall be refunded, etc.

The foregoing are all the points covered by the ordinance 2245, A. S., and they do not cover the question of paving Levee street. That seems to have been left uninterrupted entirely.

Simplified, the tenor and substance of it is, that the respondent was willing to do the work, and accept the grants and concessions that were stipulated in its favor, provided that should its use to the quota of *batture*, etc., be adjudicated in that suit as not legally conferred, it should be fully compensated and reimbursed the amount of its outlay.

The final clause of section 3 of the ordinance No. 2245, A. S., is a saving clause, and provides: That the contract between the mayor and the respondent shall specify "that nothing in this ordinance shall in any way relieve the said railroad company of any of the obligations imposed by the provisions of said ordinance No. 7483, A. S.," and that it shall not interfere with the rights of either party in the pending suit, "which shall be according as the said case may be determined, and as the rights of said railroad company may be adjudicated and decreed thereon on final decision of the appellate court, which said suit shall proceed to a final termination thereof for the purpose of fixing the rights of the parties thereto, nor shall this agreement be offered in evidence or referred to in that suit."

This was intended to operate as a mutual shield and safeguard against danger arising out of that suit to either party thereto; while the contract stipulations enabled the respondent to do the work with the assurance of being fully reimbursed for its money outlay, and the city to have her wharves and streets put in repair according to the contract. As we have seen, there was in that suit an incurable vice, and it has been discontinued and terminated, and this suit is in its stead. We do not regard the stipulation that said suit shall proceed to a final termination

as in the nature of a contract that it should not be abated or dismissed, but merely that the ordinance should not have the effect of discontinuing or abating it. This clause stands apart from the contracting clauses quoted.

In pursuance of ordinance No. 2245, C. S., the relator and respondent entered into a notarial contract on the 25th of May, 1887, —only a few days subsequent to the execution of the release of the wharf lessees,—wherein it was stipulated on the part of the city that she granted to respondent the right to construct and maintain wharves on the riverfront from Port street to Montegut street, in the manner and under the written terms and conditions in ordinance No. 7483, A. S., and wherein it was likewise stipulated on the part of the respondent that it would cause to be constructed and maintained wharves on the river front "from Port to Montegut streets," in conformity to the provisions and requirements of ordinance No. 7483, A. S. Both ordinances are incorporated in full in the contract, and then follow stipulations precisely in conformity thereto, as outlined above.

After making a most careful examination and comparison of said ordinances and contents, we feel satisfied that there is nothing precarious or uncertain in the respondent's possession of the terminal facilities granted it by the city; that the company acted in view of all stipulations in those two ordinances in its favor; and of the obligations and conditions they imposed upon it. They were willing to take possession and to erect wharves, etc., on the sole condition that it should be remunerated in case of eviction by a decree in that suit. The position of the railroad company, condensed, is that the possession of the 1,000 feet of levee, which was disputed and precarious, because ordinance 7483, A. S., is assailed as illegal in circuit court suit 11,375, and that the effect of that suit was suspended by ordinance 2245, C. S., under which it went into possession. That suit was brought by the city to coerce the railroad company's full compliance with all obligations under the former ordinance, and *inter alia* the obligation to pave Levee street. In that suit the defendant's answer was that the city was seeking, by that ordinance, illegally to enforce certain conditions upon the use of her streets, and its prayer was that the stipulation in said ordinance in relation to paving Levee street be annulled, on the ground that it is entitled under its charter to all of the rights that are purported to be conferred by said ordinance, and that the petition be dismissed, with costs.

In the first place, we have found and decided the riparian rights and franchises purporting to have been conferred by that ordinance were not, as a matter of fact, conferred by the charter of the railroad company, and therefore the supposed illegality of said ordinance did not, as a matter of law, exist. We have thereby disposed finally of the question of the alleged illegality of said ordinance which was set up in the former suit, as a reconventional demand, though it was not, as a matter of fact, such a demand. *Meyers v. Burtie*, 6

South. Rep. 607. In the second place, we have found and decided that, as in that suit there was no averment that the wharf lessees had made the required release of the wharves in question, that suit disclosed no right in the city to compel the defendant to pave Levee street, and that this lack of essential averment was an incurable defect therein, in this particular, and, upon trial thereof, judgment would have necessarily gone against the city on that issue, as of nonsuit. Hence the right of the company to occupy Levee street, and its obligation to do the paving, were not issues in that case, and could not have been decided therein. We have also found and decided that the question of paving Levee street is not mentioned in ordinance 2245, C. S., under which defendant claims to have acted in entering into possession of its *batture* rights and franchises, and hence its possession of the 1,000 feet of levee was in pursuance of ordinance 7483, A. S., and was not only unquestioned, but expressly affirmed, by the city. But that suit was voluntarily discontinued by the city, and the company's charge of illegality against said ordinance passed out of court with it. This suit has for its sole object to coerce the defendant to pave Levee street, and it is met with a general denial as an answer. There can be no serious question as to the right of the city to insist on the respondent's performance of this part of the contract according to the provisions of ordinance 7483, A. S., and the city surveyor's specifications.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered and decreed that the provisional *mandamus* be made peremptory, and that the respondent be taxed with all costs, in both courts.

FENNER, J., (*dissenting*.) 1. Ordinance No. 7483 shows that the matters here involved are included only in the second section, and that the provisions touching the paving and wharves relate exclusively to the wharf levee privileges, and have no connection with other privileges conferred in other parts of the ordinance.

2. It is clear that the obligation to pave cannot be imposed on the railroad company without its assent, express or plainly implied.

3. It is equally plain, from suit No. 11,735, that, prior to ordinance 2245, the railroad company did not consent to, but denied, this obligation, and had never taken possession of the "levee, *batture*, and wharf," and could not do so, because the wharf lessees refused their consent.

4. If the railroad company had been willing to accept ordinance 7483, nothing would have been necessary but to obtain the consent of the wharf lessees, and there was no necessity whatever for ordinance 2285.

5. That ordinance shows that, independent of the consent of the lessees as recited in its preamble, it was necessary, in order to induce the railroad company to act, to embody other new and additional conditions and stipulations, not only in the ordinance itself, but in an express contract between the parties.

6. Among those stipulations is found the following: "Nor shall the rights of the said railroad company, as set forth in said suit No. 11,375, be prejudiced in consequence of this ordinance and the said notarial agreement, which shall be according as the said case may be determined, and as the right of the said railroad company may be adjudicated and decreed, therein on final decree in the appellate court, which said suit shall proceed to a final termination thereof for the purpose of fixing the rights of the parties thereto; nor shall this agreement be offered in evidence or referred to in said suit." And in the contract entered into between the parties the meaning of these words "final termination" was more fully expressed, as being until said suit "shall be adjudicated and decreed on final decree in the appellate court," and that "said suit shall proceed to a final termination thereof, for the purpose of fixing the rights of the parties thereto."

7. Only after and under the foregoing ordinance and contract did the railroad company take possession of the warehouses and levee.

8. It cannot be disputed that the right of the city to impose, and the obligation of the defendant to perform, the duty of paving Levee street, were directly at issue in suit No. 11,375. I quote from the prayer of the city's petition therein the following: "That said company be ordered to pave, at its own expense, with square granite blocks, Levee street from Louisa to Poland streets;" and from the prayer of defendant's answer and defendant's reconvention the following: "That the requirements of said ordinance No. 7483, for the paving of Levee street with square granite blocks, from Louisa to Poland streets, be decreed illegal, null, and void."

9. Unless the voluntary dismissal, by the city, of the suit No. 11,375, can be accepted as a termination thereof, for the purpose of fixing the rights of the parties thereto, I do not see how the city can prosecute the present action, without violating her clear and solemn contract. If the words quoted have any meaning or purpose, it is to prevent the very thing which the city has done, viz., the dismissal of the suit, and to require a final settlement by judicial decree, in that suit, of this contested right, as a condition precedent to such an action as the one now brought.

10. The sole purpose of ordinance 2245, C. S., was to enable defendant to take possession of the wharves and levee without thereby accepting the provisions of ordinance 7483, A. S., and to suspend all conflicting claims upon the latter until finally adjudicated in the pending suit; and to hold that, by acting under the later ordinance, defendant accepted the former, seems to me to contradict and obliterate, not only the terms, but the sole object and purpose, of the later ordinance and contract. However improvident may be the suit No. 11,375; however untenable may be the position taken therein by the company; however clear it may be that the company cannot retain the wharf and levee privileges granted in the second section of ordinance No. 7483, without performing the conditions attached to the grant,—the stubborn

facts remain that the company had the option to accept or decline the grant, and, by declining, to escape the conditions; that she has never accepted the grant, except *sub modo*, and subject to new conditions expressly stipulated in a solemn contract; and that the city, being a party to and bound by that contract, is powerless to repudiate it, to convert the company's conditional acceptance into an absolute acceptance, and to deprive the company of its option to abandon the wharf and levee privileges, and thereby to escape the conditions of the grant. For these reasons I cannot concur in the view taken by the lower court, and dissent from the opinion and decree herein.

MORRIS V. GLENN.

(Supreme Court of Alabama. Dec. Term, 1888.)

CORPORATIONS—STOCKHOLDERS—ASSIGNMENT.

One who subscribes for stock of a corporation does so with reference to the laws of the state under which the corporation is organized; and a subscriber for stock in a Virginia corporation is liable for an assessment thereon made after he has transferred the stock, as Code Va. 1873, c. 57, § 26, provides that "no stock shall be assigned on the books without the consent of the company until all the money which has become payable thereon shall have been paid, and on any assignment the assignee and assignor shall each be liable for any installments which may have accrued, or which may thereafter accrue, and may be proceeded against, in the manner before provided," by action or motion.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Action by John Glenn, trustee, against Morris, to recover an assessment on stock of the Nation Express & Transportation Company, a corporation organized under the laws of Virginia. Judgment for plaintiff, and defendant appeals. For a more extended statement, see *Lehman v. Glenn*, 6 South. Rep. 44.

Troy, Tompkins & London, for appellant.
W. S. Thornton, for appellee.

SOMERVILLE, J. All the assignments of error in this case, except a single one, will be overruled, on the authority of *Lehman v. Glenn*, 6 South. Rep. 44, and *Semple v. Glenn*, Id. 46, (decided at the present term.)

One other question is raised, by reason of the fact that the appellant, Morris, is shown to have accepted and transferred his certificate of stock prior to the time the assessment here sued for was made, by order of the chancery court of Richmond, Va., on March 26, 1886. This transfer did not discharge his liability to be further assessed, by reason of the provisions of the Virginia statute. The corporation being organized in that state, the subscriptions of stockholders must be held to have reference to the laws of Virginia, as fully as if these laws were a part of the subscription. 2 Mor. Priv. Corp. (2d Ed.) § 874; *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. Rep. 120. The Virginia statute provides that "no stock shall be assigned on the books without the consent of the company until all the money which has become payable thereon shall have been paid, and on any assignment the assignee and assignor shall each be liable for any installments which may have accrued, or which may

thereafter accrue, and may be proceeded against in the manner before provided," by action or motion. Code Va. (1849, 1860), c. 57, § 24; (1873, c. 57, § 26. The precise point arose in *McKim v. Glenn*, 66 Md. 479, 8 Atl. Rep. 130, and again in *Glenn v. Scott*, 28 Fed. Rep. 804, (decided by the United States circuit court of the western district of Virginia in September, 1886;) and in each case the statute was construed to continue in effect the liability of a transferrer of stock, just as if no transfer had been made.

The judgment is affirmed.

BARNES et al. v. ALABAMA STATE BANK.

(*Supreme Court of Alabama*. Dec. Term, 1888.)

EQUITABLE LIENS—CHattel MORTGAGES—AFTER-ACQUIRED PROPERTY.

1. An agreement under which defendants were to make advances to a firm of cotton brokers, to be used in paying for cotton to be purchased by them during the ensuing cotton season, on condition that all the cotton bought and paid for should be the property of defendants until they were repaid all money advanced, with the right to ship and sell it whenever deemed necessary for their protection, creates neither a mortgage at law nor a pledge of specific cotton, though it gives defendants an equitable lien on the cotton as it is bought.

2. A subsequent agreement, made nearly a year afterwards, — another agreement intervening, — that defendants should pay a note given by the brokers, and cancel a bill of lading on cotton given to secure it; that, in consideration thereof, the brokers should hold all the cotton then on hand, to pay for which defendants had advanced the money, until a designated date; that, if the cotton was not then sold by the brokers, defendants should have the right to sell it, and apply the proceeds in discharge of the brokers' indebtedness, including the note, — is a distinct and independent contract, made without reference to the first agreement, and designed to meet new and different conditions; and it also creates only an equitable lien.

3. Before defendants had acquired their equitable lien, an unindorsed warehouse receipt for 100 bales of cotton, given by the brokers, had come into plaintiff's possession as collateral security for money loaned the brokers. The 100 bales had been set apart, but, after defendants had made their advances, without notice of the plaintiff's claim, 24 of the bales were sold, and others substituted. *Held*, that the brokers' indorsement of the receipt, made after defendants' seizure of the cotton, did not pass to plaintiffs the legal title to the substituted cotton, so as to cut off the intervening equity of defendants.

Appeal from circuit court, Greene county: SAM. H. SPROTT, Judge.

Detinue by the Alabama State Bank against B. B. Barnes and others, doing business as partners under the name of the Bank of Eutaw, to recover 100 bales of cotton. The facts are fully stated by Judge CLOPTON in a former decision, reported in 2 South. Rep. 349. The agreement of May, 1884, referred to in the following opinion, was stated by him to be substantially as follows, (page 353:) "The defendants were to pay a note of Cleage Bros. for \$5,000 held by a bank in Chattanooga, as security for which Cleage Bros. had delivered a bill of lading for 100 bales of cotton, and were to take up and cancel the bill of lading; and, in consideration thereof, Cleage Bros. agreed that defendants should hold all the cotton then on hand, to pay for which defendants had advanced the money, until June 15, 1884, the quantity of which was

estimated; and, if not then shipped or sold by Cleage Bros., the defendants should have the right and authority to take, ship, and sell the same, and apply the proceeds to the payment of Cleage Bros.' indebtedness to them, the amount of which was computed, including the amount paid the bank in Chattanooga. The amount was paid as agreed on; * * * and in July thereafter the defendants took possession of the cotton in controversy, without the consent and against the objection of Cleage Bros." Plaintiff claimed the 100 bales of cotton on an unindorsed warehouse receipt given by Cleage Bros. as security for money borrowed from the National Bank of Birmingham, and transferred by it to plaintiff. The 100 bales had been set apart before the above agreement with defendants had been entered into; but after that agreement, on or about June 15, 1884, Cleage Bros. sold 24 of these bales, and substituted others in their stead. After defendant's seizure of these 100 bales, Cleage Bros. indorsed the warehouse receipt to plaintiff, and it instituted this action. The court charged the jury to find for defendants as to the substituted cotton, and for plaintiff as to the balance. Both parties appeal.

Webb & Tillman, for plaintiff. *J. B. Hend* and *E. W. de Graffenreid*, for defendants.

CLOPTON, J. The present record, and the record which was before us on the former appeal, do not materially vary as to the facts. By the cross-appeals, substantially the same questions which we then decided are again presented; and we are asked to reconsider the conclusions then announced. *Bank v. Barnes*, 82 Ala. 607, 2 South. Rep. 349. On the former appeal we held that the agreement of August, 1883, created neither a mortgage nor a pledge of specific cotton. Not controverting that a mortgage upon property to be acquired in the future does not operate to convey the legal title, if it be to secure any antecedent debt, but is only an agreement to convey when the property is acquired, counsel now insist that, as there was no existing debt at the time the agreement was made, it was simply a contract prescribing rules for the government and construction of future transactions when had, and that the cotton, under the agreement, became the property of defendants, and the legal title vested in them, as and when the cotton was purchased and paid for. The terms of the agreement were that defendants would advance money to pay for cotton purchased by Cleage Bros. in Greene county during the ensuing cotton season, by paying checks drawn by them on defendant as the cotton was purchased, on the condition and understanding that all cotton so bought and paid for should be the property of defendants until they were repaid all money advanced, and that they should have the right to take, hold, ship, and sell the same whenever deemed necessary for their protection, otherwise Cleage Bros. could ship and sell the cotton to such persons as they desired; but whenever a shipment was made they should give defendants a draft for the proceeds, with bill of

lading attached. The advances were to be made, and the property acquired, in the future. It is manifest, from the terms of the agreement, it was not intended that the cotton should become the absolute property of defendants, or that the title there-to should vest in them, but merely a security for money advanced, not for a present, subsisting debt, but for future advances. Had Cleage Bros., at the time the agreement was made, owned the cotton, it may be that the words, "should be the property of defendants," would have been sufficient to have constituted a legal mortgage. At law, a mortgage can operate only on property actually or potentially belonging to the mortgagor. If he does not own the property, there is nothing upon which the conveyance can operate. The rule is otherwise in equity; but, even in equity, a contract to transfer property to be subsequently acquired does not operate as a present alienation, but merely to transfer the beneficial interest immediately on the acquisition of the property. On the principle that a future acquisition, merely expected or contemplated, is not the subject of a mortgage at law, rest all our decisions holding that a mortgage on an unplanted crop does not pass the legal title, even when the crop comes into existence, unless the mortgagor does some new act for the purpose of carrying it into effect, though it creates an equitable interest which attaches when the crop comes into existence, and which a court of equity will protect and enforce. The same principle controls the effect and operation of the agreement under consideration.

It is further contended that the agreement of May, 1884, was made with reference to the agreement of August, 1883, and for the purpose of carrying the latter agreement into effect. The terms of the agreement are stated in the opinion delivered on the former appeal, and need not be repeated. We then ruled that it created only an equitable lien, such as may exist without the delivery of possession, and did not authorize defendants to take possession of the cotton against the objection of Cleage Bros., so as to defeat the legal title which plaintiff acquired by the indorsement to the warehouse receipt. The contract of May, 1884, is a separate, distinct, and independent contract, designed to meet new and different conditions, without reference to the contract of August, 1883, except to originate an additional equitable lien for the balance due on account of the money previously advanced. This becomes manifest when the contract of October 1, 1883, an intervening contract, is considered. By this last agreement, B. B. Barnes, one of the defendants, and who was cashier of the Bank of Eutaw, stipulated that the bank should pay for all cotton purchased by Cleage Bros. at designated places in Greene county, and would not furnish other cotton buyers with funds with which to purchase cotton. Cleage Bros. were to keep a regular buyer in the market, and use efforts to throw the cotton business into the hands of the bank. The bank was to charge the usual exchange, and the profits to be divided between Cleage Bros. and B. B. Barnes. This agreement continued only

a few days, when it was changed; the change being that, in lieu of one-half of the profits, Cleage Bros. agreed to pay Barnes \$500. It is said that this was a private agreement with Barnes, with which the other defendants had no connection. It is apparent, however, that it was made also for the benefit of the bank, which was bound by the stipulations of the cashier and managing partner. The agreement was intended to supersede, and did supersede, the agreement of August, 1883, or, at least, operated to break any possible connection which might otherwise have existed between the latter agreement and the agreement of May, 1884.

On the cross-appeal plaintiff contends that the indorsement of the warehouse receipt related back to the time of the substitution of other cotton for a portion of the 100 bales originally included in the receipt, which had been sold by Cleage Bros., and vested in plaintiffs a title to the substituted cotton sufficient to maintain detinue. The argument is that by the substitution plaintiff acquired an equitable claim to the substituted cotton; and having such interest, and Cleage Bros. having an interest in upholding its validity, they could, without committing maintenance, put the plaintiff in a position to maintain its lien on the cotton. This may be conceded; but the equitable interest of the plaintiff was inchoate, and not itself acquired until ratification. Defendants had previously acquired an equitable interest, without notice of plaintiff's claim; and a subsequent ratification, by which only an equitable interest is acquired, does not operate to cut off the intervening equity of defendants. Whatever may have been the operation of the indorsement of the warehouse receipt as between plaintiff and Cleage Bros., it does not pass, as against the equity of defendants, the legal title to cotton not originally included in the receipt. After careful consideration of the questions raised and argued, we adhere to and affirm the rulings on the former appeal. Affirmed.

KNABE V BURDEN.

(Supreme Court of Alabama. Dec. 20, 1889.)

PATENTS—EVIDENCE—OFFICIAL DUTY—PRESUMPTION.

A patent issued by the state, under Act Ala. Jan. 15, 1828, authorizing the sale of public school lands granted to the state by congress, is, under Code Ala. § 2781, providing that "patents * * * must be received in evidence without further proof," admissible in evidence, and raises a presumption that all required preliminary proceedings as to the selection of the lands by the general government, and for their sale, have been properly complied with, and, when accompanied by uninterrupted and notorious possession for 30 years, will prevail, as a legal title, against a certificate of entry subsequently issued by the United States land-office.

Appeal from circuit court, Randolph county; J. R. DOWDELL, Judge.

Ejectment by Julian C. Knabe, appellant, against Calvin J. Burden, appellee. The claims to title by both plaintiff and defendant, respectively, are set out at length in the opinion. After plaintiff introduced in evidence his certificate of entry issued

by the register of the United States land-office at Montgomery, Ala., he rested. The defendant offered in evidence the patent from the state of Alabama to C. J. Ussery, referred to in the opinion. The plaintiff objected on the following grounds: "(1) The said patent is illegal evidence; (2) it fails to show any right in the state of Alabama to grant the said patent; (3) it fails to show that the lands therein described were ever selected or set apart by the state of Alabama as required by law; (4) it fails to show that the United States ever parted with the title to said lands to the state of Alabama." The court overruled each objection, and plaintiff moved to exclude the patent from the jury as evidence, which the court overruled. Upon the evidence disclosed, the court, at defendant's request, instructed the jury that "the jury is charged, if they believe all the evidence in this case, they will find for the defendant;" to which plaintiff excepted. There was verdict and judgment for defendant, and plaintiff appeals.

Samuel Henderson, W. M. Smith, and W. M. Lackey, for appellant. N. D. Deson, for appellee.

SOMERVILLE, J. The title of the plaintiff to the land in controversy is based on a certificate of entry issued by the register of the United States local land-office at Montgomery, which instrument bears date December 2, 1835. The statute provides that such a certificate, when lawfully issued, shall "vest the legal title in the holder or his assignee, and must be received as evidence of such title." Code, 1886, § 2782; *Case v. Edgeworth*, 87 Ala. 204, 5 South. Rep. 753. This statute does not differ in substance from the act of 1812, which was construed to confer on the holder of the certificate such a title as to maintain an action of ejectment, which is a possessory action, and capable of being sustained on the right of possession. It was held not to confer the fee of the land, which remained vested in the government, in trust for the holder of the certificate, until the patent was issued. *Bullock v. Wilson*, 2 Port. (Ala.) 436; *Masters v. Eastis*, 3 Port. (Ala.) 368; *Deffenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95. The statute was not intended to determine that the holder of such certificate held more than an equitable title, as against the United States government, before the patent was issued. As evidence of such title, it can only be *prima facie*, or merely presumptive. The legislature had neither the power nor the intention to make it conclusive. *Sedg. & W. Tr. Title Land*, (2d Ed.) §§ 890, 891; *Wilcox v. Jackson*, 13 Pet. 498; *Tied. Real Prop.* § 746.

Upon this evidence the plaintiff was *prima facie* entitled to recover the land, and the *onus* was cast on the defendant to show a better title. This he attempted to do by introducing in evidence a patent from the state of Alabama, issued in due form, on January 21, 1858, to one Ussery, through whom defendant claims title by unbroken chain. It is also shown that the defendant, and those through whom he claims, have been in the open, notorious, and adverse possession of the land, exercising acts of ownership over it, since the issue of the

patent, or for more than 30 years. To the introduction of this instrument it was objected that there was no preliminary evidence of any right in the state of Alabama to make a grant of the lands described, or that the state had ever acquired the title to the lands from the general government. Such a patent is made evidence by statute, without further proof. Code 1886, § 2781. It is commonly said to be the highest evidence of title, and raises a presumption that all preliminary proceedings have been taken which justify its issue. 3 Washb. Real Prop. (3d Ed.) 205; *Polk v. Wendal*, 9 Cranch, 87; *Minter v. Crommelin*, 18 How. 87.

The defendant's contention is that the lands were granted, by act of congress, to the state of Alabama, for the support of public schools, by virtue of the statute approved May 20, 1826, (4 U. S. St. at Large, 179,) having been selected by the secretary of the treasury pursuant to the duty imposed upon him by section 2 of that act. There can be no doubt of the legal proposition that a title to government lands may pass by legislative grant as effectually as by a patent. Such a grant, therefore, by congress, necessarily prevails over a subsequent title asserted by the holder of a subsequent patent, or certificate of entry, from the general government. *Megerle v. Ashe*, 27 Cal. 322. And in such case the subsequent title may be assailed collaterally, at law, in an action of ejectment. The principle being that a patent from the United States cannot affect a pre-existing title in a third person, it is held to be void as against a prior title acquired from the same source, either by legislative grant, by patent, treaty, or otherwise; and, being a mere nullity, it may be declared so at law, without resort to a court of equity. *Sherman v. Bulck*, 93 U. S. 209; *City of New Orleans v. De Armas*, 9 Pet. 224; *Bates v. Herron*, 35 Ala. 117, and cases cited; *Stoddard v. Chambers*, 2 How. 317; *Patterson v. Winn*, 11 Wheat. 380; *Sedg. & W. Tr. Title Land*, (2d Ed.) § 887. To prove his title, then, it is necessary for the defendant not only to show a grant from the general government, but that the grant has attached to the particular lands in controversy. If the taking effect of the grant depends upon any condition, precedent or subsequent, the performance of this condition must be made to appear, either positively or presumptively. *Megerle v. Ashe*, 27 Cal. 322, *supra*. The patent from the state of Alabama, dated January 21, 1858, purports to have been executed under the authority of the act of the Alabama legislature, approved January 15, 1828, which authorized the sale of the sixteenth section granted by congress for the support of public schools. This act was passed in exact conformity to the act of congress approved March 2, 1827, which permitted such sales by consent of the inhabitants of each township or district. 4 U. S. St. 237. The mode of giving consent was by an election, to be held on a fixed day, to take the sense of the legal voters on the subject. The issue of the patent, under the principle above announced, raises a presumption that this election was legally held, and that the requisite consent was

given to the sale. *Stringer v. Young*, 3 Pet. 320; *Stark v. Mather*, 12 Amer. Dec. 565, note.

It may be said, however, that the land in controversy is no part of the sixteenth section, and was, therefore, not subject to sale under the act of 1828. It is described as "fraction C of fractional section 17, township 22, range 13 E., containing 46 acres, more or less." We are authorized to take judicial notice of the United States government surveys in this state, and of the location and relative situation of the lands officially surveyed and mapped out under the authority of the laws enacted by congress. *Lanfair v. Mestier*, 89 Amer. Dec. 689, and note; *Chambers v. Ringstaff*, 69 Ala. 140. We therefore know judicially, as the trial court is presumed to have known, that this land was a part of a fractional township, in which the sixteenth section contained but four 40's on the south line, or something over 160 acres. The act of congress approved May 20, 1828, (4 U. S. St. 179,) appropriating lands for the support of schools in certain townships and fractional townships not before provided for, authorizes the selection of a specified quantity of unappropriated lands, proportioned to the entire quantity in each fractional township. The total area of fractional township 22, in question, is known by the government survey to be 8,703 49-100 acres. This is greater than one-fourth, and less than one-half, of an ordinary township, which we know contains, approximately, 23,040 acres. The quantity authorized to be selected by the act is therefore, by its express terms, one-half section, or 320 acres. The law made it the duty of the secretary of the treasury of the general government to select these lands out of "any unappropriated lands in the land-district where the township for which any tract is selected may be situated;" and when so selected they are to be "held by the same tenure, and upon the same terms, for the support of schools in such township, as section number sixteen (16) is or may be held." 4 U. S. St. § 2, p. 179. They would, therefore, when selected, be subject to sale under the authority given by the act of the Alabama legislature approved January 15, 1828.

The question, then, is reduced to this: Can we presume a selection of the lands in controversy by the secretary of the treasury, pursuant to his official duty under the act of congress approved May 20, 1828, from the fact that the state of Alabama has in a most emphatic manner asserted a right to the land as school land, issued a patent to it more than 30 years ago, and there has been an uninterrupted, open, and adverse occupancy by the defendant, and those under whom he claims title, for this great length of time? The cases are numerous where like presumptions have been made to furnish a connecting link in the title of the property held and claimed for a period of 20 years or over, as a "means of maintaining peace, order, and harmony in the relations of civil society." And, under the past decisions of this court, we feel authorized to hold that, under the facts of this case, the presumption is legitimate that the proper selection of the land in controversy must have been made before the

state asserted title to it, and issued the patent to Usery, in January, 1858. *Iron Co. v. Fullenwider*, 87 Ala. 584, 6 South. Rep. 197; *Bozeman v. Bozeman*, 82 Ala. 389, 2 South. Rep. 732; *Long v. Parmer*, 81 Ala. 384, 1 South. Rep. 900; *Gosson v. Ladd*, 77 Ala. 223; *Matthews v. McDade*, 72 Ala. 377; *Kelly v. Hancock*, 75 Ala. 229; *McArthur v. Carrie*, 32 Ala. 75; 2 Whart. Ev. § 1338.

The circuit court did not err either in admitting the patent in evidence or in the charge given, and the judgment is affirmed.

ROME & D. R. CO. V. CHASTEEN.

(*Supreme Court of Alabama*. Dec. 19, 1889.)

INDEPENDENT CONTRACTORS—LIABILITY OF PRINCIPAL—INSTRUCTIONS.

1. A railroad company is not liable to a person injured through the negligence of a contractor or his servants engaged in constructing its road, where it appears that the contractor had the general control and direction of the manner of doing the work.

2. Plaintiff was injured while coupling cars in a train transporting materials for constructing defendant's road, and, with others operating the train, was employed by the contractor, who was building the road. *Held*, that an instruction "that if the jury believe from the evidence that the defendant, by the negligence of its agents in operating its train, injured the plaintiff, * * * and that this was done without any negligence on the part of the plaintiff, then the verdict of the jury must be for the plaintiff," is misleading in assuming that defendant's negligence was the primary issue in the case.

3. An instruction that if the jury believe "from the evidence that [the contractor] was operating the defendant's road from Gadsden to Atalla, and conveying freight and passengers between those points and receiving reward therefor, then the defendant is responsible for the negligence of the agents and servants of said [contractor,] if the jury believe from the evidence there was any negligence on their part," is erroneous, in assuming that the contractor was operating the road under an unauthorized contract with defendant, and that he could not have operated the road for the purposes specified, and at the same time exercised an independent occupation as to the work of construction.

4. The court refused to charge that defendant was not liable for plaintiff's injuries if they were sustained while C. (the contractor) was operating the road, without regard to the circumstances under which the operations were carried on. *Held* that, as the request was not predicated on the hypothesis that the jury would find that C. was an independent contractor, the refusal was proper.

Appeal from circuit court, Etowah county; JOHN B. TALLY, Judge.

Action by R. Chasteen against the appellant, the Rome & Decatur Railroad Company, for personal injuries. The case was tried on the general issue and a special plea of contributory negligence. The essential facts of the case are sufficiently stated in the opinion of this court, and need not be repeated here.

The court instructed the jury, at plaintiff's request, as follows: (1) "The court charges the jury that if they believe from the evidence that the defendant, by the negligence of its agent in operating its train, injured the plaintiff, by mashing two of his fingers, so that it was necessary to have them amputated, and that this was done without any negligence on the part of the plaintiff, then the verdict of the jury must be for the plaintiff." (2) "The court

charges the jury that if they believe from the evidence that plaintiff, at time of injury, was in the employ of Daniel Callahan and under the authority of the conductor, and had been used in coupling cars before, and the conductor ordered him to couple the cars, and the coupling of the cars was not manifestly dangerous, then it was not negligence in him in obeying said order and attempting to execute said order." (3) "The court charges the jury that if the jury believe from the evidence that Daniel Callahan was operating the defendant's road from Gadsden to Atalla, and conveying freight and passengers between these points, and receiving reward therefor, then the defendant is responsible for the negligence of the agents and servants of said Callahan, if the jury believe from the evidence there was any negligence on their part." (4) "The court charges the jury that although they may believe that Chasteen went in to couple the cars against the orders of Lunsden, yet if the engineer knew, or ought to have known, the position of peril in which Chasteen placed himself, if he placed himself in such position, and the engineer failed to exercise due care and skill to avoid injuring Chasteen, and Chasteen was injured thereby, the contributory negligence of Chasteen would be no defense, and he would be entitled to recover if he has made out his case otherwise."

The court refused to instruct the jury, at defendant's request, as follows: (1) "The court charges the jury, at the request of the defendant, that, if they believe all the evidence in this case, they must find their verdict for the defendant." (2) "The court charges the jury for the defendant that if they believe from the evidence that there was no contract between Callahan and defendant to build the road, and Callahan was not building the road, yet if the jury believe from the evidence that the train that injured plaintiff was being operated by Callahan through his agents and servants, and the jury further believe that the plaintiff was a servant of said Callahan, employed on said train to aid in operating it and in loading at the time the injury occurred, then the jury must find for the defendant." (3) "The court charges the jury, at the request of defendant, that, before the plaintiff can recover in this case, the plaintiff must show by the evidence in the case, to the reasonable satisfaction of the jury, that at the time the alleged injury occurred to plaintiff, by his attempting to couple cars, the train was being operated by defendant or under its control, that the persons operating said train were the servants or agents of defendant in operating said train, and, if the plaintiff has failed to reasonably satisfy the jury of these things by the evidence, then the verdict of the jury must be for the defendant." (4) "The court charges the jury, at the request of the defendant, that building a railroad by a railroad corporation is not a corporate act, and such railroad corporation may employ an individual or company to build such railroad for such corporation; and if the jury believe from the evidence that the defendant employed one Callahan to build its railroad, and the jury further believe from the evidence that the alleged

injury occurred to plaintiff while he was attempting to couple cars, and that the train of said cars was being operated by said Callahan through his agents to aid him in building said railroad, that the plaintiff was employed by said Callahan to work on or about said train at the time of the alleged injury, and at such time the engineer and conductor were the agents and servants of said Callahan to operate said train, then, in such case, the defendant is not liable for such injury, and the verdict of the jury must be for the defendant." (5) "The court charges the jury, at the request of the defendant, that if they believe from the evidence that, at the time of the alleged injury, Callahan was engaged in building the defendant's railroad, whether under contract with defendant or not to build said road, and the jury further believe from the evidence that the alleged injury occurred to plaintiff by his attempting to couple cars, and that the train of said cars was being operated by said Callahan, through his agents, to aid him in building said railroad, that Lunsden and the engineer were the agents of Callahan to operate said train at the time of the injury, and at the time of said injury the plaintiff was the servant of Callahan, employed to work on or about said train, then, and in such case, the defendant is not liable, and the verdict of the jury must be for the defendant." (6) "The court charges the jury, at the request of the defendant, that if they believe from the evidence that, at the time of the alleged injury, Callahan was not employed by the defendant to build its railroad, and was not engaged in building any railroad, yet if the jury believe from the evidence that, at the time of the alleged injury, Callahan, through his servants and agents, was operating said train of cars for his own benefit or use, and that the alleged injury occurred to plaintiff while he was attempting to couple cars composing a part of said train, and at such time the plaintiff was a servant or agent of the said Callahan, employed to work on or about said train, then, in such case, the defendant is not liable, and the verdict of the jury must be for the defendant." (7) "The court charges the jury, at the request of the defendant, that in ascertaining whether the plaintiff, conductor, or other persons were the servants or agents of Callahan in operating said train, and whether the train was being operated by Callahan to aid him in constructing the railroad, or for any other purpose, for his own use or benefit, at the time the alleged injury occurred, the jury may look to the evidence to ascertain whether Callahan employed and paid the plaintiff and other persons engaged in operating said train, and if, at the time of injury, the train was loaded and carrying its load for Callahan's use or benefit, and to aid him, and what kind of property or things the load consisted of; and if the jury, after considering these things, if they appear in the evidence, in connection with all the other testimony in the case, are reasonably satisfied that the plaintiff was a servant employed by Callahan to aid in operating or working about said train, and said train was being operated by said Callahan, through his

servants or agents, for his own use or benefit, and that the alleged injury occurred to plaintiff by his attempting to couple cars of said train while it was being so operated or worked on by plaintiff and others as the servants of said Callahan, then, in such case, the defendant is not liable, and the verdict of the jury must be for the defendant." (8) "If the jury believe from the evidence that the plaintiff was in a place of danger, yet if the jury believe from the evidence that the plaintiff took such place of danger at such a time, and under such circumstances, that the engineer, although he saw plaintiff, could not have prevented the injury by the exercise of due skill and care, then the plaintiff cannot recover; and in determining this question the jury will look to the evidence to determine how close the cars were to each other, whether they were moved down by engineer, and whether the engineer could have given such force to cars as stated by plaintiff, the distance they were apart, or the distance the evidence of defendant's witnesses show the cars were from each other, and the speed they were moved down, and where the plaintiff was before he went between the cars, and taking these matters in consideration, with all the other evidence in the case, the jury are reasonably satisfied from the evidence that the plaintiff took the place of danger on such a sudden and short time as not to give the engineer the power to prevent the injury by exercise of due care, then the defendant is not liable, and the jury must find verdict for defendant."

Judgment for the plaintiff, and defendant appealed.

Denson & Tanner, for appellant. *Dortch & Martin*, for appellee.

CLOPTON, J. Plaintiff's right to recover for the personal injuries complained of is based on the alleged negligence of the engineer, while he was attempting to couple cars in obedience to the order of the conductor of the train. At the time of the injury the train was engaged in transporting iron and cross-ties to be used in the construction of the road of the defendant, the Rome & Decatur Railroad Company. The main defense is that the conductor, engineer, and plaintiff were not the employees and servants of the company, but were employed and paid by one Callahan, who was engaged in constructing the road, and that the defendant is not responsible for his or his servant's wrongful acts or omissions. The decisions of this court are in line with those authorities which hold that a person who contracts for the erection of a structure, though for his own use, is not liable for injuries caused by the negligence of the contractor or of his servants, when he is exercising an independent employment,—when he is an independent contractor, in contradistinction to an agent or servant. *Mayor, etc., v. McCary*, 84 Ala. 469, 4 South. Rep. 630; *Myer v. Hobbs*, 57 Ala. 175. A railroad corporation, being clothed with full authority to construct its road in a manner suitable to its purposes and uses, may have the work performed by the employment of its own agencies and instrumentalities, or by independent con-

tract. In respect to liability for the negligence of the contractors and their servants, the law makes no distinction between natural persons and corporations. A railroad company, which contracts with a third person for the construction of its road in such a manner that the contractor has the right to direct the details of construction, and to control the mode in which the work shall be done, and the agencies employed, the company only reserving the right to insist that the result shall be in compliance with the terms of the contract, is not liable for injury caused by the negligence of the contractor or of his employees. Liability for injuries suffered during the process of construction depends, as in the case of natural persons, on the existing relation,—whether of master and servant, or contractor and contractee. *Cunningham v. Railroad Co.*, 51 Tex. 503; *Railway Co. v. Fitzsimmons*, 18 Kan. 34; *Hughes v. Railway Co.*, 39 Ohio St. 461. The test most comprehensive and generally applicable, which includes the several special tests suggested, is stated in 1 Shear. & R. Neg. § 164, as follows: "The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished."

The evidence establishes without dispute that Callahan was engaged in building the road, and was in possession of and using the engine and cars for the transportation of iron and cross-ties, and of freight and passengers, to and from Gadsden and Atalla, receiving the toll therefor, and employed and paid the workmen. Whether or not these facts are *prima facie* sufficient to show that Callahan was an independent contractor the members of the court are divided in opinion. Some of them deem them sufficient, and hold that the affirmative charge requested by defendant should have been given. Speaking for myself, as no contract was produced or proved, which was in the power of the defendant, evidence that the engine and cars belonged to the company, and that the road was being constructed for its benefit, if believed, *prima facie* shows that those employed in the work of construction were the agents and servants of the company, and devolves the burden to prove that the road, engine, and cars were in the possession and under the control of Callahan as a contractor, and that those employed were exclusively his agents and servants. As an inference may be reasonably drawn that the company retained the right to direct what should be done and how,—the general mode of performance,—though Callahan may have employed and paid the workmen, the sufficiency of the undisputed facts mentioned to overcome the presumption arising from ownership was a question for the jury, on consideration of all the circumstances proved. All of us concur, if they should find that the persons employed by Callahan were his agents and servants, whom defendant had no right to dismiss or otherwise control, the company would not be

responsible for an injury caused by the negligence of the engineer. 1 Shear. & R. Neg. § 158; Railroad Co. v. Hanning, 15 Wall. 649; Speed v. Railroad Co., 71 Mo. 303. But as the case must be reversed on other points, and as additional proof may be adduced on another trial, we shall leave this question undecided.

As a material issue was whether the persons employed were the servants and agents of Callahan or of the company, the first charge requested by the plaintiff is obnoxious to the criticism that it is calculated to draw the minds of the jury from such issue, and to create the impression that negligence *vel non* was the pivotal issue in the case.

The third charge given at the instance of plaintiff bases the responsibility of defendant upon the isolated fact that Callahan was transporting freight and passengers to and from Gadsden and Atalla for reward. The charge is defective in two respects: (1) It does not claim that the company had made any unauthorized surrender of the road, engine, and cars, or that Callahan was operating them under any contract which the corporation had no authority to make. Under the charge, the jury were authorized to hold the company liable, though Callahan may have been operating the road without defendant's permission and against its objection; or though he may have been an independent contractor, having possession and control, and operating the finished portion in aid of the further construction of the road under a contract with the company. Railway Co. v. Fitzsimmons, *supra*. (2) Plaintiff was injured while the engine and cars were employed in transporting iron and cross-ties for the purpose of construction. Callahan may have transported freight and passengers under an arrangement with defendant which did not avail to exempt from liability for his or his servants' negligence while rendering that particular service, and at the same time, in respect to the work of construction, have exercised an independent occupation, which avoided responsibility on the part of the company while rendering that particular service. As plaintiff was not injured while freight or passengers were being transported, such use of the road, engine, and cars does not constitute a sufficient ground on which to make defendant liable for his injury, if Callahan was an independent contractor for the construction of the road.

The second, fifth, and sixth charges requested by the defendant assert the proposition that the company is not liable if Callahan was operating the engine and cars by his agents and servants; though he was not employed to construct the road, or engaged in its construction. The proposition of the charge is that a railroad corporation is not responsible for the torts of any person actually operating its line, whatever may be the circumstances under which he is so operating it. Actual operation by the corporation at the time of an injury is not essential to liability. A railroad corporation does not avoid responsibility for an injury caused by the negligence of the agents or servants of another corporation, or of a natural person, to

whom it may lease or voluntarily surrender its property and franchises without competent authority. Ricketts v. Railway Co., 85 Ala. 601, 5 South. Rep. 353. The charges should have predicated exemption from liability as part of the hypothesis, on the jury finding that Callahan was an independent contractor.

As to contributory negligence, we may remark that if plaintiff was an employee of defendant, subject to the control of the conductor, an attempt to couple the cars in obedience to his order would not constitute negligence on his part; but if he attempted to do so in violation of the order of the conductor, and without occasion or necessity placed himself in a condition of peril, from which he could not escape by the exercise of ordinary care, this would be contributory negligence. The second charge given at the instance of the plaintiff in relation to this question is abstract, being based on the hypothesis that plaintiff was in the employ of Callahan, and not of defendant. The eighth charge requested by defendant is argumentative, and for this reason, if no other, was properly refused.

Reversed and remanded.

LOWE v. STATE.

(Supreme Court of Alabama. Jan. 7, 1890.)

CRIMINAL LAW—CONFESSIONS—INSTRUCTIONS.

1. If information derived from a confession of crime leads to the discovery of material facts, which go to prove the commission of the crime, so much of the confession as strictly relates to the facts discovered will be received in testimony, though the confession may not be shown to have been voluntary.

2. Where the bill of exceptions sets out only part of the evidence, it will be presumed, if necessary in order to sustain the admission of the confession, that the facts were discovered after the confession, and from the information derived therefrom.

3. Defendant, having excepted generally to the refusal of the court to exclude an entire confession, part of which was admissible, cannot complain that some parts of the confession should have been excluded.

4. Where the court has charged the jury that before they can convict defendant of murder they must be satisfied that he has been proven guilty of the offense, "fully, clearly, conclusively, satisfactorily, and that to a moral certainty, and beyond all reasonable doubt," it is not error to explain that the terms used meant the same as that they must be convinced of his guilt "beyond a reasonable doubt."

5. It is not error to refuse to charge that "if a witness has willfully testified falsely to any material fact the jury should disregard his evidence altogether," as this would be an invasion of the province of the jury.

6. The tendency of a charge, unexplained, that "it is better that ninety-nine guilty men should escape than that one innocent man should be punished" is to mislead; and it is not error to refuse to charge it.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

Gilbert Lowe was indicted for the murder of John W. Meadows, and found guilty, and appeals.

S. M. & W. C. Meek, for appellant. W. L. Martin, Atty. Gen., for the State.

CLOPTON, J. The first matter complained of is the refusal of the court to exclude the entire confession of defendant on

the ground that it was not shown to have been freely and voluntarily made. The necessities of the case do not call for a decision of the question whether or not the confession was voluntary. In his confession defendant described the kind of clothing which the deceased wore when killed, and the place where he was killed, and stated that the body was left in a sink covered with leaves, and also some keys, a watch-chain, a broken-handled knife, and a brown, soft hat. The court excluded all of the confession, except the statements describing the dress of deceased, the place where the killing occurred, and the manner in which the body was left.

A modification of the rule which excludes a confession not shown to be voluntary is, if information derived therefrom leads to the discovery of material facts, which go to prove the commission of the crime, so much of the confession as strictly relates to the facts discovered, and the facts themselves, will be received in testimony, though the confession may not be shown to have been voluntary, for the reason that the discovery of the facts corroborates the truth of the confession to that extent. *Banks v. State*, 84 Ala. 430, 4 South. Rep. 382; *Murphy v. State*, 63 Ala. 1. There is evidence, showing that the body of the deceased was found at the place where accused stated it was left, partially covered with leaves, as were also a broken-handled knife, watch-chain, keys, and a brown, soft hat, near the body. The record does not affirmatively disclose whether the body and other articles were discovered before the confession was made or afterwards, as a sequence of the information derived from the accused. But the bill of exceptions does not purport to set out all the evidence. In this state of the record, we must presume, if necessary to sustain the ruling of the criminal court, that they were discovered after the confession. It is true that the clothing which the defendant stated deceased wore was not discovered. He was stripped of apparel, except the underwear. The only identifying testimony as to the clothing is that the deceased wore such the last time he was seen before the killing. It may be that the statement of defendant as to the coat, vest, pantaloons and shoes of deceased do not come within the rule of admissibility. This question we do not decide. The motion was to exclude, and the exception goes to the refusal of the court to exclude, the entire confession. When general exceptions are made to evidence partly admissible and partly inadmissible, the court is not bound to separate the legal and illegal parts. The criminal court could have properly overruled the entire motion, a portion of the statements of defendant being admissible. No objection having been made separately and specially to the portion of the statement describing the dress of deceased, which may be of doubtful admissibility, and as the court could have properly, on the motion to exclude the entire confession, retained the whole of it in evidence, defendant cannot complain that the court failed to nicely separate the legal and illegal parts.

The court, having charged the jury, at the instance of defendant, that before they

can convict of murder they must be satisfied that he has been proven guilty of the offense, "fully, clearly, conclusively, satisfactorily, and that to a moral certainty, and beyond all reasonable doubt," the prosecuting solicitor requested the court to instruct the jury that the terms used in the foregoing charge meant the same as that they must be convinced of his guilt "beyond a reasonable doubt." The charge given at the instance of the defendant was probably calculated, by the conjunctive use of cumulative words and expressions, to create upon the mind of the average juror the erroneous impression that a higher degree of proof is essential to conviction for murder than is meant by the phrase "beyond a reasonable doubt." The explanatory charge was proper, to prevent the jury from being misled. *McKleroy v. State*, 77 Ala. 95.

There is no error in the refusal of the court to charge the jury that if a witness has willfully testified falsely to any material fact the jury should disregard his evidence altogether. Of the weight and credibility of all oral proof, whether given for or against the accused, the jurors are the sole judges. They may disregard altogether the evidence of a witness who has willfully sworn falsely, or they may credit portions of his testimony, especially if corroborated by other witnesses, or by circumstances clearly proved. The court cannot, as matter of law, instruct them to disregard altogether the testimony of any witness. The charge would have invaded the province of the jury. *Moore v. State*, 68 Ala. 360; *Jordan v. State*, 81 Ala. 20, 1 South. Rep. 577.

It cannot be said that the trite expression, "it is better that ninety-nine guilty men should escape than that one innocent man should be punished," is an established maxim of the law. The law recognizes no such comparison of numbers. Its sole object is to punish the guilty, and that the innocent be acquitted. The tendency of such a charge, unexplained, is to mislead. We have heretofore ruled in several cases that it is not error to refuse similar charges. *Ward v. State*, 78 Ala. 441; *Carden v. State*, 84 Ala. 417, 4 South. Rep. 823.

Affirmed.

PARKER V. STATE.

(Supreme Court of Alabama. Jan. 7. 1890.)

HOMICIDE—SELF-DEFENSE.

Where one charged with homicide is the original aggressor, he cannot ordinarily justify on the ground of necessity for the killing; but if he withdraws from the conflict in good faith, and clearly shows his desire for peace, his right of self-defense revives, and if he is pursued, and taking life becomes inevitable to save life, he is justified. The question of good or bad faith of the retreating party is, however, of the utmost importance, and should generally be submitted to the jury in connection with the fact of retreat itself; especially where there is any room for conflicting inferences on this point from the evidence.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

The defendant in this case, Scott Parker, was indicted for the murder of Simon Anderson, by shooting him with a gun, was

convicted of murder in the second degree, and sentenced to the penitentiary for the term of 50 years. The difficulty between them occurred in May, 1889, on the premises of the Coaldale Mining Company, in the presence of several persons, who testified, in substance, that when the parties met, being about 10 or 12 feet apart, they began to curse and abuse one another, the defendant having his gun in his hand, and the deceased having his hand on his pistol pocket; that the defendant threw up his gun, and pulled the trigger, but the "gun snapped;" that he then retreated backwards very slowly, while he put new caps on his gun, still holding it in a position to shoot, and followed by the deceased; that after the defendant had thus moved backwards about 40 or 50 feet, followed by the deceased, cursing and abusing each other, the deceased said, "I'll take no more from you," and pulled out his pistol, when the defendant fired and killed him instantly. The defendant introduced evidence of threats made against him by the deceased on the morning of the difficulty, declaring his intention to kill defendant that day, which threats were communicated to defendant about two hours before the parties met; and he testified in his own behalf to other threats previously made to him in person by the deceased.

The defendant requested the court to give the following charges in writing, and duly excepted to the court's refusing to give each one of them. (1) "Even if the jury should find from the evidence that the defendant was in the wrong in the first instance, yet a space for repentance is always open; and when a combatant withdraws as far as he can without putting himself in greater peril, and his adversary pursues him, if the taking of life becomes necessary to save his own he will be justified." (2) "When a person has reasonable cause to apprehend a design on the part of another to do him great bodily harm, and there is cause to apprehend immediate danger, he may act upon appearances, and may kill his assailant, if necessary to avoid the danger." (3) "Although the jury may believe from the evidence that the defendant first drew his gun on the deceased, yet if they further believe from the evidence that afterwards, before the fatal shot was fired, he attempted to withdraw from the conflict by retreating or otherwise, then the right of the deceased to follow him up, and to use or to threaten violence against him, ceased; and if the deceased did not then desist from attempting to use violence towards the defendant, then defendant's right to defend himself revived; and if he then found himself in apparent danger of losing his life, or of sustaining great bodily injury at the hands of the deceased, he had the same right to defend himself that he would have had if he had not commenced the conflict." (4) "Justifiable homicide is the killing of a human being in self-defense; and if the jury believe from the evidence that the defendant, at the time he shot and killed Anderson, had reasonable cause to believe from the act, threats, and demonstrations of the deceased that his life was in peril, or that the deceased would inflict great bodily harm upon him, then he was

justifiable in shooting the deceased; and the law did not require that he should wait until struck or wounded by the deceased, but, if he had reasonable cause to believe the same, he was justifiable in shooting, and the jury must acquit him." (5) "If a person's life is actually threatened, and there is imminent danger of losing his life, or of suffering great bodily harm, the person thus endangered will be justified in defending himself, even to the taking of the assailant's life, although the danger be only apparent. A person need not be in actual imminent peril of his life or of great bodily harm before he may slay his assailant. It is sufficient if, in good faith, from the facts as they appear to him at the time, he has a reasonable belief that he is in such imminent peril."

J. J. Altman, for appellant. W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. The general rule has often been declared that the accused, charged with homicide, must always be reasonably free from fault in having provoked or brought on the difficulty in which the killing was perpetrated; and if he was the aggressor he cannot be heard to urge, in his own justification, a necessity for the killing, which was produced by his own wrongful act. Storey's Case, 71 Ala. 330. This rule, however, is not of absolute and universal application. An exception to it exists in cases where, although the defendant originally provoked the conflict, "he withdraws from it in good faith, and clearly announces his desire for peace." If he be pursued after this, his right of self-defense, though once lost, revives. "Of course," says Mr. Wharton, in referring to this modification of the rule, "there must be a real and *bona fide* surrender and withdrawal on his part, for, if there be not, then he will still continue to be regarded as the aggressor." 1 Whart. Crim. Law, (9th Ed.) § 486. The meaning of the principle is that the law will always leave the original aggressor an opportunity to repent, before he takes the life of his adversary. Where, therefore, as said by Mr. Bishop, "a combatant in good faith withdraws as far as he can, really intending to abandon the conflict, and not merely to gain fresh strength or some new advantage for an attack, but the other will pursue him, then, if taking life becomes inevitable to save life, he is justified. But a mere colorable withdrawal avails nothing." 1 Bish. Crim. Law, (7th Ed.) § 871.

This exception to the general rule under discussion we recognize as a just one, and we fully approve it. But due caution must be observed by courts and juries in its application, as it involves a principle which is very liable to abuse. The question of the good or bad faith of the retreating party is of the utmost importance, and should generally be submitted to the jury in connection with the fact of retreat itself, especially where there is any room for conflicting inferences on this point from the evidence. The first and third charges requested by the defendant were faulty in withdrawing this question from the consideration of the jury, and they were therefore properly refused. Sackett, Instruc-

tion to Juries, 530. The other three charges were entirely misleading in ignoring the question as to who was the original aggressor in the conflict, and no facts are hypothesized which tend to bring the case within the exception above stated. Storey's Case, 71 Ala. 330, supra.

We discover no error in the record, and the judgment is affirmed.

ANONYMOUS.

(Supreme Court of Alabama. Jan. 7, 1890.)

DIVORCE—PHYSICAL INCAPACITY.

1. Code Ala. 1886, § 2322, provides that either party to a marriage is entitled to a divorce from the bonds of matrimony "when the other was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state." Held, that "physically incapacitated," as here used, means substantially the same as "impotent."

2. On a bill for divorce on the ground of physical incapacity, it was decreed that complainant and defendant be required to submit their persons to examination by physicians.

Appeal from chancery court, Butler county; JOHN A. FOSTER, Chancellor.

Richardson & Steiner, for appellant.
Chas. Wilkinson, for respondent.

STONE, C. J. The averments of the bill in this case are too offensive to modesty to allow their publication in our reports. But, as said by Sir WILLIAM SCOTT in *Briggs v. Morgan*, 3 Phillim. Ecc. 325, 1 Eng. Ecc. R. 408: "Courts of law are not invested with the powers of selection; they must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender. Here the claim is for a remedy; and the court cannot refuse to entertain it, on any fastidious notions of its own."

Our statute (Code 1886, § 2322) declares that either party to a marriage is entitled to a divorce from the bonds of matrimony "when the other was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state." The meaning of the words "physically incapacitated," as here used, is substantially the same as that of the word "impotent," frequently met with in divorce proceedings. It means powerless, or wanting in physical power, to consummate the marriage. Animal desire between the sexes is one of the incitements to matrimony, the lawful gratification of which is encouraged and protected alike by moral sentiment and municipal regulation. Copulation or coition, the act of gratifying sexual desire, is the consummation of marriage; inability to accomplish which, when it proceeds from incurable physical imperfection or malformation, is precisely what our statute means and expresses by the words "physically incapacitated." "Barrenness," however, is in no sense the synonym of "impotency." We consider it unnecessary, at this stage of this case, to go further into details. 1 Bish. Mar. & Div. (6th Ed.) §§ 322-338a, inclusive, treats the subject at length, and collates and reviews the adjudged cases. We approve his statement

of the American doctrine as set forth in said section. *Devanbagh v. Devanbagh*, 28 Amer. Dec. 443, note.

The chancellor overruled the defendant's demurrer, and his motion to dismiss the bill for want of equity; and the present appeal by the defendant is from his ruling. It is here contended that before seeking a divorce complainant should have submitted to a triennial test, sometimes required in the English ecclesiastical court. That being a rule of the canon, and not of the common law, it is doubtful if it could exert any influence in our deliberations, even if uninfluenced by statute. We think, however, that our statute forbids us to consider that rule in passing on this statutory ground of divorce.

It is contended for appellant that the averments in the present bill are not sufficiently specific. We think there is nothing in this, for very obvious reasons. We know not how the charges could be made more definite.

Questions are raised on the form of relief, and on the right to allow the amendment to the bill, which was made in the court below. There is nothing in these objections. However a sentence annulling marriage on account of impotency may have been classified or regarded under the canon law, such marriages were not absolutely void. They were only voidable at the request of the injured party. If not annulled by judicial sentence during the life of the parties, they entailed all the legal consequences of a valid marriage; and until such sentence of annulment neither party could contract other marriage. But we need not pursue this inquiry. Our statute, in terms, makes it a ground for divorce from the bonds of matrimony; and that fixes its class and status for us.

Is the malformation or physical incapacity charged in the bill, if true, sufficient ground for divorce? Can we, as matter of law, or of indisputable fact, affirm that the charge is preposterous, and therefore untrue? Are the abnormal proportions which are charged impossible, in the nature of things? We know of no rule of law or logic by which we can reach such conclusion. We hold that the chancellor, in his decretal order overruling the demurrer and refusing to dismiss the bill, did not err.

The briefs of counsel give evidence of diligent research; and they furnish no adjudged case in which the malformation here complained of was the ground of complaint. We suppose such cases, if they exist at all, are very rare. To authorize the relief prayed, the proof should be very satisfactory, and the most direct which the nature of the question is susceptible of. The complainant must be required to submit her person to examination by physicians, or matrons skilled in such matters, to be appointed by the chancellor; and proof of such examination by the persons so appointed, showing that the fault is not with her, must be made an indispensable condition of relief. If she refuse to submit to such examination, then let her bill be dismissed. The defendant, also, should submit to skillful examination as a condition of his defense, if he contests the complainant's right of relief. But if the defense is

not made as herein indicated, the chancellor should scrutinize the testimony narrowly, and have recourse to any other legal means, with a view of ascertaining if the proceedings have not become consensive and collusive. Findings such to be the case, relief should be denied, except on clear proof of the charge preferred in the bill, namely, that for the reason stated the defendant "was at the time of the marriage physically and incurably incapacitated from entering into the marriage state." Affirmed.

MOSES V. STATE.

(Supreme Court of Alabama. Jan. 9, 1890.)

ROBBERY—HEARSAY—CONTRADICTION STATEMENTS.

1. On the trial of an indictment for robbery, unsworn statements by the victim of the robbery, which she was heard to make several hours after the alleged robbery, purporting to be explanatory of the transaction, are inadmissible in evidence.

2. A witness was permitted to testify that defendant had made three several statements to him as to where she had obtained the articles of jewelry discovered in her possession. The first was that she had gotten them from her husband. The other two statements he did not remember, "except that they were different from each other and from the first statement." Held, that the testimony should have been excluded.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

Indictment for robbery.

Atty. Gen. Martin, for the State.

SOMERVILLE, J. The defendant was convicted of the crime of robbery, and was sentenced to death by hanging. Crim. Code 1886, § 3742. The bill of exceptions taken in the case raises no question for our consideration except the rulings of the court on the evidence.

1. The person robbed was a female, and was not introduced as a witness on the trial, possibly for some good reason not shown by the record. But the state was allowed to prove certain unsworn statements which she was heard to make some time after the alleged robbery, purporting to be explanatory of the transaction.

It appeared from the evidence that she was seen on the day of the robbery in company with the defendant, and between 12 and 1 o'clock they entered the woods together. A witness for the state was allowed to testify that about 1 o'clock, while walking in the woods, he saw the Egyptian woman [the victim of the robbery] coming towards him out of the woods, all bruised, wounded, and bleeding, and her clothes badly torn, that she was gesticulating and trying to talk, but he did not understand, and did not suffer her to come near him, but went off, and a short time afterwards, with others to whom he had reported the incident, he returned, and found the woman badly cut and beaten; and they asked her who had cut her, and she replied and gesticulated, "The woman that went with her." This was objected to as the mere statement of the person robbed. A similar statement made by the woman robbed to another witness, about 4 o'clock P. M. of the same day, or

about three hours after the robbery, was allowed to go to the jury, against the objection of the defendant.

The court clearly erred in admitting these unsworn statements of the person robbed, which were mere hearsay, and not competent evidence of the facts stated. Even dying declarations are inadmissible in prosecutions for robbery. So, in rape cases, the complaint of the prosecutrix, unless it constitutes a part of the *res gestæ*, is not admissible on her direct examination by the state to identify the perpetrator of the crime. *Barnett v. State*, 83 Ala. 40, 3 South. Rep. 612. The time elapsing between the alleged act of robbery and the declarations made by the person robbed in explanation of it is not sufficiently brief, nor are the two transactions otherwise so clearly connected, as to bring the declarations within the principle of *res gestæ*. The statement is rather a narrative of a by-gone transaction, past and completed. *Kennedy v. State*, 85 Ala. 326, 5 South. Rep. 300; *Railroad Co. v. Hawk*, 72 Ala. 112; *Dismukes v. State*, 83 Ala. 287, 3 South. Rep. 671; *Burns v. State*, 49 Ala. 370.

2. The objection taken to the witness Wright's testimony should, in our opinion, have been sustained. He asserted that the defendant had made three several statements to him as to where she had obtained the articles of jewelry discovered in her possession. The first was that she had gotten them from her husband. The other two statements he did not remember, "except that they were different from each other and from the first statement." Wherein they differed, or in what respect their alleged contradiction consisted, the witness did not pretend to recollect. If the statements had been before the jury, they might have come to another conclusion than that reached by the witness. His assertion savored rather of an opinion than a fact, and should have been excluded.

For the errors above pointed out the judgment is reversed, and the cause remanded for a new trial. The prisoner, in the mean while, will be retained in custody until discharged by due process of law.

Reversed and remanded.

WILLIAMS V. STATE.

(Supreme Court of Alabama. Jan. 9, 1890.)

LARCENY—COMPLAINT AND WARRANT.

1. Code Ala. 1886, § 4286, provides that "the forms for proceedings before the county court, under the provisions of the preceding article, or other substantially the same, may be used by a justice of the peace, in cases tried before him." Section 4204, a section of the preceding article, prescribing the constituents of the requisite affidavit to bring a criminal accusation before the county court, declares that when a party, desiring to bring a charge of misdemeanor before the county court, makes affidavit in writing before the judge thereof or some justice of the peace of the county that he has probable cause to believe, and does believe, that an offense, designating it by name, or by some other phrase, which, in common parlance, designates it, has been committed by some person, (naming the offender,) on the person or property of another, (naming the person injured,) the judge of the court or justice of the peace shall issue his warrant of arrest. Held, that an affidavit before a justice of the peace, charging that defendant

stole, in the county of Montgomery, certain personal chattels from the premises of the complainant, setting forth the property, but averring neither the value nor ownership, was sufficient to give the justice jurisdiction so as to constitute his judgment the proper basis of appeal.

2. And such appeal cuts off all inquiry into the inaccuracies of the affidavit, and the city court has authority to try the case *de novo*, without an indictment or presentment by a grand jury; Code Ala. 1886, § 4231, relating to cases taken by appeal from the judgment of a justice, providing that "the trial in the circuit or city court shall be *de novo*, and without indictment or presentment by the grand jury, but the solicitor shall make a brief statement of the cause of complaint."

Appeal from city court of Montgomery, THOMAS M. ARRINGTON, Judge.

Prosecution for petit larceny. The defendant in this case was arrested under a warrant issued by a justice of the peace, "on a charge of petit larceny alleged to have been committed by him in said county, on or about the 12th day of June, 1889, on the premises of J. W. James, said charge being preferred by said James." The affidavit on which said warrant was issued was made before the justice by said James, and stated that "in said county, on or about the 12th of June, 1889, one Henry Williams did steal from his premises one plow-stock, sweep, single-tree, and set of gearing, against the peace," etc. On the trial before the justice of the peace, the defendant was found guilty, and sentenced to hard labor for the county for six months, from which judgment he took an appeal to the city court. In that court the solicitor filed a statement or complaint in the name of the state, charging the defendant with the larceny of the articles named, alleging that they were the personal property of J. W. James, and of the aggregate value of five dollars. To this complaint the defendant pleaded not guilty, but was found guilty by the verdict of the jury; and he then moved in arrest of judgment, on the ground that the proceedings were void for want of jurisdiction; that the affidavit was void because it does not aver the value or the ownership of the stolen property; and that the city court had no jurisdiction of the case. The court overruled the motion in arrest of judgment, and rendered judgment on the verdict, to which ruling the defendant excepted.

John Gindrat Winter, for appellant.
Atty. Gen. Martin, for the State.

CLOPTON, J. After a verdict of guilty had been returned, appellant moved for arrest of judgment, on the ground that the affidavit on which the justice of the peace issued his warrant of arrest charges no criminal offense of which the justice had jurisdiction, by reason whereof the proceedings before him, including the judgment of conviction and sentence, from which the defendant took an appeal to the city court, are void. The contention is that, the jurisdiction of a justice of the peace to try criminal offenses being statutory, the facts out of which the jurisdiction proceeds must affirmatively appear from the proceedings; and as the justice has jurisdiction of larceny only when the value of the property taken does not exceed \$10, the value is a jurisdictional fact. In respect to the trial

of cases taken by appeal from the judgment of a justice, section 4231, Code 1886, provides: "The trial in the circuit or city court shall be *de novo*, and without any indictment or presentment by the grand jury, but the solicitor shall make a brief statement of the cause of complaint." It is well settled that when the defendant fails to make any objection to the sufficiency of the affidavit before the justice, and takes the case by appeal into the circuit or city court, where the trial is *de novo*, a complaint may be filed by the solicitor, properly charging the offense with which the accused was charged before the justice, and no objection can be made to any inaccuracies or imperfection in the proceedings before him. *Tatum v. State*, 66 Ala. 465; *Blankenshire v. State*, 70 Ala. 10. This general rule is not controverted, but it is insisted that the city court, being prohibited by the constitution to try any person for an indictable offense by information, does not acquire jurisdiction by appeal to try a case *de novo*, without an indictment or presentment by a grand jury, when the proceedings before the justice are void; and that in such case the city court has jurisdiction to hear and determine the case, only by virtue of its original jurisdiction over the subject-matter. Whether in this contention counsel have failed to observe the distinction between jurisdiction of the subject-matter and the mode by which a particular case may be brought within the jurisdiction of the court, or whether, after appeal, complaint filed, and conviction in the city court, the objection, that the affidavit made before the justice of the peace is void, can be taken advantage of by motion for arrest of judgment, it is unnecessary to decide. The question is not whether the affidavit and warrant should have been quashed on direct and seasonable objection, but whether it is sufficient to uphold the judgment of the justice for the purposes of an appeal to the circuit or city court. Section 4236, Code 1886, provides: "The forms for proceedings before the county court, under the provisions of the preceding article, or others substantially the same, may be used by a justice of the peace in cases tried before him." And section 4204, being a section of the preceding article, prescribes the constituents of the requisite affidavit to bring a criminal accusation before the county court. It declares that upon a party, desiring to bring a charge of misdemeanor before the county court, making affidavit in writing before the judge thereof, or some justice of the peace of the county, that he has probable cause to believe, and does believe, that an offense, designating it by name, or by some other phrase which, in common parlance, designates it, has been committed by some person, (naming the offender,) on the person or property of another, (naming the person injured,) the judge of the court or justice of the peace shall issue his warrant of arrest. It is obvious that the statute dispenses with the fullness and accuracy of description of the offense, and altogether with some averments necessary and observed in indictments. A complaint for petit larceny, if it designates the offense by name, or by an equivalent phrase used in

common discourse to describe it, names the offender, sets forth the property, and avers the ownership, substantially conforms to the statute, and is sufficiently certain, on objection being made before the justice. *Bell v. State*, 75 Ala. 25; *Brown v. State*, 63 Ala. 97; *Brazleton v. State*, 66 Ala. 96.

The affidavit in the present case charges that the defendant stole, in the county of Montgomery, certain personal chattels from the premises of the complainant, setting forth the property. There is no averment of either value or ownership, except as may be inferred from the kind of property, and the statement that it was taken from the premises of the affiant. The warrant of arrest recites the offense of petit larceny. Neither the value nor the ownership is a jurisdictional fact essential to be stated. The statute does not require the former to be alleged; and the latter being for purpose of identification and notice, and the exclusion of an inference that the accused may be the owner, is material only as matter of pleading, to bring the case properly before the justice, not to confer jurisdiction to try it. The capacity to hear and determine criminal offenses is conferred in these terms: "Justices of the peace have, in their respective counties, jurisdiction of the following offenses," designating them by name. A warrant of arrest issued by a justice of the peace, commanding the officer to arrest the accused, "to answer the criminal offense of larceny," has been held to be sufficiently regular on its face to justify the officer in executing it. *Murphy v. State*, 55 Ala. 252. Also that a warrant, reciting the offense of obtaining goods by false pretenses, need not recite an intent to injure or defraud, though such intent is an essential constituent of the crime. *Rhodes v. King*, 52 Ala. 272. The offense and its commission in the county of the justice are the essential jurisdictional facts; and, as we have shown, the offense may be designated by name, or other equivalent phrase, when given its ordinary signification. To "steal," as defined in the law-books and by lexicographers, means the felonious taking and carrying away the personal goods of another. In legal, as well as in common, parlance, it designates the offense of larceny. *Parker v. Lewis*, 2 G. Greene, 311; *Winfield, Adj. Words & P.* It may be conceded that the affidavit and warrant abound in irregularities and inaccuracies, showing a want of observance of the statutes, which rendered them fatally defective if directly assailed before the justice; yet if, upon a fair and reasonable interpretation of the language, imputing its ordinary significations, a charge of petit larceny and the commission of the offense in the county, can be gathered, the jurisdiction of the justice attached to the complaint. *Heard v. Harris*, 68 Ala. 44. The defects were cured by the complaint filed by the solicitor. The jurisdiction of the justice sufficiently appears to constitute his judgment the proper basis of appeal, which cut off all inquiry into its inaccuracies, and on appeal the statute conferred authority on the city court to try the case *de novo*, without an indictment or presentment by a grand jury.

Affirmed.

SMITH v. STATE.

(Supreme Court of Alabama. Jan. 18, 1890.)

ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

1. To support a conviction for assault with intent to murder, specific intent to take life is not essential. An assault with intent to do grievous harm to the person of another, accompanied with ability to effect it, without legal excuse or sufficient provocation, constitutes the offense.

2. Where a charge is susceptible of two constructions, the construction will be adopted by the supreme court which is least favorable to the party asking it.

3. A charge instructing the jury that they must put upon any part of the testimony a construction favorable to the defendant, if reasonable, invades their province, and is calculated to mislead them.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Indictment for an assault with intent to murder.

W. L. Parks, for appellant. *Atty. Gen. Martin*, for the State.

CLOPTON, J. The defendant, who was indicted and convicted for an assault with intent to murder Henry White, requested the court to charge the jury: "Before the jury can find the defendant guilty, they must believe, beyond a reasonable doubt, that at the time of the firing of the pistol the defendant had a specific intent to murder Henry White." Substantially the same proposition was asserted by the second, third, and fourth charges requested by the defendant.

The statute does not create, but merely converts the offense of assault with intent to murder from a misdemeanor to a felony, by inflicting severer punishment. It neither adds to nor diminishes the constituents of the offense, as known to the common law. Malice is an essential ingredient; and the expression that a wrongful act, and the specific intent to murder, must concur, as used in the law books in defining the crime, is merely intended to distinguish it from that class of cases in which a general felonious intent is sufficient. The specific intent to take life is not essential. An assault with intent to do grievous harm to the person of another, accompanied with ability to effect it, without legal excuse or sufficient provocation, constitutes the offense. The particular intent may be inferred, as the specific, malicious intent, in murder, from the character of the assault, the use of a deadly weapon, and the absence of excusatory facts and circumstances.

While the phrase, that the specific intent to murder must be alleged and satisfactorily proved, may be sufficiently accurate and definite in defining the offense, when used in a charge, there being no evidence of an intent to take the life of, or do bodily harm to, any person other than the one named in the indictment, it renders the charge susceptible of two constructions, one of which is that an express or positive intent to murder the particular person, as contradistinguished from an intent inferred or presumed from the circumstances, must be proved. It is settled that where a charge is susceptible of two constructions the construction will be adopted by the appellate court which is least favorable to the party

asking it, and if, when so construed, it asserts an incorrect legal proposition, being calculated to mislead the jury, it should be refused. *Ross v. Ross*, 20 Ala. 105; *Carter v. Chambers*, 79 Ala. 223. The decisions in *Meredith v. State*, 60 Ala. 441, *Allen v. State*, 52 Ala. 391, and *Moore v. State*, 18 Ala. 532, are express to the point, where similar charges were held to have been properly refused.

There is no error in refusing to charge the jury, as asked by defendant, that they "are not required, under the law, to draw unjust or unreasonable inferences from the testimony; and if any of the evidence [by which we understand any of the testimony] in the case admits of two or more constructions, one of which is favorable to the defendant and one unfavorable to him, the jury must put the construction upon it, if reasonable, that is favorable to defendant." The first clause of the charge asserts a correct proposition, but the latter clause is not based upon the relative reasonableness of the two constructions. The testimony in support of the construction favorable to the accused may be weak, and yet not so weak as to render the construction unreasonable. It may be stronger in support of the construction unfavorable to the accused. Besides, the jurors are the sole judges of what construction shall be placed upon the testimony, and of what inferences shall be drawn therefrom. In consideration of the whole evidence, they may conclude that the unfavorable construction is proper. The charge instructing the jury that they must put upon any part of the testimony a construction favorable to defendant, if reasonable, invades their province, and is calculated to mislead them.

Affirmed.

RILEY V. STATE.

(*Supreme Court of Alabama. Jan. 13, 1890.*)

BURGLARY—INSTRUCTIONS—REASONABLE DOUBT.

1. A charge that, "unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they must find the defendant not guilty," is correct.

2. On a trial for burglary, a requested charge, that "the jury may look to the fact that the defendant worked with Mr. Black [the owner of the house entered] after this alleged offense, to see whether or not this shows guilty conscience on his part; and, if they think it tends to show innocence on his part, then they ought to consider such evidence, and give the defendant the benefit of all proper inferences,"—is properly refused, as being merely argumentative.

Appeal from circuit court, Butler county; JOHN P. HUBBARD, Judge.

Indictment for burglary. The defendant in this case, Paul Riley, was indicted for burglary, in breaking and entering the dwelling-house of Hugh Black with the intent to commit a felony, was convicted, and sentenced to the penitentiary for the term of five years. On the trial, as is shown by the bill of exceptions, it was proved on the part of the prosecution that the house of said Black was broken and entered into one Saturday night, in the fall of 1888, by two persons, who were seen by some members of the family; and the evi-

dence for the prosecution tended, further, to show that these persons were the defendant and his brother, Shepherd Riley. The testimony for the defendant, on the other hand, tended to show that he was not one of the persons who so broke and entered said house; that he did not leave the community, but came back to Black's house on the Monday after the alleged burglary, and was arrested at his own home on the Tuesday or Wednesday afterwards. The defendant requested the court to give two charges in writing, and duly excepted to the refusal by the court to give either one of them. The first charge is copied in the opinion of the court, and the second was in the following language: "The jury may look to the fact that the defendant worked with Mr. Black after this alleged offense, to see whether or not this shows guilty conscience on his part; and, if they think it tends to show innocence on his part, then they ought to consider such evidence, and give the defendant the benefit of all proper inferences."

Richardson & Steiner, for appellant.
Atty. Gen. Martin, for the State.

SOMERVILLE, J. The court erred in refusing to give the first charge requested by the defendant, which was that, "unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they must find the defendant not guilty." A failure to give this precise charge was held reversible error in *Mose v. State*, 36 Ala. 212, decided as far back as 1860; and this ruling was approved in *Coleman v. State*, 59 Ala. 52. In the former case it was said: "Unless the jury are morally certain of the defendant's guilt, it cannot be said that they have no reasonable doubt of his guilt. The proposition, therefore, that the jury must be convinced to a moral certainty of the defendant's guilt, is substantially the same with the proposition that they must be convinced beyond a reasonable doubt." The case of *Blackburn v. State*, 86 Ala. 595, 6 South. Rep. 96, is distinguishable from the cases above cited. On the authority of these cases, we reverse the judgment in the present case.

The second charge was properly refused as being merely argumentative. *Hussey v. State*, 86 Ala. 34, 5 South. Rep. 484; *Snider v. Burks*, 84 Ala. 53, 4 South. Rep. 225.

The remaining question, arising on the action of the court in sustaining the challenge of the state to the juror Dredgen, will not arise on another trial, in all probability, and need not be considered.

The judgment is reversed, and the cause remanded for a new trial. The defendant, in the mean while, will be retained in custody until discharged by due course of law.

DUNCAN V. STATE.

(*Supreme Court of Alabama. Jan. 13, 1890.*)

HOMICIDE—EVIDENCE TO SHOW MOTIVE—ERRORS NOT APPARENT ON RECORD.

1. On a trial for wife murder, evidence as to the conduct and conversation of the defendant in reference to a girl with whom he was infatuated,

done and had both before and after the death of his wife, and his conduct and remarks tending to show dissatisfaction with his wife, is competent, as tending to prove a motive for the commission of the crime.

2. The supreme court will not presume a fact not shown by the record, and make it a ground of reversal.

Appeal from circuit court, Dale county; J. M. CARMICHAEL, Judge.

Indictment for murder. The defendant in this case, Henry Duncan, was indicted for the murder of his wife, "by giving her morphine," or, as alleged in the second count of the indictment, "a poison, the precise kind of which is unknown to the grand jury," was convicted of murder in the first degree, and sentenced to death. The body of the deceased was exhumed the day after the burial, and the contents of the stomach were analyzed by Dr. Lupton, of Auburn, who testified that they contained "one grain and six-tenths of morphine." The prosecution proved that the defendant had, with the assistance of a friend, bought a bottle of morphine about a week or 10 days before the death of his wife; but he testified in his own behalf that he had given the bottle to his wife, and she had locked it up in a trunk, and he denied that he administered any morphine to her. He adduced evidence, also, of declarations made by his wife, who was far advanced in pregnancy, showing that she was very despondent, complained of her condition and her hard lot, and said she would destroy her unborn child, if she knew how to do it. Alexander Dean, a witness for the state, testified to a conversation had by him with the defendant, while standing by the grave, on the evening of the day of his wife's death, (Thursday,) in which the defendant told him "he was going to do something that might be a leap in the dark, but he was going to risk it," and asked him to take a note to Georgia Balderee, and a message asking her to meet him Saturday evening, "at the big gate near the plum tree," that he was to go to the house, "and take up a book, and ask her if it was hers, when she would understand, and he was to give her the note." The witness further testified that, "about three or four weeks" before the death of Mrs. Duncan, he had another conversation with defendant, in which the latter told him of an interview between himself and Georgia Balderee, in which he advised her not to marry one Miller unless she loved him; that he then asked witness, "What would you think if she gave me to understand that she loved me better than any other man?" and witness answered "that he would not be surprised." The defendant moved to exclude this conversation from the jury as evidence, "on the ground that it was irrelevant and misleading," and he excepted to the overruling of his motion by the court. J. S. Judah, a witness for the state, testified that he had a conversation with the defendant on Friday, the day after his wife's death, in which the defendant asked him "to carry him and the Balderee woman to Ozark the next night to marry," but witness refused; that the defendant "then set the next Thursday," but on Saturday, "after going

to Balderee's," he came to witness, and told him "they had decided to leave on Saturday night, and would probably go to Headlands." The defendant moved to exclude from the jury what was said about marrying the Balderee woman, and he again excepted to the overruling of his motion by the court. William Windham, another witness for the prosecution, testified that, "about two months before the death of defendant's wife, he heard the defendant say that the Balderee woman was a nice, pretty girl, and that he would like to have her." The defendant objected, and excepted to the admission of this evidence. The prosecution proved, also, that the defendant and "the Balderee woman ran off together on said Saturday night, but were pursued by her father and others, overtaken in Florida, and brought back; and the defendant admitted, in his statement to the jury, that he intended to marry the girl the next day after they were overtaken and brought back. The defendant reserved another exception, which is thus stated in the bill of exceptions: "On the first day of the trial the defendant objected to the introduction of experts to testify as to the cause of the death of the deceased, based upon the testimony of witnesses as to her symptoms during her last illness; such objections being founded upon the conflicting nature of the said testimony as to symptoms. The court overruled the objections, and allowed the expert testimony to go to the jury; to which ruling the defendant excepted. On the second day of the trial this expert testimony was excluded from the jury, and the same expert witnesses were allowed to testify upon an hypothesis. The hypothetical case stated to experts, and their answer should go in (?), which the solicitor was prevented to prove and state to them, and said experts testified precisely as they did on the preceding day. The defendant objected to the introduction of each expert witness, and afterwards moved to exclude the testimony of all the experts so examined; which motion and objection the court overruled, and the defendant excepted."

Borders & Carmichael, for appellant.
Atty. Gen. Martin, for the State.

STONE, C. J. Many exceptions were reserved in this case, but they naturally resolve themselves into two groups: *First*, the conduct and conversation of the defendant in reference to the girl Georgia Balderee, done and had both before and after the death of Mrs. Duncan; and, in this connection, the conduct and remarks of the defendant tending to show dissatisfaction with his wife, for whose murder he was tried and convicted. Each and all of this testimony was competent and legal, as tending to prove a motive for the commission of the offense. *Baalam v. State*, 17 Ala. 451; *Johnson v. State*, Id. 618; *Hall v. State*, 40 Ala. 698; *Same v. Same*, 51 Ala. 9; *Marler v. State*, 67 Ala. 55, *Same v. Same*, 68 Ala. 580; *Phillips v. State*, Id. 469.

There was expert testimony introduced, but what it was, or to what it related, we are not informed, save the single fact, deposited to by Dr. Lupton, that he found more than a grain of morphine in the

stomach of the deceased. We can imagine many subjects to which expert testimony, on such investigation, would relate, such as the quantity of morphine likely to produce a fatal result. There was a motion made to exclude the expert testimony in a mass, which the court overruled. There are many reasons why an exception, taken as this was, cannot work a reversal. We name but one. We do not know what the testimony was, whether legal or illegal. We can not presume a fact not shown by the record, and make it a ground of reversal. 1 Brick. Dig. p. 336, § 13; Id. p. 337, § 23, Id. p. 886, § 1186; Gayle v Railroad Co., 8 Ala. 586; 3 Brick. Dig. p. 443, § 570, Id. p. 406, § 40. We find no error in the record, and the judgment of the circuit court is affirmed.

In giving directions for the execution of the prisoner, the trial judge employed this language: "At which time [the day he had fixed for the execution] the sheriff of said county shall conduct you from said jail to some proper place, and there hang you by the neck until you are dead." This may mislead the sheriff, as the statute is specific as to the place of inflicting capital punishment. The day fixed by the trial court for the execution of the prisoner being passed, it is ordered and adjudged that Friday, the 21st day of February 1890, be the day fixed and set apart for the execution of the prisoner, and on that day, between the hours of 10 A. M. and 4 P. M., he be hanged by the neck until he is dead, and the sheriff of Dale is charged with the execution of this sentence. In carrying this order into effect, the sheriff is commanded to conform to the requirements of the statute. Code 1886, §§ 4667-4669, inclusive.

SARPE V. NATIONAL BANK OF BIRMINGHAM.

(Supreme Court of Alabama. Dec. Term, 1888.)

PLEDGE-SALE-RATIFICATION-FORM OF ACTION.

1. A complaint which, after stating that shares of stock had been pledged to defendant, avers that "defendant, in consideration of the premises, then and there undertook and promised plaintiff" to hold the stock only as pledgee, but that, in violation of its promise, defendant sold and converted the stock to its own use, without giving plaintiff notice of the sale, and in which plaintiff seeks to recover as damages the full value of the shares alleged to have been converted, though informal, is good as a complaint in case.

2. Where a case is tried as if the action was in form *ex delicto*, a new trial will not be granted because the trial judge refused a motion to amend the complaint by adding a count formally and substantially in case.

3. A purchase of pledged stock by the pledgee at a private sale, made without notice to the pledgeor, and of which stock the pledgee retains possession, does not transfer the title, or dissolve the relation of pledgeor and pledgee.

4. In the absence of knowledge that the sale was private, and that the pledgee was the purchaser, the execution of a note by the pledgeor for the unsatisfied balance due the pledgee after receiving information that the stock had been sold, does not amount to a ratification of the sale, unless the pledgeor's intent in so acting was to ratify, irrespective of the character of the sale, and of who was the purchaser.

5. Where a part owner of stock pledges it for his individual benefit, with the authority and consent of his own co-owner, the pledgee is es-

topped to set up the co-owner's title as a defense to an action by the pledgeor for its conversion.

Appeal from circuit court, Jefferson county; LEROY F. BOX, Judge.

Thomas Sharpe filed his complaint in two counts against the National Bank of Birmingham. The first count alleged that plaintiff pledged 20 shares of stock to defendant to secure a loan of \$1,200; that defendant, in consideration of the premises, then and there undertook and promised plaintiff "to hold the stock only as pledgee, and not to sell and convert the same to its own use, without notifying plaintiff of its intention so to do; that defendant violated its promise, and converted and sold the shares without notice to plaintiff, to his damage \$15,000, the value of the stock. The second count was for dividends declared on the stock since its sale. There was judgment for defendant, and plaintiff appeals.

W. G. Hutcheson, James Weatherly, and Ward & Head, for appellant. Hewitt, Walker & Porter, for appellee.

CLOPTON, J. Before the trial was entered upon, plaintiff moved to amend the complaint by adding a count formally and substantially in case. The court refused to allow the amendment, evidently on the idea that the original complaint counts on a breach of the contract, and is in *assumpsit*. In cases where the plaintiff has an election to sue in *assumpsit* for a breach of the contract, or to bring an action on the case for a violation of duty growing out of the contract, it is often difficult to determine whether a count is in form *ex contractu* or *ex delicto*. The same facts have to be averred, substantially, in both instances; the difference being that in one the complaint declares on the contract, and assigns breaches of the contractual stipulations, and in the other the contract is stated as mere inducement, and the cause of action is founded on a breach of duty growing out of the contract, and imposed by law. In *Whilden v. Bank*, 64 Ala. 1, the test is stated as follows: "It is from the facts stated in the body of the count the question must be determined; and, when these indicate that the plaintiff is proceeding for a measure of recovery adapted only to the one form of action, it must be intended that the count belongs to that form of action, whether it is *ex delicto* or *ex contractu*." Though the transaction may have had its origin in a contract, if the facts stated show that the cause of action is a violation or disregard of duties which the law implies from the contractual relations and conditions of the parties, the count will be regarded as in case. *Insurance Co. v. Randall*, 74 Ala. 170. The test of certain and easy application is the measure of recovery to which the count is adapted.

It may be conceded that the counts in the original complaint are not formally and technically in case. After stating the pledge contract, inapt words are used to aver the duties, growing out of the contract which the law devolved on defendant, such as "the defendant, in consideration of the premises, then and there under-

took and promised the plaintiff," followed by averments of violation and disregard of the legal duties which devolved on defendant as pledgee. But, considering all the averments, it seems that the contract is stated as inducement, and that the pleader did not intend by these words to allege that what follows them were express stipulations of the contract, but duties implied by law. The counts do not proceed for the recovery of the excess of the proceeds of the sale of the stock pledged, but for its value, as the measure of recovery. The amendment should have been allowed.

Its refusal, however, would not operate a reversal, as it appears from the record that the whole case was tried as if the action was in form *ex delicto*. The plaintiff having had the same and as full benefit under the complaint, as it stood, as if the amendment had been allowed, we regard its rejection as error without injury.

The undisputed facts are: About February, 1878, the plaintiff placed with the National Bank of Birmingham 20 shares of the capital stock of the Newcastle Iron & Coal Company, as collateral security for debts due the bank and its president individually. The debts were renewed or extended from time to time, the stock remaining in pledge. In October, 1879, the demands having matured, the president of the bank instructed the cashier to give the plaintiff par for his stock, credit him for the amount, and render him a statement of his account. The sale was private, and no notice thereof was given to the plaintiff, nor was there any demand of payment. When the debt for which shares of stock are pledged matures, and is unpaid, the pledgee may file a bill in equity for a foreclosure of the pledge, and a sale under the order of the court, or he may exercise the implied power to sell without resorting to judicial proceedings. If he elects to pursue the latter remedy, the law requires, in the absence of an agreement, that the sale shall be made at public auction, and reasonable notice of the time and place given to the pledgee, that he may have opportunity to redeem the pledge. If there is a stipulated day for payment, demand of payment is not required; notice of the sale being considered as equivalent to a demand. *Nabring v. Bank*, 58 Ala. 204. The sale of the stock, having been made privately and without notice, was inoperative to transmute the title, or to dissolve the relation of pledgee and pledgee; the bank being the purchaser, and retaining its possession. *Insurance Co. v. Dalrymple*, 25 Md. 242; *Bank v. Minot*, 4 Metc. 325; *Cook, Stocks*, §§ 477-479.

These principles are not controverted; but defendant contends, that plaintiff, with knowledge that the sale was unauthorized and inoperative, ratified it. The ratification is claimed on the undisputed facts that in December, after the sale, plaintiff was informed that his stock had been sold at par, received a statement of his account, showing a credit of the proceeds of the sale, and a few days afterwards, without objection or further inquiry, settled with the bank, by giving his note for the unsatisfied balance due by him. Unquestionably, plaintiff had the right, at his

election, to ratify the sale, and receive the benefit of the credit of the proceeds, thereby relieving it of any imputation of tortiousness, or to treat it as futile, and be remitted to his rights as they existed before the attempted sale. By giving his notes for the deficiency, after deducting the proceeds, without objection, and after being informed, and receiving his account, was a ratification, if the other essential elements existed. *Child v. Hugg*, 41 Cal. 519. Plaintiff, admitting that he knew his stock had been sold, and that notice of the sale was not given, seeks to avoid the ratification on the alleged ground that it was made in ignorance of the fact that the bank was the purchaser, and that it was a private sale by the bank to itself. Defendant does not claim or pretend that this fact was communicated to plaintiff, or that he was otherwise informed of it, at the time of the alleged ratification. As to this question, the court instructed the jury that if, at the time the sale was reported to plaintiff, it was impeachable, and he knew it was impeachable, and elected not to impeach it, but to accept and enjoy its benefits, he cannot now impeach the sale. When referred to the evidence, the charge imported to the jury that if plaintiff had knowledge of the invalidity of the sale, on the ground only that the notice of the time and place had not been given, and elected to assent to and ratify it, he cannot afterwards disaffirm it, though he was not informed that the pledgee became the purchaser at a private sale.

The salutary doctrine that trustees and others holding fiduciary relations are incompetent to purchase the trust property at their own sales applies with full force to pledges. Knowledge of all the material facts and circumstances is essential to an efficient and valid ratification of a sale made by the pledgee in disregard of the requirements of the law, and of the rights of the pledgee. It is readily supposable that a pledgee might be willing to abide by a sale, though made without notice, and even a private sale, if made in open market, where there may be competition, and yet be unwilling to assent to a sale made by the pledgee to himself, without affording others an opportunity to buy. A confirmation, to be effectual and binding, must be tantamount to a valid and binding agreement. Partial knowledge of the facts is insufficient; and the knowledge of some of the grounds on which a sale may be avoided, there being others, is not the equivalent of information of all the material facts necessary to enable the party to form a correct judgment. The ratification may be subject to objections and disabilities, as well as the attempted sale; and is so subject, if made in ignorance of some of the material facts, unless it was done with the intent to ratify irrespective of the character of the sale, and of who was the purchaser. When plaintiff received information of the material facts, of which he was ignorant at the time he ratified the sale, he was entitled to disaffirm the ratification. *Bannon v. Warfield*, 42 Md. 22; *Miller v. Board*, 44 Cal. 166. If promptly disaffirmed, the disaffirmance would relate back, and operate to avoid the sale.

On the case as presented by the record, the real matter of controversy between the parties arises at this point. The entire case would be simplified, and rendered easier of solution, if, assuming the uncontroverted facts, the investigation of the jury were directed to the inquiries, whether the ratification in December, 1879, was made with the intent to ratify, without full knowledge of all the material facts; and, if not, of ratification *vel non*, after plaintiff received information of the character of the sale, and the purchase by the bank. The evidence leaves in doubt the time when plaintiff obtained this information and consequently it is an inference to be drawn by the jury. Having once ratified, it was especially incumbent on plaintiff, on obtaining information of these material facts, to act with promptness, and without unreasonable delay. Having assented to the sale, and having recognized it as valid and operative by obtaining and retaining its benefits, he will not be permitted to continue to retain them, acting inconsistently with the repudiation of his former ratification, speculating upon the consequences of affirmance or disaffirmance, and inducing the defendant to regard it as in force, for an unreasonable time, and then repudiate it, when it may suit his convenience or advantage. Unreasonable and undue acquiescence, under circumstances, is tantamount to a ratification.

It is admitted that Linn, the president of the bank, died in August, 1882; and there is evidence tending to show that plaintiff was informed of the facts prior to his death. If the jury should so find, and further find that he retained the benefits of the sale, without objection brought home to the defendant, until shortly prior to the commencement of this suit, in October, 1883, his former ratification should be regarded as unimpeachable. But, if he did not receive the information until the spring or summer of 1883, the question of ratification should be submitted to the jury, to be determined by the conduct of the plaintiff, and on the entire evidence.

It appears that L. P. Worl owned a part interest in the stock, which was pledged by plaintiff, for his individual benefit, by Worl's authority and consent. The pledge, under such circumstances, did not create any relation of pledgee and pledgor between defendant and Worl, and devolved on defendant no duty to him. The relation existed alone between plaintiff and defendant, and estopped the latter from disputing the title of the former. If plaintiff is entitled to recover, his right of recovery extends to the entire stock pledged.

Reversed and remanded.

MEMPHIS & C. R. Co. *et al.* v. WOOD *et al.*

(Supreme Court of Alabama. Dec. 12, 1889)

STOCKHOLDERS—MINORITY—INJUNCTION—PLEADING.

1. Where one corporation acquires a majority of the stock of another corporation, and the two have substantially the same field of operation, so that the profits of one may be enhanced by a diminution of those of the other, or where there is a conflict of interest between the two in the matter

of expenditures, or in the division of earnings, the corporation owning the majority of stock, its agents and employees, and all other persons acting in its interest, may be enjoined from voting its stock in the election of officers of the rival corporation, or from exercising the power a majority of stock confers in controlling and governing such corporation.

2. Where stockholders sue in their own names, an averment that, before filing the bill, they requested the corporation to bring suit, which it neglected to do, is sufficient to authorize them to sue in their own names.

Appeal from chancery court, Madison county, THOMAS CORBES, Chancellor.

Humes, Walker, Sheffey & Gordon, for Memphis & C. R. Co. *R. C. Brickell*, for East T., V. & G. Ry Co. *John W. Weed* and *John M. McKleroy*, for Wood and others.

STONE, C. J. This suit was commenced October 27, 1887, and is prosecuted by stockholders of the Memphis & Charleston Railroad Company, representing a minority of the stock. The case was submitted in the court below on a demurrer to the bill, and on a motion to dismiss it for want of equity. From the chancellor's decree overruling the demurrer, and refusing to dismiss the bill, or to dissolve the injunction, the present appeal is prosecuted. Coming before us in this form, we must treat as true all the averments of the bill which are well pleaded, and in the further progress of this opinion they will be stated as facts.

The Memphis & Charleston Railroad was constructed under charters obtained from the states of Tennessee and Alabama, and extends from Memphis, in Tennessee, to Stevenson, in Alabama, running partly through Mississippi. One hundred and fifty miles of the track are in Alabama. The entire length of the road is not shown. The capital stock is \$5,312,725, divided into 212,509 shares, of \$25 each. Of these shares, 106,261, being a majority of the whole number, stand on the books in the name of the East Tennessee, Virginia & Georgia Railroad Company, another corporation, which does not connect with or touch the Memphis & Charleston Railroad at any point. The complainants hold 8,800 of the shares, representing \$220,000 of the capital stock; and they sue in their names, and in the names of such other of the stockholders as may join in the suit. The Memphis & Charleston Railroad has been in operation for a third of a century. The profits of the corporation, if any, prior to the time of its passing under the control of the East Tennessee, Virginia & Georgia Railroad Company, hereafter shown, we have no certain means of ascertaining, further than that from June, 1858, two years after the completion of the road, to June 1861, the net earnings were never less than 10, and once as high as 16, per cent. We have no account of any earning during the civil war, from 1861 to 1865, and suppose not only that there were no net profits, but the cessation of hostilities left the road very much out of repair. Extraordinary expenditures became necessary to repair and equip the road, and up to June 30, 1867, the expenditures exceeded the receipts. Between the years ending June, 1868, and June, 1874, surplus profits, amounts not

shown, were earned by the road each year, except the two years 1871 and 1872. The sum of the deficiency for these two years was about \$150,000. The East Tennessee, Virginia & Georgia Railroad Company obtained its charters from the states of Tennessee and Alabama, and had been many years in operation. It extended easterly far beyond Knoxville, Tenn.; and having absorbed, or otherwise obtained control of, the Selma, Rome & Dalton Railroad, an Alabama corporation, extended, in a south-westerly direction, 150 miles or more into Alabama, terminating at Selma, in this state. It also operated a line which touched at Chattanooga, in the state of Tennessee, eastward from Stevenson, and distant from it 25 or more miles. There was, however, a connecting line between the respective termini, but it belonged to another railroad corporation. The East Tennessee, Virginia & Georgia Railroad Company had probably many other extensions and connections, not necessary to be noticed here. The extent, distances, and connections of the East Tennessee, Virginia & Georgia Railroad Company are stated partly on general knowledge. About 1874, one Wilson was elected president of the Memphis & Charleston Railroad Company, and was continued in the office until 1881. His election was procured through the instrumentality of the East Tennessee, Virginia & Georgia Railroad Company, and, although not exactly coterminous, the two railroads have been operated substantially under one management ever since. In the first instance, the Memphis & Charleston Railroad was let by lease to the East Tennessee, Virginia & Georgia Company; the rent agreed on being the net income of the former road above expenses. In a suit instituted for the purpose of testing the legality of that lease, it was set aside as being *ultra vires*. Another suit, between the Knoxville & Ohio Railroad Company and the East Tennessee, Virginia & Georgia Company, to which the Memphis & Charleston Company was not a party, resulted in the acquisition by the East Tennessee, Virginia & Georgia Company of a large volume, nearly one-half, of the shares of stock in the Memphis & Charleston Railroad Company. Later acquisitions placed a majority—a bare majority—of the entire stock of the latter company in the name and asserted ownership of the East Tennessee, Virginia & Georgia Company.

The bill insinuates that each of the two suits named above was collusive, at least in part; and facts averred point in that direction. It is also averred that certain shares of the stock which were held by the Memphis & Charleston Company in its own right were transferred by the common president of the two companies to the East Tennessee, Virginia & Georgia Company, without any authority therefor. Marked bias and partiality in favor of the latter company are charged to have prevailed in these transactions; and it is also charged that the East Tennessee, Virginia & Georgia Company was without the power to acquire and own stock in another railroad company. It is expressly charged that the intent and purpose of the said purchase of stock was to give to the East Tennessee,

Virginia & Georgia Company a controlling vote in the management of the Memphis & Charleston Company; and the exhibit taken from the record of the suit with the Knoxville & Ohio Railroad Company, if correctly set forth, proves this charge to be true. The bill further charges that after the agreement of lease noted above, which was in 1877, the two railroads have been operated under one and the same president, and under one and the same management. Inequality and fraud are charged in the combined management of the two roads, greatly to the profit of the East Tennessee, Virginia & Georgia Company, and to the equal detriment of the Memphis & Charleston Company. The bill makes specific charges of partiality and maladministration, as follows: *First*. When the East Tennessee, Virginia & Georgia Company acquired controlling power over the Memphis & Charleston Railroad, the repair-shops of the latter had been partially destroyed, but could have been rebuilt at a small expenditure. They were not rebuilt. The rolling stock of the Memphis & Charleston Company was carried to the shops of the East Tennessee, Virginia & Georgia Company, at Knoxville, Tenn., "where the repairing was done at extravagant prices, and mileage was charged for all the distance the rolling stock was carried over the road of the East Tennessee, Virginia & Georgia Railroad Company." *Second*. "The rolling stock [of the Memphis & Charleston Company] was unnecessarily increased, at exorbitant cost, [\$500,000 at one time,] and was used by the East Tennessee, Virginia & Georgia Railroad Company upon its own road, without any compensation" to the Memphis & Charleston Railroad Company for such use. *Third*. "The Memphis & Charleston Railroad was renewed with steel rails, iron bridges, and ballast, in advance of the needs of the railroad, to keep down the apparent net earnings." *Fourth*. "Less than the *pro rata* mileage share of through passenger and freight receipts from passengers and goods passing over both roads was allowed to the Memphis & Charleston Railroad Company." The bill then proceeds to show, by tabulated statement and otherwise, that the percentage of net earnings, compared with the gross income of the Memphis & Charleston Company, was much less than that of the East Tennessee, Virginia & Georgia Company, while the former was more favorably circumstanced for cheap operation than the latter. The bill charges that at the election of officers of the Memphis & Charleston Company, held in November, 1886, the East Tennessee, Virginia & Georgia Company succeeded in electing seven of its own directors to be directors of the Memphis & Charleston Company; seven being a majority of the board. The directors then elected Thomas to be president of their board; he being at the same time president of the board of directors of the East Tennessee, Virginia & Georgia Company. The two railroads were thus placed substantially under one and the same government. As we have said, the bill in this case was filed on the 27th day of October, 1887; and it charges that another

election of directors would be held on the 17th day of November then next ensuing,—21 days after the filing of the bill. It charges, further, that “if said East Tennessee, Virginia & Georgia Company, its directors, or any person on its behalf, shall be permitted to participate, or take any part, in said election, or any meeting of the stockholders of the Memphis & Charleston Railroad Company, the baneful control of the East Tennessee, Virginia & Georgia Company over its affairs will be continued for another year, and its legitimate earnings will be diverted from its stockholders, and, under various devices, absorbed by the East Tennessee, Virginia & Georgia Company.” The prayer for injunction is twofold: *First*, that the East Tennessee, Virginia & Georgia Company be enjoined from voting the stock standing in its name, either in the election of directors of the Memphis & Charleston Company or in any other meeting of the stockholders; and, *second*, that it be enjoined from disposing of its stock except with the knowledge and approval of the chancery court. The reason urged in favor of the second of the above prayers is that without such restraining order the stock might, and probably would, be transferred to some other name, and still held, and its voting power exercised in the interest of the East Tennessee, Virginia & Georgia Company. Under some reorganization, the present corporate name of the latter company is “The East Tennessee, Virginia & Georgia Railway Company.”

Under the statutes of this state, (Code 1886, §§ 1583, 1586, 1587,) a general power is conferred to consolidate two or more railroads which, when completed, “may admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption.” Section 1583. A railroad corporation “may at any time, by means of subscription to the capital stock of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation organized in pursuance of law may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such roads are continuous or connected.” Section 1586. “A corporation now existing, or which may hereafter be organized, for the building, constructing, and operating a railroad, has authority, for the purpose of extending its line or forming a connection, to acquire, hold, and operate a railroad without the state; or, within the state, may extend its road, or may build, construct, and operate branch roads from any point or points on its line.” Section 1587. It is not contended that any of these sections, or all of them combined, confer in terms the powers which the bill alleges that the East Tennessee, Virginia & Georgia Company claims and exercises in the management and control of the Memphis & Charleston Company. The conduct charged and complained of was not the consolidation of two or more roads; for consolidation was neither effected nor attempted,

nor were any of the steps taken which the statute prescribes as conditions precedent to lawful consolidation. Nor was it the connecting of two roads over which cars could pass “continuously, without break or interruption.” It was not giving aid by one corporation to another “in the construction of its railroad, for the purpose of forming a connection with” it. Neither the aid nor the purpose existed in this case, if the averments of the bill be true. It was not a lease or purchase of the Memphis & Charleston Railroad, or any part of it; and, if such lease, or purchase, or other arrangement had been attempted, the lines of the two roads are not connected. And the averments of the bill negative the idea that any of these arrangements, connected operation, or consolidation, if claimed to be such, were agreed to or consummated by the corporations, acting as such. Nor was there any agreement, or attempted arrangement, either express or implied, that the one railroad should acquire, hold, and operate the other. Nor is the Memphis & Charleston Railroad, in any sense, a branch road from any point on the line of the East Tennessee, Virginia & Georgia Company. It is not a branch road, according to the averments of the bill.

We repeat, the sections of the Code we have been commenting on do not expressly confer the powers which the complainants complain of as abuses, nor does the East Tennessee, Virginia & Georgia Company contend that they do. It could not so contend. Its precise contention is that those statutes “evidence a settled policy of the state to encourage consolidations or combinations of connecting lines.” It is manifestly true that long connecting lines of railroad are a benefaction. They economize time and labor, and thereby lessen expense. Common observation, and the simplest processes of reasoning, show this to be too clear to require argument in support of it. But does the conduct complained of in this case encourage or promote the consolidation of connecting lines? Is it a legitimate means of accomplishing that end? Private corporations can exercise only such powers as are conferred upon them, and such as are necessary and proper to carry the granted powers into effect. In this, however, is included the inherent incidental power of doing and performing such acts as are necessarily implied in the line of trade or business of the corporation, as shown by the charter or law of its creation. *Wilks v. Railway Co.*, 79 Ala. 180; 3 Brick. Dig. 159. Based on this principle, it is contended for appellee that the East Tennessee, Virginia & Georgia Company had no power to acquire and hold shares of stock in the Memphis & Charleston Company; that its purchase of the stock was *ultra vires* and void and that, as a consequence, it should not be allowed to exercise the powers which the rightful ownership alone confers. In other words, that, to authorize the exercise of the privileges of a stockholder, the stock must have been lawfully acquired. On this ground it is contended that the ruling of the chancellor in continuing the injunction is free from error. May it not be answered to this contention—*First*, that, conceding

the purchase of the stock by the East Tennessee, Virginia & Georgia Company to have been *ultra vires*, are the complainants in this suit in any position to raise that question? They are not stockholders in the East Tennessee, Virginia & Georgia Company, and can they be heard to complain that a corporation to which they are strangers has misapplied its funds? *Second.* Does not the bill show on its face that the East Tennessee, Virginia & Georgia Company purchased the stock, not as an investment of its funds, but in the collection of a debt due to it from another railroad corporation? The power of a corporation to acquire property, real or personal, as a means of collecting a debt otherwise doubtful, stands on a very different principle from that which determines its power to purchase such property as an investment of its funds or capital. *Bank v. Bank*, 92 U. S. 122; 1 Mor. Priv. Corp. § 431.

We come then, to the naked inquiry, can one corporation acquire a majority of the stock of another corporation, and, by the exercise of the voting power the majority of stock confers, govern and control the management of such corporation? This question, in its naked form, has rarely been presented to the courts, although it is generally known that such transactions are not infrequent. In 1 Mor. Priv. Corp. § 431, it is said: "The right of a corporation to invest in shares of another company cannot be implied merely because both companies are engaged in a similar kind of business. A corporation must carry on its business by its own agents, and not through the agency of another corporation." And this doctrine is stated without dissent in 4 Amer. & Eng. Cyclop. Law, 249, note 2. In *Railroad Co. v. Collins*, 40 Ga. 532, will be found a very full, and somewhat pioneer, discussion of the power and right of a railroad company to acquire and hold a majority of the stock of another railroad corporation, with a view of controlling its management. It is an able discussion, and, although not presented precisely in the form in which the present bill raises it, it enunciates principles which bear on the question in hand. Among many other wise and conservative principles declared in that opinion, we transcribe and approve the following: "I am strongly impressed with the conviction that much of their [the railroads'] success in developing the resources of the country is due to the very jealousy which has ever held them strictly to their charters, and has constantly been careful to prevent an undue accumulation of interest under one management. The certainty that each stockholder has that his funds will be applied to known and declared purposes has made them favorite investments for prudent men, while the rivalry which opposing interests engender begets an energy, economy, skill, and enterprise that have had much to do with the remarkable progress which such enterprises have made. A colossal enterprise, assured of handsome dividends by the possession of a monopoly, may well rest upon its position, knowing that, however the country may suffer from its exactions, its own profits are secure.

It is the rivalry of opposing interests, the struggle for success, nay, even for life, with dangerous opposition, that gives life, enterprise, and success to railroad as to other human undertakings. It has been the conflict with 30 state lines, each with its opposing interests, and with numerous sea-board cities, each seeking to attract the rich outpourings from the great interior, that has begotten the mighty network of iron which interlaces our extensive territory; and I am convinced that there is no public policy more striking than that which, while it fosters every such undertaking, is yet careful ever to keep in view the danger of a monopoly, and the good effect of rivalry and conflict between different companies. The Central Railroad is, and has long been, the pride of Georgia. The skill, energy, and prudence with which its affairs have been managed reflect great credit upon the men who have had these affairs in their control; and the state may well be grateful for the success that has followed. Yet we cannot but think it would be a measure fraught with great public evil to give to that company permission to control and manage its great rival, the Atlantic & Gulf road." In the case of *Hazlehurst v. Railroad Co.*, 43 Ga. 13, the principles of the foregoing case are reaffirmed. The case of *Milbank v. Railroad Co.*, 64 How. Pr. 20, was like the present one in most of its bearings. In that case, as in this, one railroad corporation had purchased a majority of the capital stock of another, and proposed to vote the stock so purchased in the election of directors. Certain stockholders of the latter company, owning a small minority of its capital stock, filed a bill to enjoin the purchasing company from voting the stock it had acquired, being a majority of the shares. The court, in delivering its opinion, said: "In the case under consideration, the New York, Lake Erie & Western Company have acquired by purchase the majority of all the stock issued by the Buffalo, New York & Erie Railroad. If its officers are permitted to vote thereon, they can elect a board of directors of their own choosing. It would then be for the interest of the New York, Lake Erie & Western Railroad Company to have the Buffalo, New York & Erie Company managed and controlled in the interests of the former company. This would be liable to result in injury to these plaintiffs, and their fellow-stockholders; and, also, they have a right to complain. My conclusions, therefore, are that, while the New York, Lake Erie & Western Railroad Company is the owner of the stock in question, and has the right, while it remains the owner, to collect and receive the dividends thereon, and has the right to sell and dispose of the same, it has not the right to vote thereon, and that the stockholders of the Buffalo, New York & Erie Railroad Company have the right to have it enjoined from so voting, in case it threatened to do so. Judgment should be ordered for the plaintiffs, in accordance with the views herein expressed, with costs." It is true that this was not a decision by the court of last resort. It was by the supreme court, an intermediate court in that state. It appears to have been acqui-

esced in, for no appeal is shown to have been taken. See, also, *Franklin Co. v. Institution*, 68 Me. 43; *Sumner v. Marcy*, 3 Woodb. & M. 105; *Bank v. Agency Co.*, 24 Conn. 159. Corporations aggregate are governed, and must be governed, and made efficient, through the instrumentality of agents. These agents, in cases of pecuniary corporations, are called "directors," who are elected at stated intervals, by the stockholders, for such term as the charter or regulations may prescribe. They may not be "trustees," in the technical sense; but their functions are largely and essentially fiduciary. *Hoyle v. Railroad Co.*, 54 N. Y. 328. Says Mr. Morawetz, (1 Priv. Corp. § 517:) The directors "impliedly undertake to give the company the benefit of their best care and judgment, and to use the powers conferred upon them solely in the interest of the corporation. They have no right, under any circumstances, to use their official positions for their own benefit, or the benefit of any one except the corporation itself. It is for this reason that the directors have no authority to represent the corporation in any transaction in which they are personally interested in obtaining an advantage at the expense of the company. The corporation would not have the benefit of their disinterested judgment, under these circumstances, as self-interest would prompt them to prefer their own advantage to that of the Company." A director "falls within the great rule by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal on his own behalf in respect to any matter involved in such confidence." *Hoyle v. Railroad Co.*, supra, and authorities cited. So, in 1 Mor. Priv. Corp. § 528, is this language: "A person who is agent for two parties cannot, in the absence of express authority from each, represent them both in a transaction in which they have contrary interests. * * * It follows, therefore, that the directors or other agents of a corporation have no implied authority to bind the company by making a contract with another corporation, which they also represent." Section 529: "It is well settled that, if the same persons are appointed to act as directors of different companies, they have no authority to represent both companies in transactions in which their interests are opposed. It matters not that the acts of the directors are in the interest of a majority of the shareholders in each company, and have received their approval. Nothing can be more unjustifiable and dishonorable than an attempt on the part of those holding a majority of the shares in a corporation to place their nominees in control of the company, and then to use their control for the purpose of obtaining advantage to themselves at the expense of the minority. It would be a conspiracy to commit a breach of trust. The directors of a corporation are bound to administer its affairs with strict impartiality, in the interest of all the shareholders alike; and the inability of the minority to protect themselves against unauthorized acts, performed with the connivance of the major-

ity, renders their right to the protection of the courts the clearer." *State v. Railroad Corp.*, 13 Amer. & Eng. R. Cas. 94; *Pearson v. Same*, Id. 102, and numerous cases cited; *Marsh v. Whitmore*, 21 Wall. 178; 1 Mor. Priv. Corp. § 530, and note 3; *Cook, Stocks*, §§ 614, 615. Although, as we have said, directors of a pecuniary corporation may not be "trustees," in the technical sense of that term, they are under the same restraints, and labor under the same disabilities, which rest on trustees proper, so far as questions raised by the present bill are concerned. When personal interest antagonizes the disinterestedness and impartiality which the law, as well as morality, exacts in the exercise of fiduciary trusts, this is, *per se*, a disqualification, not by reason of any abuse committed, but in fear that weak human nature will yield to temptation. Justice FIELD, speaking of the conflict between duty and interest, says: "Constituted as humanity is, in the majority of cases, duty would be overborne in the struggle." *Marsh v. Whitmore*, 21 Wall. 178; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. Rep. 747; *Railway Co. v. Magnay*, 25 Beav. 586.

The averments of the bill in this case show great wrongs done to the Memphis & Charleston Company by reason of the control exercised in its management by the East Tennessee, Virginia & Georgia Company. It also charges that it is the intention of the latter company to so vote its stock as to maintain its control of the Memphis & Charleston Railroad. Whether the charges of past abuses be true or false, they bring prominently to the notice of the court the character and extent of wrong and oppression which one corporation may inflict on another, when circumstanced as these are. It is scarcely necessary that we should specify in what manner the oppression may be inflicted. The board of directors elected by and for the East Tennessee, Virginia & Georgia Company, we must suppose, owe their election to all the stockholders, representing all the stock in that company. The duties of fidelity and impartiality in administering the affairs of that company, implied in the relation they sustain to it, we have stated above. They require severe disinterestedness, as between the several shareholders, and unbiased fidelity to the prosperity and success of the corporation. Now, when the directors of the Memphis & Charleston Company, or a controlling majority of them, owe their election to the East Tennessee, Virginia & Georgia Company, and to that company alone, it is manifest that questions may and will arise on which there will be a conflict of interest between the two companies. It is but human nature that in such conflict directors thus chosen will give their votes and influence in favor of the company they represent in full, and in whose entire income and emoluments they participate, rather than to the company they represent only to the extent of a trifle above a moiety of its stock. An integer against a fraction. Both law and reason force the implication that, in the governing body of a corporation, duty and interest shall not point in opposite directions. We hold that it is equally against

public policy, and against that sound rule which disables trustees, or *quasi* trustees, to act when their duty and interest conflict, that the East Tennessee, Virginia & Georgia Company should be allowed to vote its majority stock in matters pertaining to the management and control of the Memphis & Charleston Company. We confine our ruling, however, for the present, to cases like this one, where a conflict of interest may arise in the matter of expenditures and their apportionment, in the division of patronage or of earnings, and to rivalships between different companies, having substantially the same field of operation, or where the profits of one enterprise may be enhanced by the diminution of those of the other. There may be other cases to which the rule will apply, but we decline to consider them now.

This case has been very ably argued; and we are not unmindful of the grave consequences that may, and probably will, ensue from our decision, not alone to the East Tennessee, Virginia & Georgia Company, but to many other corporations similarly circumstanced. We have not declared that the law does not authorize that company to acquire and hold stock, or shares of stock, in another railroad corporation. Its charters not being before us, we have no means of ascertaining what its corporate powers are, further than the implications which naturally arise from its name and its lines of business inform us. We have not declared that if the East Tennessee, Virginia & Georgia Company is without power to acquire and hold shares of stock in another railroad corporation, the complainants in this suit have shown any right to controvert the question of its rightful ownership. Hence we have not decided that the Knoxville & Ohio Railroad Company were not the rightful, lawful owners of the stock which the East Tennessee, Virginia & Georgia Company acquired from it, nor that the latter company did not acquire a good title by its purchase. We have not attempted to set aside, or to declare invalid, either of these sales. We do not controvert the general inherent right, resulting from the ownership of stock in a corporation, to exercise the elective power such ownership confers, and to exercise it wisely or unwisely, alone, or pursuant to an agreement with other stockholders; and that no one save the former owner can question the right to vote such stock, even when obtained by fraud, or other illegal means. *Moses v. Scott*, 84 Ala. 608, 4 South. Rep. 742. This, we repeat, is the general rule; and less than this, in an ordinary case, would be an unauthorized abridgement of the stockholder's property rights.

Enjoyment and the right of disposition are general attributes of property ownership. Property rights, however, cannot be classed as absolutely independent of social and municipal regulation. "So use your own as not to invade the equal rights of others," is a maxim as sound in law as it is in the conduct of social intercourse. Its observation and preservation are the end and aim of much wise legislation, of much judicial administration. But men must be dealt with, not as faultless, but as frail,

and subject to temptation too strong for their powers of resistance. Civil liberty is but natural liberty shorn of its power to transgress the boundary which separates *meum* and *tuum*, in its comprehensive sense. Hence it is that the law, with inflexible purpose, has placed restraints on transactions in which duty and interest conflict. Hence it is that, when any relation of trust or confidence subsists, the law scrutinizes with earnest, if not severe, vigilance any pecuniary transaction that may be had between parties thus circumstanced. Hence it is that, when one man stands in a fiduciary relation to another, any contract or bargain and sale had with the beneficiary is invalid at the mere option of the latter, if seasonably expressed. The danger of abuse in such conditions dominates the power of disposition; and the power to make binding contracts, which we have classed as among the general attributes of property ownership, must submit to reasonable restraints. *Thompson v. Lee*, 31 Ala. 292; *Moses v. Micou*, 79 Ala. 564; *Huguenin v. Baseley*, 14 Ves. 273.

It is contended for appellants that if a majority of the capital stock of the Memphis & Charleston Company had belonged to an individual, or to a combination of individuals, instead of being the property of the East Tennessee, Virginia & Georgia Company, the same power of control could have been exerted as is complained of in this case. It is possible that there might be an exceptional, extreme case, in which it would advance the interest of the owner or owners of a majority of the stock in a corporation to diminish its income, that the emoluments of another enterprise, in which he or they are more largely interested, may be thereby enhanced. Such case, however, is extremely improbable, and, if found to exist, might possibly present a case of wrong for which injunction could furnish no preventive relief. This is a question we need not decide. As a rule, stockholders, in voting, as in other acts which they are called to perform, attempt to promote the welfare of the corporation; for on its success depend their profits. Whether they act wisely or not, no one can be heard to complain of their conduct; for the success of the enterprise and their individual interests are presumed to be identical. In ordinary elections by stockholders, the presumption is that men will act as their interests prompt them to act, and that their aim is to benefit the corporation in which they are stockholders. Should a case arise in which there is bad faith in the management, and consequent loss to the stockholders, there would seem to be no doubt that redress could be obtained from the faithless governing body.

The case in which the votes are cast by individual stockholders, and the one in hand, are, presumptively at least, essentially different. In that, duty and interest are in complete accord. In this, if the averments of the bill be true, they are in palpable antagonism. In the one, the presumption is that the vote will be cast solely in the interest of the corporation holding the election. In the other, that the greater opposing interest will prevail over the lesser,

as it is so apt to do in all human conduct. We think it is no answer to the relief prayed in this case that in another possibly supposable case a wrong very like the one here complained of might be inflicted, and yet the same measure of redress could not be accorded.

It is contended that if relief be granted in this case it will greatly embarrass railroad corporations in the matter of maintaining continuous, connecting lines, so conducive to public convenience and to economy in transportation. It cannot be denied that steam has, in many respects, revolutionized the world, and that railroads are among the more potent instrumentalities which have effected that revolution. The nations of the earth have been brought into closer neighborhood and better acquaintance, while Christian civilization has been much more speedily and widely diffused. So, commerce and the industrial enterprises have received a new impetus and expansion, theretofore unknown in the world's history. An instrumentality possessing such vast capabilities should be cherished and protected in the enjoyment and exercise of all its rights and privileges. The groveling or agrarian spirit which would hinder or embarrass this mighty agency in the full enjoyment of its rightful powers should receive no encouragement or countenance from right-thinking people. On the other hand, the tremendous power that may be wielded by aggregated or incorporated wealth should be kept within due bounds, and restricted to legitimate methods. The pernicious ends to which concentrated wealth may be perverted need not be mentioned here. The virtuous and patriotic utterances of many of the courts of supreme jurisdiction, re-echoed from the highest officials in the federal government, show all too plainly that the public is awakened to the wrongs inflicted through the instrumentality of combined capital. Let us accord to corporations all their rights, and restrain them in the abuse of their powers, should such be attempted.

The principle we have declared in a former part of this opinion will apply with equal force to all employees, agents, and all other persons or corporations who may be acting in the interest or for the benefit of the East Tennessee, Virginia & Georgia Company. Nothing less than an absolute sale of the stock to some person or persons authorized to vote it will relieve it of the infirmity of its present ownership, or authorize the present or any pretended owner to be heard in the government of the Memphis & Charleston Company.

The bill does not charge that the East Tennessee, Virginia & Georgia Company contemplates a sale, or pretended sale, of the stock, and does not charge that the company, by any indirect means, will attempt to have its stock voted in its interest. The charge is that "if said East Tennessee, Virginia & Georgia Company is permitted to transfer said stock it will conceal its interest in the same under the name of some other party, and through such party reacquire the control it now has, with said stock standing in its own name." If such attempt be made without

an actual sale of the stock, it will be a violation of the order made in this case, and can be punished as such. Moreover, an election of directors thus procured would be a fraud perpetrated in defiance of the order of the court; and such election would be annulled, on proper application. We hold, however, that in the present stage of this case, and under the averments of the bill, all of which that is pertinent we have copied, there is not enough shown to authorize an injunction against a sale of the stock. That question can be properly raised when an attempt is made, should it ever be made, to violate or evade the principles of the injunction granted in this cause. 1 Brick. Dig. p. 704, § 980; 3 Brick. Dig. p. 377, §§ 154, 155, 158.

The bill in this case avers that before filing the bill the complainants "requested the Memphis & Charleston Railroad Company, by a request addressed to its officers, to take appropriate legal proceedings to prevent the stock standing in the name of the East Tennessee, Virginia & Georgia Railway Company from being voted upon," etc., "but said corporation has neglected to comply with said request." This averment is sufficient to authorize the stockholders to sue in their own names, if any previous request was necessary to give them that right. Circumstanced as this case is charged to have been, it would seem any previous request would obviously have been denied, and therefore it was not necessary to prefer it. *Manufacturing Co. v. Cox*, 68 Ala. 71; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. Rep. 747; *Merchants' & Planters' Line v. Wagener*, 71 Ala. 581; *Green's Brice, Ultra Vires*, 673, note a; *Dodge v. Woolsey*, 18 How. 331; *Hawes v. Oakland*, 104 U. S. 450.

We have stated above that the complainants' bill makes a case for an injunction, restraining the East Tennessee, Virginia & Georgia Railway Company, its agents, directors, and all other persons representing it and in its interest, from voting the shares of stock held by that company. We have forbore to state one imperfection in the bill until this time. Many of the essential averments of the bill are stated in this form: Complainants are "informed and believed," or are "advised and believe," without any allegation or charge that the information or advice is true. This form of allegation has always been held in this court to be insufficient. It is not an averment that the information or advice is true, but that the pleader believes it to be true. A full denial of such averment would be, either that complainants had not received such information or advice, or, if they received it, they did not believe it. This would not present the issue sought to be raised. 1 Brick. Dig. p. 702, §§ 907, 908. We will not, however, dissolve the injunction for this imperfection in pleading. Should it not be remedied within a reasonable time, it will become the duty of the chancellor to act upon the bill as if the imperfect averments pointed out had not been made.

The decree of the chancellor is modified, and the cause remanded. Let the appellees pay the cost of appeal.

Modified and remanded.

DEXTER v. OHLANDER.

(Supreme Court of Alabama. Dec. 17, 1889.)

CONTRACTS—PLEADING—PAROL EVIDENCE—LEASE—RELINQUISHMENT.

1. It need not be alleged in the complaint that the contract sued on is in writing, as required by the statute of frauds, as such fact properly arises on the proof.

2. A writing signed by defendant reciting that he has received a relinquishment of a lease "for consideration of \$150, to be paid in ten days," is a sufficient promise of defendant to pay such amount.

3. Whether plaintiff had such an interest in the premises as would support a relinquishment of the lease goes to the question of the consideration defendant received, for the liability he incurred, properly arising on the evidence, and need not be shown by the complaint.

4. Such instrument importing an absolute promise to pay a sum certain within a certain time, defendant can only set up as a defense thereto that the promise was conditional, by a sworn plea; Code Ala. § 2770, declaring that "every written instrument, the foundation of the suit, purporting to be signed by the defendant, * * * must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit."

5. Defendant, in consideration of the relinquishment of a lease by plaintiff, obligated himself to pay a certain sum. By the relinquishment plaintiff gave up all his right and claim to the premises "that I have by virtue of a five-years lease," etc. In an action to recover from defendant the amount he agreed to pay, the evidence showed that the owner of the premises wished to sell, and could not do so on account of the lease, and that defendant acted as his agent, or as agent of the expected purchaser, in securing the relinquishment. *Held*, that the validity of the lease, the time it had to run, or whether the relinquishment vested any interest in defendant, are immaterial questions, since the obligation was given in consideration of the relinquishment, to make way for the sale, without regard to the character of the lease.

6. The relinquishment, and defendant's obligation to pay for it, being executed on the same day, each in consideration of the other, are to be construed together as one transaction; and, in the interpretation of the agreement thus evidenced, it is competent for the court, for the purpose of enlightening itself as to the intent of the parties, to admit oral testimony to show that defendant acted as agent of the owner of the premises, who wished to obtain a relinquishment of the lease in order that he might sell and give possession.

7. Parol testimony is inadmissible to show that defendant's liability to pay was dependent upon the consummation of such sale, since it tends to fix a condition on a written obligation which on its face shows an absolute promise.

8. Though it is immaterial whether plaintiff technically surrendered the lease and delivered possession to defendant, yet, if he alleges these facts in his complaint, he must prove them before he can recover.

9. Where the complaint in the first count alleges that plaintiff surrendered the lease to defendant, and in the second count alleges that he delivered possession, an instruction to find for defendant generally, if it is found that there was no surrender of the lease, is bad, as it neither goes to the whole case, nor is confined to that part of the case to which it applies.

10. Nor in such case is an instruction good which charges that if the jury find that plaintiff did not surrender the lease, and did not deliver possession, they must find for defendant, as plaintiff's right to recover on one count or the other depends on the proof of one of these facts only.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Thorington & Smith, for appellant. *E.*

P. Morrissett and Watts & Son, for appellee.

MCCLELLAN, J. The plaintiff, who is appellee here, had judgment below on an obligation of the appellant, (hereinafter referred to as the defendant,) which was evidenced by the following writing: "Montgomery, Ala., Aug. 27th, 1887. I have received from Mr. A. Ohlander a relinquishment to his lease with L. Lowell for consideration of one hundred and fifty dollars, to be paid him in ten days, and use of the premises until Nov. 12th, 1887, free of rent. R. P. DEXTER."

The relinquishment here referred to is in the following terms: "In consideration of one hundred and fifty dollars to be paid to me within the next ten days, and to allow me to continue the use of the store-house on the north-west corner of Dexter avenue and Bainbridge streets for the use of storing furniture until Nov. 1st next free of charge, I agree to relinquish and give up all my right and claim to above-mentioned store-house that I have by virtue of a five-years lease with Mr. L. Lowell. Montgomery, Ala., August 27, '87. AUGS. OHLANDER."

The complaint failed to aver that either the lease or plaintiff's relinquishment or surrender of it was in writing, and demurrers were interposed to each of its two counts on this ground. These demurrers were properly overruled. Granting defendant's position that both of these contracts were required by the statute of frauds to be in writing, and conceding that the declaration is upon the lease and the relinquishment of it, the authorities are uniform that the fact need not be alleged, but is a matter which properly arises on the proof. *Perrine v. Leachman*, 10 Ala. 140; *Rigby v. Norwood*, 34 Ala. 134; *Martin v. Wharton*, 38 Ala. 637.

It was further demurred that the complaint did not show such an interest or estate in the premises covered by the lease in the plaintiff as would support an assignment, relinquishment, or surrender of it. This went to the question of what the defendant received for the liability he incurred,—the consideration for his contract,—and is also a question arising on the evidence.

The second count sets out the written obligation copied first above as in part the foundation of the cause of action, and was demurred to on the ground that no promise of the defendant to pay the sum therein specified was shown. It is not essential that there should have been an affirmatively expressed promise to pay. It is sufficient if words are used which would be tantamount to a promise, express or implied. *Rice's Adm'r v. Rice*, 68 Ala. 218.

The instrument might have been declared on as a promissory note, though differing in some respects from the form usually employed. *Story, Prom. Notes*, § 14; *Russell v. Whipple*, 2 Cow. 536; *Wardwell v. Sterne*, 22 La. Ann. 28. The obligation imports an absolute promise to pay a sum certain to the plaintiff within a given time. The special plea undertook to set up a defense resting upon a condition to its obligatory force of which there is no hint in either of the writings set out. This was,

in effect, to say that the contract as written was not the contract as agreed upon between the parties; and involved the necessity of interposing the defense by a sworn plea, which was not done. Plaintiff's demurrer to this plea was correctly sustained. Code, § 2770; *Lazarus v. Shearer*, 2 Ala. 718; *Campbell v. Larmore*, 84 Ala. 499, 4 South. Rep. 593.

The relinquishment of the plaintiff, and the defendant's obligation to pay therefor, having been, as the evidence shows, executed on the same day, each as the consideration of the other, constitute one transaction, and are to be construed as one and the same contract. *Carr v. Hays*, 11 N. E. Rep. 25; *Herbst v. Lowe*, 65 Wis. 316, 26 N. W. Rep. 751; *Railroad Co. v. Beidler*, 45 Ark. 17. In the interpretation of the agreement thus evidenced, it was competent for the court below to take such oral testimony as tended to put it in the position and give it the point of view occupied and had by the parties themselves in the execution of the contract. *Railroad Co. v. Railroad Co.*, 73 Ala. 426; *Griell v. Lomax*, 86 Ala. 132, 5 South. Rep. 325. Upon this principle, evidence was properly admitted to the effect that the plaintiff was in possession of a certain house and lot under what was nominally a five-years lease from Louis Lowell; that both the defendant and Lowell desired to free this lot from this lease, and to induce the plaintiff to surrender the possession, to the end that it might be sold to a syndicate for the Methodist Episcopal Church, and possession given under the sale; and that the defendant acted in the premises as the agent of Lowell and of the syndicate, either or both. All of these facts served to enlighten the court as to the intent of the parties, and aid in its construction of their agreement, by advising it of their positions towards each other and the property, and of their objects and purposes. So advised, it was for the court to determine what was meant by the two writings which constituted the contract. But here the offices of parol testimony ceased. It could not be looked to to import terms and conditions into the writings which were repugnant to the expressions of the papers themselves, nor to vary, add to, or take from the language employed, as construed in the light of attendant circumstances, and the court properly excluded the evidence offered by the defendant to the effect that his liability was to depend on the consummation of a sale of the property which was then imminent. Authorities *supra*; *Pollard v. Maddox*, 28 Ala. 321; *Chambers v. Ringstaff*, 69 Ala. 140; *Griell v. Lomax*, 86 Ala. 132, 5 South. Rep. 325.

When reference is thus had to the situation of the parties, and the ends they intended to accomplish, it becomes apparent that the real character of the lease under which the plaintiff held does not enter into the issue. Whether it was valid or invalid; or really, as well as nominally, for five years, or for a month less than that term; or, by reason of the title being in the wife of the nominal lessor, was efficacious for one year instead of five,—are immaterial inquiries. The plaintiff had possession under it, and claimed as for a term

of five years. It was treated and described in the negotiations, and in the writings in which these culminated, as a lease for five years. It was contracted to be relinquished, not as a valid lease for any period of time, but specifically as a lease which the plaintiff had "from Mr. L. Lowell," which lease on its face designated a term of five years; and it was this lease, regardless of its latent invalidity, or of any infirmity dependent upon extraneous facts, which would operate to defeat the terms, in whole or to any less extent, and the plaintiff's possession under it, which stood in the way of the contemplated sale and delivery of possession to the church. It was the "right and claim" of the plaintiff under this paper, whatever its legal effect, the relinquishment of which was essential to the ends in view, induced the contract, and formed a sufficient consideration for the defendant's liability. *Sykes v. Chadwick*, 18 Wall. 141.

So far as the abstract rights of the parties under the writings are concerned, we regard it as immaterial whether the plaintiff's relinquishment was technically a surrender of the lease, or an assignment to the defendant, or merely a general divestiture of his rights; and, if it be considered an assignment to the defendant, it is not important whether its effect was to vest the lessee's rights in the assignee. If the plaintiff's testimony is true, the defendant acted as Lowell's agent in the transaction, and in that view the relinquishment was an effort to surrender the lease. If defendant's version is the correct one, he represented the proposed purchaser, and, in some sort, Lowell also; as the latter was privy to the arrangement, and was to pay half the sum plaintiff was to receive. Whatever the real fact in this connection may be, it seems assured, from every point of view, that the whole purpose and effort of the defendant was to get the lease out of the way, so that a sale might be effected, either by him, as the agent of the owner, or to him, the agent Lowell, as one of the syndicate, and that the contract which he induced the plaintiff to enter into had the desired effect of removing the outstanding lease and possession under it out of the path of the pending negotiations. What the removal of these obstacles availed the defendant is beyond the inquiry as to the status and rights of the parties under the writings they respectively executed. The obligation of Dexter is supported by considerations of detriment to Ohlander, and also by the facts that the extinguishment of the lease and the abandonment of the possession under it, whether the defendant was eventually benefited thereby or not, were the things which he contracted and agreed to pay for, and which he, at the time, conceived to be valuable to him as elements of success in the pending sale. Therefore to the cause of action shown by the proof it was not essential that plaintiff should have technically surrendered the lease to defendant, or should have assigned it to him, or relinquished it, in the sense of vesting his rights under it in the defendant; nor was it necessary for the plaintiff to have surrendered the possession to defendant. Yet the plaintiff, in the first

count of the complaint, alleges, and thus assumes the burden of proving, that he agreed to surrender and did surrender the lease to the defendant; and in the second count it is negatively alleged that the contract there declared on required a surrender and delivery of possession to the defendant, and that plaintiff, in compliance with this contract, did so surrender possession to Dexter. The plaintiff thus took upon himself to prove these facts, which we think are not material to his rights in the abstract, but only as he has asserted them; and, if he failed to prove a surrender of the lease to the defendant, he is not entitled to recover under the first count. If he failed to prove a surrender of the possession to defendant, he was not entitled to recover under the second count, and if the jury had found that he had surrendered neither the lease nor the possession to the defendant he was not entitled to recover at all. *Railroad Co. v. Mt. Vernon Co.*, 84 Ala. 173, 4 South. Rep. 356; *Railway Co. v. Culver*, 75 Ala. 587.

The special charges asked by the defendant in this connection were bad, because they did not go to the whole case, and were not, in terms, confined to that part of the case to which they severally applied. Thus charge No. 2 demands a verdict for the defendant generally, if the jury should find that there had been no surrender of the lease, when under the second count proof of such a surrender was not necessary to a recovery. Charges No. 4 and 5, on the other hand, base defendant's right to a verdict under both counts on a failure to prove delivery of possession to him, notwithstanding plaintiff, as we have seen, was entitled to recover on the first count without surrendering possession to defendant. Charge No. 3 appears to have been an effort to avoid the infirmities just noted in the other requests for instructions. Its language is: "If the jury find from the evidence that Ohlander did not surrender the lease and the possession of the property to Dexter, then they must find for the defendant." This charge is open to the criticism that it would have denied the plaintiff a verdict, unless he proved the surrender of both the lease and the possession, although under either count his right to recover depended on proof of only one of these facts. That part of the court's general charge which asserts that "in this case it makes no difference whether plaintiff surrendered possession of the premises to the defendant or to any one else," goes to the other extreme; it is too broad. Had its application been confined to the first count, it would have been unobjectionable, but it goes to both, and obviates the necessity which the plaintiff was under to prove delivery of possession under the second count. Perhaps it may be considered as misleading only, and, if so, defendant should have asked an explanatory charge limiting its operation. This we deem unnecessary to decide, however, as the case must be reversed on another ground, and this question is not likely to occur on another trial. The affirmative charge requested by the defendant should have been given. There is no evidence in support of the plaintiff's averment of a surrender of

the lease, by which, construing the pleadings most strongly against him, he must be held to have alleged a technical surrender. This is fatal to recovery on the first count. And there is no evidence of a surrender of possession to the defendant. This is fatal to a recovery under the second count. The affirmative charge covered both points, of course, and its refusal was error for which the judgment must be reversed.

The undertaking on its face was the individual contract of R. P. Dexter. In the transaction he may have acted as the agent of the syndicate, and this fact may have been known to the plaintiff, yet he may have exceeded his agency, (indeed, his own testimony shows that he did exceed the powers conferred upon him by his associates, in that they only agreed to a conditional promise, whereas the promise he made was an absolute one,) and in that event he would be personally liable. The charge requested on this part of the case pretermitted inquiry as to excess of authority, and for this reason, if not on other grounds, was properly refused. *Drake v. Flewellen*, 38 Ala. 106; *Bell v. Teague*, 85 Ala. 215, 3 South. Rep. 861.

There was no inquiry submitted to the jury upon which the evidence offered by the plaintiff to the effect that the Methodist Church was, at the time of trial, in possession of the property out of which this controversy arose, could have legitimately shed any light. It was impertinent, and should have been excluded.

Reversed and remanded.

STONE *et al.* v. WAITE *et al.*

(*Supreme Court of Alabama. Jan. 14, 1890.*)

SALE—TITLE.

An understanding or agreement between a vendor and vendee, entered into when they commenced to take the inventory of the goods sold, that the inventoried goods should belong to the vendee, "to do with as he pleased" in respect to the matter of selling to customers, does not clearly imply a waiver of the stipulation, in a written contract between the parties, that the vendor should retain title until the goods are paid for.

Appeal from circuit court, St. Clair county; LEROY F. BOX, Judge.

Action for money had and received.

Bishop & Whitson, for appellants. *John W. Inzer*, for appellees.

CLOPTON, J. On March 7, 1888, the parties entered into a written contract for the sale by appellees to appellants of a stock of goods and furniture in a store at Easonville. The parties each deposited \$350—appellants in cash, and appellees in a check—as a forfeit on failure to perform the contract. The goods were destroyed by fire during the night of March 10, 1888. Appellees having obtained possession after the fire of the money deposited by appellants, the latter bring the action to recover this amount, and also the amount of the check. The main question presented is, upon whom falls the loss occasioned by the destruction of the goods?

In order to ascertain the price to be paid by plaintiffs, the goods were to be inventoried and marked at first cost, except cer-

tain classes which were to be marked at their cost delivered in the store, and 10 per cent. deducted from the aggregate amount. Plaintiffs were to pay one-half of the price in cash, but in no event less than \$1,000, and for the balance give two notes of equal amounts, payable, respectively, on the 15th day of October and the 1st day of November, 1888, with interest. The payment was to be made and the notes given, at the furthest, by the 15th of March of the same year. It was expressly stipulated that the goods should be delivered to the plaintiffs after the cash payment was made and notes given as agreed, and that the title should remain in defendants until such payment was made and notes given. There is no contention as to the construction and effect of the written contract. It is not controverted, as the price of the goods had not been definitely ascertained, and payment had not been made and notes given, that by the terms of the written contract the possession and title resided in defendants at the time of the fire, and that the loss falls on them, unless, by the modification of the contract, the goods were delivered, and the property vested in defendants, before they were burned.

Defendants contend that the contract was so modified by subsequent parol agreement, and this contention raises the really controverted issue. The parties substantially concur in their testimony that at or soon after they began to take an inventory of the goods there was an understanding that plaintiffs should sell to customers the goods inventoried; the object being to prevent closing the doors of the store while ascertaining the price to be paid. As to the force and effect of the understanding, their evidence materially varies. Plaintiffs' testimony tends to show that the understanding was made merely for the convenience of customers, and not with the intent to change or modify the contract. D. W. Waite, one of the defendants, after testifying that they decided that the doors should not be closed, and that a sale of goods to customers should go on, defendants selling ahead and plaintiffs selling behind the invoice, states: "We then agreed that the goods behind the invoice should belong to the plaintiffs, to do with the same as they pleased, and the goods ahead of the invoice should belong to D. W. Waite & Co., to do with them as they pleased." The parties proceeded under this arrangement until the completion of the inventory, on the afternoon of the day preceding the night on which the fire occurred, but left the store without ascertaining definitely the price to be paid, owing to a difference in the addition of the marked prices. On leaving the store, one of the plaintiffs took the key, and locked the door, at the instance of one of the defendants, carrying it home with him.

In this state of the evidence, the court properly charged the jury that if the arrangement or agreement, when about to begin invoicing the stock, was that defendants should sell ahead of the invoice to customers, and plaintiffs should sell behind the invoice, and that such arrangement was made for the accommodation of cus-

tomers, and to avoid closing the store, without intention to change the written contract except as to articles so sold, such arrangement or agreement did not change or affect the written contract in respect to that part of the stock of goods destroyed by the fire. After having thus charged the jury, the court further instructed them that if the terms of the contract were changed by an agreement, by which the goods, on being invoiced, were to belong to the plaintiffs to do with as they pleased, and that the entire stock, with the prices, were put on the inventory, and turned over to plaintiffs, and they received and took charge of the goods to do with as they pleased, and also took charge of the key, before the goods were burned, their destruction was plaintiffs' loss, and they could not recover, notwithstanding the freight on certain classes of goods had not been ascertained and added, and the 10 per cent. deducted, and plaintiffs had not made the cash payment, nor given the notes.

The charge was evidently intended to declare the law on the phase of the facts which the evidence of defendants tends to establish. Assuming, therefore, that the modifying agreement was in the language of the witness Waite, above quoted, the correctness of the charge depends on what was meant and intended by the phrase, "were to belong to plaintiffs to do with as they pleased," as employed. If the parties meant and intended that not only the possession and use, but also the property in the goods, should unconditionally vest in plaintiffs,—in other words, that after the completion of the inventory, and taking charge of the key, plaintiffs had the right to remove and retain the entire stock, as against defendants' retention of title, notwithstanding they failed to perform the agreed conditions,—the loss of the goods certainly fell on plaintiffs. But a construction which attributes to the agreement such extent, effect, and legal consequences, works a radical change,—even the abrogation of most material terms of the written executory contract,—tantamount to its rescission, and to making a new contract; for, if the property in each article of the goods vested in plaintiffs on being invoiced, and those not invoiced belonged to defendants, to do with as they pleased, without regard to the stipulations of the written contract, except as to the price and mode of ascertaining it, then there was no binding agreement to sell, and no sale of the latter class of goods, unless and until they were inventoried by the mutual consent of the parties. The agreement, however, is reasonably susceptible of another and qualified meaning. In view of the circumstances of the absence of proof of an agreement to waive the retention of title as security for the performance of the conditions, except as it may be inferred from the language used, and of any agreement whatever other than the one made when the parties began to invoice the goods, and that the object of the parties was to avoid closing the store, and to continue sales to customers, it may be reasonably inferred that an agreement to the effect that the inven-

toried goods should belong to plaintiffs, and the uninventoried goods to defendants, to do with as they respectively pleased, was intended to accomplish the object the parties had in view, and to have reference only to the matter of selling goods to customers in the regular course of trade, and was not intended to otherwise alter, rescind, or annul the express stipulations of the written contract. As the agreement is susceptible of two constructions, the charge is erroneous, inasmuch as it assumes that it means and implies that the property to each article of the goods when inventoried, and to the entire stock on completion of the inventory, vested in plaintiffs, with the absolute title of disposition, relieved of the lien of defendants for the payment of the price; that there was either a waiver of the stipulation as to the retention of title, or that its retention was, under the agreement, inoperative. "Where the buyer is, by the contract, bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition is fulfilled, even though the goods may have been actually delivered into the possession of the buyer." 1 Benj. Sales, § 866; *Sumner v. Woods*, 67 Ala. 139. In *Rogers v. Whitehouse*, 71 Me. 222, it was ruled that, where goods are bought by a retail dealer upon condition that the property shall not vest in him until paid for, an understanding that they should go into his store, and be sold by him in the regular course of trade, does not operate to pass the title as between the parties. The same ruling was made in *Burbank v. Crooker*, 7 Gray, 158. An understanding or agreement, entered into when the parties commenced to take the inventory in order to ascertain the price, and on the same day the written contract was signed, that the inventoried goods should belong to plaintiffs, to do with as they pleased in respect to the matter of selling to customers, does not clearly imply a waiver of the stipulation as to the retention of title until the goods are paid for. Such an agreement, and a delivery thereunder, are consistent with an existing and express stipulation for retention of title until the conditions agreed on as precedent or concurrent with the passing of title are performed. *Fairbanks v. Eureka Co.*, 67 Ala. 109. The modifying agreement being oral, the meaning and intent of the parties should be left to the jury, with proper instructions, accordingly as they may find.

The court further substantially instructed the jury that if the inventory was completed on the afternoon of the day before the fire, and plaintiffs, in pursuance of an agreement made with defendants about the time the invoicing was begun, took possession and control of the stock for the purpose and with the intention of selling to customers, in the course of trade, for their benefit, and to use the goods and proceeds as they pleased, with the consent of defendants, and the goods, while thus in the possession, control, and custody of plaintiffs, were destroyed by fire, they are not entitled to recover, although it was not the intention of defendants, in thus parting

with the possession and control of the goods, to part with the title thereto. Generally the law fixes the loss on the party in whom the title resides. *Jones v. Brewer*, 79 Ala. 545; *Grant v. U. S.*, 7 Wall. 331. When personal chattels are sold on condition that the seller retains title until paid for, and possession is delivered, the buyer may sell his interest subject to this right of the vendor. The title does not vest in the buyer until performance of the condition, and until it does pass the risk of loss remains in the seller. 1 Benj. Sales, §§ 422-427. No circumstances appear which take this case out of the general rule.

Though no question is presented relating to the right of plaintiffs to recover the amount of the check deposited by defendants, as it is involved, and will necessarily arise on another trial, we may remark that, as it is apparent from the nature and subject-matter of the contract that the parties contracted on the basis of the continued existence of the goods, their accidental destruction by fire, without fault on the part of defendants, excuses them from performance of the contract. 2 Benj. Sales, § 862; *Dexter v. Norton*, 47 N. Y. 62.

The evidence that the insurance company deducted 10 per cent. from the valuation of the stock was relevant, in connection with evidence tending to show that plaintiffs consented to the collection of the insurance money, for the purpose of showing the amount collected.

Reversed and remanded.

STONE, C. J., not sitting.

SMITH v. GEORGIA PAC. RY. CO.

(*Supreme Court of Alabama*. Jan. 15, 1890.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

As defendant's train was approaching a station, the name of the station was called, and the train was stopped very soon thereafter, the object being to take the side track for the passage of another train. When it stopped plaintiff, whose destination was the station called, went out of the rear door of the car, and was descending with one foot on the first step of the car, and the other about touching the ground, when the train moved to go forward to the depot, which caused him to fall. The place of the stoppage was in a cut, about 200 yards from the depot building. It was about 1 o'clock P. M. All the surroundings indicated that the spot at which he attempted to leave the train was not the proper place for alighting. *Held*, that defendant was not liable for the injuries caused by the fall.

Appeal from circuit court, Cleburne county; LEROY F. BOX, Judge.

Action by Robert T. Smith against the Georgia Pacific Railway Company for personal injuries sustained through the alleged negligence of defendant's servants. There was a verdict and judgment for defendant, and plaintiff appeals.

Kelly & Smith, for appellant. *Knox & Bowle*, for appellee.

CLOPTON, J. Appellant's injuries, for which he sues, were received while alighting from a train at Heflin, a regular station on defendant's road. His right of recovery is founded on the allegation that his injury was caused by the negligence of

defendant's servants. The specific negligence complained of is alleged to consist in calling out the name of the station, bringing the train to a stand-still immediately thereafter, thereby inducing plaintiff to believe, and to act upon the belief, that the train had reached the usual place for landing passengers, and suddenly starting it without giving him notice. Plaintiff's act in leaving the train being voluntary, it is incumbent on him, in order to entitle him to a recovery, or before the opinion of a jury is required to be taken as to the question of negligence, to produce evidence from which the inference may be reasonably drawn that his injury was caused by the negligence of the defendant. We shall therefore direct our consideration to the question whether, on the facts clearly proved, and having regard to the liberty to draw inferences therefrom, the court would have been justified in taking the question of negligence from the jury; for if on the facts, which admit of no dispute, and allowing all adverse inferences, it would have been the duty of the court to set aside the verdict had one been rendered in favor of plaintiff, and the affirmative charge in favor of the defendant was authorized, we need not consider the various rulings of the court. *Bentley v. Railway Co.*, 86 Ala. 484, 6 South. Rep. 37.

A railroad company, being a carrier of passengers, is under obligation to use reasonable care to transport them safely. This general duty includes the specific duty not to expose them to unnecessary danger, and not intentionally or negligently mislead them by causing them to reasonably suppose that their point of destination has been reached, and that they may safely alight, when the train is in an improper place. Calling out the name of the station is customary and proper, so that passengers may be informed that the train is approaching the station of their destination, and prepare to get off when it arrives at the platform. The mere announcement of the name of the station is not an invitation to alight, but, when followed by a full stoppage of the train soon thereafter, is ordinarily notification that it has arrived at the usual place of landing passengers. Whether the stoppage of the train, after such announcement and before it arrives at the platform, is negligence, depends upon the attendant circumstances. The rule is aptly expressed in *Bridges v. Railway Co.*, L. R. 6 Q. B. 377, by WILLES, J.: "It is an announcement by the railway officers that the train is approaching, or has arrived at, the platform, and that the passengers may get out when the train stops at the platform, or under circumstances induced and caused by the company, in which the man may reasonably suppose he is getting out at the place where the company intended him to alight. To that extent calling out is an invitation."

A reference to a few leading cases will aid in the solution of the question whether, on the facts hereafter stated, plaintiff should or could have supposed that the train had reached the usual place for the discharge of passengers.

In *Bridges v. Railway Co.*, supra, the executrix and wife sued for injuries suffered

by her husband which resulted in his death. The train on which he was a passenger had to pass through a tunnel before reaching the main platform. There was within the tunnel a platform, similar to but narrower than the main platform. The train went partially up to the main platform and stopped, the last two carriages remaining in the tunnel, the last but one opposite the small platform, and the last, in which the deceased was riding, opposite a heap of rubbish lying near the track. A passenger, who had alighted on the platform from the carriage next to the last, found the deceased lying on the heap of rubbish fatally injured. There was no light in the tunnel, and it was filled with steam. The name of the station had been called in the usual way. It was ruled, on appeal from the exchequer chamber to the house of lords, that it might be reasonably inferred that the deceased, having heard the name of the station called, and finding that the train had stopped, got out of the carriage supposing that he would alight on the platform, and that the evidence furnished matter on which it was necessary to take the opinion of a jury. L. R. 7 H. L. 213.

In *Railroad Co. v. Van Horn*, 38 N. J. Law, 133, the name of the station which was plaintiff's destination was announced while the train was in motion, and soon thereafter it was brought to a full stop, some distance from the station. The plaintiff went out on the platform of the car for the purpose of alighting, and while standing thereon the train was suddenly put in motion towards the depot, whereby she was thrown off and injured. This was at night. It is said: "The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then to stop the train short of such station, in the night-time. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night, this must be the inevitable result."

In *Taber v. Railroad Co.*, 71 N. Y. 489, ANDREWS, J., says: "The plaintiff was justified, under the circumstances, in supposing that she had reached her destination, and that the train was at the place where passengers were to alight; at least, the jury might have come to the conclusion that she was free from negligence. The defendant was bound to take notice of the circumstances, viz.: That the station had been announced; that passengers for Willards would naturally assume that the train, when it stopped, was at the station, and at the place where they were to alight; that by reason of the darkness of the night, and the absence of a depot, or other external indication of a station, passengers, especially those not familiar with the surrounding objects, would not, by observation, know that the trains had run beyond the highway crossing; that passengers, in the absence of notice, would, according to the usual custom, start to leave the train as soon as it came to a stand-still." In that case the night was dark, and there

was no depot or station light or anything to indicate the stopping place, which was a highway crossing, to a person not familiar with it. It was held that whether notice should have been given to the passengers, as a reasonable precaution, that the train was to back, and whether the omission to do so was negligence, were questions for the jury.

On the other hand, in *Mitchell v. Railway Co.*, 51 Mich. 236, 16 N. W. Rep. 388, the plaintiff intended to take another train at the crossing of two railways. Before arriving at the junction, the name of the station was called out, and the train came to a full stop, as required by law, before reaching crossings. Plaintiff hurried to leave the car, went down the steps where there was no platform or other convenience for landing, and as she was stepping off the cars were suddenly started to go forward to the depot, when she fell and was injured. This was in daylight, and it does not appear that any person employed on the train observed her. It was held that the injury was purely accidental, unless plaintiff was herself negligent, and that the company was not liable. CAMPBELL, J., said: "The only cause of the mischief, leaving defendant's carelessness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore get out. There was nothing at the spot to indicate a landing place, and there was at the proper place, a short distance further on, a building and platform, appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and, from the distances mentioned, we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this."

We have especially referred to the cases cited, because they distinguish between the instances in which the negligence of the defendant is and is not a question for the jury, and have made the foregoing extracts because they clearly declare the principles on which the distinction rests. They all concur that neither the announcement of the station, nor stopping the train before it arrives at the platform, if required by law or usage, for the purpose of avoiding collisions or other accidents, is negligence *per se*.

In *Bridges v. Railway Co.*, supra, BARON POLLOCK observes, in reference to the conduct of the passenger who was injured: "Had he known the rubbish was there instead of the platform, to jump out onto it with such a fall as would break his leg, and occasion mortal internal injuries, would indeed have been negligent, and rash in the extreme. But it was two hours after sunset, there was no light within the tunnel, and the deceased was near-sighted, and he might well have supposed he would step on the platform, as did the

passenger in the next carriage, with impunity." It will be observed that, in each of the cases in which it was ruled there was evidence of negligence sufficient to be submitted to the jury, there existed the element that, by reason of the want of light or other things, the passenger may have been deceived into supposing the train had arrived at the platform or place where it was intended he should alight. Comparing all the cases, we deduce that when the name of the station is called, and soon thereafter the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render manifest that the train has not reached the proper and usual landing place.

The undisputed facts are: Heflin was the point at which the regular passenger trains met and passed each other. It was customary for the east-bound train, on which plaintiff was a passenger, to take the side track, leaving the main track unobstructed for the passage of the train going westwardly. This was necessary to avoid collision. Heflin was plaintiff's point of destination. As the train was approaching, the name of the station was called, as was usual, and the train was stopped very soon thereafter, the object being to take the side track. On its stoppage, plaintiff went out of the rear door of the car, and was descending with one foot on the first step of the car and the other about touching the ground, when the train moved to go forward to the depot, which caused him to fall. It was drawn to the usual place for the discharge of passengers, and again stopped. The rear of the car, from which plaintiff was getting off, was about 200 yards from the depot building, the proper place for the discharge of passengers. The train was first stopped in a cut, about 360 feet long, and from 5 to 11 feet deep. This was in daylight, about 1 o'clock P. M. Plaintiff had been in Heflin once before, but, as he states, arrived and departed in the night-time, and was not about the depot in day-time. Nevertheless he knew, or ought to have known, that there was a depot at which passengers got off and on the trains, and that it was not in such a cut. All the surroundings indicated that the spot at which plaintiff attempted to leave the train was not the proper place for landing. From the description of the place given by witnesses and shown by the diagram in evidence, it is unreasonable to conclude or infer that any person possessing the ordinary sense of sight, and using it, could have supposed that the train had arrived at the place where the company intended passengers to get off. It does not appear that any of those in charge of or employed on the train noticed the plaintiff when leaving it, or had cause to suspect his intention to get off. There were no circumstances or surroundings caused by the company which should have induced plaintiff to reasonably suppose he was getting out at the place where the company intended him to alight. The evidence clearly establishes that his injury was accidental, if not pro-

duced by his own negligence. On the undisputed facts, the court would have been justified in giving the affirmative charge in favor of defendant.

Affirmed.

MEMPHIS & C. R. Co. et al. v. GRAYSON.

(Supreme Court of Alabama. Jan. 15, 1890.)

CORPORATIONS—STOCKHOLDERS—ESTOPPEL—RES
ADJUDICATA.

1. A stockholder in a railroad company who, at a meeting of the stockholders, votes for the lease of the road to another company, cannot, while his company continues to be committed to the lease, attack its validity.

2. But the operation of this estoppel is between the corporation and its shareholder; the company itself is not estopped to proceed against the lessee for the avoidance of the lease.

3. A decree rendered in a court of one state controls a decree subsequently rendered between the same parties and upon the same subject-matter, in another state, although the suit in which the later decree is rendered was instituted first.

Appeal from chancery court, Madison county; THOMAS COBBS, Judge.

Bill in equity to restrain a railroad corporation from issuing bonds, and to have leases of such company annulled.

Poston & Poston and *M. H. Humes*, for appellants. *Cabaniss & Ward*, *L. W. Day*, and *D. D. Shelby*, for appellee.

MCCLELLAN, J. In June, 1877, the Memphis & Charleston Railroad Company leased its road and equipment to the East Tennessee, Virginia & Georgia Railroad Company, for a term of 20 years, to commence in July thereafter. In December, 1879,—the lessee in the mean time being in possession of the property,—a modification of the original lease was agreed upon by and between the two companies. Both the original and amended leases were duly authorized and ratified by the stockholders of the Memphis & Charleston Company. The complainant was owner of stock in the lessor corporation at the time of these transactions, and his shares were represented at the meetings which consummated the lease and ratified the modification of it above referred to, and were voted with his knowledge and consent for the lease and amended lease, respectively. In November, 1881, the stockholders of the Memphis & Charleston Company adopted a resolution instructing their president and directors to treat the lease to the East Tennessee, Virginia & Georgia Company as invalid, and to proceed to take possession and control of the road. These instructions were not acted on. In August, 1882, the stockholders of the Memphis & Charleston Company passed a resolution authorizing the issuance of \$5,000,000 of additional stock, and directed the same to be sold at eight cents on the dollar, and the proceeds thereof, \$490,000, to be paid to the East Tennessee, Virginia & Georgia Company in consideration of a surrender of said lease and amended lease. The appellee (complainant below) was present at this meeting, and voted his stock, and protested against the adoption of this resolution, and immediately afterwards filed the present bill against the lessor and lessee

corporations, alleging that the lease was *ultra vires* of the lessor corporation and void; that the East Tennessee, Virginia & Georgia Company was largely indebted to the Memphis & Charleston Company by reason of its possession, operation, and use of the road and other property of the latter; and that the directors of the Memphis & Charleston Company were about to issue and sell said additional stock, and pay the proceeds thereof to the East Tennessee, Virginia & Georgia Company in consideration of a surrender and cancellation of said pretended lease. The bill prays for an injunction against the Memphis & Charleston Company restraining it from the issuance of said additional stock, and the payment of the proceeds thereof for a surrender of the lease, and against the East Tennessee, Virginia & Georgia Company restraining it from further control, use, etc., of the Memphis & Charleston road; for a receiver to take possession of the road-bed, equipment, etc., of the Memphis & Charleston Company, and operate the same for the benefit of the company's stockholders; and that, upon final hearing, said lease and amended lease be decreed to be void, and ordered canceled, and an account be taken between the defendant companies, and the East Tennessee, Virginia & Georgia Company be adjudged to pay the Memphis & Charleston Company whatever amount should be found due thereon for its use and occupation of the latter's road, or on account of inequitable division of traffic receipts between the two roads. No injunction was ever ordered pending the litigation, until the final decree, which perpetually restrains the Memphis & Charleston Company from issuing the additional stock contemplated by the resolution of August, 1882, and from paying the proceeds thereof for a surrender of the lease. No receiver was appointed. The final decree declares the lease null and void, but no accounting is decreed, because it was made to appear by the record of a proceeding in a chancery court of the state of Tennessee between the Memphis & Charleston Company and the East Tennessee, Virginia & Georgia Company, for the cancellation of the lease on account, etc., that the parties had already accounted between themselves. The correctness of the decree of the chancery court of Madison, in so far as it holds abstractly that the lease (originally and as amended) was *ultra vires* and void, is not controverted on this appeal. On this point, therefore, we content ourselves with a reference to some of the authorities which sustain the conclusion reached by the court below, the Memphis & Charleston Railroad Company having no special power under its charter or under the general laws of the state to lease its road to the East Tennessee, Virginia & Georgia Railroad Company. *Railroad Co. v. Railroad Co.*, 118 U. S. 294, 6 Sup. Ct. Rep. 1094; *Thomas v. Railroad Co.*, 101 U. S. 71.

The decree is attacked here on two grounds only: First, that complainant was estopped to question the validity of the lease, and the modified lease, by the fact that he was represented at the meetings of the stockholders which authorized or ratified them, and his stock was voted

by his proxy, and with his knowledge, for both the original and the amendment thereof; and, *second*, that the decree of the Tennessee chancery court declaring the lease void, etc., was a merger of complainant's cause of action, and therefore a bar to the further prosecution of his bill in the Alabama court.

It is not seriously denied that the complainant was at one time estopped by his conduct to prosecute this suit against the Memphis & Charleston Railroad Company. The relation existing between him and that company was that of *cestui que trust* and trustee. Acts of the corporation, participated, ratified, or acquiesced in by him as a shareholder, he has no right to call in question in any proceeding in form or effect adversary in its character with respect to his trustee, who in that regard is considered as executing his will. It would be manifestly inequitable to the corporate entity and to other stockholders to allow him, so long as the course in which he has set the company continues to be the corporate policy, to appeal to the court to have that policy reversed, and the company coerced into a different line of conduct. The shares owned by complainant having been voted by his representative, and, according to the weight of evidence, with his knowledge and consent, for the lease of July, 1877, and for the modification thereof resolved upon in December, 1879, he could not be permitted, while his trustee continued to be committed to the leases, to attack their validity. 2 Mor. Priv. Corp. § 630 et seq.; Cook, Stocks, § 683 et seq.

But the operation of this estoppel is between the trustee and the *cestui que trust*,—the corporation and its shareholder. The latter cannot proceed against the former for doing that which he has directed to be done, but the company itself is not estopped to proceed against a third person or other corporation for the avoidance of an executory *ultra vires* contract, and it would be the duty of the company to so proceed. Bigelow, Estop. 466-468. This well-settled proposition demonstrates that the estoppel does not obtain in favor of third parties, natural or artificial, and that they cannot rely upon it either against the corporation *eo nomine*, or against a stockholder suing for and in behalf of the corporation; for clearly it would be wholly immaterial to them whether the assault on the *ultra vires* contract proceeded from corporate volition, so to speak, or from the volition of a stockholder, exercising his right to act for the corporation. The Memphis & Charleston Company having, as we have seen, before the filing of this bill, repudiated the leases of its property to the East Tennessee, Virginia & Georgia Company, and instructed its directors to take possession of its road and equipment, the estoppel resting on complainant was thereby relieved.

As to the effect of the decree of the chancery court in Tennessee, a somewhat more difficult question arises. The bill in Alabama was first filed; the decree in Tennessee was first rendered. The suit in Alabama, while proceeding in the name of a stockholder in behalf of himself and all other stockholders who should come in and

make themselves parties, and nominally against the Memphis & Charleston Company as well as the East Tennessee, Virginia & Georgia Company, was in legal contemplation and effect for and in behalf of the Memphis & Charleston Company, capable of resulting in no other relief than such as the latter company was entitled to have decreed against the East Tennessee, Virginia & Georgia Company, and hence, for all practicable purposes incident to the present *status* of the case, is to be considered as a suit of one corporation against the other. 1 Mor. Priv. Corp. §§ 256, 257, 271. The suit in Tennessee proceeded in the name of the corporation itself, and its main objects were the same as those sought to be attained in the Alabama suit,—the cancellation of the leases of July, 1877, and December, 1879, and an accounting between the companies. The only relief insisted on in the domestic action which was not prayed for in the foreign suit was that the Memphis & Charleston Company be enjoined from the issuance and sale of the \$5,000,000 of additional stock authorized by a meeting of stockholders held in 1882. Even this relief, while it could not be specially prayed in the Tennessee suit, was necessarily involved and effectuated in that case, since this stock was to be issued and disposed of only for the specific purpose of providing a fund with which to pay the East Tennessee, Virginia & Georgia Company a bonus for a surrender of the leases; and, the leases having been decreed void and ordered canceled, there was no longer any authorization for the issuance of the additional stock, and no such action threatened. The parties and the issues, we therefore conclude, were substantially the same in the two cases; and it only remains to be considered, on this branch of the appeal, whether the Tennessee court had jurisdiction to render the decree which was set up as a bar to the further prosecution of this cause in the Madison chancery court. It is, of course, well settled, with respect to courts acting within one and the same territorial jurisdiction, and administering the laws of the same sovereignty, that the first to take cognizance of a controversy, or the control and custody of the property, cannot be defeated of its right to proceed to a final determination of the dispute, or to a complete administration of the property by the subsequent interposition of another tribunal; but, on the contrary, the pendency of the first action, properly pleaded, will abate the second. It may be conceded that jurisdiction taken by the court of one state to hear and determine a controversy, accompanied by the assumption of custody of the subject-matter in litigation, may be pleaded in bar of a subsequent proceeding, not merely ancillary in its character, in a court of another state or of the United States. But in each of the cases put, we apprehend, the pendency of the former suit must be pleaded, and if not pleaded, and the court in which the later proceeding is instituted goes on to judgment, that judgment will bar the further prosecution of the older suit. On the other hand, while there has been some diversity of adjudications on the point, it may now be consid-

ered as settled in principle and by the weight of authority that the pendency of an action in the courts of one state cannot, except possibly in the case conceded above, be set up to defeat a subsequent action in a court of another state. Wells, Res. Adj. § 530; Story, Conf. Law, § 609, p. 832, note c; Hatch v. Spofford, 22 Conn. 493; Percival v. Hickey, 18 Johns. 257; Drake v. Brander, 8 Tex. 352; Bowne v. Joy, 9 Johns. 221; Stanton v. Embrey, 93 U. S. 554.

Assuming, what is not questioned, that the Tennessee court had jurisdiction, otherwise than as affected by the pendency of this case, of the parties to and subject-matter involved in the bill of the Memphis & Charleston Company against the East Tennessee, Virginia & Georgia Company, it would be an anomaly to hold that it could not render a final decree between those parties because of the pendency of a case in Alabama, between the same parties, and involving the same controversy, when the fact was never pleaded, and would have availed nothing if it had been pleaded, or to deny to its decree when rendered, pending the Alabama case, a title of the force and effect it would have had in the absence of the other suit. This decree is not attacked as fraudulent or collusive. If it had been fraudulent or the result of collusion between the two corporations, it would, of course, exert no influence upon the litigation pending in the Madison chancery court. Its sole alleged infirmity, however, results from the fact that it was rendered on a bill filed after the bill in this case was exhibited. The objection is untenable. "The first judgment rendered controls, whether the action in which it is reached be instituted before the other or not, and the rule applies where the first judgment is rendered in another state." Wells, Res. Adj. § 292; Child v. Powder Works, 45 N. H. 547; Duffy v. Lytle, 5 Watts, 130; Casebeer v. Mowry, 55 Pa. St. 422; McGilvray v. Avery, 30 Vt. 538; Wood v. Gamble, 11 Cush. 8; Rogers v. Odell, 39 N. H. 452; Stout v. Lye, 103 U. S. 70, 71. And the same rule prevails as to decrees. Low v. Mussey, 41 Vt. 393; Peak v. Ligon, 10 Yerg. 468.

The *gravamen* of the bill in each case was the existence of the void leases of the Memphis & Charleston Company to the East Tennessee, Virginia & Georgia Company, possession and use by the latter of the former's property under these leases, and the indebtedness of the lessee to the lessor on account of such possession and use. The Tennessee decree determined each and all of these matters. It cancels the leases, it enforces a surrender of the property, and it settles the accounts between the parties. After that decree there was no lease in existence to be upheld or annulled by our court; no property of one party in the wrongful possession and enjoyment of the other to be restored to its rightful control and use; nothing due from the East Tennessee, Virginia & Georgia Company to the Memphis & Charleston Company to be decreed to be paid by the former to the latter. Complainant's cause of action had been destroyed by being merged into the decree of a competent court, and there was nothing left for the chancery court of Madison to act upon. Wells, Res. Adj. § 530; Barnes

v. Gibbs, 31 N. J. Law, 317; Freem. Judgm. §§ 215-221; Bank v. Brown, 50 Me. 214; Jones v. Jamison, 15 La. Ann. 35.

Our opinion, therefore, is that the court below erred in decreeing cancellation of the lease and amended lease, in adjudging or finding that the parties had accounted between themselves, and in enjoining the Memphis & Charleston Company from the issuance of the stock authorized in 1882. All of these matters had been expressly or necessarily settled by the Tennessee decree. Unquestionably, however, the complainant, Grayson, had a good cause of action when he filed his bill. The answer which set up the foreign decrees is therefore to be treated as a plea of *puis darrien continuance*, and the final disposition of this case, as to complainant's costs and reasonable expenses in the prosecution of his suit in behalf of the Memphis & Charleston corporation, should be had accordingly.

Reversed and remanded.

TUCKER V. ILLINOIS CENT. R. CO.

(Supreme Court of Louisiana. Jan. 29, 1890.)

NUISANCE—DANGEROUS BUILDINGS—NOTICE.

1. It is not necessary to serve notice, in order to recover damages for injuries received from a falling building, on the owner of its dangerous condition. He is bound to know the condition of his property. Ignorance of its condition can be no excuse for any accident caused by its weakness.

2. Where a standard of duty is fixed, and its measure defined by law, the omission is negligence *per se*.

3. There can be no difference in principle whether a building has been made unsafe by the agencies of time, or the acts of trespassers, which it was within the power of the owner to prevent. In any event, and under all these circumstances, it is the duty of the owner to keep his building in a safe condition.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

Girault Farrar, for appellant. *W. S. Benedict* and *D. B. H. Chaffe*, for appellee.

MCENERY, J. Mrs. Emma Freud, widow of J. H. Tucker, sued the defendant company for \$25,000 damages for the bodily suffering of her husband, and her pecuniary loss in his death caused by the falling of lumber sheds situated on property belonging to defendant, in the square bounded by Delord, Rampart, Euphrosine, and Franklin streets, in the city of New Orleans, on the 12th September, 1887. This suit was brought under the provisions of article 2315, Rev. Civil Code. The defense is a general denial. There was a verdict and judgment in favor of plaintiff, for \$7,500, from which the defendant appealed. The facts are as follows: The buildings on defendant's lots were a series of sheds adjoining each other, and running from Delord to Euphrosine streets. They were strong enough and suitable for the purpose for which they had been erected,—the storing of lumber. A shed awning extended over Delord street, for a distance of 100 feet. The defendant's agent, O'Connor, who had control of the property, employed one Poland to keep trespassers from the premises, who had been engaged dismantling the sheds. Their depredations had been going

on for some two weeks prior to the falling of the sheds. There was no organized force of large bodies, but they were committed at such times as suited the convenience of the individual trespasser. The sheds were weakened by the continuous displacing of materials, and on the afternoon of September 12, 1887, a greater portion of the sheds suddenly fell. The husband of the plaintiff, J. H. Tucker, was found dead under the *débris* on the banquet on Delord street. He was in failing health, and had left his house but a short time prior to the accident for a walk.

The defendant concedes that if the building had fallen from a failure to comply with the provision of article 2322, Civil Code, the liability of the company would be fixed unless there was some contributory negligence on the part of Tucker. But the company denies that the accident was caused by failure to comply with the provision of said article of the Code; affirms that it was caused by the unlawful acts of third persons, trespassers, who invaded the premises in swarms, and literally pulled down the sheds, on the afternoon of the 12th September, 1887. There is no evidence in the record that trespassers were present on this day in greater numbers than at any previous time. There is no proof that there was ever any overpowering force. On the contrary, it was established that these depredations or trespasses were the effects of individual trespassers, for the purpose of individual gain. Portions of the inclosures of the premises were down, and passages were left open, and thus an opportunity, if not an invitation, was given by the defendant for trespassing. There is some controversy about notice having been given to the defendant company through its agent O'Connor, as to the weakened condition of the sheds caused by taking away materials. But it was not necessary to serve any notice on the defendant company. It was bound to know the condition of its property. Ignorance of its condition, resulting from complete lack of proper and prudent attention, can be no excuse for any accident caused by its weakness. The law makes it the duty of the owner of a building to keep it in proper order, so that no one may be injured by it. An inspection of the building would have disclosed the acts of the trespassers. *Barnes v. Beirne*, 38 La. Ann. 280. In this case the defendant's standard of duty was fixed, and its measure defined by law. It is the same under all circumstances, and its omission is negligence *per se*. There can be no difference in principle whether the building has been made unsafe by the agencies of time, or the acts of trespassers which it was in the power of the owner to prevent. In any event, and under all these circumstances, it is the duty of the owner to keep his building in that condition of safety so that no one will be injured by its fall. The defendant company in its brief says: "The man in charge, supposed to be Mr. Paland, was among the killed, and of course it cannot, therefore, be stated whether he took part in the demolition, or invited or suffered the trespassers to do this outrageous act, or whether he tried to prevent it. If he was a party to the act,

or a silent by-stander, suffering it to be done without resistance, and if the plaintiff was not an actor in the proceedings, and was harmlessly walking by at the time without knowledge of the danger, then defendant is liable under the law." The defendant company did not exhaust its duties in the appointment, if one was made, of a party to watch the sheds. An efficient protection of the sheds was required, such as to prevent them from being put in a dangerous condition. The sheds in fact were practically abandoned to their fate. There is no evidence to connect plaintiff's husband with the trespassers. He was harmlessly walking on the banquet, without knowledge of the danger. The owner must know the condition of his property, and the company was aware of these trespasses, and the effect they had to weaken the buildings. It was its duty to warn the public of danger. There is, in our opinion, not the slightest doubt of the responsibility of the defendant company, but we think the amount of damages allowed by the jury is too large. The husband of the plaintiff was in bad health. He was 53 years of age. He had been out of employment for one year. His occupation was that of steward on a steam-boat during the boating season, and he earned from \$75 to \$80 per month when employed. His death was instantaneous, and therefore only actual damages are claimed for the pecuniary loss sustained by plaintiff. Under these circumstances, we think \$2,500 will be a just and proper amount to allow for the pecuniary loss suffered by plaintiff in the death of her husband. The judgment appealed from is therefore amended so as to give the plaintiff the sum of \$2,500 as damages, and in all other respects it is affirmed, plaintiff to pay costs of appeal.

Rehearing refused.

STATE v. WATSON.

(*Supreme Court of Louisiana*. May, 1889. 41 La. Ann.)

WOUNDING—INDICTMENT—AIDED BY PLEA OF GUILTY.

1. In pleading guilty to an indictment, the defendant confesses himself guilty in manner and form as charged in the indictment, and, if the indictment charges no offense against the law, none is confessed.

2. When the indictment charged the defendant with "feloniously" inflicting a wound less than mayhem, and omitted the statutory definition of the offense, held, that no judgment could be entered upon the plea of guilty, as the indictment charged no offense against the law. The law, to make the inflicting of the wound an offense, requires that it must be done maliciously and willfully.

3. The word "feloniously" is not equivalent in meaning to "willfully and maliciously." It has no well-defined meaning in American law, but is used in this state to describe more particularly offenses which were felonies at common law, or of offenses of gravity which are declared felonies by statute law.

4. The offense charged against defendant was not felony at common law, nor has it been made one by statute.

5. Offenses must be charged in the words of the statute which describe them, or in words which convey the clear meaning of the language used in the statute.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; LEWIS, Judge.

Keneth Baillis, for appellant. *Walter H. Rogers*, Atty. Gen., for the State.

McENERY, J. The defendant was indicted for feloniously inflicting a wound less than mayhem. The words "willfully" and "maliciously," in Act 17 of 1888, which are used to describe the offense, were omitted from the indictment. The defendant pleaded guilty, and thereafter filed a motion in arrest of judgment, the first ground of which is that no judgment could be entered on the plea, as the indictment charged no offense known to the laws of Louisiana. The state appealed from the judgment sustaining the motion, and alleges that the plea of guilty cured all defects in the indictment, and that the word "feloniously" was equivalent to the words "willfully and maliciously," found in the statute.

By a plea of guilty the defendant confesses himself guilty in manner and form as charged in the indictment, and, if the indictment charges no offense against the law, none is confessed. 1 Whart. Crim. Law, § 532. "Feloniously" is a technical word, which was essential in every indictment at common law which charged a felony, which occasioned, on conviction, a forfeiture of lands or goods, to which was superadded other punishment. In American law it has no well-defined meaning, but it is used in this state to designate offenses which were declared a felony at common law, or offenses of considerable gravity, which are declared felonies by statute.

The offense with which the accused is charged is a statutory offense, and it was not a felony at common law, and has not been declared one in the statute. The use of the word "feloniously" in the indictment was meaningless and surplusage. The offense charged should have been described in the words of the statute, or in words which convey the clear meaning of the language used in the statute. *State v. Williams*, 37 La. Ann. 776. The plea of guilty, therefore, entered by the defendant, was to a charge of inflicting a wound less than mayhem, not punishable under the law, unless it was done willfully and maliciously.

In indictments where it is necessary to use "feloniously" to designate the offense as a felony, the omission of the words "with malice aforethought" will not be supplied by the employment of the word "feloniously." 1 Whart. Crim. Law, § 399. It has been held in an indictment for arson, in which the defendants were charged with feloniously setting fire to a barn, that the word "feloniously" did not supply the omission of the word "maliciously;" and also, when a statute makes criminal the doing of an act "willfully and maliciously," it is not sufficient for the indictment to charge that it was done "feloniously." Id. § 401, note.

We are of the opinion that the word "feloniously," used in the indictment, is not an equivalent to, nor is it synonymous with, the words "willfully" and "maliciously," in Act 17 of 1888, which describes the offense of inflicting a wound less than mayhem, and that the indictment does not charge an offense punishable under the

laws of the state, and no judgment could be entered upon the plea of guilty.

Judgment affirmed.

Succession of MURRAY.

(*Supreme Court of Louisiana. Dec. 16, 1889.*)

DESCENT AND DISTRIBUTION—LIABILITIES OF HEIRS—EVIDENCE—DOCUMENTS—WILLS—REQUISITES.

1. An heir has the right to be discharged from the payment of his ancestor's debts, out of his own property, by abandoning the effects of his ancestor's succession to his creditors; the right of preserving the identity of his own property from that of his ancestor's succession; and the right of claiming out of the ancestor's succession the debts that are due to him therefrom; but to do so he must safeguard his acceptance of the succession by a clear and distinct reservation of the benefit of inventory.

2. A party, in offering written documents in evidence, has the right to restrict their effect as evidence to a definite purpose, and is not compelled to offer them for whatever they may be worth as evidence.

3. Articles 1591 and 1595 of the Civil Code employ the word "testaments" in its generic sense, and the law-maker intended it should convey the idea that the several formalities which are required in the confection of different testaments must be observed therein "respectively," and not "collectively." The law does not make it the duty of notaries to state the qualifications of witnesses, in the sense of Rev. Civil Code, art. 1591; but it does make it their duty to state their qualifications, in the sense of Id. art. 1578.

4. It is a sacramental requirement of a notary that he shall make express mention of all formalities having been fulfilled, but not that they were done at one time, and without turning aside to other acts. But only those formalities which are specified in article 1578 are referred to.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Moise & Cahn and *Felix J. Drayfous*, for appellant. *A. J. Lewis*, for appellee.

WATKINS, J. Mrs. Bridget Murray, wife of George Grover, died in the city of New Orleans on the 16th of November, 1888, leaving a nuncupative testament, which was received by public act. This will is couched in the following terms, viz.: "State of Louisiana, City of New Orleans. Be it known that on this ninth day of December, eighteen hundred and eighty four, I, Alphonse Barnett, a notary public, in and for the city and parish of New Orleans, duly commissioned and sworn, did, at the request of Bridget Murray, wife of George Grover, proceed to her residence, at the corner of Bienville and Burgundy streets, in the second district of this city, where I found the said Mrs. Grover, sound in mind, memory, and understanding, as she appeared to me, notary, and the witnesses hereinafter named and undersigned, and she requested of me, notary, to receive her last will and testament, as follows, to-wit: 'My name is Mary Bridget Murray, and am a resident of this city. I have no father or mother living, and no children. I give and bequeath to my husband, George Grover, the whole of my property, movable and immovable, I may be possessed of. I appoint my said husband, George Grover, my testamentary executor, with seisin of my estate. I revoke all wills and testaments heretofore made by me.' It was thus that the foregoing will was dictated to me, no-

tary, by the testatrix, to the undersigned notary, in presence of said witnesses, and the undersigned notary did write it down as dictated by said testatrix in presence of said witnesses, and lecture of said will as dictated and written having been given by the undersigned notary in a loud and intelligible voice, to the said testatrix, in presence of said witnesses, as she declared to me, notary, in presence of said witnesses, that it contained her last will and testament, in which she persists. The whole was done at one time, without interruption or turning aside to other acts, in the presence of said witnesses, who have signed their names with said testatrix and me, notary; the witnesses hereto being Reuben T. Wheeler, Joseph Paillet, and William S. Mackay, residing in this city, and of lawful age. The name of Robert erased, and that of Reuben interlined, app'd before signing; the name of Mary, interlined also, app'd before signing. MARY GROVER. RUEBEN T. WHEELER. JOSEPH PAILET. WM. S. MACKAY. A. BARNETT, Not. Pub." One J. G. Spor, upon allegation and proof of the incapacity of the universal legatee appointed in said will to accept and perform the functions of executor, applied for and obtained the probate of the will, and procured an order of court placing said universal legatee in possession of the property of the deceased. Thereupon Mrs. Margaret Torregano, alleging herself to be the surviving sister of the deceased, of the full blood, and her sole legal heir, in the absence of both descendants and ascendants, instituted this suit for the revocation of the will, on the ground that it contains certain radical defects of form, which vitiate it, and make it an absolute nullity, and therefore void.

The various alleged defects in the will are set out with great particularity and *in extenso* in the petition, but, as they are succinctly summarized in plaintiff's brief, we quote them, viz.: (1) It was not received by said notary in the presence of three witnesses of lawful age, and residing in the place, and otherwise competent, as required by law. (2) It was not written by said notary as it was dictated, and in the presence of the same three witnesses. (3) It was not read by said notary to said testatrix in the presence of the same three witnesses. (4) It was not signed by the testatrix in the presence of the same three witnesses and the said notary. (5) It was not signed by the same three witnesses. (6) The act states the testatrix to be 'Bridget Murray, wife of George Grover,' and further states that she dictated to the notary her name to be 'Bridget Murray,' whilst the act is not signed with that name, but is signed 'MARY GROVER,' an entirely different name. (7) The interlineation of the word 'Mary' before the word 'Bridget,' on the first page of said act, was made after the signing and conclusion of the will, as is shown by the interlineation running irregularly between the ruled lines of the writing paper and the scrawled signature 'Mary Grover,' and was neither dictated nor approved by the testatrix. (8) The erasure of the word 'Robert,' and the interlineation of the word 'Reuben,' were not approved by the testatrix, and show two different persons, and appearing at

different times, and of whom only one has signed his name. (9) The three persons who signed their names are not the three witnesses referred to in the caption or at the end of the will, and were not all present as witnesses when the will was received, dictated, written, and signed, continuously; and the act does not show who were the three witnesses. (10) The act does not make proof by itself of a strict compliance with all the legal requisites, but does show on its face all of said illegalities. (11) All the legal requisites were not done at one time, without interruption and without turning aside to other acts, and such formalities as were observed were done at different times."

We will discuss these various objections *seriatim*, and in the order foregoing.

1. Preliminary to the discussion of the merits are the exceptions of George Grover, beneficiary under the mooted will, and two bills of exceptions retained by him during the trial:

(a) The exceptions are: (1) That the petition contains inconsistent demands, and fails to aver any injury as resulting from the alleged errors in the copy of the will; (2) that it is vague, general, and indefinite; (3) that it shows no cause of action; (4) that the plaintiff must either accept or reject the succession of the deceased, absolutely and unequivocally, and, in case she accepts, such acceptance must be with or without the benefit of an inventory, and she cannot assume an equivocal position, so "as to receive, if there is anything to receive, and yet not be liable if there is any liability." These exceptions were overruled by the judge *a quo*, and the language of the petition, though somewhat guarded, is sufficient for his so doing. It is that the petitioner "is the sole legal heir of said deceased, [and] that, in so far as she may have a right to do so, [she] accepts the succession of said deceased, with the benefit of inventory," etc. This is followed by a prayer to the effect that the will and the probate be annulled and set aside, and "that petitioner be recognized as the sole legal heir of said deceased, under the benefit of inventory, and, as such, entitled to the entire estate of said deceased, after the payment of debts, if any there be," etc. The object had in view by the petitioner was, doubtless, to preserve the benefit of being liable for the charges and debts of the succession only to the value of the succession effects. Rev. Civil Code, arts. 1032, 1054. The Code defines "succession" to be the transmission of the rights and obligations of the deceased to the heirs. *Id.* art. 871. It is matter of no consequence whether the property exceed the charges, or the charges exceed the property, or whether the deceased left charges without property. *Id.* art. 872. The right of an heir to be discharged from the payment of his ancestor's debts out of his own property, by abandoning the effects of his ancestor to his creditors, the right of preserving the identity of his own property, as well as the right of claiming out of the ancestor's succession the debts that are due to him from it, are all valuable rights, and petitioner had the clear legal option to safeguard them as she did in accepting it.

(b) The demands of her petition are all of like tenor, and tend to the same conclusion,—the nullity of the will. They do not assail the will for any inherent defects, but as null for vices of form. They appear to us to be perfectly consistent, and free from ambiguity, and set out a cause of action.

(c) The defendant's exceptions are taken to the rulings of the judge in permitting the plaintiff to restrict the effect of certain written instruments offered in evidence to a definite purpose; his position being "that the documents must go in for all they are worth as evidence." It is elementary that a written instrument is only binding upon parties and privies to it, and third persons are not estopped from assailing or contradicting its recitals. In this instance plaintiff's claim is that Bridget Murray's will is null, and she is her sole heir. If it were true that the plaintiff was bound to offer and file the will "for all it is worth as evidence," and could not be permitted to restrict the offer to a certain purpose, that would be an end of the case; because it is a fundamental rule of evidence that a party is bound by the testimony he places on record in his own behalf. Plaintiff had the undeniable right to offer the will for the purposes of *rem ipsam*, as the commencement of proof, and with a view of exhibiting to the court its defects and informalities. If this were not a correct rule of evidence, how could fraud or simulation in written contracts be shown by parol evidence? We think the judge *a quo* ruled correctly.

2. The judge of the lower court maintained the plaintiff's first ground of objection to the will, annulled it, and held her to be Bridget Murray's sole legal heir, and, as such, entitled to be placed in possession of the property left at her demise. From his elaborate and carefully considered opinion, it appears that he rested his conclusions upon what was said on this subject in *Succession of Vollmer*, 40 La. Ann. 597, 4 South. Rep. 254, and *Welck v. Heure*, 41 La. Ann. —, 5 South. Rep. 528, and the various authorities therein cited. The *gravamen* of the judge's opinion is contained in the following paragraph, viz: "In this case the legal capacity of the three witnesses named appears only from the declaration of the notary, 'the witnesses Bereto * * * residing in this city, and of lawful age.' It is true the names Reuben, Joseph, and William indicate males, but there is nothing to indicate their age as being over sixteen years, or that they are not insane or deaf or dumb or blind, or that they are capable of exercising civil functions, unless we accept, as such indication, the declaration of the notary that they reside in this city, and are of lawful age. Under the decisions above quoted, the notary is not the judge as to these requirements, and, on the pain of nullity, it was his duty to mention explicitly the qualifications of the witnesses, in order that same might be determined by the court in the probate and execution of the will. Age and residence are only two of the seven qualifications required by law for nuncupative testaments, and nothing can be left to inference or proof *dehors* the face of the will itself." As a foundation on which to rest this proposition, the judge previously an-

nounced the opinion that "the nuncupative will, by public act, must make, of itself and on its face, full proof that every requirement of the law for the execution of testaments in this form has been complied with. One of the requirements of the law is that the three witnesses in whose presence the will must be received and executed, and who must sign the act, shall have the legal capacity defined in Rev. Civil Code, arts. 1591, 1592, 1594."

We are of the opinion that our learned brother of the lower court has mistaken the true import of Rev. Civil Code, art. 1591 et seq. In *Succession of Vollmer*, *supra*, we said of the testament under consideration, which was in the nuncupative form, by public act: "The charge against it is that it does not set forth that the three witnesses are residents of the parish of Orleans, but that they are competent witnesses. The omission is fatal. The notary is required by law, under pain of nullity of the act, to express specifically every material fact constituting the competency of himself, and of the officiating witnesses, under the law, in that respect, and also every formality observed in the execution of the will. The act must make full proof on its face of every element necessary to its validity, as no evidence is admissible to supply any deficiency." The language in which that opinion is couched is carefully selected, and pertinent to the question under consideration, and it was whether the will was valid in that particular form; for, though it might have been invalid as a nuncupative testament received by public act, it might have been valid in some other form. *Id.* art. 1590. As it was a question of form only, we must look to the articles of the Code which prescribe the essential formalities for this particular kind of testament. Now, we find in article 1578 this declaration: "The nuncupative testaments by public act must be received by a notary public, in the presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place. This testament must be dictated by the testator, and written by the notary as it is dictated. It must then be read to the testator in presence of the witnesses. Express mention is made of the whole, observing that all those formalities must be fulfilled at one time, without interruption, and without turning aside to other acts."

The guarded language of our opinion in *Succession of Vollmer* was aptly chosen, and properly limited to the question of the special qualification of witnesses to a nuncupative testament by public act, on the score of their residence in the place where same was executed, that being the only one involved in that case. Hence we said that the notary is required "to express specifically every material fact constituting the competency of himself, and of the officiating witnesses, under the law, in that respect, and also every formality observed in the execution of the will." Italics are ours. There is no other formality in the execution of a nuncupative will by a public act than those enumerated in *Id.* art. 1578. In *Welck v. Heure* we merely quoted what was said on the subject in *Succession of Vollmer* with approv-

al, without announcing anything new or additional, for that was a similar case.

It will be observed that the articles of the Codesucceeding article 1580 treat of the nuncupative testament under private signature, the mystic or sealed testament, and the olographic testament, and designate the requisites of each. They are followed by articles containing general provisions which are applicable alike to all. Among this number is article 1591, which declares that certain designated persons "are absolutely incapable of being witnesses to testaments,"—not to the nuncupative testament by public act alone, but to testaments in general. In this and subsequent articles the plural noun "testaments" is employed in a generic sense, to indicate the applicability of the principle to all; and the provisions of article 1595 must be so construed, for it declares that the "formalities to which testaments" are subject "by the provisions of the present section must be observed; otherwise the testaments are null and void." We think it erroneous to conclude therefrom that, in order to be valid, a nuncupative testament received by public act should circumstantially recite full compliance with all the formalities that are prescribed in that section; on the contrary, we think such a testament would be utterly null and void, if it did recite them all. For instance, article 1588 provides that the olographic testament, "in order to be valid, must be entirely written, dated, and signed by the hand of the testator." That is one of the formalities to which testaments are subject by the provisions of that section, yet it is completely at variance with those required for the validity of nuncupative testaments received by public act, which are likewise provided for by that section. This is sufficient to show that article 1595 employs the word "testaments" in its generic sense, and that the law-giver intended it should convey the idea that the several formalities which are required in the confectio of different kinds of testaments must be observed therein respectively, and not collectively. Article 1591 is in the same category, and it is clear to our minds that it does not specify any formality to which testaments are subject, but simply declares what persons are absolutely incapable of being witnesses to testaments in general. If this article has received a proper interpretation at the hands of our learned brother of the lower court, the law has entailed upon notaries a great hardship—the performance, indeed, of an utter impossibility—in requiring that, on pain of nullity, they shall specifically state, in acts executed by them, all the facts which tend to negative the disqualifications of witnesses mentioned in that article; for how could a notary know that a witness was more or less than 16 years of age, or was so deaf, dumb, blind, or insane that he was incapable of being a witness to a testament? By what means could he determine what persons are disqualified by the criminal law from exercising civil functions? Such an interpretation was certainly not intended by our opinion in *Succession of Vollmer*. When it was said that "the notary is required by law, under pain of nullity of the act, to express specifically every material fact constituting the com-

petency * * * of the officiating witnesses, under the law, in that respect," it was not intended to convey the idea that it was the duty of the notary to state "every material fact" constituting their competency in every respect, or that he should state "every material fact" necessary to negative their disqualification in every respect. Suffice it to say, broadly, that the law does not make it the duty of notaries to state the qualifications of witnesses in the sense of Rev. Civil Code, art. 1591, but it does make it their duty to state their qualifications in the sense of *Id.* art. 1578.

3. The recitals of the will are as follows, viz.: "And the undersigned notary did write it"—the will—"down, as dictated by said testatrix, in presence of said witnesses." This statement fully answers plaintiff's second charge, and satisfies the law in this regard.

4. The recitals of the will are further to the effect that "lecture of said will, as dictated" and written, having been given by the "undersigned notary, in a loud and intelligible voice, to the said testatrix, in the presence of said witnesses," etc., and they answer the third charge, and likewise satisfy the law. The word "lecture" is to be understood in the sense of "reading." That is the English of it.

5. The will further recites that "the whole was done in the presence of said witnesses, who have signed their names, with said testatrix, and me, said notary." This recital sufficiently answers the plaintiff's fourth charge, and also the law.

6. The plaintiff's fifth charge against the will is that it is signed by Mary Grover as testatrix, while the body of the act states the testatrix to be Bridget Murray, wife of George Grover, an entirely different person to all appearances. The act states that "I, Alphonse Barnett, a notary public, did, at the request of Bridget Murray, wife of George Grover, proceed to her residence, where I found the said Mrs. Grover * * * as she appeared to me, notary, and the witnesses, and she requested me, notary, to receive her last will and testament, as follows, to-wit: 'My name is Bridget Murray. * * * I give and bequeath to my husband, George Grover, the whole of my property. * * * I appoint my said husband, George Grover, my testamentary executor,' etc. From the foregoing recitals it is clear that "Bridget Murray, wife of George Grover," and "Mrs. Grover," are one and the same person. Then we have "Bridget Murray" for the maiden name of the testatrix, and Grover, the name of her husband. But the original act shows the interlineation of the name "Mary" before "Bridget," and the sentence made to read thus: "My name is Mary Bridget Murray" or Mary Bridget Grover, she being the wife of George Grover. Now, it may be perfectly true that the testatrix at first dictated her name as "Bridget Murray, wife of George Grover," yet when it was read to her, in the presence of the witnesses, she doubtless invited the notary's attention to the fact that her full maiden name was Mary Bridget Murray; and, in affixing her signature to the act, she doubtless appended that of "Mary Grover," as the one by her most used dur-

ing her married life, instead of her maiden name. In full confirmation of that fact, we find it stated in the body of the will and immediately over the signature "Mary Grover," these words, viz.: "The name of Mary interlined, also app'd before signing." We do not think there is any reasonable doubt of the fact that "Bridget Murray, wife of George Grover," "Mrs. Grover," "Mary Bridget Murray," and "Mary Grover," are the names of one and the same person. This objection of plaintiff is not good.

7. The charge that the interlineation of the word "Mary," before the word "Bridget," on the first page of the act, was made after the signing and conclusion of the will, is not borne out by a close inspection of the will, which is before us in the original. Preceding the commencement of the clause of the will, viz.: "My name is," etc., there is an entire line left blank, and in this space the name "Mary" is clearly and distinctly written, and it does not bear the appearance suggested.

8. The charge that the erasure of the name "Robert," and the interlineation of the name "Reuben," were not approved by the testatrix and show two different persons, who appeared at different times, and of whom only one has signed his name, is not borne out by the record. In the beginning of the act the notary states that Mrs. Grover appeared to him, "and the witnesses hereinafter named and undersigned," and at the conclusion their names appear to have been originally stated to be "Robert T. Wheeler, Joseph Pallet, and William S. Mackey;" but the name "Robert," in the original act, appears to have been subsequently erased and that of "Reuben" interlined. After stating the names and residence of the witnesses, but before the signatures of the testatrix and witnesses, we find this announcement, viz.: "The name of 'Robert,' erased, and that of 'Reuben' interlined, app'd before signing. The name of 'Mary,' interlined, also app'd before signing." This affirmative declaration that this erasure and interlineation occurred before the signing is conclusive proof that the subsequent affixing of the testatrix's signature to the will is an approval of it. Independent of the written declaration of the fact, the subsequent signing is a conclusive evidence of her approval.

9, 10. These two charges are substantially embraced in and discussed under different preceding paragraphs. The significance of these objections is that, in plaintiff's view, the then witnesses who signed the act are not the same three witnesses who are mentioned in the act. This is merely a verbal criticism, or play on words, growing out of the erasure of the name "Robert," and the substitution and interlineation of "Reuben" therefor. They are without merit.

11. The final charge is that all the legal requisites were not done at one time, and without turning aside to other acts. It is a sacramental requirement of the notary that he shall make "express mention * * * of the whole," but not that he shall declare that all those formalities had been "fulfilled at one time, * * * and without turning aside to other acts." Rev.

Civil Code, art. 1578. His failure to make such a declaration in the will is not a ground of nullity. *Featherstone v. Robinson*, 7 La. 599; *Keller v. McCalop*, 12 Rob. (La.) 689. That article only refers to the formalities which are therein mentioned. All of those formalities seem to have been fulfilled at one and the same time, and the act furnishes no proof that he turned aside to other acts. There is no evidence of his having prepared any other act. This charge must share the fate of its predecessors.

A conscientious and painstaking examination of the law and evidence appertaining to this case has brought us to the conclusion that the judgment appealed from is erroneous, and should be reversed. It is therefore ordered and decreed that the judgment appealed from be and the same is annulled and reversed, and it is now ordered and decreed that the demands of plaintiff and appellee be rejected, at her cost in both courts.

STATE v. CALLEGARI.

(Supreme Court of Louisiana. May, 1839. 41 La. Ann.)

CRIMINAL LAW—TRIAL—PRESENCE OF ACCUSED—IMPEACHMENT OF WITNESS—NEW TRIAL.

1. The presence of an accused in court is sufficiently shown by a minute entry reading as follows: "In this case the prisoner, F. A. C., represented by his counsel, Messrs. S., D. and W., and the district attorney, being all present in open court, the jury come," etc.

2. An attempt to impeach the veracity of a witness, by proving that he had previously made statements different from the testimony which he gave in the case on trial, must be preceded by proper foundation to put the witness on his guard, and, if the statements ascribed to him had been made in or reduced to writing, the proper foundation is in the production of the writing itself; otherwise, the inquiry must be suppressed.

3. There is no warrant in law or jurisprudence to justify counsel of an accused to take testimony to disprove statements of facts by the trial judge in a bill of exception.

(Syllabus by the Court.)

Appeal from district court, parish of Calcasieu; READ, Judge.

George H. Wells, L. J. Ducote, and W. F. Schwing, for appellant. *Walter H. Rogers*, Atty. Gen., for the State.

POCHE, J. Appealing from a life sentence predicated on a conviction of murder without capital punishment, the defendant submits an assignment of errors and three bills of exceptions. In the assignment of errors he avers that the record does not show that he was present in court when the jury rendered their verdict in his case. On that point his counsel argue as follows: "But it will perhaps be contended that the language of the transcript, on page 37, reading as follows: 'In this case the prisoner, F. A. Callegari, represented by his counsel, Messrs. Schwing, Ducote, and Wells, all present in open court, the jury, etc.,'—implies the presence of the prisoner in court. In answer, we contend that the adjective 'all' in the above sentence refers, not to the prisoner, but to his counsel, Messrs. Schwing, Ducote, and Wells, by whom he was represented." But counsel's quotation from the record is materially erroneous. The entry is in the following words: "In

this case the prisoner, F. A. Callegari, represented by his counsel, Messrs. Schwing, Ducote, and Wells, and the district attorney, all being present in open court, the jury duly impaneled for the trial of the case, come into court, and through their foreman render the following verdict. * * *

The jury is discharged, and the prisoner remanded to jail." (Italics are ours, showing the words omitted in counsel's quotation from the record.) Comment would be superfluous, under such a showing. The correct entry does show the presence of the accused at that stage of his trial, and that he was remanded to jail.

1. The first bill is leveled at the judge's overruling the following question, propounded on cross-examination to a leading state witness, who had testified that he had seen the homicide: "Did you not testify on the preliminary examination of the accused for the murder of Neyland, referring to a conversation between yourself and George Bucher which occurred in the room where the homicide occurred, that you were expecting a fight with said Bucher, from the way said Bucher talked at the time?" The testimony which the witness had given at the preliminary examination had been reduced to writing, and is annexed to this bill, but it was not handed or read to the witness at the time that the question was put to him, or at any time during his examination and cross-examination, and that omission is the ground on which the judge rested this ruling. We cannot say that his conclusion was erroneous. The undoubted purpose of the interrogatory was to impeach the veracity of the witness, and to weaken his testimony. In that line of examination the witness is entitled to be put on his guard touching the previous statement which he has made; and, if the statement is contained in writing, the production thereof is the proper foundation for the proposed investigation. Greenleaf, in his work on Evidence, formulates the rule as follows: "If he [the witness] is asked, generally, whether he has made representations of the particular nature stated to him, the counsel will be required to specify whether the question refers to representations in writing, or in words alone; and, if the former is meant, the inquiry, for the reasons before mentioned, will be suppressed, unless the writing is produced." 1 Greenl. Ev. § 465. See, also, Rosc. Crim. Ev. (8th Ed.) 216. It appears from the bill that while counsel was cross-examining the witness he held the testimony in his hand; and he has failed to adduce any reasons, satisfactory to the legal mind, in explanation of his omission or refusal to submit it to the witness, for his examination of the statement ascribed to him, as contained in that document.

2. The second bill is to the refusal of a new trial, prayed for on the ground of newly-discovered evidence, which consisted of testimony going to show that about two hours before the homicide, during a quarrel between the two, the deceased had threatened to break the neck of the accused. It appears from the bill that at the moment of, or immediately before, the fatal affray, the deceased had made no demonstration indicating a design to do any

bodily harm to the accused, but that he was about to begin a dance when he was shot down. Under well-settled law, such a showing could not admit of proof of previous threats, either in justification or in mitigation of the act. And it also appears, from the judge's statement in the bill, that the newly-discovered evidence would at most have amounted to cumulative testimony, as other witnesses had on the trial testified as to hot words and quarrels between the parties. That circumstance, of itself, was sufficient to justify the ruling of the trial judge on the point. *State v. Fahey*, 35 La. Ann. 12; *State v. Hyland*, 38 La. Ann. 709; *State v. Hanks*, 39 La. Ann. 234, 1 South. Rep. 458.

3. In this connection, the last bill discloses the following incident: After the refusal of a new trial, counsel for the accused proposed to show by testimony that the trial judge was in error in the statement implied in his reasons for refusing a new trial, to the effect that there had been testimony at the trial on the subject of threats made by the deceased against the life of the accused. The judge very properly suppressed such an investigation, which finds no warrant either in law or in jurisprudence. Until otherwise provided for by legislative authority, this court must be guided by the recitals of the trial judge as to the nature and scope of the evidence submitted to the jury during the trial, as bearing on motions for new trials predicated on evidence alleged to be newly discovered.

Our conclusion is that none of defendant's complaints are well founded.

Judgment affirmed.

STATE V. FRANK.

(*Supreme Court of Louisiana*. May, 1889. 41 La. Ann.)

BURGLARY—INDICTMENT.

An indictment which charges an offender with breaking and entering a store-house, used as a dwelling-house, in which a person was at the time residing, is equivalent to charging that the offender did break and enter a dwelling-house, a person being lawfully therein; and such indictment contains the essential elements of the crime of burglary, and is therefore valid and sufficient.

(*Syllabus by the Court*.)

Appeal from district court, parish of St. Landry; LEWIS, Judge.

E. P. Venzie, for appellant. Walter H. Rogers, Atty. Gen., for the State.

WATKINS, J. The sole question presented by this appeal arises on a motion in arrest of judgment filed in the court below, and an assignment of error filed here. They are to the effect that the indictment does not charge the accused with breaking and entering a house which was at the time lawfully occupied, and, therefore, no judgment and sentence could be pronounced thereon for "breaking and entering a dwelling-house in the night-time, with intent to kill."

The indictment charges that "on or about the 1st of January, 1889, Eugene Frank did unlawfully, feloniously, willfully, and burglariously, and with malice aforethought, in the night-time, break and enter a dwelling-house, that is to say, a

store-house used as a dwelling-house, in which Adolphe Chachère was then residing, with intent to kill, being at the time armed with a dangerous weapon, and * * * did then and there commit an assault upon the said Adolphe Chachère," etc. It was evidently the intention of the grand jury to indict the accused under section 850 of the Revised Statutes, and the district attorney so framed the bill. It is so stated, in terms, in the judgment of the court below. It provides that "whoever, with intent to kill, * * * shall in the night-time break and enter * * * a dwelling-house, any person being lawfully therein * * * at the time of such breaking or entering, armed with a dangerous weapon, * * * or committing an actual assault upon any person lawfully being in such house," etc. Rev. St. § 850. Not only does the indictment respond, in substance, to the requirements of the statute, but it does not appear to be susceptible of any other interpretation. What idea does the phrase, "a store-house used as a dwelling-house, in which Adolphe Chachère was then residing," mean? Certainly, that the store-house was at the time lawfully occupied by Adolphe Chachère as a dwelling-house.

The indictment further charges that the accused was at the time armed with a dangerous weapon, "and then and there committed an assault upon the said Adolphe Chachère." Then the inference is irresistible that Adolphe Chachère was at the time in the store-house used as a dwelling, and in which he "was then residing."

"The crime of burglary known to our law is statutory," said our predecessors in *Newton's Case*, 80 La. Ann. 1254. "The statute defines it, and we must therefore look to the statute to ascertain the essential averments of the indictment." To this construction we have constantly adhered. *Vide State v. Jordan*, 39 La. Ann. 340, 1 South. Rep. 655. It has often been held that a statutory offense need not be described in the language of the statute, but that it was sufficient if all of the essential elements of the offense are distinctly and clearly set out "in words of similar import to those employed in the statute; that is, in such words as clearly convey the real meaning of the language used in the statute." *State v. Eames*, 39 La. Ann. 989, 8 South. Rep. 93; *State v. Williams*, 37 La. Ann. 776; *State v. Humphries*, 35 La. Ann. 966; *State v. Hood*, 6 La. Ann. 179.

In the instant case the language which is employed in the indictment is of similar import to that which is employed in the statute, and we think it is entirely sufficient.

Judgment affirmed.

STATE V. REED.

(*Supreme Court of Louisiana*, May, 1889. 41 La. Ann.)

CRIMINAL LAW—INSANITY—EVIDENCE OF CHARACTER.

1. A person indicted for crime cannot, validly, plead, or be tried or convicted or sentenced, while in a state of insanity, although his mental derangement may only have supervened since the date of the crime charged.

2. The objection of present insanity may be made at any stage of the proceedings. It requires no special or formal plea, but may be adequately

presented orally, or the court may itself suggest, and act upon its own observation.

3. Whenever and however presented, evidence, if offered, must be received, and the issue must in some way be determined.

4. As to the mode of determining it, some discretion is left to the judge, according to the time and circumstances under which the objection is made.

5. When raised during the progress of the trial, the better course seems to be to submit the special issue, with the general issue, to the jury; but, whatever be the judge's discretion on this point, it is error to refuse to entertain the objection, or to receive evidence, or to determine it in any way.

6. When a witness, properly introduced to impeach the reputation for virtue and chastity of the prosecutrix in a rape case, has stated positively that he knew her general reputation, his competency is not destroyed because, on cross-examination as to the nature of his knowledge, he states that he has heard 10, 15, or 20 persons speak of her character in that respect, and say that it was bad. Knowledge of reputation is derived from what one person has heard from others; and its generality is sufficiently sustained when the witness has heard a considerable number of persons speak of it, and when they all concur.

(*Syllabus by the Court*.)

Appeal from district court, parish of Bienville; Boone, Judge.

John A. Richardson and Young, Drew & Stewart, for appellant. *Walter H. Rogers*, Atty. Gen., for the State.

FENNER, J. The appeal of the defendant rests on several bills of exception, and on overruling of a motion for a new trial.

Bill No. 1 was taken to the refusal of the judge to admit testimony offered to prove the insanity of the prisoner at the time of trial, in absence of any plea. There is no pretense that insanity existed at the time when the offense for which defendant was prosecuted was committed. In such case it would have been a legal defense, and under Rev. St. § 995, evidence thereof would have been admissible under the general plea of not guilty. But the precise question here presented is a novel one in this state. It is elementary that a man cannot plead, or be tried or convicted or sentenced, while in a state of insanity. 1 Bish. Crim. Law, § 396; 1 Whart. Crim. Law, § 33 et seq.; 2 Bish. Crim. Proc. §§ 666-668. If insanity exist at the time of the arraignment, counsel should then make the objection, and, if sustained, the prisoner should be excused from pleading, and the proceeding should await his recovery. If not made at arraignment, the objection may be raised at any time, before commencement of trial, and if sustained the trial cannot proceed. Even though not made until the trial has begun, it is still not too late, and must be considered and determined in some way. Indeed, even after conviction it may be opposed as a reason why sentence should not be passed. The better opinion is that the objection requires no formal plea, but may be adequately presented orally, or the court may raise it on its own observation. *Reg. v. Southey*, 4 Fost. & F. 864; *Reg. v. Turton*, 6 Cox. Crim. Cas. 885; *Case of Frith*, 22 How. State Tr. 307; *Rex v. Dyson*, 7 Car. & P. 305. Whenever and however raised, evidence must be received, if offered, and the issue must in some way be disposed of. As to the mode of disposition, it seems that much is left to the discretion of the judge. If

made before trial, or after conviction, the general practice is to submit the issue to a jury impaneled for the purpose, though perhaps the judge may, in his discretion, adopt some other suitable method of ascertaining the fact. If made during the progress of the trial, the court may let the trial proceed, and submit the question of present insanity, with that of guilt or innocence, together to the jury. Reg. v. Southey, 4 East. & F. 864; Reg. v. Berry, 1 Q. B. Div. 447.

All the foregoing propositions are sustained by Mr. Bishop in his work on Criminal Procedure, §§ 666-668, with references to numerous authorities, which need not be here quoted. We consider it very clear that the counsel for defendant had the right to raise the question of their client's present sanity, without special or formal plea, and to have evidence received on the point, and to have the issue determined in some proper way. The judge's safest course would have been to have received the evidence, and to have submitted this special issue to the jury with the general issue; in which case, if the jury found the defendant to be insane, it would have returned such verdict by itself, without passing on the general issue; or, if it found him sane, it would proceed to pass on the general issue, and return both verdicts together. But, whatever be his discretion as to the mode of determination, he undoubtedly committed error in refusing to entertain the objection, or to hear evidence thereon, or to determine it in any way.

This is sufficient to sustain a reversal and remanding; but bills of exception Nos. 2 and 3 involve questions likely to arise on a new trial, and therefore are proper to be determined. The trial was for rape. Two witnesses were introduced to prove the general reputation for virtue and chastity of the prosecuting witness charged to have been raped. They stated that "they knew her general reputation for virtue and chastity;" when, before proceeding further, the state was allowed to intervene to test, by cross-examination, the nature of their knowledge. One stated that he had heard at least 10 young men and boys speak of her reputation for chastity; and the other stated that he had heard at least 15 or 20 young men and boys say her reputation for virtue and chastity was bad. On this the judge ruled out the testimony, holding that the knowledge of the witnesses was special, and not general. In this we think the judge erred. Reputation is the general opinion of a person held by the community. A witness' knowledge of another's reputation must be derived from what he has heard others say on the subject. He is not required to have heard every member of the community express himself on the subject. If he has heard the opinion of a considerable number, and if such opinion is concurrent, that suffices. Certainly nothing elicited from the witnesses contradicted or overthrew their first positive statement that they knew the general reputation of the prosecutrix. It is therefore ordered and decreed that the verdict and sentence appealed from be annulled and set aside, and that the case be remanded to the lower court, to be there proceeded with according to law.

STATE v. DESCHAMPS.

(Supreme Court of Louisiana. Dec. 2, 1890.)

CRIMINAL LAW—CONTINUANCE—TIME TO PREPARE DEFENSE.

A motion for a continuance, made for the first time by an attorney assigned to defend an accused in a capital case, ought to be allowed, when supported by his affidavit that he has not had sufficient time to prepare a suitable and valid defense, which he believes there is in the case; less than 48 hours having intervened between his appointment and the calling of the case, which involves questions of fact and law which require much study and research. McENERY and FENNER, JJ., dissenting.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; MARR, Judge.

James H. Dowling, for appellant. W. H. Rogers, Atty. Gen., for the State.

BERMUDEZ, J. The defendant was prosecuted for murder, tried, convicted, and sentenced to death. On appeal, he complains that the district judge erred (1) in refusing a continuance; (2) in hearing an incompetent witness; (3) in admitting certain testimony; (4) in giving an improper charge. The record contains three bills, and a motion for a new trial to the refusal of which a bill was taken.

The following is an extract from the statement of the trial judge, contained in the bill taken to his refusal to grant a continuance: "On the 29th of April, when the accused was brought to the bar for trial, he informed the court that he had no counsel, and asked the court to appoint counsel for him, such as the court might select. After positive refusal by some half a dozen members of the bar, the appointment was made, and the case was continued to 1st May." On that day the counsel thus appointed made affidavit, stating "that he is entitled to an indulgence from the honorable court of a reasonable time in which to prepare a suitable and valid defense, which counsel believes there is in this case; that he has not had sufficient time to do so, as less than forty-eight hours have intervened since his assignment as counsel and the calling of the accused to the bar of the court for trial; that he has been altogether unable to prepare the case involving, as it does, the life of a human being, embracing points of law and fact requiring much study and research, which he has been unable to devote to it." When the case was called, counsel moved for a continuance, based on the affidavit made by him, which was refused by the court. For so doing the trial judge states in the bill taken to his ruling: "The time allowed I considered sufficient to enable counsel to ascertain what defense, if any, there was, and to obtain from the accused the names of witnesses by whom any exculpatory facts or matters of defense could be proved; and such information might have been ground for affidavit and motion for continuance. The counsel for accused, in answer to inquiry by the court, said he would require about a month to prepare suitable defense. As the court will be in vacation from 1st June to 1st September, this simply meant a continuance for four months. The accused never in any way intimated to the court that he had any defense. He

never mentioned any fact which he expected or desired to prove; nor did he ever ask for delay to procure testimony, or to have witnesses in his behalf summoned. I considered the affidavit insufficient, in that it does not indicate any line of defense. It does not mention any fact to be proven, nor does it ask for delay to have witnesses summoned on behalf of the accused. On such showing, I did not consider that I would be justified in granting a continuance."

The question here presented is whether, under the showing made by the counsel appointed to the accused by the court, a continuance ought or not to have been granted. When arraigned, the accused pleaded not guilty, and when called upon to stand his trial, on the 29th of April, he announced that he had no counsel, and asked that one be appointed for him. The court at once assigned counsel, and continued the case to the day after the next, May 1st. There is nothing to show when the counsel appointed was informed or notified of his assignment, and when he accepted the same, except his appearance on the day fixed for trial, when he made the affidavit and motion for a continuance. Supposing, however, that he knew of the appointment, and accepted it, at the very moment that it was made, it is evident that a very short time intervened between that of the appointment and that when the case was called for trial; surely, less than 48 hours. Now, on that day, 1st May, the counsel, a sworn officer of the court, in whom the judge placed reliance, to whom the life of the accused had been intrusted, who had no personal interest to serve, nothing to gain by delaying trial, makes affidavit that he is entitled to the indulgence of the court for a reasonable time in which to prepare a suitable and valid defense, which he believes there is in the case; that he has not had sufficient time to do so, as less than 48 hours have intervened; that he has been altogether unable to prepare the case, which involves questions of fact and law which require much study and research, which he has been unable to devote to it. The affidavit should have been taken for true, and, if true, surely was sufficient authority, under the circumstances, to grant a continuance for a reasonable time. No court can expect from counsel appointed by it to defend an accused in a capital case that they shall assume the great responsibility imposed upon them without being allowed a reasonable time to inquire into the facts and the law should they require it; and no court should compel such counsel to proceed with the defense of such a case, under such circumstances, when the counsel, under his solemn oath, declares that he believes there is a defense to be made, but that he has not had sufficient time to prepare it, when the time intervening between the time of appointment and that of the trial is less than 48 hours. We have been shown no precedent, and we know of none, in which a continuance for a reasonable time made for the first time in a capital case, under such circumstances, has not been granted.

In *State v. Ferris*, 16 La. Ann. 425, which was a murder case, the then court said, in reference to accused in criminal cases: "The

law, in securing to them the assistance of counsel, did not intend to extend a barren right; for of what avail would be the privilege of counsel * * * if, on the spur of the moment, without an opportunity of studying the case, the former should be compelled to enter into the investigation of the cause?" In the case of *State v. Horn*, 34 La. Ann. 100, which was a penitentiary case only, counsel appointed to the accused having made affidavits that he had not time to prepare a defense, and having retired on the overruling of his motion, and the accused having made affidavit for the allowance of time to prepare, and the court having refused a continuance, this court considered the showing sufficient, quashed the verdict, and remanded the case. In *State v. Boyd*, 37 La. Ann. 781, which was a capital case, the court had appointed two members of the bar to defend the accused, allowing them three hours for preparation. At the expiration of that time they made affidavit and a motion for further delay, as they had not had sufficient time to prepare a defense. This court there held that in a capital case, under such a showing, the trial judge ought to have allowed time, and that the ruling was erroneous. In *State v. Simpson*, 38 La. Ann. 24, which involved a penitentiary offense only, the court said that the right to be heard by counsel, guarantied by the constitution, to the accused, was not an empty formality, but an inestimable privilege, and that counsel should be allowed reasonable time to prepare the defense. It ruled accordingly. In *State v. Brooks*, 39 La. Ann. 242, 1 South. Rep. 421, in which the penalty was no more than hard labor, this court, on affidavit of the accused, fortified by that of his counsel, asking time for him to prepare, reiterated the language, with approbation, found in 16 La. Ann. 424. In all those presentations the verdicts were quashed, and the cases remanded.

The rulings in *State v. Wilson*, 83 La. Ann. 261; *State v. Doyle*, 36 La. Ann. 91; and *State v. Johnson*, Id. 852,—have no real bearing upon the question under consideration, as the facts are materially dissimilar. In the *Wilson* Case the affidavit was not made by the appointed attorney. He did not state that there was a valid defense; that the case involved questions of fact and law which required much study and research; and that counsel needed a reasonable time to prepare such defense. In the instant case the affidavit is made by the assigned counsel, who distinctly states those special causes for a continuance. The oath of the attorney was entitled to much weight, as he was the best judge of the condition of the case he was called on to defend; of his readiness to do so, as the prosecution was for a capital offense, and the application was made for the first time, and had not unnecessary delay for its purpose. In the *Doyle* Case there was no complaint. The accused had not asked for the appointment of counsel, had not prayed for a continuance owing to the absence of his counsel, and the case had proceeded regularly, without the aid of counsel. In the *Case of Johnson* the accused had asked a continuance on account of the absence of his counsel, which the court declined, assigning counsel to him, who did not make affidavit that he had not had and required time to prepare,

and who invoked every technical defense which legal ingenuity could suggest. In the instant case, the counsel appointed to defend the accused made affidavit, and asked time to prepare, under circumstances and in a form which entitled him and the accused to a reasonable delay, and charged injury to the accused in the motion for a mistrial.

The reasons assigned by the district judge in justification of his refusal are lengthy. In a portion of his statement founded in the bill of exceptions, and which we have not deemed necessary to transcribe, he says, substantially, that several counsel appointed by him had either declined to act, or had not been accepted; that others, chosen by the accused, had refused to represent him. All this may be true; but how does it militate against the motion for a continuance made by the attorney appointed by the court, and accepted by the accused? The reasons given by the trial judge declining the continuance may be condensed as being: (1) The accused refused to accept counsel appointed to him by the court. (2) The time which had intervened between the last appointment of counsel and that of the motion for a continuance was sufficient to ascertain the defense, if any, and to summon witnesses. (3) The accused never intimated that he had any defense; never mentioned any fact which he expected or desired to prove; never asked delay to procure testimony, or to summon witnesses. (4) The affidavit does not indicate any line of defense; mentions no fact to be proved; asks no time to have witnesses summoned. (5) The time asked was one month. Allowing that time would have been allowing four months.

1. The law provides (Rev. St. § 992) that "every person shall be allowed to make his full defense by counsel learned in the law, and the court before whom he shall be tried * * * shall immediately, upon his request, assign to him such counsel as he shall desire." Under this provision the accused was not bound to accept any counsel appointed to him. He had a right to refuse counsel assigned whom he thought he should not accept, and he was under no obligations to adduce reasons to justify his conduct. The law makes it the duty of the court "to assign him such counsel as he may request."

2. How could the trial judge know that 48 hours or less were sufficient? How could he know that more than 48 hours was not necessary to enable counsel to prepare a defense in a case, of the nature of which he could officially then have had no knowledge? He is not presumed to know before trial the facts upon which the prosecution rests, or a defense is based. Whatever knowledge or information he may have acquired on the subject it is his duty officially to ignore; and such knowledge must necessarily, before the trial, be imperfect, as it is only after that that the facts may be considered as developed. How could he know what points of law could be raised, either by the prosecution, or by the accused, and what degree or extent of research or study was necessary for a proper vindication of the constitutional rights of the accused?

From an expression which has escaped

the trial judge, it would seem that he momentarily lost sight of the presumption of innocence in favor of the accused before trial; for he says that the time allowed was sufficient to enable the counsel to ascertain what the defense, if any, there was. An accused who has pleaded not guilty has always a defense to make, and rights to vindicate, not only to repel the charges against him, but also, no fewer guilty he may be in fact, to have himself tried in the manner and form prescribed and required by law, particularly in capital cases. Of course, if the accused could be presumed conclusively to be guilty, and was so, he could not have established his innocence, and the assigned attorney would not have needed, and could not have required, any time to prepare the defense; but, on the contrary, if the accused was to be presumed innocent, he could have urged a defense, and surely, in a prosecution of such gravity, less than 48 hours would have been too short a delay for the newly-appointed counsel to ascertain the facts and prepare the law, the more so if such counsel be an utter stranger to the accused, whose language he did not speak, and had been recently admitted to the bar, and therefore was not experienced in the defense of capital cases. It is worthy of notice that in the motion for a new trial the appointed attorney reiterated that he had not had time to prepare; that he had no opportunity of properly conferring with the accused, not even understanding his language; that improper evidence had been admitted; that an important, erroneous charge had been given by the court, operating to the prejudice and injury of the accused. It is palpable, from all the circumstances of the case, that the complaint of the assigned counsel that he has not had, and needed further, time to prepare, is well founded, and that his motion for delay, made for the first time, ought to have been favorably considered.

3. It was not necessary that the accused should intimate his defense, or mention his witnesses, to the judge, or to any one else. It is a possibility that he may have had a defense which he intended to set up suddenly, to the surprise and defeat of the prosecution, or that his witnesses, if any he had, would be present in court without being summoned, and that he would have had something to make by such a course. He is entitled for his defense to all the means which the law does not forbid, or which it allows him; and no one has a right to inquire into them, unless when he intends to procure wanting evidence or testimony which he had secured, and of which circumstances would deprive him, otherwise.

4. Neither the counsel nor the accused was bound to divulge a line of defense. Surely, the counsel, if so bound, could not have done so, without having had sufficient time to inquire, and without having ascertained the same.

5. It does not follow that, because counsel asked one month to prepare the defense, that the court was bound to allow that time, and still less four months. The court might have allowed less than one month, or might have allowed more, if necessary. The happening of the coming vacation

term, to which allusion is made, would not have closed the division of the court before which the accused had been for trial. The act of 1880 (No. 98, § 7) does not force an adjournment. It leaves it discretionary with the judges of the criminal district court for the parish of Orleans to arrange between themselves, so as to suit their convenience; but in so doing the law expects that the judges shall keep in view due regard to proper and speedy administration of criminal justice.

We therefore conclude that, as the trial judge has not exercised a just legal discretion in declining to allow further time, and as the accused was thus unduly denied an important privilege, a great right, and the full justice to which he was entitled, the bill of exceptions was well taken, and the complaint on appeal is well found. This view of the case dispenses us from the necessity of considering the other points or matters to which our attention has been called by the assigned counsel.

In ruling as we have done, far has been from our minds any intention in the least to reflect on the character and motives of the trial judge, which are above all suspicion, as we hold him in great respect. We only rule that, in an extreme desire to vindicate the public law, he has erred in not sufficiently safeguarding the rights of the accused.

It is therefore ordered and decreed that the verdict of the jury be quashed; that the judgment and sentence thereon be annulled and reversed; and that this cause be remanded to the lower court for further proceedings according to law.

McENERY, J., (*dissenting*.) The defendant was indicted on February 18, 1889. On the 23d of February, the court appointed Charles J. Theard to defend the accused. The accused had made an application for the appointment of an attorney. Mr. Theard declined the appointment. The accused was thereon, the 23d February, arraigned, and remanded to await further proceedings. On the 27th February, an able and experienced lawyer in criminal trials was offered by the court to represent the accused. He declined the services of the attorney, without assigning reasons therefor. On the 27th of February the following appeared on the minutes of the court: "The court having appointed Charles J. Theard, Esq., as counsel to represent the accused, and the appointment having been declined, the court has this day appointed H. C. Castellanos, Esq., to represent the said accused; the appointment being accepted in person by the appointee." On the 18th day of April the defendant was ordered to appear for trial on the 29th day of April. On the 20th of April the *venire* was served on the defendant. On the 29th of April the accused again made application to the court for the appointment of counsel, and the court appointed James H. Dowling, Esq. The case was continued, on his motion, until Wednesday, May 1, 1889. On May the 1st, the attorney, James H. Dowling, filed a motion for a continuance. The cause assigned in the affidavit and motion for a continuance is as follows: "That he is entitled to an indulgence from this honorable court of a rea-

sonable time in which to prepare a suitable and valid defense, which counsel believes there is in this case; that he has not had sufficient time to do so, as less than forty-eight hours have intervened since his assignment as counsel and the calling of the accused to the bar of the court for trial; that he had been altogether unable to prepare the case, involving, as it does, the life of a human being, embracing points of law and fact requiring much study and research, which he has been unable to devote to it." This motion was addressed to the sound discretion of the court, which should not be interfered with, unless there has been an improper and unjust abuse of such discretion in its ruling. Whart. Crim. Law, 3037; State v. Wilson, 33 La. Ann. 262; State v. Johnson, 36 La. Ann. 863; State v. Clark, 37 La. Ann. 128; State v. Primeaux, 39 La. Ann. 673, 2 South. Rep. 423.

The learned district judge, in giving his reasons for denying the continuance, says: "On the 23d February, 1889, Etienne Deschamps was brought into court, and was arraigned, and pleaded not guilty. On the same day, at his request, and upon his affidavit of want of means to supply counsel, the court appointed a member of the bar in every way competent; and he, under date 26th February, 1889, informed the court that he declined the appointment. Thereupon I, the judge, put myself into communication successively with quite a number of the members of the bar, all of whom declined to accept the appointment. In the mean time I was informed, and it was generally understood, that the accused was in communication with a distinguished member of the bar, who had probably been employed by the accused. On the 18th April the gentleman stated to the district attorney, who immediately informed me, that he would not undertake the case. Thereupon, on the same day, I ordered a copy of the indictment, and of the jury list, and notice that the trial was fixed for Monday, 29th of April. I obtained the consent of one of the oldest members of the bar, a lawyer of large experience and of great ability in criminal cases, to undertake the defense; and notice of trial, issued on the 20th of April, was served on him on the 22d of April. The accused refused to accept the services of this gentleman; and thereupon I had the accused brought into court, the gentleman who had consented to defend him being also present in the court-room. The accused then, in open court, refused to accept the services of this gentleman, and requested the court to appoint another, selected by himself, whose name he gave. This gentleman, a prominent member of the bar, was sent for; and he asked for time to visit the accused, and to determine whether or not he would accept the appointment. On the 23d of April he declined to take the case; and Wednesday, 24th, I sent the chief deputy-sheriff to tell the accused, if he would furnish the names of witnesses, I would see that they were brought into court on the trial. The answer to me was that he had no witnesses; and it was repeated in court, on the day of trial, that he had no witnesses. On the 29th of April, when the accused was brought to the bar for trial, he

informed the court that he had no counsel, and asked the court to appoint counsel for him, such as the court might select. After positive refusal by some half dozen members of the bar, the appointment was made, and the case continued to May 1st. The time I allowed I considered sufficient to enable the counsel to ascertain what defense, if any, there was, and to obtain from the accused the names of witnesses by whom any exculpatory facts or matters of defense could be proved; and such information might have been grounds for continuance. The counsel for accused, in answer to inquiry by the court, said that he would require about a month to prepare suitable defense. As the court will be in vacation from 1st June to 1st September, this simply meant a continuance for four months. The accused never in any way intimated to the court that he had any defense. He never mentioned any fact which he expected or desired to prove, nor did he ever ask for delay to procure testimony, or to have witnesses in his behalf summoned. I consider the affidavit insufficient, in that it does not indicate any line of defense. It does not mention any fact to be proven, nor does it ask for delay to have witnesses summoned in behalf of the accused. On such showing, I did not consider that I would be justified in granting a continuance."

As a general rule, error does not lie to the action of the court on a motion for a continuance, which is in the discretion of the court, though, when a bill of exceptions is taken, this discretion, in a strong case, may be reviewed. *Whart. Crim. Pl.* (9th Ed.) § 601. This court has guarded this discretion in such matters, and its expressions on the subject have been emphatically stated. Thus, in one case we said: "The legal discretion of the trial judge in a criminal case, in matters of continuances, will not be interfered with, unless the ruling complained of is glaringly erroneous, and manifestly unjust." *State v. Johnson*, 36 La. Ann. 853. In the case of *State v. Clark*, 37 La. Ann. 128, we said: "Continuances are peculiarly within the legal discretion of the trial judge in criminal cases. Refusals to grant them will not be interfered with, unless in cases of flagrant error or gross abuse of power. In a case similar to the one above, the facts are stated in the opinion as follows: "An attorney was appointed on the 14th to defend him, and the case was fixed for trial for the 16th following. On that day a motion was filed for a continuance on the ground stated, (that the counsel appointed by the court had not sufficient time to prepare his defense,) supported by affidavit; but it was overruled. It stated no special cause for the delay. The attorney does not appear to have been shocked at the ruling. He did not resign his trust, but proceeded with the trial of the case, giving the accused his able and generous assistance. After a verdict of guilty, a motion was made for a new trial; but no attempt appears to have been made to show that by the refusal of the judge to continue the cause the prisoner had sustained any injury, and that the judge should have granted the postponement of the case. The motion charged, besides, that the verdict was contrary to law and

evidence." This case is similar in every respect to the instant case; the only difference being in those features of the latter which are less favorable to the defendant. In this case we said: "It is left to the sound discretion of a district judge, in such cases, to determine what time should be allowed counsel appointed by him to represent the accused in order to prepare his defense, (16 La. Ann. 425,) and also to pass upon applications for a continuance on the day of trial, (23 La. Ann. 559,) as well as upon motions for a new trial. Unless it be shown that some special and sufficient reason was assigned, and made good, in support of an application for a continuance, and that the district judge acted arbitrarily, and was guilty of a denial of justice, his rulings in two instances, the one affirming the other, at different stages, particularly when the last was made on a motion after verdict, will not be revised on appeal." *State v. Wilson*, 33 La. Ann. 262. In the case of *State v. Johnson*, 36 La. Ann. 853, we said: "It appears that when he [accused] was arraigned, one week previous to his trial, the court offered to assign counsel for his defense. The offer was declined, for the reason that he had secured counsel of his own. On the day of the trial he informed the court that his counsel had abandoned him, and he therefore prayed for a continuance on that ground; whereupon, the court having assigned him counsel, who now represents him, refused the continuance, but allowed two hours' delay to the attorney thus appointed." In this case the court said: "Our jurisprudence has firmly settled the rule that this court will not interfere with the legal discretion of the trial judge, unless gross injustice has been done to the accused. The defendant chose to rely upon his own selection of counsel, rather than to accept the guidance of the court; and he must abide the consequences."

In the instant case the accused had ample time to prepare for his defense, to consult with counsel, and communicate to him his defense had he accepted the services of the able and experienced attorney appointed to represent him by the court. No reason is assigned for declining the services of this attorney.

While the constitution of the state guarantees to every accused party the right to be heard by counsel, and, in furtherance of this provision, the statutory law directs the judge to appoint counsel learned in the law to represent him, when he is unable to employ one, there is no law absolutely requiring him to be heard by counsel. It is his privilege to go to trial without an attorney, and to decline to accept the services of counsel tendered him, and he must abide the consequences of such refusal. The district judge, it seems, in this case, exhausted all the resources he possessed in the interest of the accused. Nothing else, in the administration of justice and a sense of duty to society and the state, could have been done. After having declined the services of counsel appointed by the court, he was notified of the day fixed for his trial, and was requested by the judge to furnish the names of witnesses whom he desired to have summoned on his behalf. He replied he had none. On the 29th April an attorney was appointed by the

court, at the request of the accused, and on his motion the case was continued until the 1st of May, when he asked for a further continuance, for the reasons alleged in the motion. In this motion it is not even suggested that the accused had any defense, or that he had any witnesses to summon. The only reason is that the attorney desired time to prepare a defense for his client. On the trial, after the state had concluded her evidence, the accused retired with his attorney for consultation, and answered, on the return to the court-room, that the accused had no testimony to offer.

That this is a capital case can make no difference in the rulings of the court, to distinguish it from cases of a lower grade in the list of crimes. There is no law requiring the trial judge to view with more favor applications for continuance in capital cases than those made for offenses punishable at hard labor. Under the facts in this case, the action of the trial judge in refusing a continuance does not seem to have been "glaringly erroneous," or "manifestly unjust," or "a flagrant error, or gross abuse of power." On the contrary, the district judge was anxious and solicitous in the defense of the accused, and was zealous in his efforts to secure for him the services of learned and experienced counsel.

For these reasons, I respectfully dissent from the opinion of the majority of the court.

FENNER, J., concurs in this opinion.

ON APPLICATION FOR REHEARING.
(Dec. 31, 1839.)

WATKINS, J. This application is made on the part of the attorney general, and the *gravamen* of his complaint is contained in the two following extracts we have selected from his brief, viz.: *First*. "It will be very difficult, in the execution of criminal justice, to meet the many devices and attempts at delay, if the facts of the present case justify the ruling just pronounced. If only forty-eight hours had been granted counsel for the accused, and a longer time refused, some rule of conduct, as controlling the trial judge's discretion, might be adopted; and, if the opinion of the court was unanimous as to facts, a rule of practice might be held adopted." *Second*. "If the facts of this case could have been considered by the whole court as fixing the time and seasonableness of the application and appointment of counsel, the matter could have rested; but I respectfully submit that, as the opinion now stands, there is so much of divergence and conflict that I pray the court to reconsider." Intervening between these paragraphs, the attorney general is pleased to indulge in some animadversions upon the disparity existing between the statement of facts contained in the opinion of the court, and the statement of dissenting justices, in respect to the date of the appointment of counsel by the trial judge to represent the accused; and he concludes them by saying: "It will be impossible to establish any rule in this regard, if we are to follow this case, and its facts, as a precedent." In purport, the attorney general has tendered the proposition for our consideration that the opinion of this court does not establish "a

rule of practice," because the court is not "unanimous as to facts," and because, "as the *opinions* now stand, there is so much divergence and conflict," we ought to reconsider the case. (The word "*opinions*" was italicized by us.)

There seems to be a notion prevalent that expressions of opinion by a minority of the court constitute, in some part, a decree, in respect to the facts of a case, that carry with them the force of authority. For the information of those who entertain such a notion, it is sufficient to say that, however much consideration may be due to the views of dissenting justices, the opinion of the court as expressed by the majority only is authoritative in the enunciation of facts as well as of legal principles in any given case. Such is the plain and emphatic meaning of that provision of the constitution which says: "No judgment shall be rendered by the supreme court without the concurrence of three judges." There cannot be, in the very nature of things, two opinions of this court, unless they concur.

The substance of the motion for a rehearing is that, because of the disagreement in reference to certain facts, the opinion, as it stands, is not a safe guide for the law officers of the state "in the execution of criminal justice." The views entertained and expressed by our predecessors on an application for a rehearing in *Foulkes v. Howes*, 11 La. Ann. 448, strike us as being so peculiarly applicable that we quote from them *in extenso*, as a fitting answer to the one in hand. Said MERRICK, C. J., as the organ of the court: "We find in the application for a rehearing in this case the following passage: * * * 'We respectfully refer the majority of the court to the opinion of Judge SPOFFORD in connection with what we hastily suggest. We will not say that that opinion is unanswerable; although, in our humble opinion, no answer suggests itself. But we submit that that opinion should be refuted, or should control the decision of this case, in the interest of the jurisprudence of our state.' * * * The high standing of the gentlemen who have applied for the rehearing in this case requires from us some notice of the petition for a rehearing so extraordinary in its tone. We have hitherto supposed that we had discharged our duty when we had respectfully considered each other's opinions, and decided each individual case upon the reasons applicable to it. We were not aware that we owed to counsel, or the public, the duty of combating the opinion of the judge who might be unable to concur with the majority in opinion; neither had we surmised the way, or learned precisely how, we were to be informed, and on what occasions it would be necessary and proper to vindicate any particular decision of this court. We thought that in the case before us all that was required of either the minority or the majority of the court was that the case should be so decided that injustice should not be done under the law to one party or the other. * * * The minority of the court have entertained, and with marked ability expressed, different views, which are entitled to the same respect, although not decisive of the mat-

ters in controversy, as the opinion of the majority of this court, and no more. Neither the opinion of the majority nor minority was written to catch the approbation of this or that man,—motives unworthy of any judicial tribunal, whose sole object should be to do justice in each case according to the laws of the land. Nor can it be permitted to any one, how respectable soever his standing may be, so far to forget, in his official intercourse with this tribunal, what is due to it, as to point out, under the pretense of its interest to jurisprudence, what particular opinions are worthy of favor, and what need to be vindicated by the court." Comment would add nothing to the force of these observations; and we will conclude by expressing the view that was expressed by the majority of that court: "Justice has been done."

Rehearing refused.

CLAFLIN *et al.* v. MEYER.

(*Supreme Court of Louisiana*. Dec. 16, 1889.)

SALES BY AGENTS BY SAMPLE—ACCEPTANCE OF ORDER.

Where an agent in New Orleans, for non-resident dealers, has authority only to exhibit samples and receive orders, which he communicates to his principal for acceptance or rejection, *held*, that an order so transmitted was similar in every respect to an order to purchase sent direct by the buyer to the seller, and when accepted and filled, and the goods delivered to the carrier, and insured by the buyer, that it was a contract.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

On rule to rank creditors.

Percy Roberts, Jos. N. Wolfson, L. L. Levy, W. S. Parkerson, A. H. Wilson, and J. W. Gurley, for plaintiff and creditors. *Buck, Dinkelspiel & Hart*, for defendant.

MCENERY, J. The plaintiffs, H. B. Claflin & Co., attached the merchandise and stock of goods of the defendant in the city of New Orleans. Other creditors proceeded against the defendant, some by attachments, and others sequestered his stock, claiming a vendors' privilege therein. On a rule to rank creditors taken by Claflin & Co., there was judgment sustaining the privilege of the creditors who sued out writs of sequestration. From this judgment the other creditors have appealed. The question presented in this appeal is whether the creditors who sued and sequestered, and claimed the vendors' privilege, executed their contracts here, or elsewhere, out of the state of Louisiana.

It is conceded that, under the law in the state where the creditors reside, there is no vendor's privilege resulting from the contract. Hence the privilege springs from the law of Louisiana, and, if the contracts were executed in this state, the vendors have a privilege on the goods sequestered and identified by them. The only creditors who have identified the goods sold by them to defendant are G. B. A. Plummer and the Metropolitan Knitting Company. All goods were unpacked and mixed with defendant's general stock, and had been so mixed for several months. There is no evidence identifying the goods of the other creditors, and in relation to the contract for

the purchase of goods from these creditors. Meyer, the defendant, says he bought some by letter, some through an agent of his in New York, some by sample, and others personally in New York. He was unable to identify those purchased by sample. The sheriff's return shows what goods were seized under the writs and sold, upon which the sequestrators claimed this privilege, but the goods were not identified with that certainty that the law requires. Meyer in his evidence states he saw them taking out goods which were not purchased from these plaintiffs, and others for which he had paid. This plainly establishes the fact that the evidence upon which the plaintiff relied for identification was unsatisfactory. Admitting that the contracts of these creditors were completed in Louisiana, which is very doubtful, they clearly have no privilege on the goods sequestered, because they have not been identified. Plummer and the Metropolitan Knitting Company had agents in New Orleans, who exhibited samples to the defendant, from which he made selections and based his orders. These orders were communicated by these agents to their principals. It appears from the evidence that their authority was confined exclusively to soliciting orders, without any power to bind their principals, who could accept or reject the offer to buy which they received through their agents in New Orleans. The completion of the contract—the acceptance of the price and conditions—depended entirely upon the non-resident creditors. When the agents exhibited their samples, under their restricted authority, and transmitted the order to their principals, there was no obligation created which the buyer could enforce. When the proposal to purchase, as forwarded by the agent, was accepted by his principal, there was then a contract created which the buyer in New Orleans could enforce. There was no stipulation for delivery in New Orleans, and the presumption is that the goods were to be delivered in New York, where they were situated. They were delivered to a carrier at defendant's risk, as he had under an open policy insured the goods. Had they been lost or destroyed in transit, he would have undoubtedly been the proper party to collect the insurance.

Several cases are relied upon by the plaintiffs in the sequestration suits, to which they refer. In *Overend v. Robinson*, 10 La. Ann. 728, the goods were shipped to an agent in New Orleans, with special instructions not to deliver them to the defendant until the latter should have complied with certain specified conditions about furnishing security. The sale was completed in Louisiana, and became a Louisiana contract. In *Maillard v. Nihoul*, 21 La. Ann. 412, the sale was made by sample exhibited, the goods selected, and the seller, by his agent in New Orleans, promised and agreed to deliver them in New Orleans. The agreement was made in New Orleans, and the goods delivered in New Orleans, and it was executed in New Orleans, and became a Louisiana contract. And to the same effect is the doctrine declared in *McIlvaine v. Legare*, 36 La. Ann. 359. The contract expressly stipulated that the boilers purchased should be deliv-

ered on the plantation of defendant, Legare. The acceptance of the boilers by Mrs. Legare was a suspensive condition, stipulated for in the contract; under which it could not be executed before delivery of the things sold in Louisiana. The warranty resulting from a sale by sample of the manufacturer, for instance, against secret defects of manufacture, and the merchant, as to quality, are not of the essence of a contract, or essential to it. This warranty, in fact, is implied in every sale, and may be modified or renounced at the will of both parties, without changing the character of the contract or destroying its effect. Rev. Civil Code, art. 1764, § 2. There is also, in a sale by sample, an implied condition that the buyer shall have fair opportunity of comparing the bulk with the sample, and a refusal to allow this will justify the buyer in rejecting the contract. Benj. Sales, (Bennett's Ed.) § 649. This implied condition, unless expressly stipulated and reserved as a suspensive condition preventing the execution of the contract before delivery, cannot prevent the execution of the contract at the place of final acceptance of the proposal to buy. If the sale had been in New York by samples exhibited there, and the price paid and goods delivered without opportunity to examine them immediately before shipment, the implied condition for inspection at New Orleans would still exist. If the goods were not, according to quality, as represented, the buyer could sue for a dissolution of the sale, or return the goods to the seller. This implied condition in a sale by sample is not the view and trial to the satisfaction of the buyer contemplated in article 2460, Rev. Civil Code, which operates as a suspensive condition of the sale. In the instant case there is no difference between the proposal to purchase forwarded by the agent, and one transmitted through the mails by the buyer. It is not doubted that purchases by order by the buyer himself become contracts at the place where the order is filled. The agent's authority here was limited and restricted. He could not bind his principal, and his sole duty was to exhibit the samples, receive and forward orders for goods. In this case the order was filled, the goods delivered where the contract was consummated, and the goods insured by the buyer. The title to the goods was in the defendant the moment the goods were set aside and placed at his risk. There seems to be no opposition to the general privilege for clerk's hire presented by A. Castenado.

The judgment appealed from is therefore amended by rejecting the vendor's privilege in the goods sequestered by the Metropolitan Knitting Company, Wachusett's Shirt Company, George A. Plummer, Noyes, Smith & Co., and James Talcott, and in all other respects it is ordered affirmed, the appellees herein to pay costs of appeal.

Rehearing refused February 10, 1890.

MILLER v. FINEGAN *et al.*

(Supreme Court of Florida. Jan. 17, 1890.)

HOMESTEAD—HEAD OF FAMILY—HEIRS—DOWER.

1. A husband and wife living together constitute a "family," within the meaning of the word

as used in the first section of the ninth or homestead article of the constitution of 1868.

2. The third section of the same article provided that the exemption of the homestead from forced sale, granted by the first section, to the head of a family residing in this state, should accrue to his heirs; and under it the exemption from such liability for indebtedness of the head of the family passed on his death to whomsoever the title of the homestead descended by virtue of the statute of descents, and became incident to the inheritance of the land.

3. The term "heirs" in the third section includes an adult son, and an adult grandson, the son of a daughter deceased at the death of the head of the family, notwithstanding they were not at his death living at the home place.

4. Residence by the heirs on the homestead of the ancestor after his death is not necessary to continue the exemption of it from his debts.

5. A creditor seeking to satisfy a judgment which he has recovered against the administratrix out of the homestead of her intestate, who was the head of a family residing in this state, can claim no advantage from the fact that the wife has elected to take a child's part in lieu of dower. If by her election she forfeited her dower interest, the heirs took the entire homestead.

6. A judgment rendered against an administratrix on an indebtedness of her intestate, not excepted from the exemption provisions of the homestead provisions of the constitution of 1868, was not a lien on the homestead of the intestate, who was the head of a family residing in this state. The title to the homestead descended at his death to his heirs exempt from any liability for the indebtedness.

(Syllabus by the Court.)

Appeal from circuit court, Orange county; JOHN D. BROOME, Judge.

C. F. Akers, for appellant. Foster & Gunby and J. F. Welborne, for appellees.

RANEY, C. J. The first question to be disposed of in this case is whether Joseph Finegan, the intestate, was at the time of his death, November 3, 1885, the "head of a family residing in this state," within the meaning of the first section of the ninth article of the constitution of 1868. That he and his wife were at the time occupying the land as a home is not denied, and that husband and wife living together constitute a family, within the spirit and intent of homestead legislation, whether it be in the form of organic or of more mutable law, is a sound and recognised proposition. *Thomp. Homest. & Ex.* §§ 44, 46, 48; *Kitchell v. Burgwin*, 21 Ill. 40, 45. Where the relation of husband and wife exists, their joint consent is essential, under our constitution, to any voluntary alienation of the homestead, and the existence of such relation logically, if not necessarily, fills out the measure of the requirement of the constitution for exemption of the land owned by the head of the family, and occupied by them as a home, from forced sale.

2. Two of the complainants, J. Ford Finegan and J. Finegan Paramore, are the heirs of the intestate; the former being his son, and the latter a grandson, and the child of a daughter, Mrs. Paramore. The son was not living with the father at the death of the latter; and whether or not the grandson was, the record does not inform us. The son had attained his majority before such death; and the answer says that the grandson reached maturity before the filing of the bill, which, however, was nearly 19 months subsequent to his grand-

father's death. As it does not affirmatively appear that the grandson was at the intestate's death under 21 years of age, or that he was living with his grandfather at the homestead, we will, as the most favorable view that can be taken with reference to the argument of counsel for appellant, regard him as having been over the age of 21, and as not one of those living at the homestead.

The complainants before us, seeking an injunction against the sale of the homestead of the intestate upon a judgment recovered since his death against his administratrix, are, then, his widow, a son, and a grandson. The constitution of 1868 provided that "a homestead, to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of an incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars' worth of personal property, and the improvements of the real estate, shall be exempted from forced sale under any process of law, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists, * * *" and the exemptions "shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption. * * *"

The indebtedness against which the exemption is claimed is a judgment recovered against the administratrix on a promissory note made by the intestate early in February, 1882.

The intestate enjoyed the benefit of the exemption. It was not necessary to such enjoyment that there should have been an attempt to enforce the debt against the land, nor an actual setting apart of the homestead in the manner provided by the statute, nor that there should be any record thereof.

To those upon whom the statute throws the title by descent, the constitution gives the right of exemption; or, in other words, the constitution makes the exemption an incident to the inheritance, and thereby, in so far as the homestead or other exempt property is concerned, repeals the general law, governing in the case of other property, that the heir takes subject to the debts of the ancestor.

The rights of the complainants, whatever they may be, accrued under the constitution of 1868; the indebtedness having been contracted and the intestate having died prior to the adoption of the present organic law, which organic law, we may remark, expressly ordains (section 3, art. 9) that the exemptions allowed by the former constitution shall apply to all debts contracted and judgments rendered subsequent to its adoption, and prior to the adoption of the present constitution.

It has been held, and must be regarded as settled by this court, that a widow is not an "heir" of her husband, within the meaning of the ninth article of the constitution of 1868, where children survive him. *Wilson v. Fridenberg*, 19 Fla. 461, (decided in June term, 1882;) *Brokaw v. McDougall*, 20 Fla. 212; *Wilson v. Fridenberg*, 21 Fla. 386.

That the son and grandson are heirs, according to the statute of descents, cannot be denied; but it is urged that "heirs"

means "children," and that "children" means "infants," or persons under 21 years of age, not adults; and two sections of statutory law are invoked in support of this view. The first of these is section 8, p. 531, *McClell. Dig.*, it being the fifth section of an act approved January 16, 1868. The previous provisions of the act exempted certain personal property, and every dwelling-house, and the lot upon which it stood, in any city, town, or village, when the owner or his family resided in the house, and the house and lot did not exceed the value of \$1,000, and to every farmer 40 acres of land, 5 acres thereof being in cultivation or productive use, or so much of the 40 acres as did not exceed the value of \$1,000. The section relied upon by counsel provided that the proprietor of such lands so exempted from execution, attachment, and distress should have power to dispose of the same by last will and testament; and, should the proprietor of such land die intestate, then the same should descend to his widow and minor children, and such exemption continue through the widowhood of the widow, and the minority of the children; and, should the proprietor leave neither widow nor children, the property shall be subject to his debts.

The other section invoked is section 16, p. 533, *McClell. Dig.*, the sixth section of the act approved June 23, 1869, entitled "An act for setting apart a homestead and personal property to be exempted from forced sale under process of law." The only part of it necessary to be given reads as follows: "Real and personal estate exempted from forced sale under any process of law shall likewise, after the death of the owner, being the head of the family, be exempt from sale in all cases in which any widow or infant children of the owner shall survive and claim such exemption."

The former of the above sections is, as is apparent, a part of the homestead and exemption law, as regulated by statute in force here prior to the operation of the constitution of 1868; and it is clear to our minds that the ninth article of that constitution, by its exemption provisions as to real and personal property, supplanted entirely all previous statutory exemptions, at least as to indebtedness accruing subsequent to the time when the constitution became of force. An immediate result of a comparison of the section of the statute of 1866 with the exemption provisions of the constitution is a perception of the absence from the latter of any discrimination between minor and adult heirs, and of any limitation upon the duration of the exemption from indebtedness after the death of the head of the family. In the statute the discrimination and limitation are express and unmistakable; in the constitution there is none, but the "heirs" take the property with an express guaranty of an exemption, which is unlimited. The absence from the constitution of the distinction and the limitation to be found in the statute cannot be regarded as accidental or meaningless, but are clearly indicative of a purpose to do away with them.

Turning our attention to the above statute of June, 1869, we find that, in the sections preceding the one set out above, it provides a mode of procedure by which a

head of a family residing in this state may, either before or after a levy, designate or set apart his homestead, and for a survey of the same at the instance of a judgment creditor dissatisfied as to the quantity of land claimed as a homestead. The seventh and subsequent sections make provision for setting apart \$1,000 worth of personal property when a levy has been made, and for a plaintiff in decree or judgment testing by bill in equity whether property claimed to be exempt as a homestead is so.

It was not the purpose of the above statute of 1869 to amend the statute of descents, nor was such the effect of the language quoted from the sixth section. Adult children and grandchildren, the latter being the offspring of a child who has died before the common ancestor, are still the heirs of the deceased ancestor, and upon them the title of his real estate falls by inheritance, whether the land be impressed with the character of a homestead or not. The only meaning or effect that can be claimed for the quoted language of the section, if it is to be regarded other than an adoption of the same mode of procedure applicable in other cases for setting apart a homestead and personal property exempted from forced sale, is that it excludes from the benefit of the exemption any heir upon whom the title to the land may descend, who is not an infant child of the ancestor or head of the family; either this, or that the adult heirs are excluded unless there be at the death of the ancestor also a widow or an infant child surviving him.

The language of the third section of the ninth article of the constitution is that "the exemptions provided for in sections one and two shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption." The meaning of this is that those who inherit the property shall take with it, and as incident to the inheritance, the same exemption from the debts of the deceased head of the family who owned it as he enjoyed at his death. This exemption is from liability for the debts of the ancestor, and it is given to whoever may be heirs, without reference to whether they be infants or adults. No such condition is to be found in the constitution, but, according to its plain language and meaning, the heirs, if they be all adults, take the exemption with the land in the same way that infant heirs do; and, if some heirs are adult and some infant, the constitution has provided that the title to the homestead vests in the former freed from liability for the ancestor's debts, just as it does in the latter. Legislation seeking to make infancy a test among heirs of the right to the enjoyment of the exemption is hostile to the constitution, in that it adds a requirement for such enjoyment not to be found in that instrument. We are not required nor do we mean to say that the constitution inhibits all changes of the statute of descents, but, in our opinion, the purpose and effect of that instrument was that the exemption should follow the land or other property to whomsoever it might descend by inheritance, independent of the consideration of the age of such person or persons.

It may be said, however, that to permit adult heirs to enjoy the benefit of the exemption is inconsistent with the general idea or purpose of a homestead, and that this is more prominently so when such adults have not lived under the home roof, and been a part of the family it protects. The answer to this is found in the very provision of the constitution that the exemption shall accrue to the heirs of the party having enjoyed it. That property which creditors could not take from the head of the family when he was living they cannot take from his heirs after his death. This is what the constitution plainly said to any one who might become a creditor. It required that a person should be an heir, and nothing else, to successfully claim the exemption against the debts of the ancestor who, at his death, was the head of a family residing in this state. No residence upon the land, or abiding with the parent or ancestor, was made a condition to such heirship or consequent right of exemption; nor is the heirs' right of exemption from the ancestor's debts dependent upon a use by them of the land as a homestead. *Reeves v. Petty*, 44 Tex. 249. Whatever the interest of the ancestor was in the land, it descends to and vests in the heir, whether it be a term of years, a fee-simple, or other estate extending beyond the life of the ancestor. We have found no constitution or other homestead law like ours; nor any decision which, in view of the plain language of our instrument, justifies us in departing from the well-known meaning of the terms used, and, by construction, formulating what to our minds might be a more reasonable homestead or exemption system.

We are aware the word "children" in a Texas statute providing that a homestead shall descend and be set apart to the widow and children has been construed to include only such children as were minors, and not those who were adults. The word "children," when used irrespective of parentage, may denote that class of persons under the age of 21 years, as distinguished from adults, but its ordinary meaning, with respect to parentage, is sons and daughters of whatever age, (see titles "Child," "Minority," "Majority," *Abb. Law Dict.* and *Bouv. Law Dict.*;) and the Texas court adopted the former meaning as more consistent with the purposes of homestead legislation, yet held that the estate vested in the infant children not merely during minority or infancy, or so long as they continued to occupy it as a homestead, but in fee and independent of a continuation of its use as a home, (*Reeves v. Petty*, 44 Tex. 249; *Horn v. Arnold*, 52 Tex. 161.) The word "heirs" does not afford an opportunity for the construction thus given to "children," as between minors and adults.

3. It appears from the record before us that, at the time the bill was filed to enjoin the sale by the sheriff under the execution issued upon the judgment referred to, Mrs. Finegan had instituted against the son and grandson a proceeding for the partition of the homestead property, and that a decree had been made on February 3, 1887, appointing commissioners to divide the same between herself and them, and

the commissioners reported the lands to be so situated that they could not be divided without great prejudice to the owners, and recommended a sale, and on the 1st of March a sale was ordered, and on the 1st day of August in the same year the property was sold to Mrs. Finegan, and the sale was confirmed in the following September, and on the 4th day of October the commissioner conveyed the land to her by a deed. The bill was filed on the 23d day of May in the same year, and, as is apparent, the sale and proceedings consequent upon it were subsequent thereto. The decree of partition, that for the sale, and the deed are the only parts of the partition proceeding before us, yet they give the information indicated above. It also appears that on the 26th day of January, 1886, a few days less than three months after the death of the intestate, Mrs. Finegan filed in the county court of Orange county an election to take a child's part in lieu of dower "in and to all the real and personal property of which she was dowable, according to the true intentment of the law, as widow" of the intestate.

Upon these proceedings two positions are asserted by counsel for appellant. The first is that, the widow having elected to take a child's part, her interest in the estate is subject to the execution; and the second is that, the property having been sold and passed out of the heirs, it has thereby become subject to the lien of the judgment.

The answers to these propositions are apparent. To the first it may be well said that if the widow had no other interest in the homestead but dower, as was held in the *Fridenburg* and *McDougall* Cases, *supra*, and her election to take a child's part was a surrender of her dower claim with its superiority to the rights of creditors, this did not affect the title of the heirs to the entire homestead discharge of her dower claim. Again, if she has successfully asserted, as she seems to have done by her partition suit, a claim to a one-third interest in this land as against the heirs, or with their consent, it is a matter of no concern to the appellant or other similar creditors. They are not injured, for the same land, if she had no interest in it, would go to the heirs exempt from the indebtedness.

As to the lien of the judgment, nothing is required to be said other than that before the judgment was rendered the title had descended to the heirs exempt from liability for the intestate's indebtedness, and the judgment against the administratrix was never a lien upon it, even should we admit that a judgment against an administrator or administratrix is a lien upon any of the lands of an intestate.

The decree making the injunction perpetual is affirmed, and it will be ordered accordingly.

LAY v. AUSTIN.

(*Supreme Court of Florida. Jan. 13, 1890.*)

CORPORATIONS—ASSIGNMENT OF NOTE BY OFFICERS.

A promissory note payable to the order of the *Panasoffkee & Withlacoochee Navigation Com-*

pany, and a mortgage securing the same, were assigned by its president and secretary; the assignment being, in substance: "We, the undersigned D. R. T., president, and C. S. B., secretary, of the P. & W. N. Co., have transferred to J. C. the attached mortgage and note, and on the part of said company have hereto attached our names and affixed our seals."—they signing their individual names, and using statutory private seals: *Held*, (1) that the assignment is upon its face the act of the company, through these officers, and not the individual act of the officers; (2) that a bill setting up the assignment, and alleging that the officers had authority to make it, shows a valid transfer of the note and mortgage to the assignee, and is not demurrable as not showing that the company had parted with its title to these instruments. *MAXWELL, J., dissenting.*

(*Syllabus by the Court.*)

Appeal from circuit court, Sumter county; J. J. FINLEY, Judge.

Fleming & Daniel, for appellant. *John G. Reardon*, for appellee.

RANEY, C. J. The bill of foreclosure before us alleges that the appellee executed a promissory note payable to the order of the *Panasoffkee & Withlacoochee Navigation Company*, and a mortgage on lands to secure its payment, and that the note and mortgage were assigned to one *John Conley*, for value received, by *D. R. Towns*, as president, and *C. S. Bushnell*, as secretary, of the said *Panasoffkee & Withlacoochee Navigation Company*, the said president and secretary having the authority so do; all of which will appear indorsed and acknowledged upon said mortgage. The note and mortgage are made exhibits to the bill, as a part of it. The assignment indorsed on the mortgage is, omitting the statement of the locality of its execution, and the names and attestation of the subscribing witnesses, as follows:

"Be it known to all men that on this thirteenth day of September, A. D. 1884, we, the undersigned, *D. R. Towns*, president, and *C. S. Bushnell*, secretary, of the *Panasoffkee and Withlacoochee Navigation Company*, have transferred to *John Conley* the attached mortgage and note, and, on the part of said company, have hereto attached our names, and affixed our seals, the day and year first above written.

"*D. R. Towns.* [L. s.]"

"*C. S. Bushnell.* [L. s.]"

The bill also alleges that *Conley*, for value, sold and assigned the note and mortgage to complainant.

The appellant has demurred, and the grounds stated are that it appears by the bill—*First*, that complainant has no title to the note or mortgage; and, *second*, that neither of said instruments has been assigned to the plaintiff by the *Panasoffkee & Withlacoochee Navigation Company*; and, *third*, that the company hold title to the note and mortgage.

It is contended on behalf of appellant that the assignment is the act of *Towns* and *Bushnell* individually, and not the act of the corporation; but the authorities do not sustain this position. Where a note is payable to a corporation by its corporate name, and is indorsed by an authorized agent or official, with the suffix of his official position, it will be regarded that he acts for his principal, disclosed on the paper as the payee, and who therefore is the

only person competent to transfer the legal title. Daniel, Neg. Inst. § 416; Rand. Com. Paper, § 145. An indorsement by an officer of a corporation is *prima facie* the act of the company. Id. § 368; Frye v. Tucker, 24 Ill. 180. In McIntire v. Preston, 5 Gilman, 48, a note payable to a corporation was assigned thus: "Without recourse. JOEL SCOTT, Secy ;" and it was held that when properly filled out, as the plaintiff might do on the trial, it was sufficient to pass the legal title to the note, and that the authority of Scott, the secretary, to assign it, could only be questioned by plea. See, also, Goodrich v. Reynolds, 31 Ill. 491. Bank v. Pepoon, 11 Mass. 288, decides the same, where the indorsement was in blank, by an authorized attorney signing his name, and styling himself "attorney." Folger v. Chase, 18 Pick. 63, was a case where a note was indorsed by the payee to a bank, and its cashier indorsed it as follows: "P. H. FOLGER, Cashier;" and it was objected that the latter indorsement was not made in the name of the corporation. "But," said the supreme court of Massachusetts, "we think the indorsement by the cashier, in his official capacity, sufficiently shows that the indorsement was made in behalf of the bank; and, if that is not sufficient, the plaintiffs have the right now to prefix the name of the corporation." Nicholas v. Oliver, 36 N. H. 218, decides that the indorsement, "W. EARLE, A. Sec'y," made on a promissory note payable to an insurance company, is to be considered the indorsement of the company, if nothing further appear to indicate that it is intended as the indorsement of some other party. In Russell v. Folsom, 72 Me. 436, the indorsement, by the treasurer of the payee corporation signing his name, and an abbreviation of his office, was held to transfer the legal title; and in Farrar v. Gilman, 19 Me. 440, the indorsement by the cashier of the bank was adjudged to be *prima facie* evidence of a legal transfer of a negotiable note. See, also, Chase v. Hathorn, 61 Me. 505; Dunn v. Weston, 71 Me. 270; Elwell v. Dodge, 33 Barb. 336; Bank v. Clements, 31 N. Y. 33.

Looking at the indorsement, it is apparent from its face, considering its entire language, that the officers intended to act on behalf of their company, and not as principals; and, when viewed in the light of the above authorities, the conclusion follows that the indorsement is the act of the company, and not of the individuals whose signatures are affixed to it.

The bill alleges that the officers had authority to assign the note and mortgage; and this is admitted by the demurrer, and can only be traversed by proper averments in an answer or plea.

There is nothing in the conclusion reached, or the authorities cited above, that is inconsistent with the case of Robinson v. Springfield Co., 21 Fla. 203, and other kindred cases not falling within the rule controlling indorsements by officers of corporations.

The order overruling the demurrer is affirmed, and the cause will be remanded for further proceedings consistent with this

opinion, and the equity practice in such cases.

MAXWELL, J., (*dissenting*.) I do not concur with the majority of the court. That the assignment to Conley, so far as legal obligation is concerned, is not, in its character, such as of itself to bind the corporation, does not, I think, admit of dispute. The paper executed for the purpose of assignment is not in the name of the company, and is executed by parties who do not in terms claim authority to make it; and there is nothing in it that makes it the act of the company. Towns and Bushnell "have transferred" to Conley. This is their individual act, according to fully-established law, notwithstanding the words "president" and "secretary," which follow. These, in such a connection, are only words describing the persons, and do not import representative action,—in this case, more manifest from the fact that they sign the paper, not in the name of the company, but in their individual names, without any official or other designation of agency, and affix their individual seals thereto. Such an instrument, regarded upon its face alone, cannot be taken as transferring the property of the company in the note and mortgage. It belongs to the class of transactions in which persons acting, or claiming to act, in a representative capacity, so discharge their functions as to make themselves individually responsible. Among the numerous cases of this character are Barker v. Insurance Co., 3 Wend. 94; Taft v. Brewster, 9 Johns. 334; Stone v. Wood, 7 Cow. 453; Tippetts v. Walker, 4 Mass. 594; Bradlee v. Manufactory, 16 Pick. 347. See, also, Story, Ag. § 276.

The assignment itself being insufficient to bind the corporation, I think the allegations of the bill in regard to authority of the president and secretary of the corporation to make it are not sufficiently specific to hold the demurrer as admitting the authority. I concede that, if they were, the complainant would be entitled to his decree. The infirmity of the assignment is not such as to render it totally void as against the corporation; but, upon due allegation and proof of proper agency in its execution, it should be upheld as the act of the corporation. That this may be done by evidence *aliunde*, where the instrument itself is defectively executed, is maintained by abundant authority. See, among others, Fleckner v. Bank, 8 Wheat. 338; Everett v. U. S., 6 Port. (Ala.) 166; McWhorter v. Lewis, 4 Ala. 198; Melledge v. Iron Co., 5 Cush. 158; Halle v. Peirce, 32 Md. 327; and Tippetts v. Walker, *supra*. In the last case it was decided that the persons professing to act as agents were individually liable, and not the corporation; but the court virtually said that, if there had been evidence to show the agency of the persons, its decision would have been different.

My conclusion is that the demurrer should have been sustained, with liberty to complainant to amend his bill, if he can, by more definite and certain allegations of the authority of the president and secretary to make the assignment in question.

PORTER v. STATE.

(Supreme Court of Florida. Feb. 12, 1890.)

LARCENY—INDICTMENT—DESCRIPTION OF PROPERTY—MONEY.

1. An indictment for larceny sufficiently describes the kind and value of property stolen as "one lot of silver coin, of the denomination of one dollar each, of the currency of the United States, of the value of twenty-five dollars, of the goods, moneys, and chattels of one J. H. M."

2. An indictment for the larceny of "one lot of silver coin of the United States currency, of the denomination of dollars, half-dollars, quarters, dimes, and five-cent pieces, of the value of twenty-five dollars, a more particular description of which coin is to the jurors unknown, of the goods," etc., is sufficiently specific to warrant a judgment upon a general verdict of guilty.

(Syllabus by the Court.)

William B. Lamar, Atty. Gen., for the State.

MITCHELL, J. The plaintiff in error was convicted upon a charge of larceny, and brings his case here upon writ of error to the circuit court of Santa Rosa county from an order of said court overruling the motion in arrest of judgment, and assigns the following errors: (1) The court erred in refusing the motion in arrest of judgment; (2) the court erred in holding the indictment herein sufficient to render judgment on; (3) the court erred in holding that the indictment sufficiently described the money alleged to have been stolen. These several assignments may be construed together.

The indictment contains two counts, the first of which charges the defendant with larceny of "one lot of silver coin, of the denomination of one dollar each, of the currency of the United States, of the value of twenty-five dollars, of the goods, moneys, and chattels of one J. H. McLendon;" and the second count charges the defendant with the larceny of "one lot of silver coin of the United States currency, of the denomination of dollars, half dollars, quarters, dimes, and five-cent pieces, of the value of twenty-five dollars, a more particular description of which coin is to the jurors unknown, of the goods," etc. The only question to be considered is as to the sufficiency of the indictment.

There is a conflict of authorities as to whether or not the description of the coin in the first count of the indictment is sufficiently definite. At the common law this description was not sufficient, and the same doctrine has been held in some of the courts in this country; but other authorities of high respectability hold that the description is sufficient. *Brown v. People*, 29 Mich. 232; *Com. v. O'Connell*, 12 Allen, 451; *State v. Walker*, 22 La. Ann. 425; *Com. v. Gallagher*, 16 Gray, 240, citing *U. S. v. Rigby*, 2 Cranch, C. C. 364; *Merwin v. People*, 26 Mich. 298; *McKane v. State*, 11 Ind. 195; *Berry v. State*, 10 Ga. 511.

We are inclined to think that the rule laid down by these authorities is the correct one. The money was described as silver dollars, of the currency of the United States, of the value of twenty-five dollars, and it was sufficient to put the defendant on notice of the charge against him; and being thus advised, and it being incumbent on the state to prove every material alle-

gation of the indictment, including the description of the money alleged to have been stolen, the defendant was protected in all his rights, and was not injured because the money was not more definitely described. But, if there could be any doubt as to the sufficiency of the description of the money in the first count, there could be no doubt as to the sufficiency of the second count, because the second count shows why the money was not more particularly described; and this was all that was required to make the description sufficient. *People v. Linn*, 23 Cal. 150; *Com. v. Sawtelle*, 11 Cush. 142; 2 Bish. Crim. Proc. § 703 et seq.; *Com. v. Gallagher*, 16 Gray, 240; *Merwin v. People*, 26 Mich. 298.

There being a good count in the indictment, and there being a general verdict of guilty, it applied to the whole indictment; and the court below committed no error in deciding that the indictment was sufficient, and overruling the motion in arrest of judgment.

The judgment of the court below is affirmed.

COOPER et al. v. DAVIS et al.

(Supreme Court of Alabama. Jan. 28, 1890.)

EXECUTION—CLAIM-BONDS.

Where an affidavit of title to property levied on under execution is made, and a claim-bond executed, and upon the trial the property is found liable to execution, and, upon failure to deliver by the claimant within 10 days, the claim-bond is indorsed, "Forfeited," and returned, the constable is unauthorized to accept affidavit of claim and claim-bond from another party, while the property is withheld, so as to defeat the plaintiffs' right to execution.

Appeal from city court of Anniston; W. F. JOHNSTON, Judge.

This was a motion to quash an execution in favor of appellants, C. J. Cooper & Co., against L. A. Davis et al., appellees.

E. H. Hanna, for appellants. John M. Caldwell, for appellees.

CLOPTON, J. This proceeding is a motion to quash an execution issued against the makers of a claim-bond, on the ground that the bond was improperly indorsed, and returned, "Forfeited." The motion was submitted to the city court on an agreed statement of facts, which are: An execution in favor of appellants was levied by the constable on certain property. Mrs. L. A. Davis made an affidavit that she had a just title to the property, and a claim-bond, which was accepted by the constable. On a trial of the claim suit before a justice of the peace, the property was found subject to plaintiffs' judgment. The makers of the bond failing to have it forthcoming within 10 days thereafter, the constable indorsed the bond, "Forfeited," and returned the same to the justice, who thereupon issued execution against all the obligors in the bond. After the rendition of the judgment condemning the property to the satisfaction of plaintiffs' judgment, but before the claim-bond was indorsed and returned, "Forfeited," a stranger to plaintiffs' execution and to the claim proceedings made an affidavit of claim and a claim-bond, under the statute, for the trial

of the right of property, which were accepted by the constable.

No question being raised in regard to the regularity of the judgment rendered by the justice on the trial of the right of property, which may be amended, if necessary, and as to the parties agreed that the property was found subject, we shall consider the questions raised and argued as they were presented and decided by the city court on the agreed statement of facts. The condition of the claim-bond was that the makers should have the property forthcoming for the satisfaction of plaintiffs' judgment, if found liable therefor. The judgment, finding the property liable, fixed and rendered absolute the obligation to have it forthcoming. On failure to do so, plaintiffs' unquestioned right was to have the bond indorsed and returned, "Forfeited," and to have an execution against the obligors. The judgment of condemnation was conclusive, and estopped them from denying that the property was subject to the execution. If the constable had refused or failed to indorse and return the bond as required by the statute, a *mandamus* would have been awarded, on proper application, to compel him to perform such duty. The facts clearly distinguish this case from *Roswald v. Hobbie*, 85 Ala. 73, 4 South. Rep. 177, and bring it within the principle settled in *Cooper v. Peck*, 22 Ala. 406. In the first case, the claimant, by a replevy-bond, obtained possession of the property levied on under an attachment against a third person. On the next day they interposed a claim under the statute, by making the requisite affidavit and bond, which was accepted and approved by the sheriff, and returned by him to the court. It is said that the acceptance of affidavit of claim, and approval of the claim-bond, "estopped the claimants from denying that they acquired the possession, and held it under the claim-bond. If the sheriff had been placed in possession of the property, he would have retained it only long enough to have approved the bond, when it would have passed instantly to the claimants." The obligation to deliver the property to the sheriff under the replevy-bond had not been rendered absolute by a judgment in favor of the plaintiff in the attachment suit. The effect of accepting and approving the claim-bond was to transfer possession under the replevy-bond from the claimants to themselves under the claim-bond, with the assent of the sheriff; the makers of both bonds being the same persons. Manual delivery of the property to the sheriff was considered an empty form and unsubstantial ceremony which the law does not regard. In the second case, property, which had been attached, was replevied by a stranger to the attachment. Judgment having been rendered against the defendant in attachment, the sheriff demanded the property of the makers of the replevy-bond, who refused to deliver, and tendered to the sheriff an affidavit and bond for the trial of the right of property, which he refused to accept, and indorsed and returned the replevy-bond, "Forfeited." The makers of the bond sought to supersede the execution issued thereon. It was held that the con-

dition of a replevy-bond can only be complied with, after judgment against the defendant in attachment, by a delivery of the property to the sheriff on his demand. The *supersedeas* was dismissed. The same observation applies to the claim-bond upon which the execution now sought to be quashed was issued. The constable delivered possession of the property levied on to Mrs. Davis, on her making the affidavit and bond for the trial of the right of property. After judgment finding the property liable, the condition of the bond can only be complied with by having it forthcoming within 10 days thereafter for the satisfaction of plaintiffs' judgment. The constable was unauthorized to defeat plaintiffs' right to an execution by accepting an affidavit of claim and a claim-bond from another party, while the property was withheld from his possession. *Rhodes v. Smith*, 66 Ala. 174; *Woolfolk v. Ingram*, 53 Ala. 11. Reversed and remanded.

MOSES *et al.* v. JOHNSON.

(Supreme Court of Alabama. Jan. 15, 1890.)

VENDOR AND VENDEE—WASTE.

1. A vendor who sells land, retaining the title as security for the purchase money, sustains the same relation to the vendee, so far as the question of security is concerned, as does a mortgagee to a mortgagor, and, if the security of the land is insufficient, may restrain the vendee from cutting timber on the land.

2. The averment by the vendee that the value of the land would be enhanced by clearing it is affirmative matter, the burden of proving which is on him.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

The bill in this case was filed by the appellants, Moses Bros., against the appellee, Berry Johnson, and sought an injunction to restrain the defendant from committing waste on the lands involved, and sold to the defendant by the complainants. The bill averred the cutting of timber and wood from the land by the defendant, and the other facts, as shown by the opinion, and on these grounds prayed for a writ of injunction against the defendant. The case was submitted to the court on the motion of the defendant to dismiss the bill, for the want of equity, and upon the sworn answer of the defendant. The court granted the motion, and dissolved the injunction, and it is from this decree that the appeal is prosecuted, and the same is assigned as error.

John Gindrat Winter, for appellants. *E. P. Morrissett*, for appellee.

STONE, C. J. The appellants, who were the complainants, sold 160 acres of land to the defendant at the agreed price of \$1,400, —\$9 per acre. Only \$5 of the purchase money was paid. The balance, including interest, was agreed to be paid in annual installments running through about five years from the date of the purchase, January 5, 1889. Complainants retained the title, giving to Johnson, the purchaser, their obligation to make him title, on payment by him of the purchase money and accruing taxes. The agreement stipulated, further, that, if Johnson failed "to pay any of said

installments when due," then Moses Bros. "have the right to annul this agreement, and take possession of the premises, and to retain out of the moneys paid under this agreement [by Johnson] sixty dollars per annum as rent of the premises, said amount being hereby agreed and declared by said parties to be the annual rental value of the premises; returning the surplus, if any, to" Johnson.

What we have copied contains every stipulation in the agreement which sheds any light on Johnson's rights acquired under the purchase. Nothing is said about felling timber, or clearing lands, or of Johnson's right to take and hold possession, further than is implied in the language copied above. Johnson did take possession immediately after the agreement was executed, and was in possession when this bill was filed, August 26, 1889. No part of the debt for the purchase money had then matured, and there then remained unpaid about \$1,400. Under our interpretation of the agreement, Johnson had the clear right to enter into possession of the land, and to remain in possession until he made default in the payment of some installment of the purchase money. On such default, Moses Bros. had the option, secured by the contract, to put an end to the agreement, so far as it evidenced a sale, to convert Johnson's holding into a tenancy *ab initio*, and to retake possession of the land. This is a right of election reserved for their benefit, and they alone can exercise it. *Collins v. Whigham*, 58 Ala. 438; *Wilkinson v. Roper*, 74 Ala. 140.

When a vendor of real estate enters into an executory agreement to convey title on the payment of the purchase money, he sustains, in substance, the same relation to the vendee as a mortgagee does to a mortgagor. Each has a legal title which, in the absence of stipulations for possession, will maintain an action of ejectment. Each can retain his legal title against the other, until the purchase money or mortgage debt is paid, unless he permits the other to remain in undisturbed possession for 20 years. And yet each is at last but a trustee of the legal title for the mortgagor or vendee, if the purchase money or mortgage debt, as the case may be, is paid, or seasonably tendered. The same mutual rights and remedies, legal and equitable, and the same limitation to the right of recovery, obtains in the one relation and in the other. *Relfe v. Relfe*, 34 Ala. 500; *Bizzell v. Nix*, 60 Ala. 281; *Chapman v. Lee*, 64 Ala. 483; *Sweeney v. Bixler*, 69 Ala. 539.

We have found but a single case precisely like the present one in its facts. In *Scott v. Wharton*, 2 Hen. & M. 25, a sale of land had been made on a credit, and title retained by the vendor. The vendee went into possession, and a bill was filed by the vendor, charging him with committing waste by cutting timber, and praying for an injunction. The court treated the case precisely as if it had been a bill by mortgagee against mortgagor, to restrain him from lessening the security by felling and removing the timber. *Fairbank v. Cudworth*, 33 Wis. 358. We feel safe in holding that a vendor who sells on credit, retaining the title as security for the purchase money,

sustains the same relation to the vendee, so far as the question of security is concerned, as does the mortgagee to the mortgagor.

In *King v. Smith*, 2 Hare, 239, 24 Eng. Ch. 239, it was said to be an established rule "that if the security of the mortgagee is insufficient, and the court is satisfied of that fact, the mortgagor will not be allowed to do that which would directly impair the security,—cut timber upon the mortgaged premises. * * * The cases decide that a mortgagee out of possession is not, of course, entitled to an injunction to restrain the mortgagor from cutting timber on the mortgaged property. If the security is sufficient, the court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this court will interpose. The difficulty I feel is in discovering what is meant by a 'sufficient security.' Suppose the mortgage debt, with all the expenses, to be £1,000, and the property to be worth £1,000, that is, in one sense, a sufficient security; but no mortgagee, who is well advised, would lend his money unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage." This was considered the rule, and the only safe rule, under English values. In that country land values were, in a measure, stationary. In this, they are fluctuating. To be a "sufficient security" with us, there should be a much broader margin between the amount of the debt and the estimated value of the property mortgaged for its security than is considered sufficient in that older country.

This court is fully committed to the same doctrine. In *Coker v. Whitlock*, 54 Ala. 180, this court ruled that when the mortgagor is committing waste which impairs the security, or renders it insufficient, chancery, at the suit of the mortgagee, will restrain him by injunction. *Coleman v. Smith*, 55 Ala. 368; *Hammond v. Winchester*, 82 Ala. 470, 2 South. Rep. 892; *Sullivan v. Rabb*, 86 Ala. 493, 5 South. Rep. 746; 2 *Daniell*, Ch. Pr. *1629, note 3; *Usborne v. Usborne*, 1 Dick. 75; *Brady v. Waldron*, 2 Johns. Ch. 148; *Robinson v. Preswick*, 3 Edw. Ch. 246; *Murdock's Case*, 2 Bland, 461; *Downing v. Palmateer*, 1 T. B. Mon. 64.

The bill charges and the answer admits that the land which is the subject of this suit is in value not exceeding the sum of the purchase money that remains unpaid. The bill also charges that the defendant is insolvent. To this charge the answer interposes a general denial, but accompanies it with a statement as follows: "This defendant denies that he is insolvent, and avers that he is solvent; that, except the debt he owes for this land, his liabilities are small; and that he owns real estate in his own name, not subject to exemption as a homestead, in Montgomery county, Ala., that is worth much more than any liabilities on debts he owes, excepting his debt for this land." We understand this language to mean that defendant's other property will pay his other debts, but we cannot interpret it as affirming that it will pay any certain sum above his other debts. This leaves the land in controversy as the sole security for its promised purchase

money. The bill also charges that the land lies near the city of Montgomery, where fire-wood is in demand, and commands ready sale, and that to denude the land of its timber would greatly diminish its value as a security. The answer admits the truth of each of these averments except the last, which it denies. It sets up that the land is fertile, and would be made more valuable if cleared of its timber, and brought under cultivation. This last averment must be treated as affirmative defensive matter, the proof of which rests with defendant. Such averment, until proved, furnishes no ground for dissolving the injunction. 1 Brick. Dig. p. 678, §§ 557, 558.

It may be, as contended, that the right to clear the land, sell the timber, and put the land in cultivation were inducements—controlling inducements—to enter into the purchase. They were not expressed as terms of the contract, and defendant failed to stipulate for any such privilege. Considering the proximity of the land to a market for the fire-wood,—an averment not denied, but admitted,—we feel forced to presume, as charged in the bill, that the land is more valuable with the timber on it than if cleared and put in cultivation. Hence we hold that the averment to the effect that the value of the land would be enhanced by clearing it is affirmative matter, the burden of proving which is on the defendant. We may state here that injunction is the only relief prayed, and is the only proper relief in a case like the present one. However, it may be made to appear by proof the pleadings do not make a case for a dissolution of the injunction, and the decretal order dissolving the injunction must be reversed, and the injunction reinstated.

Reversed and rendered.

PULLUM v. STATE.

(*Supreme Court of Alabama.* Jan. 16, 1890.)

HIGHWAYS—DESTROYING INDEX-BOARDS.

Code Ala. 1886, § 1414, makes it the duty of overseers of public roads, when the road forks, or turns out, or crosses another public road, to erect within the same index-boards, with proper directions. Section 4122 makes it an indictable offense "willfully to deface, injure, or destroy any mile-post, index-board, bridge, or causeway." *Held*, that an index-board erected by private individuals is within the protection of the law.

Appeal from circuit court, Geneve county; J. M. CARMICHAEL, Judge.

Indictment for destroying or removing guide-board on public road.

The indictment in this case charged that the defendant, Tomacius Pullum, "did willfully destroy or remove a guide-board set upon a certain public road or highway, commonly known and called the 'Dothan and Chiply Road.'" The evidence showed that the defendant knocked the sign-board down, and that it lay in the road for several days, until the overseer replaced it. The other evidence, as shown by the bill of exceptions, is sufficiently set forth in the opinion. Upon the evidence as thus shown, the court charged the jury that "if the sign-board was at a public road crossing, devoted to public use, and was useful in directing the traveling public to the places

to which the roads led, then it would be a violation of the law to willfully knock it down, although it was not put thereby any public authority." The defendant objected, and reserved an exception to the giving of this charge.

C. H. Laney, for appellant. Atty. Gen. Martin, for the State.

CLOPTON, J. The evidence does not show by what authority the guide or index-board, for the injury or removal of which the defendant was indicted and convicted, was erected. The overseer testified that the road was a new road, and that he would have placed an index-board at the same place but for the fact that the one in question was already there. It is contended that to deface, injure, or destroy an index-board not shown to have been erected by public authority is not a violation of the statute. It is true section 1414, Code 1886, makes it the duty of overseers of public roads, when the road forks, or turns out, or crosses another public road, to erect within the same index-boards, with proper directions. The design of the statute was to secure the erection of such boards, at the public expense, for the convenience and guidance of the traveling public. It was not intended to require the overseer to remove one already erected, though by private citizens, and put another in its place. The language of section 4122, under which defendant was indicted, is general and comprehensive: "Willfully to deface, injure, or destroy any mile-post, index-board, bridge, or causeway." If private citizens should build a causeway, which the overseer of the road had failed to do, from neglect of duty or want of time, it would not be seriously contended that to willfully destroy such causeway was not the offense denounced by the statute. It is immaterial to defendant by what authority the index-board was erected. If erected by private individuals, for the convenience and guidance of the public, and devoted to the public use, and permitted to remain for that purpose by the overseer of the road, it is within the protection of the law.

Affirmed.

COTTON v. STATE.

(*Supreme Court of Alabama.* Jan. 16, 1890.)

CARRYING WEAPONS—PROVINCE OF JURY.

In a prosecution for carrying a concealed pistol, where the only witness introduced testifies that he did not see the pistol, but that its impression on the outside of defendant's coat "was so distinct and plain that he could tell the length of the pistol, as well as its shape and size, and even the shape of the hammer," the jury alone are competent to draw the inference that the impression was made by a pistol, and a charge that they must find defendant guilty is erroneous.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Indictment for carrying a concealed pistol. The court instructed the jury that they must find defendant guilty, and defendant excepted, and appealed.

John Gindrat Winter, for appellant. W. L. Martin, Atty. Gen., for the State.

STONE, C. J. There is no positive testimony in this case that defendant carried

a pistol concealed about his person. The testimony was by a single witness, who testified "that the defendant, at the time, had on a military, close-fitting coat; that the pistol was carried in an inside breast pocket; that he could not and did not see the pistol, or any part of it, but he could and did plainly see the impression of the pistol, 15 feet off, made on the outside of the coat; that said impression was perfect, and plainly noticeable to any one on casual observation, and that any one looking at defendant could easily see the said impression, and know that it was made by a pistol carried under the coat; that the impression was so distinct and plain that he could tell the length of the pistol, as well as its shape and size, and even the shape of the hammer." This was all the testimony as to matters of fact. The rest was the opinion or conclusion of the witness, which was not legal evidence in a case like the present.

However strong and convincing the circumstances may have been, they were not of the class which authorized the general charge. An inference to be drawn was a necessary element in the constitution of the offense, namely, that the visible impression on the clothing was made by a pistol; and this inference the jury alone was competent to draw. 1 Brick. Dig. p. 335, § 4; 3 Brick. Dig. p. 110, § 56 et seq.; *Rabitt v. Orr*, 83 Ala. 185, 3 South. Rep. 420. Is it not logically incontrovertible that if the impression made on the coat was so clear and palpable that a witness 15 feet away could readily and unmistakably affirm as fact that it was made by a pistol, then the pistol was not concealed, and the statute was not violated? We think, however, that this case does not fall within such principle. The pistol, if it was a pistol, was concealed, covered up, hidden from sight. What we decide is that it was for the jury to draw the inference whether or not it was a pistol.

Reversed and remanded.

RILEY v. STATE.

(Supreme Court of Alabama. Jan. 22, 1890.)

CRIMINAL LAW—TRIAL—EXCUSING JUROR—EXCLUDING WITNESSES—OPINION EVIDENCE—INSTRUCTIONS.

1. Where a person has been excused from serving on a jury without having been sworn as to the truth of his excuse, a party who did not object in the court below cannot avail himself of the error.

2. Where a motion is made which does not in its very nature disclose the ground on which it is rested, and counsel refuses to state the ground, it is not error to overrule the motion.

3. When a motion has been made to exclude the witnesses from the court-room, it is in the discretion of the trial judge to allow any of them to remain.

4. It is in the discretion of the trial judge to allow a witness previously examined to be recalled at any stage of the trial.

5. It is error to allow a witness, not an expert, to state his opinion as to whether certain tracks were made by defendant.

6. In a prosecution for burglary, defendant's request to charge the jury that, "unless the evidence against the prisoner should be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him, they must find him not guilty," should be given.

Appeal from circuit court, Butler county; JOHN P. HUBBARD, Judge.

Indictment against Shepherd Riley for burglary. On the trial defendant moved that all the witnesses be excluded from the court-room, but one witness was allowed to remain. The third charge asked for by defendant and refused was: "Unless the evidence against the prisoner should be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him, they must find him not guilty." Defendant was convicted, sentenced to the penitentiary for five years, and appealed.

For the opinion on appeal from the conviction of Paul Riley for the same robbery, see ante, 104.

Richardson & Steiner, for appellant. *W. L. Martin*, Atty. Gen., for the State.

STONE, C. J. The fact of excusing the juror Grant from serving on the jury, without requiring him to be sworn to the truth of his excuse, is not available to defendant, unless he had objected on that ground in the court below. We cannot know that the presiding judge did not himself discover that the juror appeared to be sick. Moreover, when an objection is made in a trial court which does not in its very nature disclose the ground on which it is rested, candor and fair dealing alike require that the ground be stated. This course of practice will relieve judges of the imputation of appearing to decide what they had not in contemplation. When a general objection is made by counsel, and he refuses to disclose the ground or grounds of such objection when interrogated thereto, the court commits no error in overruling it. 3 Brick. Dig. p. 443, § 567; *Wallis v. Rhea*, 10 Ala. 451; 1 Brick. Dig. p. 887, § 1189.

When witnesses are placed under the rule, it is discretionary with the presiding judge to permit exceptions to its enforcement; and to allow witnesses previously examined to be recalled at any stage of the trial is also a matter of discretion, which cannot be reviewed. *Id.* p. 886, § 1174.

The circuit court erred in permitting the witness Robert Black to testify that in his opinion or judgment certain tracks were made by defendant. It was for the jury to determine, from the facts deposed to, whether they were or not. *Id.* p. 873, §§ 978, 980, 982; 3 Brick. Dig. 435, 436. Experts are an exception to the rule.

Charge No. 3, asked by defendant, ought to have been given. The other charges were argumentative, and were properly refused.

Reversed and remanded.

MCCULLOUGH et al. v. McCLINTOCK.

(Supreme Court of Alabama. Jan. 13, 1890.)

EXECUTION—WIFE OF DEFENDANT AS SPECIAL BAILEE.

Where personal property has been levied on by a duly-authorized officer, the levy is not invalidated, as between the parties, by delivering it to the wife of defendant to keep until the day of sale, and defendant is bound to restore the property at that day, if in his possession.

Appeal from circuit court, Clay county; LEROY F. BOX, Judge.

Action of trespass by R. W. McClintock against John W. McCullough, S. W. Mc-

Cullough, C. Knight, H. W. Armstrong, and D. C. Harris. It appeared in evidence that J. W. McCullough had, as special constable, levied on a mule of plaintiff, and had afterwards delivered it to the wife of plaintiff, on an agreement that it would be forthcoming at the day of sale. It was not forthcoming on that day, and he then went on plaintiff's premises, and took the mule from his stable. The court charged the jury that the wife of plaintiff could not, without his consent, contract such a bailment with the constable as to retain any lien created by the levy. Judgment was rendered for plaintiff, and defendants appealed.

W. H. Smith, Jr., and Kelly & Smith, for appellants.

SOMERVILLE, J. Where personal property has been levied on by a sheriff or constable invested with due authority, the levy is not invalidated, as between the parties, by leaving the property in the custody of the defendant as a special bailee. The only persons who can complain of this conduct on the part of the officer would be the plaintiff in execution, whose rights may have been prejudiced, and the vendees and creditors of the defendant. 2 Freem. Ex'ns, § 261; *Campbell v. Spence*, 4 Ala. 543. The question here is whether the wife of the defendant may become the sheriff's bailee, in the absence of any special consent on the part of the husband. In this case the mule levied on as the husband's property was left by the constable in the hands of the wife, in order to save the costs of keeping; she agreeing to keep the animal, and to have it forthcoming at the house of her husband on the day of sale. This was in November, 1885, prior to the enactment of the present married woman's law. Code 1886, §§ 2341-2356. While the wife may have incurred no personal liability by her contract as bailee, she certainly acquired no right to misappropriate the property, or to refuse to restore it, so as to destroy the special property vested in the constable by the levy. The lien of the levy was unaffected by her disability to incur all the contractual liabilities of a bailee or depositary, and the husband was bound to restore the mule to the officer of the law, if in his possession. There seems to be no reason, for the purposes of this case, why the wife could not act as bailee of the constable without the consent of her husband, such agency involving no duties or services inconsistent with those appertaining to the marital relation. Story, Ag. (8th Ed.) §§ 7, 485; Story, Bailm. (8th Ed.) § 162; Schouler, Bailm. 37; *Pullam v. State*, 78 Ala. 31; 1 Amer. & Eng. Cyclop. Law, 334, 335. The court erred in the charge given. Reversed and remanded.

STOUGH V. STATE.

(*Supreme Court of Alabama. Jan. 14, 1890.*)

PHYSICIANS AND SURGEONS—LICENSE.

Code Ala. 1886, §§ 1296-1298, provide that a graduate of a medical college in the United States, whose diploma is recorded, may practice medicine without a license in any county having only a medical board established by the county commissioners: but where there is a board of medical exam-

iners, organized according to the constitution of the state medical association, and in affiliation with it, a license or certificate of qualification from such board is necessary. Section 4073 provides for the punishment of any person practicing medicine without a license, diploma, or certificate, or who is not "a regular graduate of a medical college of this state, having had his diploma legally recorded." *Held*, that a graduate of a medical college of another state, whose diploma is recorded, is not indictable for practicing without license or certificate from a board of medical examiners in the county, organized under or in affiliation with the state association. *Following Brooks v. State*, 6 South. Rep. 902.

Appeal from circuit court, Crenshaw county; JOHN. P. HUBBARD, Judge.

W. L. Martin, Atty. Gen., for the State.

STONE, C. J. Our statute (Code 1886, § 4073) makes it an indictable offense to practice medicine "without having first obtained a license, or diploma, or certificate of qualification, or, not being a regular graduate of a medical college of this state, having had his diploma legally recorded." Defendant had first obtained a diploma, and proved that fact. True, his diploma was from a medical college of another state, and had not been recorded. But the statute does not restrict the defensive exception to holding a diploma from a medical college of this state, nor does it specify that such diploma shall be recorded in cases like this one.

In *Brooks v. State*, 6 South. Rep. 902, (at the present term,) we interpreted the statute under which the indictment in this case was found. We need not repeat what we then said. We have no wish to qualify anything therein decided. On the authority of that case, the judgment of the circuit court is reversed, and a judgment here rendered discharging defendant.

Reversed and rendered.

CONNER *et al.* v. SMITH *et al.*

(*Supreme Court of Alabama. Jan. 14, 1890.*)

EQUITY PLEADING—AMENDMENT—MORTGAGES—SET-OFF—LIMITATION OF ACTIONS.

1. An amended paragraph of a bill which avers the assignment of certain claims to plaintiffs at a certain time is not demurrable, as a departure from the case made in the original bill, where the claims set up in the amended paragraph were in the original bill, and were relied on by claimants from the beginning, and where on former appeals no defects were pointed out except that the claims were insufficiently stated, and where the only change made is in showing when and in what manner the claims were acquired.

2. Under Code Ala. § 2673, providing that mutual debts, liquidated or unliquidated demands, not sounding in damages merely, may be used as a set-off, a claim in favor of a mortgagor against the mortgagee for conversion of personalty may be relied on by the assignee of the equity of redemption, in a suit to redeem land sold under a power of sale in the mortgage, to reduce the mortgage debt, where the claim was transferred to the assignee before the mortgagee began proceedings under the mortgage, though it was after default by the mortgagor.

3. Code Ala. § 2692, providing that "when the defendant pleads a set-off to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant is nevertheless entitled to his set-off, where it was a legal, subsisting claim at the time the right of action accrued to the plaintiff on the claim in suit," applies, in a suit to redeem land sold under a power in a mortgage, to a set-off

which existed in favor of plaintiff at the time default by the mortgagor was made, the saving provisions of the statute not being defeated by the fact that the mortgagee sold under the power instead of filing a bill to foreclose, and thus forced the mortgagor to take the initiative in the courts.

4. The statute of limitations does not run against a claim for damages for the breach of a contract, so long as the contract itself may be enforced.

Appeal from chancery court, Madison county; S. K. McSPADDEN, Chancellor.

The original bill, filed by the appellants, as children of one William H. Moore, who had conveyed to them the real estate in controversy, seeks to redeem the said lands, and prays an account stated. The conveyance under which the complainants deduce title recites that the lands are "subject to debts due to Joseph C. Bradley and E. G. Smith," and the *habendum* clause of the conveyance makes the lands conveyed subject to these debts. There were originally several parcels of land involved in the suit. But the last amendment of the bill strikes out all averments and all claims to relief except as to one, a store-house, which is shown to have been sold under a power of sale contained in a deed of trust made by said William H. Moore, prior to the conveyance to the complainants, to secure a debt owing to the defendant Elon G. Smith. The sale under the power in the deed of trust was made in June, 1867, at which sale Smith, the creditor, became the purchaser. In 1869, Smith sold and conveyed to Bernstein and Herstein, who were also made defendants to the bill. The original bill was filed on the 17th day of February, 1877. The case has been before this court on appeal twice before. The questions then considered are not now involved. The present assignment of error relates exclusively to the decree of the chancellor rendered on June 2, 1887, sustaining demurrers to the last amended bill.

As the case now stands, the purpose of the bill is to set aside the sale of a single piece of property covered by the deed of trust, and to be let in to redeem that property, and for an account stated of its rents and profits. The ground for relief is that the debt secured by the deed of trust was much less than was claimed; that it was an unadjusted open account, subject to deduction because of counter-claims in favor of the grantor, Moore, originating after he had conveyed the equity of redemption to the complainants, and before the sale under the said deed of trust, which claims he had assigned to the complainants, and of which assignment the defendants Smith and Herstein and Bernstein had notice. The second amended bill was intended to cure the defects pointed out by this court when the case was here on former appeal; and avers with particularity Moore's indebtedness to Smith, specifying the items constituting it, and shows the aggregate to be \$11,542. All of this indebtedness, except \$3,700 which was for money advanced and supplies furnished, was for mules and agricultural implements which Moore had the right to pay for and keep, or to return, paying for the use of them. The amended bill alleges that, before the time appointed for Moore to make such election, Smith took the mules and implements, depriving

Moore of the right of election; and that the use of the same was of the value of \$1,250, which, added to the \$3,700 for supplies furnished and money advanced, made to the aggregate of Moore's indebtedness only \$4,950. This indebtedness, it is averred, was "subject to the following credits, as of December, 1866." Damage suffered by Moore in consequence of being deprived of the right of taking the mules by purchase, which is stated to be \$500; and because of Smith's taking and converting the mules, corn, and cotton, the property of Moore, and of the value of \$3,775; which makes an aggregate of \$4,275, to be deducted from the indebtedness, as shown above. The fourth paragraph of the second amendment to the original bill averred the transfer and assignment by Moore to the complainants, before the sale of the property under the deed of trust, for valuable consideration, of all the claims of set-off, recoupment, counter-claims, and damages, which had been specifically averred in the amended bill, and also avers that the complainants notified the defendants of such transfer and assignment. The defendants demurred to this fourth paragraph of the amendment, upon the grounds: (1) that it was a departure from the case as made by the original bill; (2) that the said paragraph is inconsistent with and repugnant to the ninth paragraph of the amended bill, (which ninth paragraph avers notice to the defendants by the complainants that they held these counter-claims by assignment from Moore, and, further, that they offered to redeem the land from the defendants, paying what might be due between them and defendants;) (3) and (4) that the said claims set out in the paragraph are barred by the statute of limitations of six and three years, respectively; (5) that the said claim of \$500 "for the conversion of the mules by the defendant is a claim of damages for a tort, and not the subject of set-off, of which this court will take cognizance;" (6) because said claim is a claim for unliquidated damages, not the subject of set-off in equity; and (7) because said claim for the conversion of the corn is a claim for a tort, not the subject of set-off in equity. Upon the submission to the chancellor, for decree on these demurrers, the chancellor sustained all of the demurrers; and the complainants now prosecute this appeal, and assign this decree as error.

Code Ala. § 2678, provides that mutual debts, liquidated or unliquidated demands, not sounding in damages merely, subsisting between the parties at the commencement of the suit, may be set off, one against the other, by the defendant or his legal representatives.

Humes, Walker, Sheffey & Gordon, for appellants. *R. C. Brickell*, for appellees.

McClellan, J. This case has been twice before this court on appeals, by the complainants and defendants, respectively, from decrees of the chancery court on demurrers to the bill. *Smith v. Conner*, 65 Ala. 371; *Conner v. Smith*, 74 Ala. 115. On the last appeal, the averments of the bill as to the items of credit claimed by the complainants against the mortgage debt were

held to be insufficient. A state of the testimony indicated by the bill and exhibits was also adverted to by this court, and held to render the bill multifarious, assuming that the facts indicated would be the proof in the case. And the decree below, sustaining demurrers and dismissing the bill in vacation, without allowing complainants an opportunity to amend, and on this ground solely, was held erroneous, and reversed, and the cause remanded. In the further progress of the case, the bill was amended so as to obviate the objection for multifariousness, to specify the credits claimed originally by the grantor of the complainants, and to allege that these claims had been transferred and assigned by him to the complainants before the sale of the property, sought to be redeemed, by the trustee under the mortgage. The amendments further aver that complainants have ever since owned, and still own, said claims, and that before said sale they notified the trustee of their ownership of the equity of redemption, and these items of credit, and their claim that nothing was used on account of the indebtedness secured by the instrument. The original bill was filed February 17, 1877. The amendments, since the case was last in this court, were filed on June 5, 1885, and July 30, 1887. To the last amendment it was demurred that its averments in regard to the assignment by William H. Moore—the grantor in the deed of trust and of the complainants—of the claims he held against Smith to the complainants was a departure from the case made by the original bill, and repugnant to paragraph 9 of the amendment of June 5, 1885, to which it purported to be an addition; and to both amendments it was demurred that the claims and demands relied on to reduce or liquidate the debts secured by the deed of trust were barred by the statute of limitations, and that the claims were for unliquidated damages in such sort that they could not be the subject of offsets against the mortgage debt. These several demurrers were sustained, and from the decree in that behalf this appeal is prosecuted.

In considering the first assignment of demurrer, that paragraph 4 of the last amendment "is a departure from the case made by the original bill, and the several former amendments made thereto," it is to be steadily borne in mind that the claims therein referred to have been in the case and relied on by the complainants from the beginning. Not only so, but the opinions of this court, on the former appeals, have suggested no infirmity in these demands themselves, as foreshadowed in the earlier presentments of the case for the purposes for which they were brought forward, *i. e.*, the reduction of the secured debt, but only that they were insufficiently stated. The complainants have always asserted the right to have these claims applied to the reduction of the charge upon their lands, or as payments *pro tanto* of the sum claimed by Smith. It is true, these counter-claims accrued to Moore after the conveyance by him of the equity of redemption to the complainants, but, as we read the bill and amendments, it has never been averred that they continued to

be the property of Moore, or belonged to him at the time of the sale. On the contrary, the most that can be affirmed of the averments, prior to the last amendment, is that they assert complainant's right to use the claims in reduction of the mortgage debt, without showing when, or by what means, or in what manner, they acquired that right. The amendment of July, 1887, merely supplies this omission in pleading, and cannot, in any just sense, be considered a departure from the case theretofore made, nor inconsistent with paragraph 9 of the amendment of June, 1885, as is contended in the second assignment of the demurrer. So considered, the amendment illustrates the rule laid down by Chancellor KENT that "if a bill be found defective in its prayer for relief, or in proper parties, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, the amendment is usually granted." *Lyon v. Tallmadge*, 1 Johns. Ch. 188. The "substance" here is the right to assert these claims against the debt. Whether that right was acquired in one or the other, or in both, of two ways, is a fact not of itself forming the substance, but connected with it, and proper to be brought in by amendment. And certainly, under our very broad and liberal statute on the subject, which provides that amendment "must be allowed at any time before final decree * * * to meet any state of evidence which will authorize relief," (Code, § 3449,) and the decisions of this court upon it, to the effect that any amendment which does not operate an entire change of parties, or the introduction of an entirely new cause of action, is proper to be allowed, the amendment of July, 1887, was not open to the objections urged against it in the first and second assignments of error. *Steed v. McIntyre*, 68 Ala. 407; *Moore v. Alvis*, 54 Ala. 356.

The averments of the bill are insufficient to present the claims based on the conversion of certain mules, three in number, and certain corn and cotton by Smith, in the light of partial payments on the mortgage debt. As the facts are stated, it may be conceded that these claims are for damages resulting from a tort committed by Smith, and do not spring out of the contractual relations of the parties, so as to constitute matters of recoupment. But it by no means follows that these several items are not the proper subject of set-off against the mortgage indebtedness. It is quite an error to suppose that these demands necessarily sound in damages, merely within the language of our statute of set-off. It is true that an action of trespass *de bonis asportatis* would lie for their recovery, and it is also true such an action sounds in damages merely. But it is equally true that trover would lie, and in that action the law furnishes a standard by which the damages may be admeasured, and the recovery regulated and limited. *Curry v. Wilson*, 48 Ala. 638.

Damages capable of being thus measured by a pecuniary standard may be the subject of set-off at law, under section 2678 of the Code. *Cage v. Phillips*, 38 Ala. 382; *Sledge*

v. Swift, 53 Ala. 110; Collins v. Greene, 67 Ala. 211. And any demand which a mortgagor might set off against the secured debt in a suit at law for its recovery he may set off against the debt when it is sought to be enforced in equity by a bill to foreclose the mortgage. Gafford v. Proskauer, 59 Ala. 264; Knight v. Drane, 77 Ala. 371. And a set-off may be relied on by the assignee of the equity of redemption to reduce the charge on his land, although no personal judgment can be had against him. Wilts. Mortg. Forec. pp. 452, 453, § 378. And it is no objection to a claim pleaded as a set-off that the mortgagor or owner of the equity of redemption acquired it after the law-day. It may be availed of if acquired at any time before steps are taken on account of the default of payment, according to the terms of the instrument. Martin v. Mohr, 56 Ala. 221.

On the case as now presented, therefore, our conclusion is that the claims asserted on account of the conversion of the mules and crops are available to the complainants by way of set-off against the mortgage debt, unless they are barred by the statute of limitations. Of course, they are so barred, unless they come under the influence of section 2682 of the Code. That section provides that "when a defendant pleads a set-off to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant is nevertheless entitled to his set-off, where it was a legal, subsisting claim at the time the right of action accrued to the plaintiff on the claim in suit." The statutes of limitations do not, by their own terms, apply to suits in equity, but are made to so apply by section 3419 of the Code, and prior thereto were applied by analogy in courts of chancery; and, whether proceeding by analogy or in obedience to the present statute, such courts give effect to the limitations obtaining in courts of law, and to the exceptions and qualifications thereto pertaining. Crocker v. Clements' Adm'r. 23 Ala. 305; James v. James, 55 Ala. 532. Can the claims under consideration, as now presented, be brought within the exception above stated? They accrued to complainants' assignor, December 25, 1866. The right to foreclose the deed of trust accrued, by its terms, on March 16, 1867. These items, therefore, were legal and subsisting demands, within the meaning and language of the exception, when the right of action for breach of the condition of the deed of trust accrued. Riley v. Stallworth, 56 Ala. 481; Jeffries v. Castleman, 75 Ala. 262; Washington v. Timberlake, 74 Ala. 259; Patrick v. Petty, 83 Ala. 420, 3 South. Rep. 779.

It cannot be denied that had a bill been filed to foreclose the deed of trust, and sell the land to satisfy the debt secured by it, the complainants could have interposed in that suit the cross-demands they had against the beneficiary in the deed, notwithstanding the bar of the statute had been perfected against them as independent causes of action before the filing of the original bill. Shall this right be defeated, and the benefit of the exception to the statute of limitations be denied to the complainants, because, instead of proceeding

by bill, the election was made to foreclose by a sale under power, and the complainant forced to take the initiative in the courts? Do the mere facts that the instrument contains a power of sale, and that foreclosure is sought by the exercise of that power, cut off any substantive defense which the holder of the equity might otherwise have relied upon? Or, to put the same matter in another way, can the circumstance of a mere difference in the modes by which the mortgagor is put to his defense defeat and operate to deny that defense? We think not. It is very true that the case does not come precisely within the letter of the law, but it is also true that such a defense in equity can never come precisely within the letter of a statute applicable by its terms to actions at law. These demands, as now presented, fully illustrate the spirit and purpose of the exception quoted, and are in line with that principle of law applicable to cross-demands, which regards only the balance remaining after crediting the one with the other as the debt due. Washington v. Timberlake, 74 Ala. 264. Our opinion is that in courts of chancery section 2682 of the Code may be relied on to exempt a cross-demand from the operation of the statute of limitations in all cases of attempted foreclosure of a mortgage, whether by bill or sale under power, and either by way of cross-bill when a decree of foreclosure is sought, or on a bill for redemption, after an invalid sale under the power.

If the claim of \$500 for damages, because Smith defeated Moore's right of election to purchase certain mules, is to be regarded as a set-off, it would be governed by the principles held above to be applicable to the items for conversion of property by Smith. That claim, however, is one of recoupment, rather than set-off. It sprang out of the contract between parties, and is based on the right that one party has to reduce the claim preferred against him by the other under the contract by the amount of damages he has sustained from a breach of that contract by that other. Wat. Set-Off, 478 et seq.; Mayberry v. Leech, 58 Ala. 339; Washington v. Timberlake, 74 Ala. 259. Such a claim runs with the contract, so to speak, and may—at least when it goes to the consideration, as it generally does, in some sort, and as in the case here—be relied on without regard to the statute of limitations. So long as the contract, upon a breach of which the claim is predicated, subsists, and may be enforced, the claim itself may be pleaded in reduction, at least, of the demand on the contract; and this, notwithstanding the matter of recoupment, independently considered, may be barred, not only when it is pleaded, but also when the right of action, against which it is asserted, accrued. Wood, Lim. pp. 602, 603, § 282.

It results from these views that, in our opinion, the assignments of demurrer were not well taken, and each of them should have been overruled. Several other considerations—some affecting the validity of these claims as now presented, and others going to the equity of the bill—have been urged upon our attention in argument, but the effort has been to confine the in-

quity to the matters directly involved in the demurrers, and it is not intended to intimate any other opinion, not necessary to a determination of these matters.

Reversed and remanded.

ENGLEHARDT V. STATE.

(*Supreme Court of Alabama.* Jan. 15, 1890.)

ASSAULT AND BATTERY—PRIOR CONVICTION—DRUNKENNESS.

1. Where a person aims and discharges a pistol at another, and raises a stick within striking distance as if to strike him, and the latter, to prevent injury to himself, seizes the former, and they struggle together, the former is guilty of assault and battery.

2. Acts Ala. 1858-59, pp. 513, 526, (amended charter of the city of Montgomery,) provides that, "in all cases where a person is convicted or acquitted before the recorder * * * of an offense which is a misdemeanor under the laws of the state, such conviction or acquittal shall be a bar to a prosecution of such person for such offense before any state court." *Held*, that the provision was only prospective in its operation, and did not apply to a case where the conviction before the recorder had occurred prior to the amendment.

3. Voluntary drunkenness never legally justifies an assault and battery, as the condition of the mind is not an element of the offense, and drunkenness is admissible only to reduce the grade of a crime, where the question of intent, malice, or premeditation is involved.

4. A charge that if the jury believe defendant was "crazy drunk" at the time of the difficulty they should acquit him of assault with intent to murder is properly refused, where it fails to define "crazy drunk."

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

The defendant in this case, John Englehardt, was indicted for an assault on W. F. Vandiver with the intent to murder him, was convicted of an assault and battery, and fined \$300. The assault was committed about dark on the evening of September 11, 1888, on the sidewalk in front of the defendant's store, in the city of Montgomery, where Vandiver was standing with one J. Faunce. Vandiver testified that the defendant passed him a few moments before the assault, and came back, and said to him, "You haven't treated me right;" that he attempted to pass into his store, but was intercepted by the defendant, who "jumped back and drew his pistol;" that after deliberation, "thinking that there was no fight in him," witness commenced advancing on him, having in his hand an open pen-knife, with which he had been cleaning his finger nails; that the defendant fired at him, pointing his pistol towards him, but witness clinched him, and got control of the pistol; that the pistol was again discharged during the struggle between them, but he succeeded in getting the defendant down, and held him down, with the aid of Faunce. Faunce testified, on the part of the prosecution, that the defendant, when he approached Vandiver, had a small cane in his hand, which he raised when in striking distance, but Vandiver wrenched it from his hand; that the defendant then drew his pistol, which was self-cocking, and Vandiver caught his right hand, and turned the pistol aside as it was discharged, the ball striking the ground; and that the weapon

was again discharged during the struggle between them, or as the defendant was falling. The defendant, testifying in his own behalf, stated that he had been drinking heavily all day; was so drunk that he did not know what he was doing, and had no recollection of the difficulty; and he introduced several witnesses, who testified to his intoxicated condition and misbehavior at different hours during the day,—that he was "crazy drunk," as they expressed it. The defendant was arrested by a policeman, and was fined \$50 by the recorder for an assault and battery on Vandiver, and he pleaded this in bar of the prosecution; but the court sustained a demurrer to this plea. The court charged the jury that, "if they believe the evidence, the defendant was guilty of an assault, or an assault and battery." The defendant excepted to this charge, and requested the court to give the following charges in writing, and duly excepted to their refusal: (1) "If the jury believe from the evidence that the defendant was crazy drunk at the time of the difficulty with Vandiver, then they must acquit him of an assault with intent to murder." (2) "If the jury believe from the evidence that the defendant was drunk at the time of the difficulty with Vandiver, they may look to this as showing him to have been more easily excitable than a sober man would have been under like circumstances." (3) "The jury may use their own knowledge, as practical, sensible men, and their own experience of men and things, in considering whether Englehardt was drunk at the time of the difficulty with Vandiver; and if from such knowledge and experience, in connection with all the evidence in the case, they believe that he was too drunk to intend, willfully, deliberately, and premeditatedly, to maliciously kill said Vandiver, then it is their duty to acquit him."

A. A. Wiley, for appellant. Tennent Lomax, for the State.

SOMERVILLE, J. The court, in our opinion, committed no error in charging the jury that, if they believed the evidence, the defendant was guilty of assault, or assault and battery. There was undoubtedly an attempt or offer, on the defendant's part, with force and violence, to do a corporal hurt to the prosecutor,—an attempt manifested both by aiming and firing a loaded pistol in the direction of his person, and by raising a stick, within striking distance, as if to strike him, which was prevented by his wrenching the stick from the defendant's hand. This was clearly an assault, constituting, as it did, one or more acts, either of which if consummated would have resulted in a battery. *Chapman v. State*, 78 Ala. 463.

2. The evidence, moreover, shows a battery, which is "the unlawful application of violence to the person of another." *May*, *Crim. Law*, § 55; *Com. v. McKie*, 61 *Amer. Dec.* 410. "A battery is not necessarily a forcible striking with the hand or stick, or the like, but includes every touching or laying hold (however trifling) of another's person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner." 1 *Amer. & Eng. Cyclop. Law*, 783. There

is no conflict in that part of the evidence showing the circumstances attending the difficulty. To prevent being shot by the pistol the prosecutor, Vandiver, seized the defendant's right hand, which contained the weapon, forcing its discharge in the air. The use of the stick was interrupted in like manner by its seizure. The combatants "clinched" and "struggled together," the defendant either falling in the struggle, or being pushed backward to the ground, and firing his pistol a second time in the air. The prosecutor and a by-stander thereupon got on the defendant, and held him down. He may or may not have used more force than was necessary to resist the assault by the defendant. This is entirely immaterial, for had both of the combatants fought willingly together, and neither in self-defense, each would have been guilty of an assault and battery on the other. *Com. v. Collberg*, 119 Mass. 350; *Adams v. Waggoner*, 33 Ind. 531. The language described in the contest necessarily implies a contention or striving together for the mastery, one of the other,—a laying hold of each other's persons in a rude and hostile manner. This was a battery. It may have been justifiable on the part of the person assailed, and no doubt was. But there is no sort of pretext that the act was justifiable on the part of the defendant. There was no error in the charge on this subject to which exception was taken.

3. The demurrer to the defendant's plea of former conviction was properly sustained. This plea set up the fact of a former conviction before the recorder's court of the city of Montgomery for the same offense of assault and battery. It is based on a provision in the amended charter of the city approved February 23, 1889, (Acts 1888-89, pp. 513, 526,) which declares that, "in all cases where a person is convicted or acquitted before the recorder * * * of an offense which is a misdemeanor under the laws of the state, such conviction or acquittal shall be a bar to a prosecution of such person for such offense before any state court." The offense in question was committed in September of the year 1888, and the conviction before the recorder's court occurred in the same month and year. This was more than five months before the charter of the city was amended, so as to embrace the above-quoted provision on which the plea is based. That provision manifestly had no retrospective force, but was only prospective in its operation. The settled rule is that statutes should generally be construed to operate in the future only, unless the legislative intent appears clear from their terms that they are to have a retrospective operation. *Warten v. Matthews*, 80 Ala. 429; *Cooley*, *Const. Lim.* (5th Ed.) *370.

4. The voluntary drunkenness of the defendant, although he may have been so intoxicated at the time as to be unconscious of what he was doing, was no excuse for the crime of assault and battery of which he was convicted. The language of Baron PARKE, in *Rex v. Thomas*, 7 Car. & P. 817, (1837,) on this subject has been commonly approved, where he observed "that if a man makes himself voluntarily drunk, that it is no excuse for any crime he may

commit whilst he is so. He must take the consequence of his own voluntary act, or most crimes would otherwise be unpunished." There can be no doubt on this point, as said by Mr. Wharton, "either on principle, policy, or authority." 1 Whart. *Crim. Law*, § 49. The most that can be claimed in such cases, as we have repeatedly held, is that the fact of excessive drunkenness is sometimes admissible to reduce the grade of the crime where the question of intent, malice, or premeditation is involved. *Ford v. State*, 71 Ala. 385, and cases cited; *Gunter's Case*, 83 Ala. 96, 3 South. Rep. 600; *Carter v. State*, 87 Ala. 113, 6 South. Rep. 356; *Cleveland v. State*, 86 Ala. 1, 5 South. Rep. 426; *State v. Bullock*, 13 Ala. 413; 4 Amer. & Eng. *Cyclop. Law*, 707; *Flanigan v. People*, 86 N. Y. 554, 40 Amer. Rep. 556, and note, 560-570. It can, however, never legally excuse or justify an assault and battery, the condition of the criminal's mind not being an element of this particular offense. *Mooney v. State*, 33 Ala. 419.

The first charge requested by the defendant on this subject was misleading and ambiguous in meaning, because of the failure to define the meaning of the phrase "crazy drunk," and was properly refused. The third charge called for an acquittal of assault and battery, as well as of the assault with intent to murder, on the ground of drunkenness, and there was no error in the refusal to give it.

The other exceptions are not contended for, nor are they maintainable. The judgment must be affirmed.

RILEY v. BELL.

(Supreme Court of Alabama. Jan. 16, 1890.)

MARRIAGE—CONSENT OF PARENTS.

1. Code Ala. 1886, §§ 2315, 2318, provide that the judge of probate shall forfeit \$200 if he issues a license to marry to a woman under 18 years of age, who has never before been married, without first obtaining the consent of the minor's parents or guardian to such marriage. *Held*, that if the father was living his consent was necessary, and the consent of the mother was not sufficient, though the father was temporarily absent from the state.

2. The probate judge cannot excuse himself on the ground that he was misled as to the minor's age by her personal appearance, and by her representations that she was over 18 years old, unless "an affidavit was made before him by such minor, or by some other credible person, claiming to know the fact that such minor was of the age required by law," as required by section 2319.

Appeal from circuit court, Covington county, JOHN P. HUBBARD, Judge.

Action by Barney E. Bell against Malachi Riley, probate judge, to recover a penalty. Judgment for plaintiff, and defendant appeals.

W. D. Roberts, for appellant. W. L. Parks and J. D. Gardner, for appellee.

SOMERVILLE, J. While the complaint is omitted from the record, it is apparent from the judgment entry and bill of exceptions that the action is one against the defendant, who was probate judge of Covington county, for a penalty of \$200 for issuing a license for the marriage of a minor contrary to the provisions of the statute. Code 1886, § 2318.

1. The minor was a female under 18 years of age, and had never before been married. The statute, in such cases, provides that "the judge of probate must require the consent of the parents or guardians of such minors, to the marriage, to be given either personally or in writing." Code, § 2315. This obviously means the consent of the father, if he be living, and is not rendered incapable of giving it by defect of understanding or other good cause; or, if there be no father, then of the mother. The basis of the statute is the common-law principle that the father, and on his death the mother, is generally entitled to the custody of the children, and that, as parents, they are the natural protectors for maintenance and education. 2 Kent, Comm. *85, *86, *205. The father in this case was living, but was at the time temporarily absent from the state. It is shown that the mother gave her written consent to the minor daughter's marriage. This was insufficient to meet the requirements of the statute, and did not exempt the defendant from liability to the penalty in question. The circuit court so ruled.

2. The further defense is urged that the defendant was misled as to the age of such minor by her personal appearance, and by her representation that she was over 18 years of age. This defense is clearly insufficient, unless "an affidavit was made before him by such minor, or by some other credible person claiming to know the fact that such minor was of the age required by law." This is an express requirement of the statute, made a condition precedent to the court's entertaining such defense. Code 1886, § 2319. *Bell v. Wallace*, 81 Ala. 422, 1 South. Rep. 24. The circuit court did not err in giving the general affirmative charge for the plaintiff.

Judgment affirmed.

BURKS V. BRAGG.

(*Supreme Court of Alabama. Jan. 27, 1890.*)

LEASE—SECONDARY EVIDENCE—ACTION ON RENT—NOTE.

1. Secondary evidence, offered by defendant as to the contents of a written lease, will not be allowed where he testifies that the writing has been misplaced, and that he has made diligent search for it, and thinks it is lost or destroyed, but admits that it is probably among certain private papers carefully packed away for safe-keeping, which he has neglected to examine.

2. It was not error to require defendant to answer, on cross-examination, the question, "Will you swear that there is no possible chance to find the paper?"

3. Where the absence of a written lease is not satisfactorily accounted for by proof of its loss or destruction, it is proper, in an action on a note given for rent, which contains no such stipulation, to exclude evidence tending to prove a stipulation in the lease to make repairs, or evidence of any damages suffered in the destruction of goods by rains, in consequence of the failure to make such repairs.

4. Evidence as to why, at the time of executing the note, he made no claim for damages to his goods, caused by the failure of his landlord to make repairs, is also inadmissible.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Action by Elizabeth T. Bragg against W. P. Burks on a promissory note, which

was given by the defendant for the rent of a certain house which belonged to the plaintiff. On the trial the defendant pleaded the general issue, and pleaded in short, by consent, recoupment and set-off, and further that when the lease was made the plaintiff agreed to repair the store-house, by fixing the gutters, roof, etc.; but she had failed to do this, and by such failure the defendant had been injured to an extent greater than the amount due on the note here sued on. Upon the trial, as shown by the bill of exceptions, the plaintiff rested her case on the introduction in evidence of the note sued on. It was shown on the part of the defendant that the contract of lease was in writing, but the written instrument was not produced on the trial; and the defendant attempted to introduce secondary evidence of the contents of this written lease, but, on objection, the court refused to admit the evidence, and the defendant thereupon excepted. Upon the examination of the defendant as a witness, and preparatory to his offer to introduce the secondary evidence of the contents of the written instrument, the defendant was asked, against his objection, "if he would swear that there was no possible chance to find the same." The defendant reserved an exception to both the question and the answer, which the court allowed. It was further shown that the note here sued on was given by the defendant after he had vacated the store-house for the balance of the rent due upon said lease, and in this connection the defendant offered to explain why he did not then, at the time of signing the note to one Davidson; the agent of the plaintiff, make a complaint for the damages suffered by him on account of the want of repairs on the store, and also state the damages he claimed on this account; but, on objection to this testimony by the plaintiff, the court refused to allow him to so testify, and the defendant duly excepted. There was much evidence on the part of the defendant tending to show damage that the defendant had suffered on account of the defective roof and the gutters; but upon motion by the plaintiff the court excluded all of this evidence from the jury, and the defendant thereupon excepted. Upon the evidence as produced the court charged the jury in writing, upon the request of the plaintiff, that, "if the jury believe all the evidence in this case, they must find a verdict for the plaintiff for the amount of the note sued on, with the interest from the date of its maturity." The defendant excepted to the giving of this charge, and also excepted to the refusal by the court to give the following charge, which he requested in writing: "Even if the jury should believe from the evidence that the plaintiff did not agree to repair the premises during the use and occupation thereof by the defendant, yet, if the defendant refused to sign the rent-notes presented to him for his signature, upon the ground that the plaintiff had failed to stop the leaks, and to comply with her contract of renting, and that thereupon the plaintiff, through her agents, J. R. Adams & Co., undertook to repair, said premises from time to time, and to stop said leaks, then, upon this state of

facts, if believed by the jury, without more, the plaintiff was bound to make said repairs; and if she failed to perform her obligation in such manner as to stop the leaks, and to render the premises tenable as a grocery store, for which the same had been rented by defendant, and defendant was damaged by reason of her failure to carry out her obligation, then the jury may look to all these facts in determining whether or not the plaintiff is entitled to recover in this action." There was verdict and judgment for the plaintiff, and the defendant, prosecuting this appeal, now assigns the various rulings of the court as error.

Rice & Wiley, for appellant. *Marks & Massie*, for appellee.

SOMERVILLE, J. 1. The defendant testified that "to his best recollection" the contract of renting the store-house was reduced to writing at the time it was entered into between him and the agents of the plaintiff; and, while he asserted that the writing had been "misplaced," and that he had "made diligent search" for it without finding it, and "thought it was lost or destroyed," yet he showed the contrary to be true by the contradictory admission that "he was not prepared to say it was lost or destroyed," and that it was probably among certain private papers in his possession, which he had carefully packed away for safe-keeping, and which, he confessed, he had neglected to examine. The court clearly committed no error, under these circumstances, in refusing to allow secondary evidence as to the contents of the written lease.

2. This question as to secondary evidence was one exclusively for the determination of the court. There could have been no injury, therefore, in allowing the plaintiff's counsel to ask the witness "if he would swear that there was no possible chance to find the paper," or in requiring this question to be answered. The test implied by the interrogatory may have been a fallacious one, but it was propounded on cross-examination, and the decision of the court manifestly did not rest on the answer elicited by it, but on the other admitted facts, which were perfectly conclusive of the point decided.

3. No duty devolved upon the landlord to make any repairs on the premises, unless there was an agreement to make them. The tenant would take the store-house at his own risk, as to fitness for habitation or use, whatever its condition may have been at the time. *City of Lowell v. Spaulding*, 50 Amer. Dec. 775, note 776; *Fisher v. Lighthall*, 54 Amer. Rep. 258. The *onus*, then, was on the defendant, as tenant, to prove such alleged agreement to repair by legal and competent evidence. The note given for rent contained no such condition. The written lease presumptively did not. The only legal mode of showing the contrary was either by producing the lease itself, or proving its contents by secondary evidence. The writing was not produced. Its contents could not be proved by parol, because its absence was not satisfactorily accounted for by proof of its loss or destruction. It follows that the court prop-

erly excluded all the evidence tending to prove a stipulation in the lease that the plaintiff would make repairs, and necessarily there was no error in refusing to allow evidence of any damages suffered by the defendant in the destruction of his goods by rains, caused by a failure to make such repairs.

4. The "reason why" the defendant did not make a claim for such damages, when he executed the note sued on, in the above view of the case, was immaterial, to say nothing of the objection that it was but an attempt to elicit evidence of an uncommunicated motive for his silence, which was not admissible. *Ball v. Farley*, 81 Ala. 288, 1 South. Rep. 253; *McCormick v. Joseph*, 77 Ala. 236. The rulings of the court are free from error, and the judgment must be affirmed.

HAYNES v. SHORT et al.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

PARTNERSHIP — ACCOUNTING — EQUITY — JURISDICTION.

1. Where a bill by the representatives of a deceased partner shows that the partnership has not been fully settled, and that there has been no adjustment of the expenses of the concern, and that the surviving partner has the assets of the partnership, including the entire capital of the partnership which was paid in by the deceased partner, and refuses to pay the same to the personal representatives of the latter, it sufficiently shows that there is no adequate remedy at law, and a general demurrer for want of jurisdiction will be overruled.

2. A partnership was formed in 1870, and the articles of copartnership stipulated that it should continue for three years; but it was in fact continued until 1884 or 1885, when it was dissolved by mutual consent. *Held*, that a bill for its settlement would lie, filed within six years from the actual dissolution or credit, or other like partnership transaction on account between the partners, from which a promise on the part of the surviving partner to pay the balance found against him on final settlement may be implied.

3. On a motion to dismiss for want of equity, a bill praying that an account be taken "to determine the amount put in the firm of B. & H., or into the partnership business, by orators' intestate, B., and how much is still due him or his estate thereon," and further praying for a decree against said H. for the amount so found due, the bill will be considered as if already amended so as to allege the amount of the partnership debts, the amount of the profits and expenses, and the amount received by each, and to contain a prayer for the settlement of the whole partnership; and, so viewed, it contains equity, and the motion to dismiss is properly denied.

Appeal from chancery court, Clay county; S. K. McSPADEN, Judge.

Bill by J. N. Short and others, as the administrators of L. M. Burney, deceased, against W. D. Haynes, as stated in the prayer of the bill, to have an account taken "to determine the amount put in the firm of Burney & Haynes, or into the partnership business, by orators' intestate, L. M. Burney, and how much is still due him or his estate thereon," and further praying that a decree be rendered against the said W. D. Haynes for the amount so found to be due. The defendant moved the court to dismiss the bill for want of equity, and also demurred to the bill on the following grounds: "(1) Complainants have a complete, adequate remedy at law;

(2) the claim sued on is barred by the statute of limitations for six years. (3) The claim sued on is barred by the statute of limitations for three years. (4) The claim sued on is stale, more than sixteen years having elapsed since the accrual of the demand sued on." Upon the submission of the cause upon the motion to dismiss and these demurrers, the chancellor overruled both the motion and the demurrers. The defendant now prosecutes this appeal, and assigns this decree of the chancellor as error.

W. D. Bulger, for appellant. *W. M. Lackey* and *C. A. Steed*, for appellees.

McCLELLAN, J. A mercantile partnership was formed as of February 1, 1870, by and between the appellant, defendant below, and appellees' intestate, L. M. Burney, to continue three years from that date. It did, in fact, continue until 1884 or 1885, when it was dissolved by mutual consent. The articles of copartnership stipulated that Burney should furnish \$3,000, more or less, to be used in, and to constitute the capital of, the business, and upon which no interest was to be charged. Haynes was to contribute his services, and devote his time and energies to the conduct of the business, as against the money furnished by Burney. They were to share equally in the net profits. Burney did furnish \$3,500 in compliance with the articles, and the enterprise was carried on by Haynes until the dissolution before mentioned. The clear implication from the contract of copartnership is that Burney should be reimbursed on dissolution for the capital which he had put in the business, and that the use of the money in the joint venture should be considered an equivalent for the personal services of Haynes. Dissolution not having taken place at the end of three years, the stipulation of the articles to that effect will be regarded as entirely omitted, (*Boyd v. Mynatt*, 4 Ala. 79.) and the partnership be held to have continued, to the time of actual dissolution, in accordance with the terms of the original agreement, pretermittin its expressed limitation, (*Colly. Partn.*, 6th Ed., § 275, note, p. 422; 1 *Lindl. Partn.* 158, (*122.); *Miffin v. Smith*, 17 Serg. & R. 165; *Robbins v. Laswell*, 27 Ill. 365.) The partnership having thus continued until 1884 or 1885, a bill for its settlement is timely if filed within six years from the actual dissolution or credit, or other like partnership transaction or account between the partners from which a promise on the part of the defendant to pay the balance found against him on final settlement may be implied. *Bradford v. Spyker*, 32 Ala. 134; *Brewer v. Browne*, 68 Ala. 210; *Wells v. Brown*, 83 Ala. 161, 3 South. Rep. 439. It follows that the present bill is not open to the objections urged against it by the second, third, and fourth assignments of demurrer.

The first ground of demurrer was properly overruled. The bill, in our opinion, presents a cause of action which is only cognizable by a court of equity. It is true, that cause of action is very imperfectly presented, and the bill is lacking in many material allegations, as we shall presently see; but enough appears to demonstrate that the

complainants have no adequate remedy at law. It is averred that the partnership has not been fully settled; that no adjustment of the expenses of the concern has been made; that the defendant has the assets of the partnership, including its capital paid in by Burney, and refuses to pay the same to complainants. The purpose of the bill is to have the amount of said capital, with interest from dissolution, decreed to complainants out of the assets in defendant's hands. Unless there had been a settlement between the partners, and a balance struck, charging defendant with the sum now claimed, all of which the bill negatives, the complainants would have no right of action against defendant individually. On the contrary, their claim would be against the partnership assets, and a suit at law could not be maintained, because it would involve a proceeding by Burney, as represented by his administrators, against Burney, as represented by his surviving partner. *Robinson v. Bullock*, 58 Ala. 618; *Morrow v. Riley*, 15 Ala. 710. Moreover, the complainants are entitled to recover the sum paid in by their intestate, or any part thereof, only upon a contingency which depends entirely upon the state of the partnership accounts. The debts of the concern, and expenses of carrying it on, are first to be paid. The assets remaining would then be subject to a further reduction to the extent of any excess beyond one-half of the net profits received by Burney. Whatever of the assets then remained would be applied to the reimbursement to Burney for the money paid in by him, whether the amount remaining was equal to the whole capital, with interest, or only a part of it. And finally, should there still be a balance, it would belong in equal parts to complainants and the defendant, as net profits. It is therefore manifestly a prerequisite to complainant's recovery that an account and settlement of the partnership should be had; and to the taking of such an account the powers of a court of equity are alone adequate. *Calvert v. Marlow*, 6 Ala. 837; *Broda v. Greenwald*, 66 Ala. 538.

The bill, as we have said, is defective. It is partly both in averment and prayer. It fails to state sufficiently facts which would authorize relief, and it fails to pray for the only relief which can be granted when the purpose on the part of one partner is to bring the other to a settlement of the joint affairs. It fails to aver approximately the amount of the partnership debts, or that there are no debts. It should have averred the amount of the profits and expenses of the business, as nearly as practicable; to what extent there had been a division of the profits; what each had received; and what remained to be divided. The relief sought is entirely inappropriate. The prayer should have been for the settlement of the whole partnership, not for a settlement of one item that entered into the partnership account. *Russell v. Byron*, 2 Cal. 86; *Williamson v. Haycock*, 11 Iowa, 40; *Pope v. Salsman*, 35 Mo. 362; *Glover v. Hembree*, 82 Ala. 324.

There is no demurrer which goes to these several defects of the bill, or to any one of them. They may be cured by amendment,

and the bill perfected. On a motion to dismiss for a want of equity, the bill will be considered as if it had already been amended in all particulars in which amendments are proper. So viewed, this bill contains equity, and the motion to dismiss was properly denied. *Seals v. Robinson* 75 Ala. 363; *Hooper v. Railroad Co.*, 69 Ala. 529; *Cahan v. Monroe*, 56 Ala. 303; *Glover v. Hembree*, supra.

We discover no error in the rulings of the chancellor, and the decree is affirmed.

TRAYLOR *et al.* v. HUGHES.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

TROVER AND CONVERSION—TRIAL—VERDICT.

1. Plaintiffs shipped defendant 5,000 cigars upon an agreement that he "could take what he wanted at \$35 per thousand," and he elected to take 2,000, and packed away the remaining 3,000, which were appropriated by the public during the yellow fever epidemic, when the defendant was absent from the city. Held, that an action of trover would not lie against defendant.

2. Where the verdict returned by the jury in an action of trover is not responsive to the issues, and is unauthorized by law, it is not error for the court to refuse to receive it, and repeat to the jury its former instructions, that they may retire and make a finding according to law, although the counsel of plaintiff are absent from the court-room.

Appeal from city court of Decatur; W. H. SIMPSON, Judge.

This suit was brought by George M. Traylor & Co. against T. G. Hughes, and sought to recover for the alleged conversion of a certain lot of cigars.

West & Speake, for appellants. *S. M. Bains* and *W. E. Frances, Jr.*, for appellee.

SOMERVILLE, J. The evidence set out in the bill of exceptions affords no ground of inference that the defendant was guilty of a conversion of the plaintiffs' goods such as would render him liable in trover. The property alleged to have been converted was 5,000 cigars, which had been shipped by the plaintiffs to defendant some time in the year 1888. The evidence repels any idea of an absolute sale on the one hand, or an unconditional purchase on the other. The contract, however, obviously was that the plaintiffs would ship the goods to the defendant upon the agreement that he "could take what he wanted at \$35 per thousand." The receipt of the goods, therefore, made him a bailee, with the option to purchase all, or a portion, of them, as he might elect. The evidence shows that the defendant elected to take about 2,000 of the cigars, and that he packed away the remaining 3,000 in his store-house at Decatur. The lot thus stored was appropriated by the public during the yellow fever epidemic, when the defendant was absent from the city; his store-house, which he left locked, having been occupied by the yellow fever relief committee without his consent. As to the portion of the goods which defendant appropriated, he must be regarded as a purchaser at the price stipulated under the agreement with the plaintiffs. The taking was a mere exercise of his option to purchase, and must be referred to the consent of the plaintiffs. *Kinney v. Railroad Co.*, 82 Ala. 368, 8 South. Rep. 113. As to the remainder of the goods

taken by the public without the knowledge or consent of the defendant, there was clearly no conversion on his part. He was a mere bailee as to this part of the property, and, being without complicity in the act of intermeddling or appropriation by strangers, he was not responsible in trover. *Abraham v. Nunn*, 42 Ala. 51; *Thweat v. Stamps*, 67 Ala. 96. The judge of the city court did not err in giving the general affirmative charge in favor of the defendant.

The verdict first returned by the jury was not responsive to the issues to be tried, and was unauthorized by law. The court did not err in refusing to receive it, or in repeating to the jury its former instructions, in order that they might again retire and make a finding according to law; and this is true, although the counsel of the plaintiffs were, at the time, absent from the court-room. There was nothing in this conduct of the court out of the usual practice in *nisi prius* trials. The judgment is accordingly affirmed.

DAVIS *et al.* v. SMITH.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

VENDOR'S LIEN—TRANSFER—WAIVER—PARTIES.

1. Under Code Ala. 1888, § 1764, providing that "the transfer of a bond, bill, or note given for the purchase money of lands, whether the transfer be by delivery merely or in writing, expressed to be with or without recourse on the transferrer, passes to the transferee the lien of the vendor on the lands," the transfer of a purchase-money note, by delivery merely, does not pass the legal title, and the payees are still necessary parties to a bill to enforce the lien.

2. Where land is purchased by a husband, and his note executed for the unpaid purchase money, the vendor's lien on the land is not waived or lost by reason of the fact that the conveyance is made to his wife, or because the husband used some of her money in making the first payment.

3. In a bill to enforce a vendor's lien it is unnecessary to aver the ability and readiness of vendors to make title, where it cannot be inferred from the facts in the bill that the purchase money is not to become due and payable until a deed of conveyance is made.

Appeal from chancery court, Cherokee county; THOMAS COBBS, Chancellor.

Bill by J. I. Smith against Davis and others, to enforce a vendor's lien on land for the unpaid purchase money of the same, as witnessed by a promissory note, which the complainant held as transferee by delivery merely. In the original bill only, J. I. Davis was made a party defendant, but the bill was afterwards so amended as to make the children of Ann D. Davis, deceased, parties defendant also. The equity of the bill, as shown by the record, rests upon the following facts: In 1880, Mrs. Ann D. Davis, through her husband and agent, James I. Davis, bought of Morrison & Marable the land described in the bill, and paid most of the purchase money down in cash, the greater portion of such purchase money belonging to her statutory separate estate; and the vendors took the note of J. I. Davis for the balance of the purchase money, which note was made payable January 1, 1883. In the fall of 1882, they (Morrison & Marable) made a deed to Ann D. Davis, reciting a payment of the purchase money in full by her. Long after the ma-

turity of the note made by J. I. Davis for the balance of the purchase money, in the year 1885, Morrison & Marable transferred the said note to the complainant in the bill for valuable consideration, as alleged in the bill. In the mean time Ann D. Davis died, leaving several minor children. There was no administration on her estate, and no administrator was made a party to the suit. The defendants demurred to the bill, on the grounds that there was no equity in the bill; because said bill only avers as a conclusion of the pleader that the transfer of said note was for valuable consideration; because said bill is insufficient, in that it nowhere shows that said note was given for the purchase money of the lands on which a vendor's lien is sought to be enforced; because said bill does not show that deed has ever been made to respondent, nor does it aver complainant's readiness and ability to convey on payment of said note; and because, "the note having been assigned, the assignor is a necessary party complainant." Upon the submission of the cause upon these demurrers, the chancellor overruled all of them; and, upon the submission upon the pleadings and evidence, the chancellor decreed the complainant entitled to the relief prayed, and ordered a reference to the register to ascertain the amount due on said note. The defendants in the court below appeal, and assign these decrees of the chancellor as error.

Burnett & Smyer, for appellants.

SOMERVILLE, J. The bill is to enforce a vendor's lien on land for the unpaid purchase money, and is filed by a transferee of the note, who holds it by delivery only, and not by written assignment.

1. Prior to the act of February 13, 1879, (Acts 1878-79, p. 171,) which is now codified in section 1764 of the present Code, (1886,) such a transfer did not carry with it the vendor's lien, nor authorize its enforcement in the name of the holder. It required a written transfer or assignment to carry such lien, and one in such form as not to exclude the liability of the vendee for its ultimate payment. And indorsement "without recourse" on the transferrer was a waiver of the lien, and conferred no right to it. *Prickett v. Sibert*, 71 Ala. 194; *Bankhead v. Owen*, 60 Ala. 457; 3 Brick. Dig. p. 615, § 90, and cases cited.

To correct this supposed defect in the law, the act above cited was passed, and now appears in the Code in the following language: "The transfer of a bond, bill, or note, given for the purchase money of lands, whether the transfer be by delivery merely, or in writing, expressed to be with or without recourse on the transferrer, passes to the transferee the lien of the vendor on the lands." Code 1886, § 1764.

It is perfectly obvious that the effect of the statute is to pass only the vendor's lien, and nothing more, to the transferee, in the cases provided by its terms. It does not in any manner purport to effect the title of the bond, bill, or note, of which the vendor's lien is a mere incident. A verbal transfer of such an instrument, or one by delivery merely, passes to the transferee only the equitable, and not the legal, title.

The rule, therefore, requiring the transferer by delivery only of a note, given for the purchase money of land, to be made a party to a bill seeking to enforce the vendor's lien, is not changed by the new statute. The legal title being in him, he is a necessary party to the suit, in order that he may be bound by the decree, and further litigation be prevented. *Broughton v. Mitchell*, 64 Ala. 210; *Owen v. Bankhead*, 76 Ala. 143. With his consent, he may be joined as complainant with the transferee, or, at the election of the latter, be made a party defendant. 3 Brick. Dig. p. 369, §§ 20-22. The payees of the purchase-money note, Morrison & Marable, as holders of the legal title, were necessary parties to this suit. For the failure to bring them before the court the decree must be reversed.

2. The purchase of the land being made by Davis, the husband, and his note being executed for the unpaid portion of the purchase money, the vendor's lien on the land was not waived or lost by reason of the fact that the conveyance of the land was made to the wife, or because the husband used some of her money in making the first payment. Whether Davis, moreover, acted in his own behalf, or as agent of his wife, the taking of his note by the vendor, instead of the note of one not *sui juris*, would not, according to the more just and reasonable view, be interpreted into an intention to rely exclusively upon the personal credit of the husband, as maker of the note, to the exclusion of the vendor's lien. *Crampton v. Prince*, 83 Ala. 246, 3 South. Rep. 519; *Pylant v. Reeves*, 53 Ala. 132; *Carver v. Eads*, 65 Ala. 190; *Jackson v. Stanley*, 87 Ala. 270, 6 South. Rep. 193.

3. Under the facts stated in the bill, it was not necessary for the complainant to aver the ability and readiness of the vendors to make title to the land, there being nothing from which it could be inferred, even if the contract were executory, that the purchase money was not to become due and payable until a deed of conveyance was made. Such an averment is necessary to give equity to a bill seeking to enforce a vendor's lien only, where the payment of the purchase money is to be contemporaneous with, or subsequent to, a conveyance. *Munford v. Pearce*, 70 Ala. 452; *Burkett v. Munford*, Id. 423; *Linn v. McLean*, 80 Ala. 380. The other contentions of the appellant, in our judgment, are not well taken. We find no reversible error in the record, except the one above pointed out as to the question of parties.

Reversed and remanded.

SOLOMON V. WILLIS, Tax Collector.

(Supreme Court of Alabama. Jan. 27, 1890.)

TAXATION—COLLECTION BY SALE OF PROPERTY.

Under Code Ala. 1886, § 542, providing that "no property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes," and Id. § 540, authorizing the collector "to levy upon any personal property of delinquent tax-payers for the payment of their taxes," the tax collector may levy on and sell a mule purchased by the delinquent tax-payer after the tax was assessed against him.

Appeal from circuit court, Barbour county; J. M. CARMICHAEL, Judge.

This was an action of detinue brought by the appellant, S. H. Solomon, against the appellee, J. J. S. Willis, the tax collector.

L. H. Lee, for appellant. Geo. W. Peach, for appellee.

SOMERVILLE, J. The plaintiff's mule was levied on and sold by the tax collector of Barbour county for taxes due by him to the state and county, which taxes had been regularly levied and assessed in the mode required by law, and had become delinquent. The present action of detinue was brought against the collector immediately after the levy made by him, and before the sale.

The contention is that, the mule having been acquired after the taxes were assessed, and not being owned by the plaintiff at that time, the taxes were not a lien on the animal, and therefore the property could not be lawfully sold to satisfy them. The case involves no question of lien, or priority of lien, under the provisions of section 459 of the Code, as seems to be supposed by appellant's counsel. Nor does it involve any inquiry as to what property is exempt from liability to taxation. Const. 1875, art. 4, § 52; Code 1886, § 451. It is sufficient for the purposes of this case to say that, under the express provisions of our statutes governing the subject of taxation, "no property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes, and the fees and charges lawfully incurred in assessing and collecting the same," (Id. § 542;) and the collector is authorized "to levy upon any personal property of delinquent tax-payers for the payment of their taxes," (Id. § 540.) This obviously embraces any personal property whatever, whether exempted from taxation or not, or whether listed for taxation by the owner, or not listed. The law is framed *ex industria*, so as to allow nothing to escape from subjection to the payment of the public revenue, without which there can be no regular organized government.

There was no error in giving the general affirmative charge in favor of the defendant, and the judgment is affirmed.

JAMES et al. v. CLARK.

(Supreme Court of Alabama. Jan. 27, 1890.)

ADMINISTRATORS—HOMESTEAD FOR WIDOW.

Code Ala. 1886, § 2562, authorizing the probate court to set apart to a widow a homestead exempt from administration, applies only to cases where the real estate of the decedent does not exceed 160 acres.

Appeal from circuit court, Barbour county; J. M. CARMICHAEL, Judge.

This action was brought by Elizabeth Clark against John and Elizabeth James to recover the possession of certain lands specifically described in the complaint. The defendants based their claim to the land upon an alleged gift which was made to them by the husband of the plaintiff, now deceased, but about three or four

years before his death; the defendant Elizabeth James being his daughter.

G. L. Comer, for appellants. A. H. Merrill, for appellee.

SOMERVILLE, J. The action is in ejectment for the recovery of land. The plaintiff attempted to establish her title by introducing certain proceedings of the probate court of Barbour county purporting to set apart, by way of exemption to her, 160 acres of land as a homestead, under the provisions of sections 2562-2564, or the statute amendatory thereof, (Acts 1886-87, p. 112.) This tract embraced the land in controversy. The petition filed by the plaintiff in that proceeding shows that she was the surviving widow of one John Clark, a resident of this state, who died seised and possessed of a tract of land, embracing as much as 240 acres, which he occupied as a homestead, and not exceeding in value the sum of \$1,000. Other jurisdictional allegations are made in the petition which we need not mention, except to add that one of them was that there was no administration on the estate, and the decedent left no minor child or children. Upon the strength of this petition, the probate court proceeded to appoint three commissioners to make and return to the court a complete inventory and appraisement of the real and personal property of the decedent, pursuant to the requirements of the statute, (Code 1886, § 2562;) and on the return of the commissioners' report the order was made setting apart to the widow 160 acres, out of the 240 tract, as a homestead exempt from administration.

A single point is fatal to the plaintiff's recovery. The petition shows on its face that the probate court had no jurisdiction to make the order. It is only where the real property owned by the decedent at the time of his death does not exceed in amount 160 acres, in connection with the other conditions recited in the statute, that an order of this kind is authorized under the provisions of section 2562, and the other sections following in the same chapter of the Code. The reason on which the statute is founded is that in such cases there is no need for selection, such as is necessary under the conditions mentioned in section 2551, and no need of the expense of an administration. Nor is there, *prima facie* at least, any occasion for a contest on the part of creditors, heirs, devisees, or others interested in the estate subject to administration. This is perfectly plain from the context of the statute, and needs no elaboration beyond the mere statement of the proposition. Code 1886, §§ 2550-2565. The petition to the probate court conferring on that tribunal no jurisdiction of the subject-matter, it follows that the entire proceedings under it were void, and conferred no title on the plaintiff. The facts in evidence are not sufficiently definite to justify us in holding that the widow had the right to recover the land by reason of any supposed right of quarantine. Code 1886, § 1900, and cases cited. Nor does it seem that the case was tried or considered in the court below on any such idea. The court erred in admitting in evidence the probate court proceedings, and in the re-

fusal to give the general affirmative charge for the defendant. It would be futile to consider the other rulings. Reversed and remanded.

BARBOUR V. VAN CAMP.

(Supreme Court of Florida. Jan. 22, 1890.)

MECHANICS' LIENS—NOTICE—REPEAL OF STATUTE.

1. The third section of the mechanic's lien law (Act March 7, 1877, c. 3042) of Florida, which requires every contractor, journeyman, or laborer, employed in the construction or repair of any building, etc., who intends to hold the owner liable for his labor on such building, to give notice to the owner in writing, setting forth the amount of his claim and the service rendered, for which the employer is indebted to him, and that he holds the owner responsible for the same, was repealed by the act of February 16, 1885, (chapter 3611, Laws Fla. 1885.)

2. Whether circumstances might not require such notice not decided.

(*Syllabus by the Court.*)

Appeal from circuit court, Orange county; JOHN D. BROOME, Judge.

E. R. Gunby, for appellant. J. H. Allen, for appellee.

MITCHELL, J. The appellee, plaintiff in the court below, instituted his suit in the circuit court against Barbour for the enforcement of a mechanic's lien, under the act of February 16, 1885, (chapter 3611, Laws Fla.)

The defendant pleaded—*First*. "Never indebted." *Second*. "That the defendant entered into a contract with one W. M. J. Paige for the erection and building of the house on which the plaintiff claims a lien, and that before the completion of said house the said Paige abandoned the contract, and left the house incomplete and unfinished; that the defendant had paid to the said Paige all that was due him for said work, as far as it had been done, and that [he] subsequently paid to complete said house according to said contract, and before the date of the filing of the lien in this cause set out, a sum of money in excess of the sum contracted to be paid to the said Paige; and that at the time of the filing of said lien the defendant was not indebted to his said contractor, Paige, but had paid him in full." *Third*. "The defendant says that the plaintiff became a partner of W. M. J. Paige, and performed all work on the defendant's house, as such partner, under the firm name of Paige & Van Camp, [and] the defendant has fully paid and discharged."

The second plea was demurred to, in "that subcontractors, material-men, and employes have an absolute lien."

This demurrer was sustained, the court holding "that no notice is required to the owner other than that required by the statute of Florida, c. 3611, Laws 1885."

The declaration was then demurred to, and the demurrer was overruled.

The cause was tried by a jury on the 10th day of August, 1887, and the jury found for the plaintiff in the sum of \$140.50.

There was no error in sustaining the demurrer to the second plea upon the ground given therefor by the court.

The first section of the act of February 16, 1885, provides "that mechanics, and all other persons performing labor upon, or furnishing materials for, the construction or repair of any building, * * * shall have a lien, separately and jointly, upon the building. * * *" And the third section of the act provides "that when proceedings are brought to enforce a lien given by this act by subcontractors, mechanics, laborers, and others, against the owner of such building or articles before enumerated, the court shall require a notice to be given to the contractor or others interested to defend the same." There being no question raised as to whether or not the notice required by this section was given to the contractor, it is not necessary to consider it.

But it is insisted for appellant that the act of 1885 did not repeal the act of March 7, 1877, (McClell. Dig. 721,) which requires "any such contractor, journeyman, or laborer, employed in the construction or repair * * * for any building, * * * may give notice to the owner thereof, in writing, setting forth the amount of his claim and the service rendered, for which his employer is indebted to him, and that he holds the owner responsible for the same, and the owner shall then be liable for such claim to the extent of the amount due from him to the employer at the time of notice, which may be recovered in action." Section 3. But in this they are not correct.

Section 16, art. 3, Const. 1885, provides that "each law enacted in the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly stated in the title; and no law shall be amended or revised by reference to its title only, but in such case the act as revised, or section as amended, shall be re-enacted and published at length."

The act of February 16, 1885, expressly repeals all laws, or parts of laws, inconsistent with the same, including, of course, the third section of the said act of March 7, 1877, for said third section was not re-enacted and published at length, as required by section 16, art. 3, Const.

But we do not wish it understood, however, that we intend to decide that circumstances might not arise which would preclude the plaintiff from recovering in a case like that set up in the second plea. The evidence in the case at bar is not before us, and for that reason we can express no opinion as to whether such circumstances existed in this case as should preclude a recovery by the plaintiff or not.

There is this entry in the record, which, we presume, was made by the clerk: "The following is a copy of the evidence as taken, to-wit." But, if made by the clerk, it is a mere recital, and therefore amounts to nothing, as there is no part of the evidence incorporated in the bill of exceptions.

There was no error in overruling the demurrer to the declaration, nor was there any other error in the cause for which the judgment of the circuit court should be reversed.

The judgment is affirmed.

DEANS *et al.* v. WILCOXON *et al.*

(Supreme Court of Florida. Dec. 21, 1899.)

ADMINISTRATORS—SALES BY ORDER OF COURT—
LIMITATIONS—SETTLEMENTS—ACTIONS—PLEADING.

1. The jurisdiction of the county court, under the constitution of 1868, as amended in 1875, in the matter of the estates of deceased persons, was not exclusive of, or a limitation upon, the original equity jurisdiction of the circuit court in such matters. In the absence of special equities which the county court could not administer, the jurisdiction of the two courts was concurrent, but where such equities exist the jurisdiction of the circuit court was exclusive of that of the county court. The same is true of these courts under the present constitution.

2. Where a bill, filed by the heirs of an intestate, assailing an order of sale of real estate made by the probate judge as void for want of jurisdiction, alleges that one of the lots conveyed by an administrator as having been sold pursuant to such order was in fact not sold, or offered for sale, and this allegation is admitted by demurrer, it is improper to consider the validity of the order of sale in connection with such lot.

3. Where a lot formerly held through mesne conveyances, under a title from an administrator, has been surrendered to an administrator *de bonis non*, who holds it as assets of the intestate, the effect of possession under claim of title by the party who surrendered it cannot be considered upon pleadings showing merely these facts.

4. The act of March 11, 1879, "to quiet titles to real estate," (sections 21, 22, p. 219, McClel. Dig.) does not apply to land of which there was in fact no sale made under an order of the probate court.

5. An allegation of the solvency of an estate is not essential to the jurisdiction of the county court to make an order for the sale of real estate of an intestate under the act of February 16, 1870, (McClel. Dig. p. 86, § 40.)

6. Where the petition for a sale of real estate under the act of February 16, 1870, (McClel. Dig. p. 86, § 40.) states that there is "no personal property of the intestate not administered upon," and the order of the county court for a sale adjudicates that the personal estate has been exhausted, the jurisdiction of the court to act is shown by the record, in so far as the exhaustion or insufficiency of the personal property is concerned.

7. The sufficiency of the evidence of the validity of a claim for the payment of which a probate or county court has made an order of sale of real estate of a decedent is not a jurisdictional fact, and it is to be conclusively presumed that the court considered, and was satisfied of, the validity of the claim when it made the order.

8. A bill filed by heirs to arrest the execution of an order of a county court for the sale of lands of an intestate to pay debts, upon the ground that the claim for whose payment the sale has been ordered is not a valid indebtedness of the estate, must state facts in relation to the claim which if true will overthrow the *prima facie* presumption of its validity created by the order. If the claim never had any existence, but is the creature of fraud, or otherwise never of any validity, the fraud or invalidity, whatever it may be, should be explicitly charged, or if originally valid, and a satisfaction of it by payment or otherwise is relied on, such new matter should be specifically averred. Allegations that the claim was not a debt of the estate, or not such a debt or demand as could be made the lawful predicate of an order, or not a subsisting claim or demand against the estate, or that there was no valid subsisting debt or demand against the estate for which assets in the hands of the administrator could or ought in law or equity to be liable, or that the administrator was not liable or compellable in law or equity to pay the alleged claim, are but conclusions of law, the contrary of which the order of sale affirms, and are demurrable.

9. The saving clause in the act of limitations of November 10, 1838, in favor of persons "beyond the seas or out of the country," was modified by

the provisions of the act of 1846, (section 2, p. 443, Thomp. Dig.) to the effect that it should not extend to persons who were not at the making of the contract, or accruing of the cause of action, domiciled or resident within the limits of this state, which modifying act remained in force until the suspension of the several statutes of limitation on January 10, 1861.

10. An administratrix filed a petition in June, 1856, before the probate judge, for the sale of land to pay a claim against her intestate, who died in March, 1856, described as an account of December 20, 1838, for \$28,620, filed and proved as due the estate of E. B., deceased; and an order of sale was made in the following September. A statute then in force provided that, in suits brought against an executor or administrator for the recovery of a debt due upon open account, the court should cause to be expunged from such account every item appearing to have been due five years before the death of the testator or intestate; the act having a saving clause in favor of certain plaintiffs. On a bill filed in 1882, by heirs, assailing the validity of the claim, the above statute is invoked in support of a presumption of law that the claim had been satisfied prior to the proceedings of 1856. Held, that if the statute applied to probate court proceedings it must be presumed, in the absence of any affirmative showing to the contrary, that the judge of probate made due inquiry in 1856, and found that the claim was of a character that the statutory bar did not apply to, or had been taken out of the bar by a subsequent promise of the decedent, within five years before his death, or that the parties owning it were within some saving clause of the statute.

11. Section 18 of the act of November 10, 1838, (McClel. Dig. p. 97, § 72,) to the effect that no action of debt shall be brought against an executor or administrator upon a judgment obtained against a testator or intestate, nor any *scire facias* issued to revive such judgment after five years from the qualification of the executor or administrator, and all such judgments, after the expiration of five years, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged, does not, if in force, nor did it when in force, apply to other claims than judgment against a testator or intestate. The presentation of a claim, not in judgment, to an administrator or executor in due time, stopped the running of the statute of limitations, and such is still its effect.

12. F. died in March, 1856, and in June his administratrix filed a petition in the probate court for the sale of lands of his estate to pay an account of December 20, 1838, for \$28,620, filed and proved as due the estate of E. B., and in September the judge of probate made an order of sale, and in October a sale of one lot was made to A. E. B. and J. B., the owners of the E. B. estate claim, and J. B. died the latter part of May, 1857, leaving half of his estate to the administratrix, his mother, and the other to his wife, and the administratrix died in 1860, without having completed the sale, or made a settlement of her administration, and leaving A. E. B. her sole heir and personal representative; and thereupon S. was appointed administrator *de bonis non*, and in 1870 he, as such administrator, made a deed in execution of the sale made by his predecessor, bearing date January 5th, conveying the lot sold, to A. E. B. and J. B., and also including another lot as having been sold, but which the bill alleges was neither sold nor offered for sale, and A. E. B. and the wife of J. B. executed a deed with warranty of title conveying the lots to S., it bearing date March 21, 1870. On February 7, 1870, S. conveyed to a trust company, with warranty of title, the lot No. 8, alleged not to have been sold by the administratrix. S. died in 1871, without having settled F.'s estate. In 1881 the trust company, who had been sued in ejectment by the heirs of F. for lot No. 8, and had obtained an assignment of the claim mentioned above, procured D. to obtain letters of administration *de bonis non* on the estate of F., and surrendered lot 8 to him as assets of the estate, and D. applied to the county court granting such letters for an order of sale of the lot to pay the above

claim, less \$6,555 which had been received by A. E. B. and J. B. from the estate of F. thereon, and on May 8th an order of sale was made, and in June the property was offered for sale, and knocked off to "A. E. B. and the heirs and representatives of J. B." In 1882 the heirs of F. filed a bill for the settlement of the estate, and claiming that the indebtedness for the payment of which the sale was ordered in 1881 was stale, and presumed to be paid, and barred from the lapse of time. *Held*, on demurrer, that upon the face of the bill the claim did not appear to be so.

13. A county court to which application is made by an administratrix for an order to sell real estate to pay a claim held by the sureties on her official bond may, if it appear from her accounts that she is indebted to the estate, refuse to make the order, if such sale will injure other creditors, or where, if the estate is solvent, it will injure the heirs.

14. The fact that an administratrix is joint owner of an indebtedness of the estate with a surety on her administration bond does not of itself extinguish the claim to the extent of her interest, nor will such be the result of her being the sole owner.

15. The owner of a claim against an estate, holding unadministered property of it, may properly procure the appointment of an administrator *de bonis non* to take possession of the property, and surrender the property to him.

16. An allegation that a person holding a claim against an estate procured another to sue out letters of administration *de bonis non*, and to make application for an order to sell real estate to pay the debt, does not impute illegal conduct to either of the parties; but if the administrator, when applying for the order, was the attorney of the creditor for the enforcement of the claim, or to procure its payment out of the land ordered to be sold, or to obtain title to the lot through the sale, the duties of the relation of attorney, and those of administrator, were at least incompatible; and, if such relation to the creditor is neither expressly nor impliedly assented to by the heirs of the intestate, they will not be bound by his action in the matter of the sale; but when the bill filed by the heirs assailing the indebtedness expressly states that they are willing that the sale made under the order, by a commissioner appointed therein, shall stand, provided the owner of the claim, or the parties in whose name the property was bid off, and who have been reported to the county court as the purchasers, pay into the court in which the bill is filed the amount so bid, and offers to ratify the sale upon such payment being made, and prays that the amount be so paid to be disposed of by the court, or that, failing therein, the sale be set aside, the proper conclusion to be drawn is, the bill not having shown the claim to be invalid, that the heirs have not been injured by the relation sustained by the administrator to the owner of the claim, and that they have not suffered from the sale made by the commissioner, and are satisfied with the price at which the land sold.

17. A sale of real estate to pay debts will not be declared void or set aside on the ground of the invalidity of the claim for the payment of which the sale was ordered, and yet held, against the will of the purchaser, the owner of the claim, to be a valid sale for the purposes of a division of the estate among heirs.

18. It will not be assumed that a party making a bid at a sale of land of an intestate, in the names of others, was not authorized to do so; and if the party making a bid in the names of others comply with it, and take title in their names, it is of no concern to the heirs of the intestate whether the person actually bidding was authorized to use the names in which the bid was made.

19. Allegations made in a bill attacking a sale of real estate of a decedent made by a commissioner, under an order of the county court, to the effect that those making the bid, or interested in it, do not intend to make any payment thereon other than a credit on the claim for the payment of which the sale was ordered, are not sufficient, where the sale ordered is for cash, to authorize the interference of a court of equity. The statute regulates

the sale, and, among other provisions, directs that the county court shall on confirming the sale direct a deed of conveyance to be executed to the purchaser by the commissioner, and its delivery to the purchaser, upon his compliance with the terms of sale. It is not to be assumed that either the county court or commissioner will violate the duties imposed by the statute.

20. The power and duty of an administrator *de bonis non* is at the common law to administer upon whatever of the estate of the decedent remains *in specie*, and has not been administered upon by his predecessor in the administration.

21. The right of action given by the act of February 16, 1870, (page 89 et seq. McClal. Dig.) to administrators *de bonis non* against delinquent executors, and administrators who may have been removed by the probate or county court for cause, does not extend to *devastavit* of deceased executors or administrators who were not so removed.

22. If an original executor has fraudulently aliened an asset for his own use, in collusion with his vendee, such asset will be regarded in equity as unadministered, and will pass as such to the administrator *de bonis non*. Where fraud and collusion are relied upon to give a right of action, they must be clearly shown by the pleadings; and unless a bill plainly shows that a case is within the above rule, giving an administrator *de bonis non* a right of action against his predecessor, the right will be held not to exist.

23. Under the legislation prior to the act of February 16, 1870, governing sales of real estate by administrators for the payment of debts, an administrator *de bonis non* might consummate an incomplete sale made by his predecessor.

24. The heirs of a deceased administrator *de bonis non*, who conveyed land under a sale made pursuant to an order of the probate court by his predecessor in the administration, and received a deed back from his grantees, are essential parties defendant to a bill brought by the heirs of the intestate to set aside the sale, and have the land declared assets of the intestate. It is not sufficient to make the administrators of the deceased administrator *de bonis non* parties.

25. If a distributee entitled to the personalty of an intestate die, the administrator, or the executor, if there be one, of such distributee, is the proper person to sue for such personalty.

26. A bill filed by an heir for the settlement of an estate should show that there is a surplus of the estate over what is necessary for the payments of the debts, and charges of *devastavit* should be definite and clear.

27. A bill filed by heirs to settle an estate, and making an administrator *de bonis non*, and the administrators of a previous administrator *de bonis non*, and the owner of the only indebtedness existing against the estate, which indebtedness is assailed as invalid, parties, is not multifarious.

(Syllabus by the Court.)

Appeal from circuit court, Duval county.

The original bill appearing in the transcript was filed May 2, 1882, the said Deans, as the administrator *de bonis non* of the estate of Jacob Foreman, and Jonathan C. Greeley and C. F. Warriner, sureties on his official bond as administrator, and said Greeley and B. Thebaut, as sureties on the bond securing the faithful application of the proceeds of the land of said estate sold by said administrator, and "Augustus E. Bass, and the heirs and personal representatives of Job Bass, deceased," being named as defendants. No service of the subpoena was made, but Deans, Greeley, and Thebaut appeared, and filed a demurrer.

No further action was taken until the 6th day of November, 1882, when an amendment to the bill was filed. Among other changes made by this amendment, the names of Warriner, A. E. Bass, and the

"heirs," etc., "of Job Bass," as defendants, were dropped, Greeley and Thebaut being retained as defendants, as "sureties on" Deans' "official bonds as such administrator," and John J. Knox, a resident of the District of Columbia, as commissioner of the Freedman's Savings & Trust Company, and said company, a corporation created by the laws of the United States, and residing in the said District, being named as additional defendants.

On the 4th day of December of the same year, Deans filed a *præcipe* in the office of the clerk of the circuit court of Duval county, requesting the clerk to enter his "special appearance in the above cause for John J. Knox, commissioner of Freedman's Savings & Trust Company, and for the Freedman's Savings & Trust Company, named as defendants therein;" the same being signed "Geo. WHEATON DEANS, Solr."

On the same day Deans, Greeley, and Thebaut demurred to the bill as amended, and no further proceedings were had until the 20th day of September, 1888, when an "amended bill" was filed. With this bill alone we have to deal.

The complainants in this bill are James Wilcoxon, Redessa Minerva Wilcoxon, John W. Rusk, and Emma E. Rusk, and Ella Wilcoxon, of Uhricksville, Ohio; Jacob Mason Wilcoxon and James Franklin Wilcoxon, of San Luis Obispo, Cal.; Samuel B. Albright, Felix Albright, and Samuel Albright, of Killbuck, Holmes county, Ohio; Lydia Steelsmith and John Steelsmith, of Boone, Boone county, Iowa.

The defendants are Deans, as administrator *de bonis non* aforesaid, Greeley and Thebaut, "sureties on his official bond as such," Theodore Hartridge and Edward M. L'Engle, as administrators of the estate of John P. Sanderson, deceased, John J. Knox, as commissioner aforesaid, and the said Freedman's Savings & Trust Company.

It alleges: (1) That Jacob Foreman died intestate in Duval county, in this state, in March, 1856, leaving real and personal property therein; that his last will and testament was duly admitted to probate by the probate court of the county, and letters testamentary thereon granted to A. M. Reid as executor. Reid qualified and entered upon his duties as executor, but shortly afterwards it was made known that Laura Ann Foreman, the only child and heir at law of the testator, and sole legatee and devisee under said will, had died at the age of four years, in 1842, many years prior to the making of the will. That thereupon one Elizabeth Foreman, then, and continuously to the day of her death, a resident of Tensas parish, La., and claiming to be the widow of said Jacob, applied to said probate court to revoke the said letters testamentary on the ground that the will had lapsed and become of no effect, because of the death of said Laura Ann, and the court revoked the same. On the 16th day of June, 1856, letters of administration on said estate were granted to said Elizabeth,—one Job Bass and one A. E. Bass, sons of Elizabeth by a former marriage, and over 24 years of age, and residents of said Tensas parish, becoming the sureties on her administration bond in

the penal sum of \$20,000; the said Elizabeth settling in full with Reid, and taking possession of the assets, real and personal, of the estate. The evidence upon which the probate court acted, including that as to the claim of Elizabeth to being such widow, is stated to be voluminous, and liberty of reference to it is prayed, but it is not before us.

(2) That on June 8, 1856, the said administratrix, by her attorney in fact, J. P. Sanderson, filed a petition in said probate court praying an order for the sale of slaves, lands, and tenements belonging to the estate, and alleging that "the personal property of said intestate is insufficient to pay the just and lawful debts and demands against said estate, a schedule of said debts and demands, and of said personal property, being annexed to the petition as a part thereof."

"A.

"Schedule of debts and demands against estate Jacob Foreman:

Dower of widow, estimated.....	\$12,012 78
1838, Decr. 20th. Account filed and proved due estate of Elijah Bass, deceased.....	28,030 00
Amount due A. M. Reid.....	950 00
Estimated expenses, administration, probate fees, commissions, &c.....	2,000 00
	\$48,582 78

"Schedule personal property of estate of J. Foreman, in hands of administratrix:

Cash in hands of deceased at his death..	\$ 2,391 61
Cash from sales perishable property....	601 17
Notes and Florida stocks and securities	18,732 78
	\$16,725 56

"Mem. Cash in stocks in hands cashier Bk. America, in New York, not in hands of administratrix:

Georgia and Kentucky bonds.....	\$ 9,000 00
Cash in hands of cashier Bank of America, New York.....	6,820 00
	\$15,820 00

—in which widow has half for dower."

"B.

"Schedule land and tenements and slaves of the estate of Jacob Foreman, deceased:

4 slaves valued at.....	\$ 8,800 00
2 lots and improvements in Jacksonville	8,500 00
	\$7,300 00

That the said Elijah Bass mentioned in said Schedule A was the father of said Job and A. E. Bass.

That the claim of dower was wholly unfounded, and, as complainants are informed and believe, in no event a factor entering into the determination of the question whether or not the court should grant the order of sale of lands to pay the debts of the estate.

That the court had no jurisdiction to order a sale, as the petition did not allege the exhaustion of the personal assets, but, on the contrary, it showed that the personal property had not been exhausted.

That the claims or demands for the payment of which the sale was prayed were not debts or demands against said estate, and were not such claims or demands as, upon a petition setting up the jurisdiction-

al facts, could be made a lawful predicate upon which to order a sale of said real estate; nor were they, or either of them, subsisting claims or demands against the estate of Foreman.

(3) That on October 20, 1856, the probate court made an order granting the application, but lot No. 8, of block 31, in said city of Jacksonville, of which Foreman died seised and possessed, was not sold, or offered for sale, under said order, but the title to it remained in the heirs of Foreman. A copy of this order is annexed to the bill. The jurisdictional statements of it are that it appears to the satisfaction of the court that the personal property of the estate is insufficient to pay the debts, and that the notice required by the statute has been given by the administratrix. The order appears, however, to have been made on September 27, 1856.

(4) That Foreman's estate was large and valuable, possessing bonds, stocks, cash, and cash securities largely in excess of the lawful demands and just claims owing from it. That the administratrix, through her attorney in fact, Sanderson, paid off and discharged, without suit, abatement, or delay, all the lawful claims and demands of the estate.

(5) That Job Bass died prior to May 27, 1857, in Tensas parish, La., he being still a resident thereof, and left a large and valuable estate, and a last will and testament, which was duly admitted to probate on said day in the tenth district court of Louisiana, it having jurisdiction thereof, by which he bequeathed one-half of his wordly goods and effects, rights, and credits to his wife, Julia Bass, and the other half to his mother, the said Elizabeth Foreman. That thus said Elizabeth, during the administration of said Foreman's estate, became entitled to the one-half of said Job's wordly goods and effects, rights, and credits.

That before or during the early part of the year 1860 the said Elizabeth died, she being still a resident of said Tensas parish, and at her death had not made a settlement of her administration of Foreman's estate, or any distribution, partial or final, to those entitled thereto, and (charged upon information and belief) largely indebted to said estate, and leaving large estates in Louisiana, and the said Augustus E. Bass as her sole heir at law and personal representative, and thereupon said Bass possessed himself of said estate.

That said Bass, as such personal representative, or otherwise, has in no way made any settlement of said Elizabeth's administration of Foreman's estate, or accounted to or with those entitled thereto, for such administration; and the "said Bass is now, and he has been since the death of said Elizabeth, beyond the jurisdiction of this court to compel such a settlement."

(6) That on August 6, 1860, the said Sanderson, who was the attorney in fact of said administratrix, and her attorney at law in respect to her administration, and who performed all the functions that were performed in said administration, applied for and obtained, upon the death of said Elizabeth, letters of administration *de*

bonis non upon Foreman's estate; he giving bond as such in the sum of \$10,000. That, as a basis of his application, Sanderson set up that there were funds in the state of New York, and unadministered property in Florida, belonging to said estate, and thereupon he possessed himself of said funds in New York, and said property in Florida. Complainants are not advised as to the exact amount of the said funds which Sanderson so received, but upon information and belief aver the fact to be that the amount was several thousand dollars.

(7) That on January 5, 1870, Sanderson, desiring to possess himself of the title to lots 7 and 8, of block 31, in the city of Jacksonville, executed a deed, a copy of which is annexed to the bill, purporting to convey, as administrator *de bonis non*, aforesaid, to Augustus E. Bass and Job Bass, said lots 7 and 8, in execution of a sale of the same to said Augustus E. and Job, alleged to have been made by his predecessor, the said Elizabeth, administratrix aforesaid; and thereupon the said A. E. Bass and wife, and Julia Brown, formerly the wife of Job Bass, and Atlas F. Brown, her husband, reconveyed the lots to Sanderson with warranty of title. The deed from Sanderson bears date January 5, 1870, and that to him bears date March 21, 1870; but they are charged to have been only one transaction, and to have been filed for record in the clerk's office on the same day.

That the recitals in the deed from Sanderson as to lot 8 are wholly untrue. That it had never been sold, or advertised or offered for sale, by said Elizabeth, or reported to her by her said attorney in fact as having been sold, advertised, or offered for sale; nor was any money paid to or received by her as purchase money of this lot.

That lot 7 was reported by her as having been sold under said void order of sale.

That no claim to either of said lots was asserted by said Bases, or either of them, or by the representatives of Job Bass after his decease; but the title to and possession of said lots remained in the estate of Foreman until the possession of said estate was divested thereof, or sought to be divested thereof, by the deeds from and to Sanderson.

(8) That on February 7, 1870, Sanderson executed an individual deed, by which he undertook to convey said lot 8, with warranty of title, to the defendant the Freedman's Savings & Trust Company; and in June, 1871, he departed this life in Duval county, Fla., intestate, having made no settlement whatever of his administration of the estate of Foreman, nor any distribution thereof, partial or final, to those interested therein, and having filed no inventory of said estate, and having made no return whatever in any court in respect thereof, yet leaving a large estate, real and personal, in said county, and in the possession of, and claiming the fee to, said lot 7 under and by virtue of said deed to him.

That defendants L'Engle and Hartridge qualified as administrators of Sanderson's estate, and administration thereon is still

pending. That said administrators have made no settlement of Sanderson's administration *de bonis non* of Foreman's estate, nor any payment or distribution, partial or final, to those interested therein on account thereof, but his administration is wholly unsettled.

(9) That Deans was appointed administrator *de bonis non* of Foreman's estate by the county court of Duval county, Fla., on February 21, 1881, and on the 23d day of April following filed therein an application for an order to sell lot 8 to pay the debts of the estate. A copy of the petition is annexed as a part of the bill. It alleges that there is "no personal property of the intestate not administered upon," and that the lawful debts and demands now existing against said estate amount to the sum of \$22,665. The debts are stated in an annexed schedule as follows, viz.:

Amount due Augustus E. Bass and Job Bass, sole heirs of Elijah Bass, deceased, as per probated account approved and filed in the probate records of this county of Duval, state of Florida, on June 16th, A. D. 1856, and to which reference is hereby made for date and evidence of said account and amount due.....	\$28,620 00
Less amount received by Augustus E. Bass and Job Bass from said estate....	6,555 00
Balance due.....	\$22,065 00
Estimated expenses of sale, probate fees, and commissions.....	600 00
	\$22,665 00

That an order of sale was made May 6, 1881. This order, made by the county court of Duval county, recites the filing of the petition "for the purpose of paying the debts against the estate of said Jacob Foreman; and, it appearing by said petition, and the schedule annexed thereto, that there are debts against said estate, and no means of paying the same, or any part thereof, without recourse to said estate, the personal property of said estate having been exhausted," it orders a sale of all the estate, right, title, and interest of said [estate of] Jacob Foreman, deceased, of, in, and to said lot 8, to pay the debts of the estate, and appoints John S. Driggs the commissioner to sell, and directs that he make written report of the sale, and that he make no conveyance of the whole or any part of the real estate until the sale shall have been confirmed by the county court.

(10) That before Deans filed the above petition an action of ejectment was instituted in the circuit court of Duval county against the tenants in possession of lot 8, to recover the same, by James Wilcoxon, who is the surviving husband of Sarah Wilcoxon, who was the sister of Jacob Foreman, and was, at and before the death of Jacob, the wife of said James, she having died June 23, 1879, and by complainants Jacob Mason Wilcoxon, Redessa Minerva Wilcoxon, Emma E. Rusk and her husband, John W. Rusk, in her right, James F. Wilcoxon and Ella A. Wilcoxon, children of said Sarah Wilcoxon, and Lydia Steelsmith, a sister of Jacob Foreman, and John Steelsmith, her husband, in her right, and Samuel B. Albright, surviving hus-

band of Elisabeth Foreman, who died in 1879, and was a sister of said Jacob, and Felix Albright and Simpson Albright, children of said Samuel and Elizabeth, these parties being the heirs at law and distributees of said Jacob, who died leaving no children, or descendants thereof. That upon the trial the said plaintiffs took, as they were compelled to do, a nonsuit: the said Deans having introduced in evidence his letters of administration to show a right of possession in himself.

(11) That the Freedman's Savings & Trust Company, recognizing the invalidity of its above-stated title to lot 8, and desiring to acquire the title to said lot residing in the heirs of Jacob Foreman, procured from the grantors who executed the above-described deed to Sanderson an assignment of said claim alleged to be due to the estate of Elijah Bass by the estate of Foreman, and procured Deans to sue out letters of administration *de bonis non* on Foreman's estate, and to make application for the sale of said lot 8 to pay said debts. That, at the time of making application for letters of administration, Deans had no connection with Foreman's estate, or any alleged claim due from it, or any interest in or connection with said lot, except as the attorney of the Freedman's Savings & Trust Company, or its said commissioner, which relation of attorney he occupied at the time the letters of administration were granted, and now occupies.

(12) That on May 6, 1881, the county court made the order of sale, and on June 6th Driggs exposed the lot to sale in pursuance of the order, and one Lockwood, the agent of said company, bid it off at the price of \$13,000, and the sale was reported to the court as having been made to Augustus E. Bass and the heirs and representatives of Job Bass, deceased. The court has not confirmed the sale, nor taken any action thereon. At or before this sale the Freedman's Savings & Trust Company, or its said commissioner, surrendered the possession of the lot to Deans as such administrator, and he still retains possession of the same as assets of Foreman's estate, and as such administrator is receiving the rents and profits of such possession.

(13) That no purchase money was paid on said bid, nor was it intended by those making it, or interested therein, or any of them, that any payment in cash should be made, or that any payment of the bid should be made other than crediting the amount bid, as cash, upon the alleged debt aforesaid, for the payment of which the lot was ordered to be sold, and which claim has been assigned to the said company, or its said commissioner; and as the company held the deed of Sanderson conveying said lot with warranty, and Sanderson held the deed of E. A. Bass, and the representatives of Job Bass, conveying the title to said lot to him with warranty, it was immaterial whether said bid was so reported, and the sale thereon was confirmed by the said court, to the said company, who, "as your orators aver," really made the bid through its agent, Lockwood, or to the said E. A. Bass, and the heirs and representatives of Job Bass, as by the operation of said warranties the deed of the

commissioner executing the sale would inure in either event, and exclusively, to said company.

That the whole purpose underlying the application by Deans for said administration, and the proceedings had by him to effect a sale of the lot, will be accomplished, and complainants defrauded, by having the amount of said bid credited on or applied to said alleged claim, and the deed executed either to said company or the parties in whose name the bid is reported as having been made.

(14) That at the time of the appointment of Sanderson as administrator *de bonis non*, aforesaid, there was no valid subsisting debt or claim of any kind against the estate of Foreman, for which the estate, or the assets thereof in the hands of Deans, as administrator aforesaid, could or ought in law or equity to be liable, nor was Deans liable or compellable to pay the above specified claim, or any other claim, in his capacity as administrator *de bonis non*.

(15) That the county court to which Deans applied for the order of sale had no jurisdiction in the proceedings based on said application to determine whether or not the said alleged claim was established as a predicate for said order, if said debt or claim ever existed, which is denied, or if such debt or claim was a valid subsisting debt when administration was originally granted on said estate, which is denied. The reasons alleged are: Section 1. That, inasmuch as the said Job Bass and E. A. Bass were sureties on the administration bond of said Elizabeth, and were, as is alleged, the beneficial owners of said alleged claim, it could not be determined by said court, until there was a settlement by said Elizabeth, or her personal representative, the said A. E. Bass, of her administration of said estate, whether or not the said Elizabeth and her said sureties were indebted to said estate. 2. That inasmuch as the said Elizabeth succeeded, under the will of Job Bass, which was probated May 27, 1867, to the said claim, if it was at the time a valid and subsisting debt, as co-owner thereof, the right to receive, and the duty to pay, were united in the same person, and thus were extinguished by operation of law; and the *status* of said Elizabeth as a creditor or as a debtor of said estate was thus made dependent upon, and could be determined only by, a final settlement of her administration.

(16) That, if there were valid and subsisting debts at the time of Deans' application for an order to sell, it could not be determined by said county court that there was a necessity for the sale of lands for the payment of debt, or that the personal estate had been exhausted, or was insufficient to pay debts, or that the debt exceeded the value of the personal estate, until there had been a final settlement of said administration of Elizabeth, and that of Sanderson in person, or by their representatives. When the order was granted there was abundant evidence in the files of said court that each of said administrations was outstanding and unsettled.

(17) But complainants are willing that the sale made by Driggs should stand,

provided said Freedman's Savings & Trust Company, or the parties in whose name the bid is reported as having been made, pay into this court, (Duval county circuit court,) to be distributed by it to those entitled thereto, the purchase money so bid, and hereby offer to ratify said sale upon the payment by said purchasers, into this court, of the said purchase money, to be disposed of by the order of this court.

The other facts are stated in the opinion.

Geo. Wheaton Deans, C. P. & J. C. Cooper, and Fleming & Daniel, for appellants. A. W. Cockrell & Son, for appellees.

RANNEY, C. J., (after stating the facts as above.) 1. The complainants, as shown by the statement, claim to be the heirs and distributees of Jacob Foreman, and the parties defendant against whom relief is sought are Hartridge and L'Engle, as administrators of Sanderson, who at his death, in June, 1871, was administrator *de bonis non* of Foreman, under an appointment made August 6, 1860, and George Wheaton Deans, as administrator *de bonis non* of Foreman, by appointment made February 21, 1881, and the sureties on Deans' bond as such administrator, and the Freedman's Savings & Trust Company, and Knox, its commissioner.

(a) The grounds of relief set up as to the administrators of Sanderson are substantially as follows:

The sale of lot 7, of block 81, made by Mrs. Foreman, as administratrix of Jacob Foreman, under an order of the probate court, of September 27, 1856, and the conveyance of the same and lot 8 by Sanderson, as administrator *de bonis non*, in execution of such incomplete and alleged sale, and the reconveyance of said lots to Sanderson individually. It is charged in the bill that lot 8 was never sold by the administratrix, or advertised or offered by her for sale, or reported by her as having been sold, advertised, or offered for sale, notwithstanding the recitals to the contrary in the deed from Sanderson as administrator *de bonis non*, and that the probate court had no jurisdiction to order a sale of these lots, as the petition did not allege the exhaustion of personal assets, but, on the contrary, showed that the personal property had not been exhausted. The claims or demands for the payment of which the sale was made by the administratrix are also alleged not to have been debts or demands of, nor subsisting debts or demands against, Foreman's estate, nor such debts or demands as upon a petition setting up the jurisdictional facts would make a lawful predicate for ordering a sale of real estate.

It is charged also that Sanderson, upon being appointed administrator *de bonis non*, possessed himself of funds of the estate, in the state of New York, amounting to several thousand dollars, and unadministered property in Florida, and that he died without having made any settlement whatever of his administration, or any distribution, either partial or final, of Foreman's estate, to those interested therein, and that at his death he was in possession of said lot No. 7, and claimed the fee thereto; he having, however, on February 7,

1870, conveyed, in his own right, lot No. 8, mentioned above, to the Freedman's Savings & Trust Company. His administrators, it is alleged, have made no settlement of his administration of Foreman's estate.

(b) The grounds of relief against Deans, as administrator *de bonis non*, aforesaid, and his sureties, and the Freedman's Savings & Trust Company, and Knox, the commissioner of such company, are, in brief, that on April 23, 1881, Deans, as such administrator, petitioned the county court for a sale of lot 8 to pay Foreman's debts, and on May 6th obtained an order as prayed, and on June 6th one Driggs, as commissioner appointed by the county court, exposed the lot for sale, and one Lockwood, the agent of the Freedman's Savings & Trust Company, bid it off at the price of \$13,000, and the sale was reported to the court as having been made to "Augustus E. Bass and the heirs and representatives of Job Bass, deceased." No further action, it is stated, has been taken by the county court in the premises.

It is also alleged that at or before the sale just mentioned the Freedman's Savings & Trust Company or its commissioner surrendered the possession of lot 8 to Deans as such administrator, and that he still retains possession of the same as assets of Foreman's estate, and is receiving the rents and profits of such possession, and that the trust company, recognizing the invalidity of its title to lot 8 obtained through the alleged sale by Mrs. Foreman as administratrix, and the conveyance from Sanderson in completion of such sale, and the reconveyance to Sanderson individually, and his deed to the trust company, and desiring to acquire the title residing in the heirs of Foreman, procured from the grantors who had conveyed lot 8 to Sanderson an assignment of the debt subsequently set up by Deans' petition, and procured Deans to take out letters of administration, and apply for the sale; that no purchase money has been paid on the bid, nor was any intended to be paid by those making or interested in it, other than a credit upon the alleged debt, for the payment of which the sale was prayed and ordered, and which has been assigned as alleged.

It is charged that at the time of Sanderson's appointment as administrator there was no valid subsisting debt or claim of any kind against the estate of Foreman, and that the county court had no jurisdiction in the proceedings instituted by Deans to determine whether or not the alleged debt was established as a predicate for said order, if said debt or claim ever existed, which is denied. The reasons given by the bill for the last allegation are stated in a subsequent subdivision of this opinion.

It is also argued that, "if there were valid and subsisting debts at the time of Deans' application for an order to sell, it could not be determined by said county court that there was a necessity for the sale of the lands for the payment of the debt, or that the personal estate had been exhausted, or was insufficient to pay debts, or that the debt exceeded the value of the personal estate, until there had been a final settlement of said administration of Elizabeth and that of Sanderson, in person or

by their representatives." When the order was granted the bill alleges there was abundant evidence in the files of said court that each of said administrations was outstanding and unsettled.

The bill expressly states, however, that the complainants are willing that the sale made of lot 8 by the commissioner under the order obtained by Deans should stand, provided the Freedman's Savings & Trust Company, or the parties in whose names the bid is reported to have been made, pay into the circuit court of Duval county, where the bill under consideration is filed, the purchase money so bid, \$13,000, to be distributed by such circuit court to those entitled thereto; and complainants offer to ratify the sale upon the payment of the same, to be disposed of by the order of such court.

The prayer as to the administrators of Sanderson, specially, is that the sale evidenced by Sanderson's deed, as administrator *de bonis non*, conveying lots 7 and 8, be set aside and held for naught; that they fully settle in this court Sanderson's administration of Foreman's estate, and account for all the assets their intestate received, and was or is chargeable with, including lot 7.

The prayer of the bill as to Deans and the trust company and Knox, specially, is that Deans, as administrator *de bonis non*, account for all the assets he has received, and for which he is chargeable, and that the trust company or Knox, its commissioner, pay into the circuit court the sum of \$13,000, bid for lot 8, or, failing therein, the sale be set aside, and declared of no effect.

The bill also prays for a final settlement and distribution of Foreman's estate, and that the alleged claim of December 20, 1838, set up in each of the petitions as a debt of Foreman, for the payment of which a sale was sought, whether in the hands of the Freedman's Savings & Trust Company or of A. E. Bass and the representatives of Job Bass, be declared not to be a valid and subsisting claim, as against complainants, as to said lots 7 and 8, descended to them from Jacob Foreman, or such claim, if valid, as can be enforced only upon a final settlement of the said Elizabeth Foreman's administration of Jacob Foreman's estate; that, upon such settlements, the property, real and personal, of Jacob Foreman's estate, on hand, and the money balance that may be found due said estate, be delivered to complainants as next of kin of said Jacob, and they be quieted in their enjoyment and possession.

The bill was demurred to by Deans and his sureties as not stating a case entitling them to relief in a court of equity, and as multifarious; and by the administrators of Sanderson as multifarious, and as deficient in parties defendant, as the heirs of Sanderson are not made defendants, and as stating no matter for equitable relief.

The position of the complainants is that they are the sole heirs and distributees of Jacob Foreman; that his administratrix, Elizabeth Foreman, had paid all of his debts prior to her death, and that the Elijah Bass estate claim of December 20, 1838, was not a subsisting debt of Foreman's estate when

the sale made by her took place, and has not since been. They claim that they are entitled to whatever there may be of Foreman's estate existing, either in the same form in which he left it, or in the shape of indebtedness by Sanderson's estate, growing out of an alleged *devastavit* committed by Sanderson.

2. The first question to be disposed of is that as to the jurisdiction of the circuit court, as a court of equity, in the matter of the settlement of the estates of deceased persons under the constitution and laws of this state.

The constitution of 1868 gave the circuit courts "original jurisdiction of all cases of equity," and the county court "full surrogate or probate powers, but subject to appeal;" and it was held in *Ritch v. Bellamy*, 14 Fla. 587, that, in the absence from a case of special equities which the county court could not administer, such court and the circuit court had concurrent jurisdiction in the settlement of estates; that where there has been a suggestion of insolvency, under the statute, in the county court, and creditors have filed their claims, the circuit court should not take jurisdiction of the settlement of the administration at the suit of the creditors, in the absence of circumstances calling for the exercise of chancery powers, as distinguished from probate or surrogate powers, or unless, for some special reasons, it is made to appear that the county court could not administer adequate and complete relief between the parties. The bill was filed by mortgage creditors of an intestate, and alleged the existence of other mortgage creditors, and surcharged and falsified the accounts of the administrator, and alleged waste and neglect upon his part, and that upon a fair and just accounting the estate would be found solvent; and it was held, notwithstanding the complainants had proved and filed their claims in the county court under the suggestion of insolvency, that the case was one of equitable jurisdiction.

The amendments to the constitution which were adopted at the election held on May 4, 1875, vested the circuit court with "original jurisdiction in all cases in equity, * * *" and with "appellate jurisdiction of matters pertaining to the probate jurisdiction, and the estates and interests of minors in the county courts, and of such other matters as may be provided by law," (section 8, art. 6,) and gave to the county court "power to take probate of wills, to grant letters testamentary and of administration and guardianship, to attend the settlement of the estates of decedents and of minors, and to discharge the duties usually pertaining to courts of probate, subject to the direction and supervision of the appellate and equity jurisdiction of the circuit court as may be provided by law," (section 11, art. 6.) In *Sanderson v. Sanderson's Adm'rs*, 17 Fla. 820, it was claimed on appeal that the case should be remanded to the county court. The bill alleged that there had been no final settlement in the county court, and that no annual settlements had been made, and charged that claims illegal in their character had been paid, also mismanagement of the estate,

and prayed, *inter alia*, a distribution; and the proofs disclosed that the annual accounts had not been passed on when the bill was filed. The equitable jurisdiction was maintained.

It does not seem to us that the grant of original jurisdiction in all cases in equity, made by the constitution as amended in the year 1875, was diminished by any other provision of the amendments. The grant by the same section (section 8, art. 6) of appellate jurisdiction in matters pertaining to the probate jurisdiction, and to the estates and interests of minors in the county courts, does not take anything from the original equity jurisdiction. The express subjection of the jurisdiction of the county court, as defined by the quotation above from section 11 of the same article, to the "direction and supervision of the appellate and equity jurisdiction" of the circuit court, was not a limitation upon the original equity jurisdiction of the circuit court, but a subordination of the powers of the county court to the original equity jurisdiction of the circuit court, in addition to that provided by section 8 of the article in question, in giving the latter court also appellate jurisdiction. In a word, under the constitution as thus amended, the county court was not given jurisdiction exclusive of the circuit court in any matter of administration which a general grant of equity jurisdiction to the circuit court would have covered in the absence of such grant to the county court. This is the theory upon which the jurisdiction of the circuit court was maintained in *Sanderson v. Sanderson's Adm'rs*, supra. That the circuit court might, under the provision of section 11, referred to above, have been used for partial aid or relief to the county court, is not inconsistent with the view announced above.

Since the proceedings in equity now before us were had, there has been a change in the organic law of this state. The new constitution, (section 11, art. 5,) gives to the circuit court "exclusive original jurisdiction in all cases in equity, * * *" and supervision and appellate jurisdiction of matters arising before county judges pertaining to their probate jurisdiction, or to the estates and interests of minors, and of such other matters as the legislature may provide." It vests the county judges (section 17, art. 5) with "jurisdiction of the settlement of the estates of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate." In future proceedings the powers of the circuit and county courts will rest upon the present organic law; and our opinion, upon the authorities mentioned above, and those cited in them, is that the original equity jurisdiction of the circuit court, as it existed before, is not impaired by the new constitutional provisions. *Teague v. Corbitt*, 57 Ala. 529; *Deck v. Gerke*, 12 Cal. 433.

Assuming that the case made by the bill is one entitling the complainants to any relief, we are satisfied it is one for equitable relief.

3. In considering the merits of the case

presented by the bill against Deans as to lot 8. It is to be observed that the demurrer admits that the lot was neither sold, nor offered for sale, by the administratrix under the order of sale of September, A. D. 1856, and hence it would be entirely improper to discuss, in connection with this lot, the question of the jurisdiction or power of the probate court to make the order. If there was no sale of the lot under the order, the conveyance of it by Sanderson as administrator *de bonis non* was without authority of law, and the title of the trust company would depend upon its purchase and deed of conveyance from Sanderson, and possession thereunder. The effect of such purchase and conveyance, and possession thereunder, cannot, however, be considered upon a record like this,—asserting, without denial or explanation, that the company, recognising the invalidity of its title, had delivered the lot to Deans as administrator, and that he holds it as assets of the estate of Foreman.

In view of the admission of the demurrer that no sale was made of this lot by the administratrix under the order of 1856, no benefit can be claimed of the provisions of the "Act to quiet titles to real estate," approved March 11, 1879, (chapter 3134.) If there was no sale made, there are no purchasers, or assigns of purchasers, to invoke the five-year limitation or other provision of this statute.

The admissions referred to in the two preceding paragraphs are also inconsistent with a contention upon the part of the trust company of having acquired title by adverse possession for seven years under claim of its title from Sanderson, at least so long as the record remains in its present condition.

4. The next feature of the case is the sale of the above lot 8 made June 6, A. D. 1881, by Driggs, the commissioner named in the order of sale entered by the county court of Duval county May 6th of the same year, on a petition filed by Deans, administrator *de bonis non*, on the 23d day of the preceding month.

The petition alleges that there "is no personal property of the intestate not administered upon," and that the lawful debts and demands now existing against said estate amount to the sum of \$22,665. The debts are stated in an annexed schedule as follows:

Amount due Augustus E. Bass and Job Bass, sole heirs of Elijah Bass, deceased, as per probated account approved and filed in the probate records of this county of Duval, state of Florida, on June 16th, 1856, and to which reference is hereby made for date and evidence, of said account and amount due.....	\$28,620 00
Less amount received by Augustus E. Bass and Job Bass from said estate..	6,555 00
Balance due.....	\$22,065 00
Estimated expenses of sale, probate fees, and commissions.....	600 00
	\$22,665 00

The petition prays for the sale of a lot of land situate in the city of Jacksonville, county of Duval, and state of Florida, known as lot 8, in block 31, in the plan or

plot of said city, and located upon and contiguous to the south-west corner of Forsyth and Pine streets, at their intersection in said city, valued with and including lot 7, so called upon said plan or plot in said block, and adjoining said lot 8, in the appraisalment of property of said estate filed among the probate records of said county on June 20, 1856, to which reference is made, at (with improvements) \$3,500.

The order recites the fact of the filing of the petition, and that it appears by the petition and annexed schedule that there are debts against the estate, and "no means of paying the same, or any part thereof, without recourse to the real estate; the personal property of said estate having been exhausted." It orders a sale of all the estate, right, title, and interest of the estate of Jacob Foreman in and to lot 8, appoints John S. Driggs a commissioner to sell, directs him to make written report of the sale, and to make no conveyance until the sale shall have been confirmed by the county court.

At the sale by Driggs on June 6, 1881, one Lockwood, the agent of the Freedman's Savings & Trust Company, bid off the lot at the price of \$13,000, and the sale was reported to the court by the commissioner as having been made to "Augustus E. Bass and the heirs and representatives of Job Bass, deceased." The county court had neither confirmed the sale, nor taken any action thereon, when the bill was filed.

(a) It is contended that under the act of February 16, 1870, (chapter 1732, Pamph. Laws; section 40, p. 88, McClell. Dig.) an allegation of the solvency of Foreman's estate was essential to the jurisdiction of the county court to order the sale of the real estate. The fourth section of this act provides that when the estate is solvent, and the debts and charges due and owing by an intestate estate, or by a testate estate in the absence of certain provisions from the will, "shall exceed the value of the personal estate, and the personal estate shall have been exhausted, or is insufficient to pay the debts and charges," a sale of the real estate may be had. Chapter 3016, approved February 27, 1877, (section 12, p. 584, McClell. Dig.) provides, *inter alia*, that "lands, tenements, and hereditaments belonging to an insolvent estate, after the suggestion of insolvency, shall be sold under the same proceeding now required to sell lands belonging to an estate to pay debts."

The same objection to these proceedings was made by the appellees' counsel in *Deans v. Wilcoxon*, 18 Fla. 531, and was held by this court not to be good. The ruling there is that as no such allegation is expressly required by the statute, and the jurisdiction of the county court extends to sales of land of both solvent and insolvent estates, it is sufficient if it appear that there is an estate, and the facts necessary to give jurisdiction in the case of either a solvent or an insolvent estate are set up in the petition. We see no error in this conclusion, even assuming the question to be *res integra*. The allegations required by section 4 of the act of 1870, supra, will give jurisdiction whether the estate be solvent

or insolvent, and, if insolvent, whether it has not or has been formally suggested to be insolvent. An inquiry as to the solvency is not jurisdictional, and the fact does not have to be averred in the petition.

The statement of the petition is that "there is no personal property of the intestate not administered upon," and the order adjudicates that the personal estate had been "exhausted." This being so, the county court had, as against a collateral attack, jurisdiction to act in the matter of the sale of the real estate. *Hays v. McNealy*, 16 Fla. 409; *Emerson v. Ross*, 17 Fla. 122; *Sloan v. Sloan*, 25 Fla. 53, 5 South. Rep. 603; *Deans v. Wilcoxon*, supra.

(b) Being satisfied that the county court had jurisdiction to act in the matter of the order of sale of May 6, 1881, the inquiry now is whether or not the other grounds of complaint against the order are of such a character as, under the principles of law controlling in such cases, will authorize an arrest, through the instrumentality of a bill in equity, of further proceedings by the county court under its order.

One complaint of the bill is as to the indebtedness or claim for the payment of which the order of sale was made.

The petition of Deans avers that the lawful debts and demands existing against the estate amount to the sum of \$22,685, "as appears by the schedule annexed," made part of the petition. The statement of debts in this schedule is given in the second paragraph of this subdivision of this opinion.

It is evident from the bill that the above Bass claim is the same as that described in the schedule to the petition of Mrs. Foreman, administratrix, as follows: "1888, Decr. 20. Account filed and proved due estate of Elijah Bass, deceased, \$28,620."

The bill, in treating of the order of sale obtained by Mrs. Foreman in September or October, 1886, says that the claims or demands for the payment of which the sale was prayed were not debts or demands against said estate, and were not such claims or demands as, upon a petition setting up the jurisdictional facts, could be made a lawful predicate upon which to order a sale of real estate, nor were they, or either of them, subsisting claims or demands against the estate of Foreman; and it is also alleged, in connection with the order of sale procured by Deans, May 6, 1881, that at the time of Sanderson's appointment as administrator, which was August 6, 1860, there was no valid subsisting debt or claim of any kind against the estate of Foreman for which the assets of his estate in the hands of Deans as administrator *de bonis non* could or ought in law or equity to be liable, nor was Deans liable or compellable to pay the Bass claim, or any other, in his capacity as such administrator. There also occurs, in connection with an allegation that the county court had no jurisdiction in the Deans proceeding to determine whether or not the Bass claim was established as a predicate for the order, if said debt or claim ever existed, a denial of its existence, in the usual form of such denials, *i. e.*, "which is denied."

Of course, the allegation that the admin-

istratrix paid off and discharged, through her attorney, and without suit, abatement, or delay, all the lawful claims and demands of the estate, does not include the Bass claim as one so paid.

What the evidence or proof of the validity of this claim on file in the probate court, and which the probate judge in 1856, and the county judge in 1881, had before them, and by which they were satisfied of its validity, is, we are not informed. It is certain that it was such as to satisfy them of its validity in law as a claim against the intestate's estate, and that it was of such a character as to authorize a sale for its payment. This evidence, whatever it may be, is, by the terms of Deans' petition and schedule, referred to as proof of the claim; and it is to be conclusively presumed that the county judge considered it in the deliberations which resulted in his order of sale. Any other presumption would impute dereliction of duty. The sufficiency of the evidence is not jurisdictional. *Robinson v. Epping*, 24 Fla. 237, 4 South. Rep. 812; *Sloan v. Sloan*, 25 Fla. 53, 5 South. Rep. 603; *Price v. Winter*, 15 Fla. 106, 107; *Comstock v. Crawford*, 3 Wall. 396; *Florentine v. Barton*, 2 Wall. 216; *Grignon's Lessee v. Astor*, 2 How. 319; *Morrow v. Weed*, 4 Iowa, 77; *Carter v. Waugh*, 42 Ala. 452; *Stow v. Kimball*, 28 Ill. 93; *Moore v. Neil*, 39 Ill. 256; *Hobson v. Ewan*, 62 Ill. 146; *McClel. Dig.* § 40, p. 86.

Assuming, as we well may, that when an order of sale has been made by a county court, acting upon a petition which gave it jurisdiction to act or decide in the premises, the heirs of the intestate can, by a proceeding in a court of equity, arrest the execution of such order on the ground that the indebtedness upon which the county court has acted is not a valid debt of the estate, the burden is upon them to show by their bill of complaint, or other proper pleading, that the debt is not valid. The order of the county court is, under the circumstances indicated, at least *prima facie* legal as to the indebtedness; and, to invoke the aid of chancery, the heir must state in his bill facts in relation to the alleged indebtedness which, if true, will overthrow the *prima facie* presumption created by the order. General averments of conclusions of law will not do. To say that the claims or demands for the payment of which a sale was prayed were not debts of the estate, or were such claims or demands as could be made the lawful predicate of an order, or were not subsisting claims or demands against the estate, or that there was no valid subsisting debt or claim against the estate for which the assets in the hands of the administrator *de bonis non* could or ought in law or equity to be liable, or that such administrator was not liable or compellable in law or equity to pay the alleged claim, is but to aver a conclusion of law, the contrary of which the order itself affirms. If the original valid existence of the claim is admitted, and a satisfaction of it by payment or otherwise is relied upon, this new matter, whatever it may be, should be specifically averred. If, on the other hand, the claim never had any existence, but is the creature of fraud upon the part of the

owner of it, to which fraud the administrator is either a party or an innocent victim, or is otherwise invalid, such fraud or invalidity, whatever it may be, should be explicitly charged. The alleged debt must in all cases either have been originally valid, or be a creature of fraud, or otherwise of no validity. If courts of equity could be invoked to inquire into the validity or propriety of the action of the county courts on any other principle of pleading than this, or upon a mere assertion of their invalidity or non-existence as subsisting claims, not only would there be no limit to the applications to them for such inquiries, but they would enter upon their investigations, not, as in ordinary cases, to inquire into the facts of a particular charge invalidating it, and apply the law to the same, but to first explore and find out what specific charge could be made or formulated.

The allegations set out above are clearly demurrable as stating no facts to which the law can be applied, on a demurrer, as a test of the validity of the indebtedness or orders of sale.

(c) The doctrine of laches and staleness of claim is invoked by both complainants and defendants in this cause, and, in addition, the complainants contend that the Bass claim had become barred by the statute of limitations prior to the death of the intestate, Jacob Foreman, or when the first order of sale was made, whereas the defendants assert that the claim was not affected by any bar of the statute, for the reason that the claimants the Bass heirs were residents of the state of Louisiana, where the cause of action accrued.

The statute of limitations of November 10, 1828, originally made an exception in favor of persons who were, at the time certain causes of action accrued, either within the age of 21 years, *feme covert*, imprisoned, "beyond the seas, or out of the country;" but in 1846 the legislature enacted that the saving clause in the statute mentioned, and all other acts of limitation, in favor of persons "beyond the seas, or out of the country," until such persons shall have returned, shall not extend to persons who were not, at the making of the contract or accruing of the cause of action, domiciled or resident within the limits of this state. It is not pretended by defendants that the Bass heirs were so domiciled or resident. This amendatory law of 1846 (section 2, p. 443, Thomp. Dig.) was in force when Foreman died, in March, 1856, as well as when the order of sale of the following September was made, and, in fact, until the suspension of the several statutes of limitation on January 10, 1861; and the above statement of it is a sufficient answer to any contention of defendants based on the previous exception of the statute in favor of "persons beyond the seas, or out of the country."

Addressing ourselves to the question of the staleness of the Bass claim, as urged by the appellees or complainants, we find from the amended bill and exhibits that in the exhibit to the petition filed by the administratrix in June, 1856, this claim is described as an account of December 20, 1838, for \$28,620, filed and proved as due the es-

tate of Elijah Bass. This is clearly the meaning of the terms used, as they appear in the preceding pages of this opinion, and there is no doubt as to the identity of the claim described in each sale proceeding; and it would seem, from the description of it, that it originated December 20, 1838, or about 17 years and 3 months before the death of Foreman, and 17 years and 6 months before the filing of the petition by the administratrix.

The contention of complainants is that the presumption of law is that this claim had been satisfied. He invokes the twelfth section of the above act of November 10, 1828, (section 1, p. 444, Thomp. Dig.; section 71, p. 96, McClell. Dig.) by which it was provided that if any suit be brought against any executor or administrator, or other person having charge of the estate of a testator or an intestate, for the recovery of a debt due upon an open account, it shall be the duty of the court before whom such suit shall be brought to cause to be expunged from such account every item thereof which shall appear to have been due five years before the death of the testator or intestate. It had a saving clause, of three years after removal of the disability, in favor of all plaintiffs *non compos mentis*, *feme covert*, infants, or imprisoned; that as to persons "out of the state" having been repealed by the above act of 1846.

This provision was mandatory, and, when applicable, devolved upon the court the duty which it sets forth, "without reference to the state of the pleadings." *Patterson v. Cobb*, 4 Fla. 481, 487, 488.

If it be that this section applied to a case like the one before us, where the administratrix was seeking the action of the court in a manner that implied her satisfaction with the validity of the claim, we think it must be assumed, in the absence of affirmative showing to the contrary, that the judge of probate made the inquiry in 1856, and found that the claim was either of such a character that the statutory bar did not apply to it, or that it had been taken out of the bar by a subsequent promise of the testator within the five years next preceeding the death of Foreman, or that the parties owning it were infants, or under some other one of the disabilities in favor of which the statute makes a saving.

Whether we consider the case in connection with the statute referred to, or independently of it, and as governed by the equitable principle of the bar which the lapse of time makes to the enforcement of claims, the conclusion we reach, upon the pleadings before us, as to this Bass claim having been barred before the presentation of it to the administratrix, is adverse to the complainants. They are, in the equitable proceeding now before us, the actors, and their position is this: In 1882, about 26 years after the death of Foreman, and the same period after the presentation of the claim to the administratrix, and its recognition by her and by the probate court as a valid claim against the estate of Foreman, and about 25 years after the death of Job Bass, and 22 years after the death of the testatrix, and about 11 years after

Sanderson, who was the attorney of the administratrix during her administration, and who succeeded her as administrator *de bonis non* in 1860, had passed away, they are asking that the claim so recognized, and upon which a payment of over \$6,000 had been made, shall be adjudged not to have had any legal existence against the estate at the time it was either so acknowledged or partly paid. Of the parties who appear to have known anything of the merits of the claim, all but one are shown to be dead.

If we view the assault upon this claim in its application to the proceeding instituted by Deans for the sale of lot 8, our conclusions are also adverse to a presumption of its payment on the score of the lapse of time, since the recognition of it by the administratrix. It is the adjudicated law of this state that when a claim is duly presented or exhibited to an executor or administrator under the statute of non-claim, and not denied by him as being a good claim against the estate of his testator or intestate, the general statute of limitation ceases to run against it. *Sanderson's Adm'rs v. Sanderson*, 17 Fla. 820, 850, 852; *Bush v. Adams*, 22 Fla. 177; *McDonald v. Bogue*, 14 Fla. 363. The validity of this claim as of the day of its presentation to the administratrix, duly proved, as it seems to have been, not having been effectually assailed, we do not see that subsequent events have been such as to render it stale, and the subject of an adjudication that it is barred as against the lot last named. Any presumption that might arise upon the face of the bill against the claim from the delay from October, 1856, to the death of the administratrix in 1860, and from then to the year 1870, in consummating the sale of lot 7, is overcome by the partial payment made on it, and the subsequent, at least *de facto*, consummation of the sale of lot 7; and moreover we are to remember that during four years of this time, subsequent to 1860, the country was in a state of war, and for a long period subsequent to the cessation of actual hostilities business was either actually suspended or greatly paralyzed. The delay in carrying out the sale of lot 7 is unexplained by the pleadings, and, in the absence of explanation, is imputable at least as much to the administratrix and her successors as to the creditor.

The only information we have of the condition of the estate at the death of Foreman is that given by the schedule of debts and demands and assets forming a part of the petition of the administratrix, and from this it is evident that the estate was insolvent, allowing the widow one-half of the personal property in fee-simple, except slaves, and in those a life-estate, and one-third of the realty for her life. Even if we should assume that all the estate set forth in the schedule mentioned had been collected by the administratrix and administrator *de bonis non*, and applied to the widow's dower and to the indebtedness, there would still be a balance of this claim unpaid; but it is not contended that this has been done. The allegations of the bill are such as to exclude the idea that any other payment than that of \$6,555 has in

fact been made on the claim out of the assets of the estate.

Upon the face of the bill it appears that, in 1881, Deans, as administrator *de bonis non*, had come into possession of property of the estate, lot 8, which has in law never been administered upon. This is 10 years after the death of Sanderson, his predecessor, who, a year before his death, had recognized the indebtedness as existing. The evidence of the claim remains on file in the probate court, where it has been all the time. The dealing of Sanderson with this property in 1870 was, unless we voluntarily impute corrupt motives to the owners of the claim, such as to lead them to believe that Sanderson was then lawfully recognizing it as a valid indebtedness of Foreman's estate. From the time Sanderson, as administrator *de bonis non*, made the deed, in 1870, till the institution of the action of ejectment by the heirs of Foreman to recover lot 8, this being, in the language of the bill, "before Deans filed the above petition," it does not appear that there was any necessity for action in this state on the part of the owners of the claim, or, if any, that it was known to them.

Complainants invoke also section 72, p. 97, *McClell. Dig.* (section 13, Act Nov. 10, 1828,) which, omitting the saving clause, is to the effect that no action of debt shall be brought against an executor or administrator upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or administrator to revive such judgment after the expiration of five years from the qualification of his executor or administrator; and all such judgments, after the expiration of five years, upon which no proceeding shall have been had, shall be deemed to have been paid and discharged. This statute, if it be in force, upon which point we say nothing, does not apply to the case before us. We are not dealing with a judgment rendered against Foreman in his lifetime, and upon which no action had been taken by the judgment creditor for five years next after the qualification of the administratrix. In *Sanderson v. Sanderson*, 17 Fla. 851, this court said: "It has been the practice in this state, since its organization, to require of a creditor nothing more than a presentation or exhibition of his claim to the administrator. This stopped the operation of the statute of limitations and of non-claim. It has never been held in this state that the creditor after presentation must reduce his debt to judgment. * * * The accumulation of unnecessary costs, and the sacrifice of the interests of heirs, would be the natural result of such a policy." *Byrd v. Wells*, 40 Miss. 716; *Large v. Large*, 29 Wis. 64. Independent of the effect which the presentation of this claim to the administratrix had upon the statute of limitations, the running of the statutory bar would have been stopped by the act of January 15, 1861, suspending the statute of limitations "in relation to civil actions." Section 8, c. 1271, Laws Fla. 1860; *Hart v. Bostwick*, 14 Fla. 162; *McDonald v. Bogue*, *supra*. This suspension continued for some time after Sanderson's appointment as administrator *de bonis non*. The enactment of the lim-

itation act of February 27, 1872, (to be found in McClell. Dig. c. 144, p. 790,) did not do away with the effect of the presentation to the administratrix. The conduct of the administratrix and of Sanderson as to the claim are, under the allegations of the bill, irreconcilable with the idea of its having become stale or barred, or with a presumption of its actual payment while they were such administrators.

In *McArthur v. Carrie's Adm'r*, 32 Ala. 75, cited by counsel for appellees, an administrator in Mississippi had, in 1828, made a sale of a slave. Under the statute law of the latter state, administrator's sales were void if not public. Twenty-three years after, an administrator *de bonis non* began an action to recover the slave and her increase. The testimony as to whether the sale was public or private was irreconcilably conflicting. The records of the probate court had been burned, and the various persons who had held office in that court differed essentially as to what those records disclosed. From the time of the sale until March, 1853, when, a few months before the commencement of the action, the slaves were removed to Alabama, they remained all the time in the neighborhood in which they were sold, and in the independent and undisputed possession of the purchaser, McArthur, and his son, the defendant. It was held by the supreme court of Alabama that proof of uninterrupted adverse possession of personal property for 20 years raises a *prima facie* presumption of title and ownership which can only be overturned by proof showing that such possession is not inconsistent with the plaintiff's right, or explaining and excusing the long acquiescence on some other ground than original defect of title in the possessor.

The Alabama court in this case uses approvingly the expressions in other opinions, that "the lapse of twenty years is sufficient to raise the presumption of almost anything that is necessary to quiet the title of property," and "if a final judgment had been rendered, according to the principles of the common law, it would be presumed to have been paid after the expiration of twenty years, and if the parties allow this period to elapse without taking any steps to compel a settlement we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence to prove accounts and vouchers which ordinarily enter into such settlements." *Rhodes v. Turner*, 21 Ala. 210; *Sims v. Aughtery*, 4 Strob. Eq. 103; *Barnett v. Tarrence*, 23 Ala. 463; *Gantt's Adm'r v. Phillips*, Id. 275.

Bird's Adm'r v. Inslee's Ex'rs, 23 N. J. Eq. 363, which is also relied upon by complainants, was a case in which Bird had obtained a judgment against Drake, and levied execution on a farm which Drake had, prior to the judgment, conveyed to Inslee. Subsequently to the levy, Bird filed a bill, in October, 1847, to set aside the deed as being fraudulent against his judgment, and over 20 years afterwards Bird's administrator sought to revive the suit against Inslee's executors. By the statute of limitations, 20 years barred either a *scire facias* or an action on the

judgment; and it was held, on demurrer to the bill, that payment of the judgment was to be presumed from the lapse of 20 years.

The distinction between the cases relied on and the one before us is that in the latter there has been no continuous period of 20 years within which the Bass claim has not been specifically recognized by the representatives of the estate of Foreman as valid and subsisting.

There is nothing in the case of *Teague v. Corbitt*, 57 Ala. 529, (decided in 1877,) which conflicts with our conclusions. The facts there were, in short, that the administrator had orally pleaded the statute of limitations, and judgment had gone against him in 1870 on a promissory note owned by his partner, and signed by his intestate and another, and had settled the judgment, and he claimed reimbursement out of the proceeds of real estate of his intestate. The heirs who resisted the claim were permitted to show that his defense of the plea of the statute of limitations in the action on the note, which defense he conducted in person, was negligent, both in not requiring proper proof by the plaintiff, and in not using accessible evidence to prove that it was barred as to the intestate; and they were allowed to show that the note was in fact barred as to his intestate, and he was denied the reimbursement. A judgment in favor of a creditor, and against an administrator, is held to be *prima facie* evidence against other creditors and distributees of the validity of the demands on which it is founded, and of his liability to pay it, but it is not conclusive evidence; and other creditors and the distributees may, when he claims a credit for payments made on it, show the invalidity of the demand, and that the judgment was the result of his laches in making the defense. And though, to this general principle, the exception prevails there of not requiring an administrator to plead the statute, and a failure to interpose such a plea does not deprive him of the right to reimbursement out of the personal assets, yet it was decided that when he does plead it he must exercise the same degree of diligence that would be required in making any other defense, and especially when he stands in intimate and confidential relations to the creditor. It was also held that there is no privity between the administrator and heir or devisee as to the real assets, and they cannot be bound by any admission or acknowledgment of the administrator, and, further, that if an administrator pays a judgment, and claims reimbursement from the real assets, the heir may protect himself by showing that the debt upon which it was recovered was barred by the statute of limitations.

(d) It is also urged in the bill that the county court had no jurisdiction to determine, in the proceedings instituted by Deans, whether or not the alleged Bass claim "was established as a predicate" for the order granted therein, or to determine whether such claim was a valid subsisting debt when administration was originally granted on Foreman's estate.

The reasons given in support of this contention are two: (1) That, inasmuch as Job Bass and Augustus E. Bass were sure-

ties on the administration bond of Mrs. Elizabeth Foreman, and were alleged to be the beneficial owners of the claim, it could not be determined by the county court whether or not the said Elizabeth and her sureties were indebted to Foreman's estate until there was a settlement of Mrs. Foreman's administration by herself, or by her personal representative, Augustus E. Bass. (2) That, inasmuch as Mrs. Foreman succeeded under the will of Job Bass, which was probated May 27, 1857, to the claim, if it was at that time a valid and subsisting debt, as co-owner thereof, the right to receive and the duty to pay were united in the same person, and thus was extinguished by operation of law, and her status as a creditor or a debtor of the Foreman estate was made dependent upon, and could be determined only by, a final settlement of her administration.

As to the first proposition, the probate or county court could have told from the administrator's accounts whether or not the administrator was indebted to the estate; and, if so, it would have been its duty to refuse to make a sale of real estate to pay a debt held by the sureties on her bond, if such sale would injure the rights of other creditors, or the estate was solvent, and it would consequently injure the heirs.

The fact that Mrs. Foreman was at the same time joint owner of the claim, as well as administratrix of Foreman's estate, did not of itself extinguish the claim, even to the extent of her interest, nor would such have been the result had she been sole owner of it. Wankford v. Wankford, 1 Salk. 299, 305; Hall v. Pratt, 5 Ohio, 73; Lowe v. Peskett, 16 C. B. (81 E. C. L.) 500. Nothing was decided on this point in the case of Ragland v. Calhoun, 86 Ala. 606, cited by counsel for appellees. It is true that parties urged there that where a debt and a credit—a right to demand and an obligation to pay—co-exist, even for a moment, in the same person, the debt is extinguished by the presumption of its payment; but "the ultimate decision of the interesting question here suggested" was, in the language of the opinion, left "open to be decided when it arises," the court "not intending by anything * * * said" (and it had merely given the argument and authorities) "to intimate an opinion the one way or the other," yet stating that on account of a certain decree of the probate court, by which the parties referred to were concluded, the principle could be of no avail to those in whose behalf it was urged. The only one of the decisions cited by the Alabama court that we have access to is that of Enicks v. Powell, 2 Strob. Eq. 196, and it gives an administrator *de bonis non* a relation to the administration in chief that does not obtain in this state, unless it be in cases of removals under the statute of 1870, referred to in a subsequent subdivision of this opinion.

(e) The bill also contains allegations as to the trust company and Deans, in relation to the administration of Deans, and his application for the order of sale, the sale itself, and the intention of the trust company, which it is necessary to notice. They, as set out in the following three paragraphs, are:

(1) That the trust company, recognizing the invalidity of its title to lot 8, and desiring to acquire title thereto, procured from the grantors in the deed to Sanderson an assignment of the claim alleged to be due by the estate of Foreman, and upon which the subsequent order of sale obtained by Deans, as administrator *de bonis non*, was based, and also procured Deans to sue out such letters of administration, and to make application for the sale of the lot to pay said debts; that Deans, when he applied for letters of administration, had no connection with Foreman's estate, or any alleged claim due from it, or any interest in, or connection with, the lot of land, except as the attorney of the trust company or its commissioner, which relation of attorney he occupied at the time the letters of administration were granted, and still occupies.

(2) That at the sale of June 6, 1881, under the order of the county court, one Lockwood, the agent of the trust company, bid it off at the price of \$13,000, and the sale was reported to the county court, by its commissioner, Driggs, as having been made to "Augustus E. Bass, and the heirs and representatives of Job Bass, deceased," and no further action has been taken by that court.

(3) That no purchase money was paid on the bid, nor was it intended by those making it, or interested therein, that any payment in cash should be made, or that any payment of the bid should be made other than crediting the amount bid as cash upon the alleged debt for the payment of which the sale was made; it being, according to the statement of the bill, immaterial to the parties making the bid, or interested therein, whether the bid so reported, and the sale thereon, were confirmed by the court to the trust company, by whom the bid was really made, through its agent, Lockwood, or to said A. E. Bass, and the heirs and representatives of Job Bass; the reason of such immateriality or indifference on this point being that by the operation of the warranties in the deed to Sanderson, and that from Sanderson, the deed of the county court commissioner executing the sale would inure exclusively to the trust company, whether the sale was confirmed to such company or to those whom the commissioner had reported as purchasing. That the whole purpose underlying the application by Deans for administration, and the proceedings had by him to effect a sale of the lot, will be accomplished, and complainants defrauded, by having the amount of the bid credited on or applied to the parties in whose name it is reported as having been made.

If the trust company was the holder of a valid claim against the estate of Foreman, there was nothing improper in its procuring the appointment of an administrator *de bonis non* to take possession of and administer any unadministered property of the estate, which status the bill gives to this lot 8. That the company "procured" Deans to sue out letters, and to make application for the order of sale to pay the alleged debt, does not, considering how it is alleged, impute any illegal conduct to the company or Deans, but if, when he was

applying for such order, he was the attorney of the company, or its commissioner, as such, for the enforcement of this claim against the estate, or to procure its payment out of the lot, or to obtain title to the lot through the means of a sale based on the claim as a subsisting indebtedness of the estate, the duties of such relation and those of administrator were, to say the least, incompatible with each other; and, if such relation to the company is neither expressly nor impliedly assented to by the heirs, they ought not to be bound by his action in regard to the sale. "If," says this court in *Knox v. Spratt*, 19 Fla. 817, 839, "the administrator here is the attorney of the creditors, he has assumed a position of hostility to the heirs. If he represents the debt, it is his duty not to contest it, which it is his duty to the heir to do if there is legal ground for so doing." That it would be a good ground for removal from the administration, in the proper form, can hardly be doubted. *Id.*; *Epping v. Robinson*, 21 Fla. 38.

But what is the real *status* of complainants, as shown by their bill to this sale? They expressly state that they are willing that the sale made by Driggs should stand, provided the trust company, or parties in whose name the bid is reported as having been made, pay into this court, (*i. e.*, the circuit court of Duval county, sitting in chancery,) to be distributed to those entitled thereto, the purchase money so bid, and they offer to ratify the sale upon such payment being made of the purchase money, to be disposed of by the order of the court. The prayer of the bill on this point is that the trust company or Knox, its commissioner, pay into the circuit court the sum of \$18,000, bid for lot 8, to be disposed of by the court, or, failing therein, that the sale be set aside, and declared of no effect.

If the sale is voidable because of the invalidity of the indebtedness upon which it is based, it must be avoided altogether, and as to all parties, in so far as any action of the court is concerned. An invalid proceeding for the sale of real estate to pay debts cannot be declared void or set aside because of the invalidity in the alleged indebtedness, the creditor being the purchaser, and yet held, as against the purchaser's will, to be a valid sale for the purposes of division among the heirs of the estate, particularly in a case where actual fraud is not charged. *Knox v. Spratt*, 19 Fla. 837. We have held that it is not voidable by reason of illegality in the Bass claim, or, in other words, that the bill does not show the claim to have been invalid. This being so, the conclusion is that the heirs have not, by their own showing, suffered any injury on this score from the relation alleged to have been sustained by Deans to the trust company. It is also clear, from the above proposition and prayer of the bill, that the complainants are satisfied with the amount for which the property has been sold, and they have not suffered from the sale actually made by the commissioner. The claims for which the sale was made not having been shown to be illegal, and the sale having been made for an amount satisfactory,

it is apparent that the heirs, even if they have any interest in the estate, have not been injured by the proceedings up to this point.

The bill does not in the above paragraphs, numbered 2 and 3, or elsewhere, inform us that the company or its commissioner was not authorized by "Augustus E. Bass, and the heirs and representatives of Job Bass," to bid in their name, although it says that the bid was really made by the company through its agent, Lockwood. The purchasers shown by the commissioner's report are the Basses. We will not assume that the party actually making the bid was not authorized to do so. If those really making the bid comply with it, and take the titles in the names of the Basses, it is a matter of no concern to the heirs, or any other third parties, whether the Basses authorized the bid or not.

Of the allegations as to the intentions of those making the bid, or interested therein, not to make any payment therein other than a credit of the amount thereof on the Bass claim, it is only necessary to say that we do not regard them sufficient of themselves to justify interference on the part of a court of equity. As the order of sale has not "otherwise directed," the sale was in law, and must be assumed to have been in fact, made "for cash," (section 40, p. 87, *McClel. Dig.*), and of course the commissioner will, if the sale shall be confirmed by the county court, not deliver any deed to the purchaser except upon the order of the county court directing it to be done upon the purchasers' compliance with the terms of the sale, (section 43, pp. 89, 90, *McClel. Dig.*) The funds arising from the sale, says the statute, (section 43, p. 90,) shall be delivered by the commissioner to the administrator, upon the order of the court, after the administrator has given the "bond with good security, to be approved by the court," required, the condition of which bond is (section 40, p. 87) for the faithful application of the money to the payment of the debts and charges. It is not to be assumed that either the county court or the commissioner will violate the duties imposed by the statute, nor is that court without power to require obedience to its lawful orders.

Our conclusion is that the bill fails to make a case against Deans, or any one connected with the sale of lot No. 8, under the order of the county court.

5. It is contended in behalf of Sander-son's administrators that the heirs of Foreman have no right to sue for lot No. 7, but that if the bill shows a right of action in any one it is in Deans as administrator *de bonis non*, because the lot is an unadministered asset of Foreman's estate. The authorities cited by counsel in support of this position are: 2 *Williams, Ex'rs*, 986, 1002; *Cubbridge v. Boatwright*, 1 *Russ*, 549; *Forniquet v. Forstall*, 34 *Miss*, 87; *Cochran v. Thompson*, 18 *Tex*, 652; *Swink v. Snodgrass*, 17 *Ala*, 653.

It is said in the first of the citations: "If the original executor or administrator has fraudulently aliened the assets for his own use in collusion with the vendee, such assets will be considered in equity as unadministered, and will consequently pass as

such to the administrator *de bonis non*." 2 Williams, Ex'rs, 986.

In Cubbidge v. Boatwright, the testatrix, Mrs. Cubbidge, directed by her will that certain property, including a leasehold, should be sold, and the proceeds paid to her four children, share and share alike. Her administrator *cum testamento*, Higginson, a son-in-law, possessed himself of the property, and assigned the leasehold to H. upon trust to secure an annuity which H. had granted to B., the consideration for the annuity being £250, which B. had advanced to H. confessedly for the private use of the latter, and not for the purposes of the testatrix's will. The trust-deed recited that the lease and leasehold premises had, with the consent of the other legatees, been valued to H. at £570, and that he had duly paid to them their several shares of that sum; but there was no proof of this, or of any other arrangement authorizing H. to deal with the leasehold as his own property. H. died, and his executrix sold the leasehold at auction, B. becoming the purchaser, and the £250 was credited on his bid. Shortly after B. sold to Bayfield, and afterwards the administratrix *de bonis non* of Mrs. Cubbidge filed a bill, and had the sales set aside, and recovered the leasehold. "If Higginson," says the master of the rolls, "in his character of executor, had sold the property to Boatwright, and Boatwright had been ignorant of the real nature of the transaction, the sale could not have been set aside. But it is clear that this leasehold, at the time when the grant of the annuity took place, was vested in Higginson only *qua* administrator, and that the grant of the annuity to Boatwright, and the assignment in order to secure the annuity, were not acts done by him in his character of administrator, or in the course of the administration of the assets. Upon Higginson's death, therefore, no portion of this leasehold interest passed to his executrix, but, being still assets unadministered, it passed to the administratrix *de bonis non* of the original testatrix; and she is entitled to recover possession of it for the purpose of due administration." In Forniquet v. Forstall, the administrator had land bid off at a probate sale in the name of his brother-in-law, nominally, but in truth for himself. Subsequently he was removed as administrator, and the administrator *de bonis non* filed a bill to set aside the sale and recover the land. In Cochran v. Thompson, an administrator *de bonis non*, Cochran, offered real property of the intestate, Smith, for sale in pursuance of an order of the probate court, which he had obtained, and then proceeded to sell, having previously entered into a fraudulent contract with Shannon, by the terms of which Shannon was to buy in the land for cash, and reconvey two-thirds of it to Cochran, which he did. Afterwards, Cochran died, and Thompson was appointed administrator *de bonis non* of Smith, and as such recovered the land of Cochran's administrators. Swink v. Snodgrass was an action of detinue, and the sale was held to be a pretense and a fraud; and the doctrine of the case is that if an administrator fraudulently dispose of assets to one cognizant

of the fact that he is acting in violation of his trust the sale is void, and an administrator *de bonis non* may recover them.

Upon these authorities, it is apparent that collusion between the administrator and ostensible purchaser is an essential element to deprive the sale of its effect as an administration, and leave the asset unadministered, and subject to the power of the administrator *de bonis non*. We do not think that lot No. 7 is shown by the pleadings to have been dealt with by Sanderson simply as his individual property, and not as administrator, or fraudulently. His conveyance of it was pursuant to a probate sale made by a former administrator, and there is not enough to show fraudulent collusion between the vendee and himself as to it. The fact that he was an administrator *de bonis non* did not preclude his consummating the sale made by his predecessor in the administration, under the legislation then in force as to such sales. Freem. Jud. Sales, § 46; Gridley v. Phillips, 5 Kan. 349; Baker v. Bradshaw, 23 Ill. 632. The allegations of his desire to possess himself of the property, and that his deed of conveyance, and the deed back to him, were one transaction, are not sufficient to charge that the grantees did not take it under the probate sale, or impute to them either complicity in or knowledge of any improper purpose on his part. This being so, we do not think it can be said that lot No. 7 has not been administered upon, in the sense that will permit the administrator *de bonis non* to recover it. Where fraud is relied upon, it should be clearly shown by the averments of the pleading. President v. Groff, 14 Serg. & R. 181, 184; Howard v. Railroad Co., 24 Fla. 560, 5 South. Rep. 356; Wortman v. Skinner, 12 N. J. Eq. 358; Bertine v. Varian, 1 Edw. Ch. 348; Johnson v. Johnson, 5 Ala. 90.

There is, as to lot No. 7, a fatal defect in the parties defendant to this bill. Upon the face of the bill, the title to the lot was in Sanderson individually at the time of his death, and then it descended to his heirs; and they are entitled to their day in court to defend it against those seeking to set aside the conveyance by which he acquired title. Sloan v. Sloan, 21 Fla. 589; Whitlock v. Willard, 18 Fla. 156; Alston v. Rowles, 13 Fla. 110; Betton v. Williams, 4 Fla. 11. Conveyances of the character of these are not void, but, under certain circumstances, are voidable. Price v. Winter, 15 Fla. 109; Jennison v. Hapgood, 7 Pick. 1. The decisions in Sanchez v. Hart, 17 Fla. 507; Doyle v. Wade, 23 Fla. 90, 1 South. Rep. 516; Merritt v. Daffin, 24 Fla. 320, 4 South. Rep. 806, do not dispense with the heirs as necessary parties in cases of the kind before us, and are not inconsistent with those relied upon, and previously cited. In Sanchez v. Hart it is held that an administrator has the right of entry into the possession of real estate of his intestate, and can maintain ejectment; that his right to recover follows his right to rents and profits, and because lands are assets in his hands with a power to collect the same; and the basis of his action is the title of his intestate. In Doyle v. Wade the court held that where there is

an administrator on the estate of a decedent, and the estate unsettled, the heirs of the decedent cannot maintain ejectment to recover possession of his real estate, but the administrator is the proper party. He, and not the heirs, is entitled to the possession and rents and profits of the real estate until he has administered upon it. *Merritt v. Daffin* decides that an administrator holding the real estate of his intestate as assets is, under the law of this state, the only necessary party to a suit to foreclose a mortgage made by the intestate; and the heir, though not a party, is concluded by a decree of foreclosure, and a sale thereon. In each of these three cases it is apparent that the land is for the purposes of the decision conceded to be assets of the intestate, and the sole question is the powers which our statutes have clothed an administrator with as to real estate considered as assets. In the case before us, the complainants are not seeking to affect real estate which is conceded to be assets of Foreman's estate, or to reach it as assets of Sanderson's estate, but to have it declared assets or property of Foreman's estate in the hands of Sanderson's administrators. Neither the statutes nor the decisions justify us in extending the doctrine dispensing with the heirs or extending the powers of an administrator over the title thus far. In fact, the decisions first cited in this paragraph forbid it. In *Sloan v. Sloan* the devisees of Hall were subsequently and properly made parties. Even in a case of doubt, it is proper to have before the court those in whom the statute places the title. The position of the administrators with reference to complainants and Sanderson's heirs, as claimants of this lot 7, make it essential that the heirs, as well as the complainants, should be before the court to protect their respective interests.

6. At this point it is proper to notice the averments of the bill as to the "funds in New York" which Sanderson is charged with having possessed himself of. It is said in one place that Sanderson possessed himself of them, and the amount of them is averred, upon information and belief, to have been several thousand dollars. The only other averment concerning these funds is that which charges that Sanderson's administrators have made no settlement of his administration of Foreman's estate, nor any payment or distribution, either partial or final, to those interested therein, on account thereof, but his administration is wholly unsettled.

Sanderson's administrators contend that Deans, as the successor to Sanderson in the administration, is alone entitled to recover these funds. Unless the funds continue in the same form they were in when Foreman died, an administrator *de bonis non* cannot recover them. *Gregory v. Harrison*, and other authorities, *infra*. While it is true that the bill does not show that these funds do thus remain *in specie*, it is very clear that it does not show that Sanderson has applied them, or that he misapplied them, or that they ever came to the hands of his administrators. The fact that they or Sanderson did not pay them to the complainants, or those they

claim under, which the expression "payment or distribution to those interested therein" clearly means, does not, under the case made by the bill, charge either a *devastavit* against Sanderson, or show a right of action in any distributees of Foreman, or the administrator of any deceased distributee; for nowhere in the bill does it appear, when we consider the insufficiency of the allegations assailing the validity of the Bass claim, that the estate is solvent. *Stephens v. Frost*, 2 Younge & C. 297.

In connection with these "funds in New York," or any other claim against Sanderson arising out of any personal property of the estate of Foreman which he may have misappropriated, it is proper for us to remark here that an administrator or the executor, if there be such of any distributee of Foreman inheriting from him, and who has since died, is the proper and only proper person to sue. The husband and children of the sisters of Foreman are improperly complainants to this bill, and cannot maintain the suit as to any cause of action growing out of personality. *McHardy v. McHardy*, 7 Fla. 301, 308; *Alston v. Rowles*, 13 Fla. 110; *Teague v. Corbitt*, *supra*; *Barb. Parties*, 398, 399; *Clason v. Lawrence*, 3 Edw. Ch. 48; *Jenkins v. Freyer*, 4 Paige, 46.

7. The question of multifariousness is now to be considered. The bill does not make a proper case for equitable relief against any of the defendants, and the orders overruling the demurrers must be set aside, and all subsequent orders will necessarily fall with them; yet, as it may be amended, and new parties made, it is proper we should express ourselves on the subject of multifariousness.

It is true, as a matter of law, that Sanderson, as administrator *de bonis non*, is not responsible for anything administered by Mrs. Foreman, and likewise Deans is not liable for whatever may have been administered by Sanderson. Deans has no right of action against Sanderson's administrators for any alleged *devastavit* of Sanderson; for, though the statute of February 19, 1870, (chapter 1733, §§ 80-90, p. 98 et seq., *McClell. Dig.*) gives powers and rights of action not existing at the common law to administrators *de bonis non*, as against executors or administrators who may have been removed by the court for cause, these provisions do not extend to the case of a delinquent deceased executor or administrator who has not been thus removed. The duty of an administrator *de bonis non* is to administer upon whatever of the estate of the intestate remains *in specie*, and has not been administered upon by his predecessors. *Gregory v. Harrison*, 4 Fla. 56; *Beall v. New Mexico*, 16 Wall. 535; *Appeal of American Board of Commissioners*, 27 Conn. 344; 1 *Williams, Ex'rs*, 604, note *b*; *Rives v. Patty*, 43 Miss. 338; *Wankford v. Wankford*, 1 *Salk*. 306; *Dement v. Heth*, 45 Miss. 338; *Catherwood v. Chabaud*, 1 *Barn. & C.* 150; *Carriek v. Carriek*, 23 *N. J. Eq.* 364; *Bell v. Speight*, 11 *Humph.* 451.

Deans is not, nor are his sureties, interested in the case presented by the bill against the administrators of Sanderson.

In view of the allegations of the bill, the

Eljah Bass estate claim is the only one asserted against Foreman's estate; and, if it be a fact that this claim is not a subsisting debt, there is nothing in the way of the complainants' enjoying their right to whatever assets or property there may be of Foreman, the only property of which the bill gives us notice being lots Nos. 7 and 8, of block 31, in Jacksonville, and the alleged liability of Sanderson's administrators growing out of his administration *de bonis non*. On the other hand, if this is a valid indebtedness, whatever estate there may be of Foreman is applicable to its payment before any of the complainants can receive anything as heirs or distributees. Upon the case as made by the bill, considered thus far, we have before us as complainants the heirs and distributees, and administrator *de bonis non*, and the only alleged creditor of the estate. There is no doubt but that relief to which complainants may be entitled against Deans and the trust company and its commissioner could be obtained in a separate suit; and yet a suit against Sanderson's administrators without the trust company, as the owner of the Bass claim, as a party, or without some adjudication upon the validity of this claim, would not be effectual to settle the complainants' rights to Foreman's estate as against this claim. Again, relief in which Sanderson's administrators are concerned is asked as to lot 8 by the prayer to set aside the conveyance of it by their intestate as administrator *de bonis non*.

As a creditor of Foreman, the trust company has an interest in his estate. If it be that the sale of lot 7 to pay this claim, and the purchase of the lot by the former owners of the claim, and the conveyance to them, and the subsequent reconveyance by them to Sanderson, with covenants of warranty will preclude an assertion, as against such lot, of the balance of the claim now held by the trust company, still, upon the face of the bill and the demurrer under consideration, there is nothing to cut off the claim, if it is valid, from a satisfaction out of lot No. 8, and whatever may be found to be due by Sanderson's administrators. Lot No. 8 cannot be regarded, in the light of this record, as having been sold, or offered for sale, by the administratrix at the sale of October, 1856; and not only is this true, but the demurrer admits that the trust company, notwithstanding the conveyance of the lot to it by Sanderson, has surrendered it to Deans as administrator, and that he was, at the filing of the bill, holding and administering upon it as assets of Foreman's estate.

The trust company, then, has an interest in the entire case made by the bill, and is a necessary party to it. Though Deans, as administrator *de bonis non*, has not any interest in the liability of Sanderson's administrators, yet we do not think that this would render a good bill multifarious as to him and his sureties.

It is not necessary, to overcome the objection of multifariousness, that all the parties should have an interest in all the matters contained in the suit. The objection will be defeated if it appears that each party has an interest in some matters in

the suit, and they are connected with the others. Story, Eq. Pl. (Redf. 8th Ed.) §§ 271a, 279a; Parr v. Attorney General, 8 Clark & F. 403, 433; Attorney General v. Mayor, 4 Mylne & C. 17; Worthy v. Johnson, 8 Ga. 236; Warthen v. Brantley, 5 Ga. 571; Wells v. Strange, Id. 22; Campbell v. Mackay, 1 Mylne & C. 608; Attorney General v. Craddock, 3 Mylne & C. 85; Lewis v. Edmund, 6 Sim. 251. The inquiry is not whether each defendant is connected with every branch of the case, but whether the bill seeks relief in respect to matters separate and distinct in their natures. If the object of the suit is single, yet different persons have separate interests in distinct questions arising out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole subject. Daniell, Ch. Pr. 336; Story, Eq. Pl. §§ 534, 539a; Hayden v. Thrasher, 18 Fla. 795. In Attorney General v. Craddock, supra, it is observed: The object of the rule against multifariousness is to protect a defendant from unnecessary expense; but it would be a great perversion of that rule if it were to impose upon the plaintiffs, and all the other defendants, the expense of two suits instead of one.

It seems to us, after a careful consideration of the character of this case, and of the authorities upon the subject of multifariousness, that the matters sought to be presented may be more advantageously disposed of in one suit than in two. They can all be definitely settled in one suit, and it is not clear that they could be in two suits, to each of which both the trust company, Deans, as administrator, and Sanderson's administrators, were not parties. Equity is opposed to a multiplicity of suits. Story, Eq. Pl. § 287. The general object or purpose of this suit is the settlement of the estate of the complainants' ancestor, and it can be effected more conveniently and satisfactorily in one suit than in more.

The orders overruling the demurrers are reversed, and the case will be remanded for proceedings not inconsistent with this opinion.

STATE ex rel. LECHE, District Attorney, v. FOWLER.

(Supreme Court of Louisiana. Nov. 18, 1889.)

OFFICES—ACTIONS TO DETERMINE TITLE—APPEAL—MOTION TO DISMISS.

ON MOTION TO DISMISS.

1. Section 3604, Rev. St., making appeals in intrusion into office cases returnable to the supreme court, "either in New Orleans or at one of its sessions in the country," while doubtless making it eminently proper to make such appeals returnable at the next ensuing session of this court, contains no positive mandate to that effect, and does not destroy the judge's discretion.

2. When the judge renders his independent order, making the appeal returnable at a certain place "according to law," this indicates that he considered and construed the law, and, if he committed error, it could not be visited on appellant, under authority of Dellwood's Case, 38 La. Ann. 1239.

ON MOTION TO RECONSIDER.

A decree overruling a motion to dismiss is interlocutory, and is revisable until before final adjudication on the merits of the case, and, when

found erroneous, can be rescinded. In such event, the motion to dismiss revives as *res nova*.

ON MOTION TO DISMISS.

1. Appeals from judgments in cases, under the intrusion into office act, must be made returnable within 10 days to the supreme court at New Orleans, or at one of its country sessions, immediately following the judgment.

2. An appeal taken in July, returnable to the supreme court at New Orleans in November, on the suggestion of the appellant, instead of October at Shreveport, must be dismissed. The rule that when appeals are made returnable at a particular place, and on a particular day, and the appellant suggests improperly the one or the other, or both, applies equally to civil and to criminal cases.

3. Where the appellant suggests neither the place nor time, and the judge shows by an explicit act that he exercised a legal discretion by fixing the place or time, or both, the appellant is entitled to protection, but then only.

(*Syllabus by the Court.*)

Appeal from district court, parish of Jefferson.

H. N. Gautier, for appellant. Walter H. Rogers, Atty. Gen., for relator.

ON MOTION TO DISMISS.

FENNER, J. The motion is made on the ground that the suit is brought under the intrusion into office act, and involves the right to office; that judgment therein was rendered in July, 1889, and that, on motion of appellant, the appeal taken in the same month was made returnable to the supreme court in New Orleans, whereas it should have been returnable to our next ensuing October term in Shreveport. Section 2604, Rev. St., provides that such appeals shall have preference, and "shall be made returnable to the supreme court either in New Orleans, or at one of its sessions in the country." Section 7 of Act 45 of 1870, after providing the terms of the supreme court for the several parishes, and making all appeals from the parish of Jefferson returnable at New Orleans, says that appeals in cases involving the right to office "shall be returnable in ten days after judgment," without fixing the place. In support of the motion to dismiss, our decisions in regard to criminal appeals, under section 4 of act 80 of 1878, are invoked; but the language of that section is very different from that of the statutes just quoted. It provides that criminal appeals "shall be made returnable to the supreme court within ten days, wherever the court may be in session on return-day." Under this mandatory language we held that appeals made returnable elsewhere than at the ensuing session, by appellant's fault, should be dismissed. *State v. Cloud*, 40 La. Ann. 618, 4 South. Rep. 497; *State v. Jenkins*, 36 La. Ann. 865; *State v. Lyon*, 6 South. Rep. 722, (this day decided.) But the legal provision here is not similar. While, perhaps, the spirit of the law suggests, and would make it eminently proper, that the judge should make it returnable at the next ensuing session of this court, yet the language of the law is not mandatory to that effect, and his discretion is not destroyed. Moreover, in this case the judge has rendered his own order separate and apart from the motion of defendant, making the appeal "returnable to the supreme court, according to law, at

New Orleans." This indicates that the judge considered and construed the law, and even if he committed error it could not be visited on appellant, under the authority of *Dellwood's Case*, 33 La. Ann. 1229. The motion to dismiss is overruled.

ON MOTION TO RECONSIDER.

(Jan. 20, 1890.)

BERMUDEZ, J. In an informal proceeding the attorney general, considering that our previous decree herein, overruling the motion to dismiss, is erroneous, and still within our control for correction, suggests that the place at which the appeal was made returnable was suggested by the defendant, and that the judge, in granting the appeal, merely followed the improper suggestion. The question, therefore, arises whether it is in the power of this court, after it has denied a motion to dismiss, to reconsider its ruling, and, if found erroneous, such ruling can be rescinded. Code Prac., art. 537, divides judgments into interlocutory judgments and final judgments. Interlocutory judgments do not decide on the merits of the case, but are pronounced on preliminary matters in the course of the proceedings, while definitive or final judgments are such as decide all the points in controversy between the parties, and have the force of *res judicata*. A judgment must therefore be interlocutory or definitive. If it is not the one, it must be the other. The motion to dismiss was not designed to obtain a judgment on the merits of the controversy, but merely to procure a ruling on a preliminary matter, which was whether the court would or not entertain jurisdiction over the merits of the suit for a reason alleged. The judgment of this court upon it was not a final judgment, deciding all the points in controversy between the parties, and having the force of *res judicata*. If not a definitive judgment, it is an interlocutory judgment, and as such is revisable by the court before final adjudication. It has been settled by frequent rulings that where a court, whether of original or appellate jurisdiction, discovers that an order given by it is erroneous it may itself set it aside without any formal motion. *Hem. Dig.* 330, (8.) 738, (9.) This is so true that this court has, in a number of cases, decided that applications for a rehearing, where motions to dismiss appeals had been denied, were irregular, as such applications could be made only where final judgments had been rendered. *Succession of Edwards*, 34 La. Ann. 220, and other cases. The decree herein made was therefore an interlocutory judgment, and as such is revisable at any stage previous to definitive judgment. *Hairs of Burney v. Ludeling*, 41 La. Ann. 627, 6 South. Rep. 248. Such interlocutory judgment would not be affected by the lapse of judicial days, which could not run to make it final, as in cases of definitive judgments. It remains, therefore, within the control of the court, which can, even *proprio motu*, recall it and reconsider the motion, and it is its duty to avoid it where erroneous. It is true that the ruling was concurred in unanimously, but had the fact of suggestion of

the improper place by the attorney been more clearly presented a different conclusion would have been reached.

The next question is whether that decree was or not correctly rendered. A reference to the reasons assigned in support of it shows that the material fact on which the motion was based, to some important extent, did not fully attract the attention of the court so as to give it the significant prominence which was claimed for it. That fact was that the return place, namely, New Orleans, was suggested by the appellant instead of Shreveport, and the consequence urged was that, as the appellant had misled the judge, the appeal ought to be dismissed. We consider that the correctness of the opinion and decree is questionable, and that the same is revisable. It is therefore ordered that the previous decree denying the motion to dismiss be rescinded, and that the motion be reinstated for reconsideration.

ON MOTION TO DISMISS.

(Jan. 20, 1890.)

BERMUDEZ, C. J. The attorney general moves that the appeal herein be dismissed, on the ground that it was made returnable, at the instance of the appellant, at New Orleans, while it ought to have been made returnable at Shreveport. The suit was brought under the intrusion into office act, and the prayer is that "there be judgment in favor of the state, decreeing that Augustus C. Fowler usurps, intrudes into, and unlawfully holds and exercises, the office of coroner of the parish of Jefferson, and that he be excluded from said office, and for general relief." There was judgment accordingly, after hearing, which was signed on the 11th of July, 1889, the last day of the term of the district court in the parish of Jefferson. On the same day the cast defendant moved in writing "that a suspensive appeal be granted him therefrom to the supreme court of this state, returnable, according to law, at New Orleans." The district judge, in furtherance of the motion, made the following order: "Let a suspensive appeal be granted the defendant A. C. Fowler, returnable to the supreme court of the state of Louisiana, according to law, at New Orleans, within ten days, on his furnishing bond," etc. The supreme court was not in session at New Orleans on the 11th of July, and held a session in October following in Shreveport, where it heard and determined cases. The transcript of appeal was filed in the clerk's office at New Orleans, and the motion to dismiss, now under consideration, was next made.

The legislation on the subject of appeals in cases in which the right of office is involved dates back to 1866, receiving attention in 1868 and in 1870. See Act 1866, No. 82, § 13, p. 154; Act 1868, No. 156, § 12, p. 201; Act 1870, No. 45, § 7, p. 100. The spirit and letter of those several acts do not reveal or intimate any intent on the part of the legislature that the one should modify the other, and show that they well may co-exist. Blended and construed together, they clearly mean that, in all cases under the intrusion into office act, appeals

must be taken within 10 days to the supreme court at New Orleans, or at one of its sessions in the country, to be tried by preference. In *State v. Hall*, 28 La. Ann. 58, from the country, in which the appeal, allowed within 10 days after judgment rendered in September, had been made returnable in New Orleans on the first Monday in November, the court dismissed the appeal, considering that the policy of the law is to have such cases determined speedily, and with the least possible delay, and concluding that the requirement of the law must be construed strictly. It is apparent that the law not only requires that the appeal be made returnable within 10 days, but also that it be made returnable to the supreme court either at New Orleans or at one of its sessions in the country, and that it be tried by preference. Surely the object of the law, which is to oust usurpers from invaded public offices as summarily as legally practicable, would be greatly defeated if one, declared to be such usurper, by judgment signed in July, could make his appeal returnable in November, at New Orleans. He would thereby maintain himself in office in the mean time, when his appeal ought to have been made returnable within the 10 days following the signature of the judgment previously at such place at which the supreme court would next be in session. It has been repeatedly held that where the law makes appeals returnable in a particular manner as to time and place, and the appellant expressly asks that the appeal be made returnable in a different manner, suggesting, for instance, an improper place, and the order granting the appeal is inadvertently rendered in accord with the prayer, the error thus committed by the court is imputable to the appellant, who, as a penalty for misleading the judge, will be ousted from his appeal. The rule has been applied equally to civil and to criminal cases. *State v. Clinton*, 27 La. Ann. 540; *Heard v. Patton*, Id. 542; *Wootton v. Le Blanc*, 32 La. Ann. 692; *State v. Jumel*, 35 La. Ann. 980; *Same v. Balize*, 38 La. Ann. 542; *Same v. Cloud*, 40 La. Ann. 618, 4 South. Rep. 497. There is no doubt that in the latter class of cases the judge is vested with a certain discretion in fixing a different place for the return, when in his opinion such a change will conduce to a speedy determination of the appeal, and there is no reason why, in the other class of cases, he may not act in a similar manner; but it is clear that in doing so his action must appear as the result of the exercise of his own judgment, which must not be based solely on the suggestion of the appellant. The same spirit which animated the legislature when it enacted legislation for criminal cases inspired it when it adopted the intrusion into office act, providing for the manner in which such appeals should be returned. That spirit was as well to secure to an accused a speedy acquittal or conviction as promptly to hurl intruders from office, and to induct lawful claimants into the same, as to quiet the title of legitimate incumbents to the same. Surely it can less be claimed that the judge exercised a discretion in this case when he adopted the improper suggestion of the appellant, and assigns no reason

whatever for making the appeal returnable at New Orleans instead of Shreveport, where, under the law, it ought to have gone. The ruling in *State v. Dellwood*, 33 La. Ann. 1229, is no precedent or authority in the present instance, however far it may have gone to extend relief to the appellant, for there the majority of the court concluded that the judge had shown the exercise of legal discretion, as he had said: "By reason of the law and the foregoing application the appeal is granted returnable," etc. Had the appellant here not gratuitously suggested himself an improper return place, and had the judge, by some ostensible act of his own, shown that he did not rest solely on the suggestion of appellant, but had exercised a legal discretion by fixing the return place, the appellant would have been entitled to relief, but the fact patent on the record is that the judge gave no reason for changing the return place, and rested solely on the suggestion of the appellant, who is therefore at fault. It is therefore ordered that the appeal herein be dismissed, with costs.

FENNER, J., (*dissenting*.) The motion to dismiss involved nothing but the propriety of the place fixed for return. It was duly tried and submitted, and was overruled in a unanimous opinion by the court. 6 South. Rep. 602. Subsequently the case was fixed, argued, and submitted on the merits, without a whisper of complaint from any party as to the disposition of the motion to dismiss. Applications for rehearing on decrees overruling motion to dismiss are not received by the court. Succession of Edwards, 34 La. Ann. 220. Yet some time after the submission of the cause on the merits, an irregular application, suggesting no new matter affecting the main ground of the opinion, was made by the attorney general, inviting the court to review its ruling on the motion to dismiss. I think, at this stage of the case, we should have disregarded the application. There is no precedent for reviewing a motion to dismiss, based on grounds not affecting the jurisdiction of the court, after it has once been regularly tried and overruled. There are precedents to the contrary. *Duncan v. Duncan*, 29 La. Ann. 829; Succession of Edwards, 34 La. Ann. 219. Nothing was submitted to us but the merits of the case, which were submitted without reserve, and were ripe for decision. I think we were not called upon, either of our own motion or at suggestion of the party, to reconsider grounds for dismissing the appeal, which had already been duly considered and overruled. If the appellant had a bad case, affirmance of the judgment would accomplish the same end as dismissing his appeal; if he had a good case, we were not required to go out of our usual way to destroy his appeal. The appellant had the right to suppose that the motion to dismiss was out of the case. If he had not so thought, he might have furnished additional argument against it. As it is, the judgment in his favor is reversed without new notice or hearing accorded to him. Moreover, I think the original opinion in the motion to dismiss was correct, and I adhere to it. But if it were

wrong, it furnished, to my mind, the best of reasons why the appeal should not be dismissed. It is elementary that error in the day or place fixed by the order of appeal for the return is not ground of dismissal, unless attributable to the fault of the appellant. Here the only fault attributed to the appellant is a misconstruction of the law as to the proper place for return of the appeal, but, if the terms of the law are so doubtful that, in its first consideration, this unanimous court affirmed the construction placed on the law by appellant, surely the error is not such a fault as should defeat the right of appeal. Finally, the original papers in the case furnished by the attorney general show that though the motion for appeal presented by appellant's counsel did suggest New Orleans as the place of return for the appeal, yet the order of appeal, fixing that place, was written by the judge *a quo* in his own hand, showing that his discretion was not surprised, but that he deliberately made an appeal so returnable as complying with his interpretation of the law, as expressed in the words "according to law" embodied in his order. This, as it seems to me, makes the point stronger than appeared on the face of the transcript, and stronger than *Dellwood's Case*, the application of which authority should save the appeal. I dissent.

Rehearing refused.

STATE ex rel. ATTORNEY GENERAL v.
SAVAGE.

(Supreme Court of Alabama. Feb. 1, 1890.)

OFFICE AND OFFICER — REMOVAL — HABITUAL
DRUNKENNESS.

One who has been drinking to excess six or eight times a year, at intervals of from one to two months, for over three years, whose fits of intoxication lasted from one to two days, and once for two or more weeks, is guilty of "habitual drunkenness" within Const. Ala. art. 7, §§ 1-4, relating to the removal of officers.

Trial of the impeachment of R. R. Savage, probate judge of Cherokee county. For hearing on motion to quash, see ante, 7.

W. L. Martin, Atty. Gen., for the State. *Tompkins & Troy* and *J. A. Walden*, for respondent.

STONE, C. J. Article 7, § 1, of the constitution, (section 4818, Code 1886,) must be interpreted in the light of the object the law-making power had in view in their adoption and enactment. They pertain to official qualification and fitness, and require that the incumbents of the enumerated offices shall be free from the vices therein interdicted. In reference to habitual drunkenness, the *gravamen* of the present information, the purpose was to secure a calm, wise, and faithful administration of the law, uninfluenced by the endangering effects of habitual intoxication. It is implied and assumed that drunkenness so clouds the intellect and inflames the passions as that official trust cannot be safely confided to those with whom excessive indulgence in intoxicating drinks has become a habit.

"Drunkenness" is that effect produced on the mind, passions, or body, by intoxi-

cants taken into the system, which so far changes the normal condition as to materially disturb and impair the capacity for healthy, rational action or conduct; which causes abnormal results, or such as would not ensue in the absence of the intoxicants,—the changed effect produced by the immoderate or excessive use of intoxicants, as contrasted with normal *status* and conduct.

"Habit" is customary state or disposition acquired by frequent repetition; aptitude by doing frequently the same thing; usage; established manner. When a person has repeatedly acted in a particular way at intervals, whether regular or irregular, for such length of time as that we can predicate with reasonable assurance that he will continue so to act, we may affirm that this is his habit.

The testimony, taken in its entirety, proves that the accused drank to excess—to drunkenness—six or eight times a year, and that this, with intervals of from one to two months, has, with the exception of about a year immediately succeeding his last election, in 1886, been kept up for much more than three years before these proceedings were instituted; that his spree or fits of intoxication lasted from one to two or more days, and once for two or more weeks, and that during his spells or sprees he frequently staggered in walking, sometimes fell to the ground, had to be led or assisted home, and was abnormally loud, if not boisterous, in his conversation. Even after the present proceedings were set on foot, he took one or more sprees. Under the definitions given above, we hold that drunkenness had become a habit with the respondent, and that at and before the commencement of this proceeding he was and is guilty of habitual drunkenness. We therefore find the charge and specification of habitual drunkenness made against respondent to be true, and that he is guilty as charged in the information. *Blaney v. Blaney*, 126 Mass. 205.

It is therefore the order and judgment of the court that the said R. R. Savage, judge of probate of Cherokee county, be, and he is hereby, removed from the said office of judge of probate, and that he is disqualified from holding office under the authority of this state for the term for which he was elected.

SOMERVILLE, J. The information addressed by the grand jury of Cherokee county to this court, and filed by the attorney general, which is analogous to the ordinary articles of impeachment, charges the defendant, R. R. Savage, as probate judge of said county, with habitual drunkenness, as a ground of impeachment, which is one of the several causes specified in the constitution and statute which may be made the basis of such a proceeding.

Certain state officers, including judges of probate, are subject to impeachment and removal from office on the following grounds: Willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith. Const. Ala. 1875, §§ 1-4; Code 1886, §§ 4818, 4819.

It is not practicable, nor, so far as I know, has any court attempted, to lay down any fixed rule accurately defining what is "habitual drunkenness," or who may be deemed an "habitual drunkard."

The two phrases, "habitual drunkard" and "common drunkard," have been held in some states to be synonymous in meaning, in construing statutes regulating the liquor traffic, relating to the subject of granting divorces, and providing for the custody of the estates of persons of this class. Either of the expressions may, in general terms, be defined as meaning one who drinks intoxicating liquors, to excess, with habitual frequency. Indulgence by a person, on the one hand, in occasional acts of drunkenness, would not be sufficient to bring him within the sphere of this definition; nor, on the other hand, need he be constantly drunk every day or week in a year. Nor would I be willing to say that the term necessarily involves the idea of the victim of the habit yielding to the temptation of drink whenever the opportunity is afforded, as has sometimes been intimated. Common observation shows that there are persons who are in the habit of getting drunk almost regularly every week, while they indulge in drink at no other time. There are others whose formed habit it is to fall into drunken debauches, lasting for days, and even weeks, and repeated from one year to another with a periodicity more or less regular, according to the peculiar temperament of the man. This form of alcoholism often becomes a disease, formerly characterized as a species of *dipsomania*, and more recently known in scientific nomenclature as *methomania*,—an irresistible craving for alcoholic or other intoxicating liquors, accompanied by peculiar symptoms, described by medical authors, the discussion of which, however, is foreign to the scope of this opinion. The victim acquires the habit of being attacked by these drunken sprees, or fits of intoxication. I can see no good reason why such a man would not properly come within the definition of an habitual drunkard, or should be exempt from being classed as a man of intemperate habits. In popular parlance, he certainly would be so classed.

The case of *Blaney v. Blaney*, 126 Mass. 205, is an authority on this point. The Massachusetts statute makes "gross and confirmed habits of intoxication" a ground of divorce, without undertaking to define those terms. The evidence showed, using the language of the court in that case, that the defendant, "for a period of twelve or fifteen years, had as often as three or four times a year yielded to an impulse to drink to excess; that on such occasions he became grossly intoxicated, continuing in that condition a week or ten days together; and that at such times he went, or was sent, to an asylum for inebriates; that when the desire for drink came upon him he could not resist; and that a single glass would bring on excessive drinking, and a renewal of gross intoxication. It was also shown that there had been no apparent improvement in his habits in this respect, and that any undue excitement would make him drink." Upon this state

of facts, the supreme judicial court of Massachusetts concurred in sustaining a judgment finding the defendant to have been a person of gross and confirmed habits of intoxication.

In this case, the phrase "habitual drunkenness" must be construed with reference to the particular mischief intended to be remedied by the law-makers. Being one of several causes of impeachment in office, it must be interpreted in connection with the other grounds associated with it, which are also made causes of impeachment and removal from office. They are: (1) Willful neglect of duty; (2) corruption in office; (3) incompetency; or (4) any offense involving moral turpitude. These are causes which would seem to render the incumbent practically or morally unfit for office. They all tend more or less to reflect upon the dignity of office, to generate disrespect for the law, through the want of worth, moral or intellectual, in the officer, to create dissatisfaction among the people with their government, and to thus seriously cripple the administration of justice in all its departments. Any indulgence in excessive intoxication, with such habitual frequency as to produce this result, ought, in my judgment, to bring a given case within both the letter and spirit of the law.

The summary of the testimony in this case, as made in the opinion of the chief justice, is fully supported by the record. It satisfactorily shows that the respondent has during his present term of office been guilty of drunkenness which may properly be characterized as "habitual," within the meaning of the constitution and statutes of this state.

On these grounds, I concur in the judgment of impeachment rendered by the court.

FOSTER v. STATE.

(*Supreme Court of Alabama. Jan. 8, 1890.*)

CHattel Mortgages—Sale of Mortgaged Property — Former Acquittal — Secondary Evidence.

1. Defendant having been tried under an indictment for selling mortgaged property, consisting of a cow, a calf, and 900 pounds of cotton, and having been found "guilty of removing 500 pounds of cotton," the verdict and judgment entered thereon constitute an acquittal, and a bar to further prosecution as to all of the charges, except as to the 500 pounds, though set aside at his instance.

2. Though a mortgagee is bound civilly by an assignment of the mortgage, executed by another as his agent, his silent partner being present at the time, and by the representations of the partner that the mortgage debt was the only claim held by the firm against the property, he cannot be held criminally unless it be shown that he knew or had knowledge of the transfer and representations.

3. One who has assigned a mortgage on a crop, and has acquired a landlord's claim for unpaid rent, is not criminally liable for removing the crop, if he acquired the lien after transferring the mortgage, nor if he acquired it before, unless he knew that when the mortgage was transferred such representations had been made as would estop him from asserting any other lien.

4. Secondary evidence of the contents of a document cannot be given, unless it be shown to have been lost or destroyed; and, if lost, careful search must have been made at the place where it was last known to be, or where it would most likely be found.

Appeal from circuit court, Conecuh county; JOHN P. HUBBARD, Judge.

Indictment against W. C. Foster and James M. Windham, charging them "with the purpose to hinder, delay, and defraud Bryant Johnson, who had a valid and lawful claim thereto, under a written instrument, lien created by law, for rent or advances, or other lawful or valid claim, verbal or written, did sell or remove personal property, consisting of one cow and calf and 900 pounds of seed cotton, of the aggregate value of \$27; they, the said J. M. Windham and W. C. Foster, having at the time the knowledge of the existence of such claim." On the first trial Windham was acquitted, and the jury returned a verdict against Foster, finding him "guilty of removing 500 pounds of seed cotton, valued at \$12.50," and assessing a fine of \$25 against him. This verdict was entered up in the judgment, as it is copied in the transcript, as a verdict of guilty against Foster, finding the value of the property to be \$12.50, and assessing a fine of \$25 against him, and he thereupon confessed judgment for the fine and costs, with sureties; but this judgment was set aside at his instance, on a subsequent day of the term, and a new trial granted. On the second trial, as shown by the transcript, the defendant pleaded the former verdict and judgment as an acquittal (1) of the charge as to the cow and calf, and (2) of the entire charge, except as to the 500 pounds of the seed cotton. To each of these pleas the state replied the judgment granting a new trial on the defendant's motion, to which replication he demurred; but the court overruled the demurrers, and held that the former verdict and judgment constitute no bar to any part of the prosecution. Issue was then joined on the plea of not guilty, and the defendant convicted. On the trial the state introduced secondary evidence of a mortgage for advances to make a crop during the year 1888, executed to the defendant by P. Lewis and Mrs. N. P. Reid, which seems to have been transferred by the defendant, "per Stallworth & Burnett, his attorneys, on the 1st of November, 1888, to George M. Leigh, and by said Leigh, November 6, 1888, to Bryant Johnson;" and adduced evidence showing that the defendant, after the transfer of this mortgage, had received and sold some of the property conveyed by it. The defense seems to have been that the cotton sold by the defendant, after the transfer of the mortgage, which was raised by said P. Lewis during the year 1888, was subject to a prior lien for rent, of which lien and claim he was the owner at the time he sold the cotton. Numerous exceptions were reserved by the defendant to the rulings of the court on the admissibility of evidence, and in the matter of charges given and refused, and he now appeals.

John Gamble and Watts & Son, for appellant. *W. L. Martin*, Atty. Gen., for appellee.

STONE, C. J. When the case of the defendant was submitted to the jury on the first trial, he was placed or put in what the law calls "jeopardy." The case, at that stage, could not be lawfully taken from

the jury, except in one of three ways: *First*, by a verdict of guilty or not guilty, rendered; *second*, by a failure of the jury to agree with the term allotted for the court, or some other legal ground supervenes, which renders their discharge a necessity; or, *third*, where, the jury having rendered no verdict, the case is taken from them by consent, and a mistrial had. In this case the jury did render what they obviously intended as a verdict, and the court received it, and discharged them. Judgment was subsequently arrested, on the ground of an imperfection in the verdict. Now, what the jury intended as a verdict was either a verdict or it was a nullity. If a nullity, then the jury was discharged before they had rendered their verdict, without any lawful excuse therefor, and without the consent of the accused. If we come to this conclusion, the prisoner having been once put in legal jeopardy, and the case taken from the jury without a verdict, and without authority of law, he could not again be put on trial for any offense charged in that indictment. In *re Battle*, 7 Ala. 259; 1 Brick. Dig. p. 455, § 110; *Powell v. State*, 19 Ala. 577; *Hodges v. State*, 8 Ala. 55; *Allen v. State*, 52 Ala. 391; *Cook v. State*, 60 Ala. 39.

We think, however, that the verdict was not a nullity, but was only incomplete or irregular. *Dover v. State*, 75 Ala. 40, and authorities cited. *Allen v. State*, 52 Ala. 391, holds that in such case the defendant should be held for further trial. *Gunter v. State*, 83 Ala. 96, 3 South. Rep. 600. If the jury return a verdict of guilty as to a part of the offense, or items of the offense, charged in the indictment, and say nothing in reference to the residue, "as to all which is not found the conclusion must be that the jury intended to acquit." 1 Brick. Dig. p. 518, § 986; *Berry v. State*, 65 Ala. 120.

The circuit court erred in overruling the demurrer to the state's replication, interposed to the defendant's plea of former acquittal, and in the charge given to the jury on that issue. The verdict in the first trial acquitted the defendant of all criminality in removing the cow and calf, knowing them to be under a valid, subsisting lien. On that feature of the indictment the defendant can never again be put on trial.

In the transcript sent up in this case there are many obvious errors, such as mistaking one word for another; and frequent blank spaces are left, to be supplied, we suppose, by words not understood by the copyist. An air of general inaccuracy is observable throughout the transcript, which has suggested the inquiry if we should not disallow it, without attempting to ascertain what its true meaning is. Undue delay of justice, with its consequent evils, would probably result from such a course, and we therefore abstain from it. Transcripts for this court should be the work of skillful, if not experienced, copyists.

We will not attempt to notice in detail the many exceptions reserved. We could not, if we would; for many of them are so obscurely expressed that we fear to hazard an interpretation of them. The obscurity, we suppose, is the result of bad

copying. We trust so imperfect a record will not again come before us, for we should regret the necessity of making what might seem to be a harsh ruling.

Among the controlling inquiries in this case may be reckoned the transfer to Johnson, or to Lee for Johnson, of the mortgage made by P. Lewis and N. C. Reid to Foster, the defendant, bearing date February 26, 1883, and the effect of that transfer in making up the offense for which the defendant was indicted. There was no proof that W. C. Foster, the defendant, was present when that transfer was made, but there is testimony that R. Z. Foster was present, and sanctioned the sale and transfer of the mortgage to Lee for Johnson. The defendant testified that R. Z. Foster was a silent partner in the business, and it follows that what he said, did, or sanctioned binds the firm of W. C. Foster in all the civil bearings of the question. Hence if R. Z. Foster was present, and authorized or sanctioned the contract and settlement with Johnson, and the sale, and surrender to him of the mortgage and the debt secured by it, this would bind W. C. Foster civilly, to the same extent as if he had been personally present, acting for himself; and if in that contract or settlement R. Z. Foster represented that the mortgage debt of \$44 was the entire claim which the firm of W. C. Foster held against the property mortgaged, or if he knowingly permitted another to make such representation, and did not deny it, and if upon such representation Johnson was induced to purchase the mortgage claim, and, through Lee, part with his money in paying the claim, this would amount to a civil estoppel against the firm of W. C. Foster as to any other claim or lien it then held and could assert against the property embraced in the mortgage. 3 Brick. Dig. 448. And this rule of estoppel would apply even as to the claim against Lewis and Mrs. Reid for Lewis' rent, if that claim was then held or owned by the firm of W. C. Foster. We are speaking of the civil aspect of the question. To constitute criminality, there must be both an act and an intent. Knowledge, however, sometimes renders an act criminal which otherwise would be harmless. Buying stolen goods and passing counterfeit money are of this class. So, selling or removing property on which there is a valid lien, if less than larceny, cannot become criminal unless tainted with knowledge—actual knowledge—of the lien, and there is an intent to defraud the lienor. The intent, however, is an inferential fact to be drawn by the jury, and proof of the sale or removal, with knowledge of the lien, will authorize a jury to infer the intent, when there are no attendant circumstances to repel the inference. To justify the defendant's conviction in this case, it is necessary that he should have known, or been notified, that the mortgage had been transferred for Johnson's benefit, upon a consideration paid by or for him, and that the alleged representations had been made.

And if Foster was, at that time, the owner of the claim against Lewis for unpaid rent, then the question will arise whether he acquired that claim before or

after the trade with Johnson, and whether the rent was in fact unpaid. If so, rent due a landlord being the paramount lien on the crop, he should not be convicted for removing the cotton, if he acquired the claim after the transfer to Johnson. If, however, Foster owned the rent claim on Lewis before the transfer to Johnson, the rent being unpaid, then the question of his guilt would depend on the further inquiry whether in trading with Johnson representations were made which, we have said above, would estop Foster from asserting any other lien he then held on the property, and whether Foster had been notified that such representations had been made. These concurring facts could alone give Johnson a prior lien on the crop over the claim for rent, and knowledge or notice of them was an indispensable condition of finding Foster guilty of the intent to defraud Johnson.

When documents become material evidence in a cause, civil or criminal, the rules of law require that the original shall be produced, or its absence accounted for. If the document be shown to have been destroyed, or if it be shown in a satisfactory manner that it is lost, then secondary evidence may be given of its contents. If traced to the opposite party, notice to produce must be given; and if disobeyed, the contents may be proved. If the custody is in a stranger, it is reached by a *subpoena duces tecum*, if the custodian is within the jurisdiction of the court. The manner of proving loss varies with the facts of each particular case. As a rule, careful search must be made where the document was last known to be, or where it would most likely be found. 1 Brick. Dig. p. 848, §§ 626, 632-634; 3 Brick. Dig. p. 440, § 507 et seq.

We will not comment on the particular rulings. What we have said will furnish a sufficient guide on another trial.

Reversed and remanded.

TANNER & DE LANEY ENGINE CO. v. HALL.

(Supreme Court of Alabama. Jan. 31, 1890.)

CONDITIONAL SALE—WAIVER OF RIGHT.

1. When it is agreed in notes given for the unpaid purchase money of machinery that the title to the machinery shall remain in the seller until the payment of the notes, the reserved title is merely a security for the payment, and the seller may waive it, and treat his debt as an ordinary debt of the purchaser.

2. In such a case, when the seller levies an attachment on the machinery and buys it at the sale, he waives his lien, acquires a new and complete title to the machinery, and is entitled to any increase of price obtained at a subsequent sale.

Appeal from circuit court, Geneva county; J. M. CARMICHAEL, Judge.

Action by the Tanner & DeLaney Engine Company against Nathan Hall. Judgment was rendered for defendant, and plaintiff appealed.

M. E. Milligan, for appellant.

STONE, C. J. We think the circuit court erred in excluding from the jury that part of the witness Butler's testimony which purports to give the contents of the correspondence between him and Hall. The plaintiff proved enough—laid a sufficient

predicate—to let in secondary evidence. Foster v. State, ante, 185, (present term;) Bogan v. McCutchen, 48 Ala. 493; Donegan v. Wade, 70 Ala. 501; Railroad Co. v. Schaffer, 76 Ala. 233; Martin v. Brown, 75 Ala. 442.

The notes sued on were given as purchase money for an engine, mill, and fixtures, which were delivered to the purchasers. In the body of the notes it was "agreed that the ownership and title of the said machinery remains in said Tanner & De Laney Engine Company until this note is paid." Plaintiff sued out an attachment against Hall & Mobley, the apparent makers of the notes, and had it levied on the engine, mill, and machinery as the property of Hall & Mobley. This was in the state of Florida, where the machinery was situated. Under this proceeding, the property was sold, and the plaintiff became the purchaser at something less than \$500. There was proof tending to show that the engine and machinery were worth more than they sold for, and that plaintiff subsequently sold them at a price considerably above the sum for which he purchased them at the attachment sale. The main question of contest in this case is whether the makers of the notes are entitled to a credit for the increased price obtained by plaintiff in the resale of the engine, mill, and fixtures.

The retention of title by the seller is a clause of the contract inserted for his benefit. It is, at most, a form of security for the payment of the purchase money. It is not absolute ownership; for payment of the debt, or tender within a reasonable time, kept good, would divest the seller's title. So far as the rights of the purchasers were concerned, they were the owners of the property, subject only to the right and option of the seller to assert his reserved title, and the security it afforded. He alone could assert this, and he had the equal right to waive it, and treat his claim as an ordinary debt of the purchasers; and in the exercise of this option he was entirely independent of any control or wish the purchasers could assert or make known. Wooldridge v. Holmes, 78 Ala. 568, and authorities collated; Sumner v. Woods, 67 Ala. 139.

The attachment in Florida, and sale under it, were an election to treat the property as belonging to the purchasers, and not to assert the title and lien reserved in the seller. If a stranger had purchased at that sale, there can be no question that he would have acquired a good title, and the Tanner & DeLaney Engine company would have been estopped from asserting its lien or reserved ownership. The plaintiff had an equal right to purchase, and acquired an equally good title by its purchase. The defendant was not entitled to the increase of price realized in the resale, any more than he would have been required to suffer the loss, if the property had been destroyed subsequent to the sale, or could not have been resold except at a loss. This rule, however, applies only to personal property, the title to which may pass without writing. A different rule obtains when title to real estate is retained as security. Powell v. Williams, 14 Ala. 476.

Several charges of the court are in conflict with the views expressed above.

Reversed and remanded.

DANIEL V. HARDWICK.

(*Supreme Court of Alabama. Jan. 8, 1890.*)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—DETINUE—EXECUTION.

1. In Alabama, prior to act of February 28, 1887, on a purchase by a husband for his wife, they executing their joint notes, which were afterwards paid out of her money, the property became that of the wife.

2. In a complaint in detinue, brought by a married woman, a general averment that the property sued for is her separate property is sufficient, without any allegation as to the time and manner of her acquiring title.

3. A plea in justification by a sheriff, that he had taken the property under an execution in his hands, issued out of a certain court in favor of the plaintiff therein and against the defendant therein, the husband of the present plaintiff, is insufficient, in its description of the process, in failing to show the validity of the process, and that the property belonged to the defendant in the execution, or was liable to it.

4. A demurrer to the plea in justification having been sustained, and defendant having failed to plead over, he cannot on the trial introduce evidence of the judgment and execution, for the purpose of showing that the plaintiffs therein were creditors of the husband, and that the wife's claim is fraudulent as to them.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge.

Action of detinue by Emily E. Hardwick against Joseph S. Daniel, for the recovery of a horse and buggy and harness. The plaintiff was a married woman, the wife of G. L. Hardwick, and the property was claimed as belonging to her statutory separate estate. Defendant, as sheriff of Cherokee county, took it under an execution on a judgment against G. L. Hardwick, her husband, in favor of Ayer & McDonald. The defendant pleaded the general issue, and two special pleas. Upon the evidence, as adduced on the trial, the court charged the jury, *ex mero motu*: "If it be true that the husband bought the buggy and harness for her, and executed their joint notes, and was afterwards paid for out of her money, then the buggy and harness were hers, and she could recover the buggy and harness." To this charge the defendant excepted, as also to the refusal of the court to charge the jury, at his request, that, "if the jury believe the evidence, they will find for the defendant." From a verdict and judgment for the plaintiff, the defendant now appeals, and assigns the rulings of the court on pleadings and evidence, and the giving of the charge, and the refusal to give the charge asked by him, as error.

Burnett & Smyer, for appellant. *Watts & Son*, for appellee.

CLOPTON, J. The complaint in an action of detinue brought by a married woman, need not allege specially the fact as to how and when she acquired title to the property; these are proper subjects of proof. A general averment that the property sued for is her statutory separate estate is sufficient.

The defendant filed two special pleas,

justifying under legal process. The first avers, substantially, that he took possession of the property as sheriff under execution, issued from the circuit court of Cherokee county, in favor of Ayer & McDonald against G. L. Hardwick, which execution was in his hands at the time of its seizure, and that the property was in his possession as sheriff. The second plea is still more general. A plea of justification should show a process regular on its face, and issued by competent authority. The description of the process should be sufficiently certain and particular to identify it, and, when it is against a person other than the party claiming and suing, there should be an averment that the property taken was the property of the defendant in the process, or that it is liable thereto. A plea of justification, to be sufficient, must set forth matter which, if proved, would constitute a full defense to the action. *Harrison v. Davis*, 2 Stew. (Ala.) 350. Each of the pleas is defective in these material respects.

After the demurrer to the special pleas had been sustained, the defendant failed to specially plead over, and the parties went to trial on the general issue. On the trial, defendant offered in evidence a judgment in favor of Ayer & McDonald against the husband of plaintiff, and an execution thereon, being the same under which he took the property. Under the Code, the general issue merely casts on plaintiff the burden of proving the material allegations of the complaint, and limits the defense to evidence in disproof. Matter in avoidance, excuse, or justification, not being within the issue, must be specially pleaded. *Petty v. Dill*, 53 Ala. 641. Justification, that the defendant acted under legal process, cannot be given in evidence under the general issue. It is insisted, however, that the evidence of the judgment and execution was admissible for the purpose of showing that the plaintiffs therein were creditors of the husband, and that the claim and title of the wife was fraudulent as to them. The demurrer to the pleas of justification having been properly sustained, the defendant stood in the attitude of any other person who was without right to take and detain the property, whether it belonged to the plaintiff or her husband. Occupying this position, he was not entitled to show that plaintiff's claim to the property was acquired by a fraudulent transaction on the part of her husband. This was a matter not material to defendant. Though it may have been acquired by means constructively or actually fraudulent as to creditors, her claim was valid as between the parties, and as to all persons other than creditors and purchasers. *Harrison v. Davis*, supra.

Prior to the act of February 28, 1887, the husband was the trustee of the wife's statutory separate estate, and as such was clothed with authority to receive her property, real or personal, and with large discretionary powers to manage and control her estate, and to invest her money as he deemed most beneficial to her. If he bought personal property for the benefit of the wife, and used her money to pay therefor, without taking title in his own name, the

legal title, by operation of law, inured to the wife. *Evans v. English*, 61 Ala. 416; *Daffron v. Crump*, 69 Ala. 77. Though the authorities are not harmonious, it is well settled in this state that a married woman has capacity at common law, and under the statute formerly in force, to purchase property on credit, with the assent of her husband, whether or not she had a separate estate which she could charge; and, though the contract of purchase did not bind her personally, the vendor's transfer of title was valid as to all persons, unless they be creditors, or purchasers from her husband, and created in her a statutory separate estate. *Insurance Co. v. Young*, 86 Ala. 424, 5 South. Rep. 116; *Sharp v. Sharp*, 76 Ala. 312; *Pollak v. Graves*, 72 Ala. 347.

The husband of plaintiff was the only witness examined. His testimony tends to show that all the property was purchased for plaintiff, witness acting as her trustee and agent; that the horse was paid for in cash, and the buggy and harness purchased partly on credit, husband and wife giving their joint notes. The price of the horse, and one of the notes given for the buggy and harness, were paid with money belonging to plaintiff. As to the other note, the witness does not remember whether it was paid with money which he obtained from Kirkpatrick, or with money put aside for the purpose of paying taxes; but he makes the general statement that the price of the horse and the notes were paid with money belonging to plaintiff, and with the money put aside to pay taxes,—all which moneys according to his best recollection, she received from the sales of her lands. In *Wortham v. Gurley*, 75 Ala. 356, it was ruled that a purchase by the husband of personal property, in the name or for the benefit of the wife, is insufficient to create an equitable separate estate though he may furnish the means of payment. In such case, the nature of the wife's separate estate is statutory. Therefore, whether the money used in paying for the property was furnished by the husband or belonged to the plaintiff is immaterial, if it was purchased for her benefit. In either event, she had such title or property as enabled her to maintain the action. *Kennon v. Dibble*, Id. 351. This case is distinguishable from *Wilder v. Abernethy*, 54 Ala. 644. In that case the contest was between the wife and the creditors of the husband, who was carrying on business in her name. He purchased the goods on her credit, but did not use her money or effects to pay for them, and, in fact, they were not paid for when seized under process against him. In *Liddell v. Miller*, 86 Ala. 343, 5 South. Rep. 571, the controversy was also between the wife and creditors of the husband. The wife's money did not go into the property, except so much as was necessary to repay one of the partners the amount of the cash payment advanced by him on the purchase of the stock of goods, and this was not paid until after the levy. In the present case the rights of creditors are not involved. As we have shown, defendant did not place himself in a position to set up that the purchases were either constructively or actually fraudulent as to creditors. Had

the pleadings been such as to authorize the sheriff to justify under the execution against plaintiff's husband, and thus incidentally raise the question of fraud as to his creditors, it may be conceded that the proof is not as clear and convincing as the law requires. But as the relation of defendant to plaintiff's claim of ownership was that of an indifferent person, in which attitude he placed himself, the sole question was the *prima facie* sufficiency of the proof to establish that the property sued for is the statutory separate estate of the plaintiff, as against persons having no interest or connection with the title. This question, and the credibility of the witness, were properly submitted to the jury. The affirmative charge may be given at the instance of the defendant, when the court would sustain a demurrer to the evidence; but should not be given when there is any evidence, however insufficient the court may regard it, from which a fact material to plaintiff's right of recovery may be deduced or inferred, and is not a legal presumption.

On the case made by the pleadings, we discover no error in the record. Affirmed.

EAST v. WORTHINGTON.

(*Supreme Court of Alabama*. Jan. 9, 1890.)

DECEIT.

An action for deceit will not lie for a statement by defendant, on employing plaintiff to do a piece of grading, as to its cubic contents, unless it appears that plaintiff did not have equal means of knowledge, as the statement related to a matter resting in opinion, and plaintiff had no right to rely on it.

Appeal from circuit court, Jefferson county; J. B. HEAD, Judge.

Action by D. W. East against J. W. Worthington to recover damages for deceit. Plaintiff appeals from a judgment sustaining a demurrer to his complaint.

Smith & Lowe, for appellant.

SOMERVILLE, J. The plaintiff entered into an agreement with the defendants, for a valuable consideration, to do a portion of the grading of a certain railroad in this state. The complaint alleges that the defendants falsely represented to the plaintiff that this grading, thus undertaken, "contained 5,000 cubic yards of borrow and 10,000 cubic yards of waste," whereas, there were, in truth and fact, embraced in said grading "34,000 cubic yards of borrow and 18,000 cubic yards of waste." It is averred, further, that the plaintiff believed their representations to be true, and acted on them, and that defendants had the means of ascertaining that such representations were false. On this state of facts the plaintiff brings this action of damages for deceit.

It is our judgment that the representations in question *prima facie* related to a matter which rested in mere opinion or estimate. It does not appear that the plaintiff did not have equal means of knowledge on the subject with the defendants, or that by the exercise of reasonable diligence he could not have ascertained the truth. We are to presume, in the absence of averment or proof to the contrary, that the contracting parties were in a position

of perfect equality to judge of the matter represented, it not appearing that the defendants spoke as experts. The plaintiff had no right to rely upon such an expression of opinion, nor to regard it as the affirmation of a fact. The expression of an opinion, to be the ground of action, must be shown to be knowingly false, made with intent to deceive, and to have been relied on by the deceived party as true. The case at bar scarcely differs in principle from the old case of *Baily v. Merrell*, 3 Bulst. 94, decided by the king's bench prior to 1656, which was an action of deceit. The plaintiff was a common carrier of goods, and bargained with the defendant to carry for hire a quantity of wood, at the rate of two shillings for every hundred-weight. The defendant, being asked by the plaintiff how many hundred-weight it contained, said it was about 800 pounds weight. Relying upon this statement, the plaintiff caused the wood to be put in his cart, and, by reason of the overweight, killed two of his horses. He afterwards weighed the wood, and found it to be 2,000 pounds weight. It was held that no action would lie for deceit on such representation by the defendant. If we permitted the present action to lie, it would be extremely hazardous for tradesmen to venture on estimates of quantity without great caution in the use of words.

The demurrer to the complaint was properly sustained, and the judgment is affirmed.

ALLEN et al. v. WATTS et al.

(Supreme Court of Alabama. Jan. 9, 1890.)

COUNTIES—PREFERRED CLAIMS.

A fund set apart under Code Ala. 1886, § 908, making the claims of jurors and for certain other expenses preferred claims against the county, and requiring the county treasurer to set apart a sufficient fund for their payment, can be used for the payment of the current claims of those classes only, and jurors' certificates for services previously rendered are not entitled to payment out of it.

Appeal from circuit court, Conecuh county; JOHN P. HUBBARD, Judge.

Action by J. L. Allen and others against J. B. F. Watts and his sureties on his official bond as county treasurer. Plaintiffs appeal from a judgment for defendants.

G. R. Farnham, for appellants. N. Stallworth and J. F. Stallings, for appellees.

MCCLELLAN, J. This is an action on the official bond of the treasurer of Conecuh county. The breach alleged is that the treasurer failed and refused to pay certain juror and bailliff certificates, which had been issued in 1888, and belonged to the plaintiffs, and constituted a claim against the county, though there were funds in the county treasury, it is alleged, at the time of demand, which could have been devoted to this purpose. Two defenses were insisted on at the trial: (1) That the certificates had been paid; and (2) that there were no funds on hand, except such as had been set apart under statutory requirement for a specific purpose, and could not be appropriated to the payment demanded. Each side requested the general

charge. It was given for defendants, and plaintiffs' request was refused. The action of the court in each particular was excepted to, and upon these exceptions is based the only assignments of error that are made.

The proof shows that at the time the certificates in question were issued the duties of the treasurer's office were discharged by Herrington and Cooper, under an arrangement which the treasurer had made with them in consideration of their becoming sureties on his bond, by the terms of which they were to receive and have custody of the funds, keep the books of the office, make disbursements, etc. While this arrangement obtained, the certificates involved in this suit came to the hands of Herrington, as he says, by purchase from the original holders, and were by him sent to the plaintiffs in payment *pro tanto* of a debt he owed them. On the principle that it is a payment in law when the hand which is to pay is the hand also to receive,—a proposition thoroughly well established in our jurisprudence,—it was insisted below that these claims were paid the moment they came into Herrington's possession. This line of defense is not put forward in the argument here, however, and, as the case may be determined on another point, we will not decide this question.

The breach of the condition of the bond relied on here was committed in March, 1888, at the time of and resulting from the written demand for payment and its refusal. The sufficiency of the second defense, to the effect that there were no funds in the treasury which could be legally applied in satisfaction of these certificates, must therefore be determined by a reference to the law then of force, which was the Code of 1886, and not by the statute in effect at the time the claim accrued. Section 908 of the Code of 1886 makes the claims of jurors and commissioners for compensation, and the accounts for necessary stationery furnished the county, preferred claims, and requires the county treasurer "to set apart a sufficient fund from the moneys of the county for their payment." The language of the present statute is slightly different from that employed in previous acts and codifications, but we apprehend the meaning is the same, and that the purpose of this, as well as all former laws on the subject, was to assure a fund to pay such current expenses of the body politic as were essential to its very existence, and continued discharge of the functions for the performance of which it was created. It is clear, on the one hand, that the purposes of this statute would not be met by a construction which would admit of the payment, out of the fund thus set apart, of claims, even of the classes mentioned, which had accrued for services already rendered; and, on the other, that to hold it to be the duty of the treasurer to pay other claims out of this fund would be to emasculate the law of all meaning and effect. But it is urged that this interpretation would put it in the power of the treasurer to defeat all claims not of the preferred classes, for which he is thus to provide, by simply setting aside the whole fund in his hands for this purpose. A suffi-

cient answer to this position—leaving out of view any other remedy the claimant may have—is that he is only authorized to set apart a sufficient sum to meet these expenditures, and if he should, in good faith or otherwise, thus appropriate more than was necessary to fulfill the statutory purpose, he could not defend against a suit for refusing to pay other claims on the ground of such appropriation, though even in that case it would seem he ought to be let in to reduce the recovery, and confine it to the amount in his hands in excess of the sum really necessary to pay the preferred claims. *Enloe v. Reike*, 56 Ala. 505.

The uncontroverted evidence of the treasurer and his deputy shows that when the demand was made on him, and he refused to pay these certificates, he had only \$2,000 of the county's fund; that this sum was necessary to meet the claims provided for by section 908 of the Code during the year, and which would accrue before he would receive other funds; and that, in pursuance of the statute, he had set apart all of this sum for that purpose. On this state of the evidence, it was not the treasurer's duty to pay the claims held by plaintiffs when demand therefor was made; his refusal did not constitute a breach of the condition of his official bond; the action of the court in giving the general charge in favor of the defendants, and in refusing to charge that the jury should find for the plaintiffs if they believed the evidence, was free from error; and the judgment of the circuit court is affirmed.

AMERICAN REFRIGERATING & CONSTRUCTION CO. *et al.* v. LINN.

(*Supreme Court of Alabama*. Jan. 9, 1890.)

CORPORATIONS—STOCK IN OTHER COMPANIES—EQUITY—PLEADING—MULTIFARIOUSNESS.

1. A bill by a minority stockholder of a corporation, against the majority holder, another company, and the person who induced the complainant and others to build the plant and organize the corporation, alleged that the defendant company, which received its stock in payment for useless machinery sold the corporation, had called a meeting for the avowed purpose of assuming control and issuing bonds to itself, and prayed an injunction to restrain the defendant company from voting its stock, and that the stock be canceled. *Held*, that it was multifarious, as it showed no combination between the defendants, and no connection between the wrongs charged against them, and because no common relief was prayed against them, and because the corporation itself was the proper party plaintiff for the wrong imputed to the individual defendant.

2. The allegations as to the defects in the machinery, and the deficiency in its stipulated producing capacity, furnish no grounds for equitable relief.

3. If a company, which acts as a transportation company, holding the majority stock in an ice and cold storage company, proposes to deal with the latter by having its cars re-iced at the works of that company, it may be enjoined from voting its stock in that company; but if the first-named corporation acts as a transportation company only, through organizations under its control, the case is not within the rule.

Appeal from chancery court, Jefferson county; THOMAS COBBS, Chancellor.

Bill by E. W. Linn against the American Refrigerating & Construction Company, J.

M. Rutherford, and one Butler, for an injunction restraining the defendant corporation from voting its stock at a stockholders' meeting of the Alabama Ice & Cold-Storage Company, and to have that stock canceled on the books of the Alabama Company. The bill alleges that E. W. Linn, a resident of Jefferson county, Ala., and complainant in the original bill of complaint in this case, together with a number of other persons, was induced or influenced by one J. M. Rutherford to build an ice and cold storage plant,—the American Refrigerating & Construction Company agreeing to furnish said plant with machinery capable of manufacturing 20 tons of merchantable ice per day; that the said plant was constructed, and the said American Refrigerating & Construction Company placed therein machinery which they represented would manufacture 20 tons of merchantable ice per day; that the said E. W. Linn and his associates, not being acquainted with the business of manufacturing ice, relied on the representations made by the agents of the said American Refrigerating & Construction Company, and in December, 1887, organized and incorporated said plant into a company known as the "Alabama Ice & Cold-Storage Company." The whole capital stock of said company was 800 shares, of the par value of \$100 each, and the said Linn subscribed for and received 60 shares of said stock, and the said American Refrigerating & Construction Company, subscribing said machinery through its agents, received on its stock subscription 420 shares of said stock; said stock being subscribed in the name of an agent, which it now holds. The bill then alleges that the said Alabama Ice & Cold-Storage Company was organized in the winter, when there was no demand for ice, and that the full capacity of the machinery was not tested until the following summer, when it was discovered that it was impossible to manufacture said 20 tons of ice per day with said machinery, and the Alabama Ice & Cold-Storage Company, for that reason, lost money, and was compelled to make debts, which debts the American Refrigerating & Construction Company acquired; that the American Refrigerating & Construction Company forced the appointment of incompetent agents on the Alabama Ice & Cold-Storage Company, against the protest of some of the stockholders, and refused to allow the directors to remove them. The bill then avers that the American Refrigerating & Construction Company is a foreign corporation, not organized in the state of Alabama, and has a majority of the stock of the Alabama Ice & Cold-Storage Company, and seeks to run said last-named company for its own benefit, and not for the benefit of the stockholders of the said company. It also contains allegations as to the American Refrigerating & Construction Company having and controlling a line of transportation cars, etc. The bill then avers that the American Refrigerating & Construction Company had a meeting of the stockholders of the Alabama Ice & Cold-Storage Company, called for the avowed purpose of assuming entire control

over the last-mentioned company, and of issuing bonds to pay an indebtedness to itself, caused by the defective machinery it had sold to the said Alabama Ice & Cold-Storage Company. The respondents demurred to the bill, and assigned as grounds of demurrer: "(1a) That Linn is not a proper party to bring a suit complaining of an *ultra vires* act of the American Refrigerating & Construction Company; (1b) that Linn had no right to sue, but the Alabama Ice & Cold-Storage Company is the proper party complainant; (2) that the Alabama Ice & Cold-Storage Company is a necessary party; (3) that the bill is multifarious, in that it seeks to enjoin the voting, and to cancel the stock of the American Refrigerating & Construction Company, and of Rutherford, as trustee; (4) that Linn is not entitled to the relief prayed for, because the American Refrigerating & Construction Company has a right to vote and control its said stock." And the defendants in their answer deny the allegations of the bill as to its (the American Refrigerating & Construction Company) attempting to exercise exclusive control over the Alabama Ice & Cold-Storage Company, and that to the detriment and destruction of the said Alabama Company, and also denied other allegations of the bill. The defendants also moved the court to dissolve the injunction granted on the filing of the bill; on the denials of the answer; on the demurrers to the bill; and for want of equity in the bill. The case being submitted to the chancellor on the demurrers and the motion to dissolve the injunction, the chancellor rendered a decree sustaining the second ground of demurrer, and so much of the demurrers as related to the canceling of the stock belonging to the defendant corporation, and overruling all the other grounds assigned, and also overruling the motion to dissolve the injunction. From this decree defendants appeal.

P. G. Bowman, G. R. Harsh, and Webb & Tillman, for appellants. *Sterrett & Campbell and Garrett & Underwood*, for appellee.

STONE, C. J. The third ground of demurrer raises the question of multifariousness. This should have been sustained, for several reasons. First, no combination or conjoint purpose is charged to have been formed between Rutherford and the refrigerating and construction company, nor are the acts of abuse charged against them severally shown to have had any connection one with the other. 3 Brick. Dig. p. 388, § 337 et seq. A second reason is, no common relief is claimed against the two, nor is it shown that relief against the one will affect the other. The third reason is that the wrong imputed or apprehended at the hands of Rutherford is a wrong against the corporation itself, and equally against every stockholder. So far as any grievance charged against him is concerned, the corporation itself is the proper party plaintiff.

Much of the bill is devoted to complaints against the refrigerating and construction company, for alleged defects in the machinery constructed by it for the complainant,

and for a deficiency in its stipulated producing capacity. If there is any foundation for these charges, they furnish no ground for equitable interposition. No relief is prayed as to these alleged imperfections, and, if prayed, it could not be granted. It is purely an independent, legal demand. We suppose these averments were made, that they might be weighed in determining whether the refrigerating and construction company was exercising its alleged majority voting power for its own private emolument, and to the detriment of the ice and cold-storage company.

The charges of the bill on which the refrigerating and construction company is prayed to be enjoined from voting its stock in matters pertaining to the ice and cold-storage company are mainly the following: "Complainant further shows that the American Refrigerating & Construction Company owns a line of refrigerator cars, and acts as a transportation company, either itself, or through organizations under its control; that it carries fruits and perishable goods from the south to northern markets, and from the north southward; that it proposes that its cars shall run by Birmingham, (the *situs* of the ice and cold-storage works,) and be re-iced,—that is, be filled with ice, at the factory of the Alabama Ice & Cold-Storage Company; that, if allowed to control the Alabama Ice & Cold-Storage Company, the American Refrigerating & Construction Company can sell ice and re-ice the said cars for nominal prices, and, while it will then make money for itself, it will cause a loss to the stockholders of the Alabama Ice & Cold-Storage Company." Speaking in another place of the alleged purpose of the refrigerating and construction company to elect a board of directors through its own majority voting power, and through such board of directors to issue and become the owner of certain bonds of the ice and cold-storage company, the bill charges, further, that, "if this is permitted, it may secure the absolute control of the Alabama Ice & Cold-Storage Company, and its sale, when the purposes of the American Refrigerating & Construction Company demand or require" such sale. This is substantially all the bill contains, on which it is prayed that the refrigerating and construction company be enjoined from voting its stock.

In the case of *Railroad Co. v. Wood*, ante, 108, we laid down certain rules which it is claimed require the injunction to be retained in this case. In that case one railroad corporation owned a majority of the shares of stock in another railroad corporation. The two railroads, though not exactly connected, were, to a large extent, in a line with each other, and trade and travel over the one road very often was carried continuously over the other. The consequence was that large and complicated dealings would necessarily be had, and complicated settlements would result therefrom, in which the interests of the two corporations would be antagonistic. The one corporation, owning a majority of the stock in the other, could and did exercise the voting power of that stock in the selection and election of a majority of the board of directors of its own choosing.

It did, in fact, elect, from its own board of directors, a majority of the directors for the Memphis & Charleston Company, and the same person was chosen president of the two companies. This resulted in placing the two corporations under one and the same governing body. In dealings and settlements between the two corporations, the same personality must represent each, and consequently must do the impossible, —contract with himself. As the only practicable means of preventing this result, we enjoined the stockholding corporation from voting its stock.

In the present case the two corporations are situated somewhat differently in relation to each other. The controlling business of one, it would seem, was the manufacture and erection of machinery for manufacturing ice, and constructing refrigerating appliances or attachments. The business and purpose of the other were to manufacture and sell ice, and, for a price, to furnish the use of its refrigerating appliances. Nothing appears to be antagonistic between the aim and purposes of these two enterprises. But the bill charges, as we have seen, "that the American Refrigerating & Construction Company runs a line of refrigerating cars, and acts as a transportation company, either itself, or through organizations under its control." When disjunctive averments are made in a bill, each must be sufficient, or the whole averment fails. 3 Brick. Dig. p. 378, § 183. The averment that the refrigerating and construction company "acts as a transportation company * * * itself," is, if it stood alone, a direct averment, which, if it be shown that it proposes to deal with the ice and cold-storage company, would probably bring this case within the principle declared in *Railroad Co. v. Wood*. The averment, however, is that it acts as a transportation company either itself, or through organizations under its control. If it owned simply a majority of stock in any corporation engaged in such transportation, that would give it control of such corporation; and yet it would not bring it within the rule for an injunction, nor within the principle of the rule, which was declared in *Railroad Co. v. Wood*. To apply that principle in such case, would in effect deny to the refrigerating and construction company the right to vote its stock in the management of either corporation; for the same reason would exist for interdicting its vote in the transportation company as in the ice and cold-storage company. We may add that the denials of the answer bring this case directly within the principle last above stated. In such case the plaintiff must seek redress after the wrong is inflicted, if there be bad faith in the governing board, and consequent injury to the corporation, or to him as one of its stockholders.

The fourth ground of demurrer ought to have been sustained, and for that reason, and also on the denials in the answer, the injunction should have been dissolved. The decree of the chancellor, in the matters above pointed out, is reversed, and a decree here rendered, dissolving the injunction. The complainant is allowed 40 days

within which to amend his bill, after which he can apply for a reinstatement of the injunction, as he may be advised.

Reversed, rendered in part, and remanded.

HOLMES v. STATE.

(Supreme Court of Alabama. Jan. 10, 1890.)

HOMICIDE—MURDER—PROVOCATION—EVIDENCE OF CHARACTER.

1. In a prosecution for murder, when it appears that defendant, while seeking a difficulty with another, and endeavoring to get to him, was intercepted by deceased solely for the purpose of preventing the difficulty, and that in the scuffle following the fatal shot was fired, no provocation is shown sufficient to arouse such passion as to reduce the homicide to manslaughter.

2. Where a witness on his examination in chief has testified that he had never heard anything against defendant, he can be asked, on cross-examination, if he had heard that defendant had worn "stripes."

3. Where a witness has testified that the relations between himself and defendant "were not intimate, and he did not know where defendant lived," he cannot testify as to his personal opinion of defendant's good character.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Indictment against George Holmes for the murder of Thomas Robinson. Defendant was convicted, sentenced to the penitentiary for life, and appealed.

W. L. Martin, Atty. Gen., for the State.

McCLELLAN, J. It was clearly competent to ask the witness Farley, on cross-examination, if he had not heard that the defendant "wore stripes" while working on the streets of Montgomery; the witness having testified on his examination in chief that he had never heard anything against the defendant. To say of one that he wore "stripes," the appellation commonly applied to the garb of a convict, necessarily implies a conviction of some infraction of the law, and is therefore derogatory of the person so referred to. In this instance, the testimony tended directly to contradict and weaken the negative evidence of good character given by the witness, and its admission was free from error.

The witness McHugh was incompetent to testify either affirmatively or negatively as to character. He knew nothing of the reputation borne by the prisoner in the neighborhood in which he lived or where he was known; and he failed to show that he was in such a position with reference to the defendant's residence or circle of acquaintances as that the fact of his not hearing anything against him would have any tendency to show that nothing had been said, and that, therefore, his character was good. This witness swore that "he thought the character of prisoner for peace and quiet was good," but he further testifies that this was his personal opinion merely, based on what he himself knew from a personal acquaintance which had existed for about two years, during which time he had seen him frequently, "but their relations were not intimate, and he did not know where the defendant lived." Very clearly this witness neither knew the reputation of the defendant affirmatively, nor

was he in a position to have heard what was said in derogation of good character in such sort that his having heard nothing against the defendant could have shed any light on the inquiry. His evidence was properly excluded. *Cheritree v. Roggen*, 67 Barb. 124; *Dave v. State*, 22 Ala. 23; *Mose v. State*, 36 Ala. 211; *Martin v. Martin*, 25 Ala. 201; *Sorrelle v. Craig*, 9 Ala. 534; *Hadjo v. Gooden*, 13 Ala. 718.

It appeared on the trial that the defendant, while seeking a difficulty with one King Woods, and endeavoring to get to him, was intercepted by the deceased, solely for the purpose of preventing a consummation of defendant's design against Woods, and that in the scuffle incident to this interference the fatal shot was fired. The charge given at the instance of the state, and the first, second, and third charges asked by the defendant and refused, related to the passion assumed to have been aroused by the interference, and the sufficiency of passion, thus excited, to reduce the homicide below the grade of murder. The principle laid down in *Field's Case*, 52 Ala. 348, and elaborated in the later cases of *Judge v. State*, 58 Ala. 406, and *Mitchell v. State*, 60 Ala. 26, that an affray may occur or sudden provocation be given which, if acted on in the heat of passion produced thereby, might mitigate homicide to manslaughter, yet if the provocation, though sudden, be not of that character which would, in the mind of a just and reasonable man, stir resentment to violence, endangering life, the killing would be murder, applies here. The provocation shown by the evidence, and hypothesized in the charges referred to, was not sufficient to arouse passion, the existence of which would have reduced the homicide to manslaughter, and hence the action of the court, as well in giving the charge requested by the state as in refusing those referred to above asked by the defendant, was free from error.

On the facts supposed in defendant's fourth charge, he could not have been guiltless. If, as there hypothesized, he was returning to Robinson's store for the purpose of killing Woods, if it became necessary, thus endeavoring to put himself under a necessity, which it was his duty and within his power to avoid, he was engaged in an unlawful act; and if the deceased interfered to arrest this unlawful act, and in the scuffle incident to that interference he was accidentally shot by the defendant and killed, manifestly this killing, while, abstractly considered, it was a misadventure, yet, when referred to the intent of the defendant towards Woods, and treated as a resultant of an effort to thwart that intent, was a crime, and on this ground the refusal of this charge may be justified. The charge was bad, moreover, because it was involved and argumentative, and naturally tended to mislead and confuse the jury.

The fifth charge requested by the defendant is unsupported in several of the facts upon which it proceeds, and was properly refused on this ground. *Jordan v. State*, 81 Ala. 20, 1 South. Rep. 577.

The judgment of the city court is affirmed.

WARDSWORTH V. HODGE.

(Supreme Court of Alabama. Jan. 14, 1890.)

MECHANICS' LIENS—MARRIED WOMEN.

1. Code Ala. 1886, § 2346, provides that "the wife has full legal capacity to contract in writing as if she were sole, with the assent or concurrence of the husband, expressed in writing." Section 8018 creates a lien for work done or materials furnished in constructing or repairing any building on land, "under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor." Section 8046 provides that "every person, including married women and *cestuis que trust*, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor.'" *Held*, that an oral contract with a married woman is sufficient to create a lien for work done or materials furnished.

2. The contract must be with the married woman herself, or her authorized agent, and her land is not bound for materials furnished without her knowledge or consent, under a contract with her husband.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Action by W. W. Wardsworth against M. L. Hodge. Judgment was rendered for defendant, and plaintiff appealed.

Sayre, Stringfellow & Le Grand, for appellant. *Tompkins & Troy*, for appellee.

SOMERVILLE, J. 1. The first question raised by the rulings of the court on the plaintiff's demurrer to the defendant's plea is whether a married woman can bind her separate estate by a mechanic's lien, through a mere oral contract, and without the assent or concurrence of her husband, expressed in writing. The plaintiff in the present case is an original contractor, and furnished certain building materials, consisting of lumber, shingles, and other articles, which were used in the early part of the year 1888 to construct a house on land owned by the defendant, Mrs. Hodge. The defendant insists that under the law, as it now stands, a married woman cannot create a mechanic's lien on her property unless she contracts in writing, and by the written consent of the husband, in accordance with the requirement of section 2346, Code 1886, governing the general personal contracts of the wife. This section is a part of the new married woman's law of February 23, 1887, and is in the following words: "The wife has full legal capacity to contract in writing as if she were sole, with the assent or concurrence of her husband, expressed in writing." Code 1886, § 2346.

The statute governing the liens of mechanics and material-men creates a lien in favor of every mechanic or other person, for work or labor done, or materials furnished, in constructing or repairing any building on land "under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor," upon complying with certain prescribed provisions. *Id.* § 3018 et seq. It is further declared that "every person, including married women and *cestuis que trust*, for whose use, benefit, and enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor,' as used

in this chapter." Code 1886, § 3046. The statutes on the subject of mechanics' liens, as embraced in sections 3018 to 3048, are a complete system in themselves. The clear legislative intention is to require no written contract to create such a lien. An oral contract is obviously all that is necessary, provided the labor done or materials furnished are brought within the terms of the statute, evidenced only by "a statement in writing, verified by the oath of the claimant, or some other person having knowledge of the facts, containing a just and true account of the demand secured by the lien, after all just credits have been given," which must be filed with the judge of probate within a prescribed time. Code, § 3022. The lien is created rather by the law than by the contract of the parties. It is analogous to the vendor's lien, and is based upon a like reason,—that it is unconscionable for a vendee to retain a vendor's property and not pay the stipulated price for it. It can scarcely be maintained, on any sound principle, that a married woman could not bind land by a vendor's lien for the purchase money, without the written assent or concurrence of her husband. *Ramage v. Towles*, 85 Ala. 538, 5 South. Rep. 342; *Crampton v. Prince*, 83 Ala. 248, 3 South. Rep. 519. The enforcement of such a lien is in the nature of a proceeding *in rem*, rather than one *in personam*, especially as against the estates of married women. There is no more reason why a *feme sole*, who is brought within the terms of the statute, should enjoy the benefit of a mechanic's labor or materials, without paying for them, than one *sui juris* should perpetrate a like injustice. And so it has uniformly been held in this state since the enactment of the mechanic's lien law. In *Ex parte Schmidt*, 62 Ala. 252, it was decided that a married woman, by the contract of herself, or her husband, as agent or trustee, acting in her behalf, could create a mechanic's lien on her separate estate, although she was not capacitated to contract generally, and, in fact, was empowered by statute to bind her separate estate only for "articles of comfort and support of the household," suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law. Code 1876, § 2711. This ruling was followed in *Schmidt v. Joseph*, 65 Ala. 476. These decisions construed section 3460 of the Code of 1876, which is the same in substance with section 3046 of the present Code, as expressly authorizing married women, *eo nomine*, to contract for a mechanic's or materialman's lien on the same terms, and in the same mode, as any other person *sui juris* may do. The Code of Missouri contains a statute of which the Alabama mechanic's lien law was originally a substantial copy. Section 3192 of that Code is the same, in substance, with section 3046 of the Alabama Code of 1886, with the exception that the words "owner or proprietor" are there made to include not only married women, but minors under 18 years of age. Code Mo. 1879, § 3192. The supreme court of Missouri has repeatedly construed that section as authorizing married women, otherwise laboring under disabilities of

coverture, to make oral contracts binding their separate estates by a mechanic's lien, of lien for building materials, furnished to construct improvements on land owned by them. *Manufacturing Co. v. Gapen*, 22 Mo. App. 397; *Murphy v. Murphy*, 15 Mo. App. 600. In New York, where a general statute gave a mechanic's lien against all owners of land who should become parties to certain contracts for labor or materials, it was held to embrace married women as well as others. It was observed that "there was no exception in terms in favor of married women, and there is none in the nature of the case, or in reason, policy, or convenience." *Hauptman v. Catlin*, 20 N. Y. 247. See, also, *Loonie v. Hogan*, 61 Amer. Dec. 693, note. There are decisions to the contrary, holding that a mechanic's lien will not attach to a married woman's separate estate under a contract made with her. But these decisions rest on the fact that the words "owner or proprietor," as used in the particular laws construed, could not be made to embrace a married woman by mere construction, as that would authorize a personal judgment against her by the terms of the statute. *O'Neill v. Percival*, 20 Fla. 937; *Rogers v. Phillips*, 8 Ark. 366. The Alabama statute, as we have said, expressly declares that married women shall be embraced in the words "owner or proprietor," as used in the chapter establishing and regulating the enforcement of the liens of mechanics and material-men. Our conclusion is that section 2346 of the Code has reference only to the general contracts of married women other than those coming within the influence of the law regulating mechanics' liens, and the liens of material-men; and that the verbal contract of a married woman, through herself or her authorized agent, is sufficient to create a lien for labor done or materials furnished for the improvement of her realty, under the provisions of sections 3018-3048 of the present Code. The plea of coverture, in such cases, can go no further, at most, than to bar a personal judgment against a married woman, to which the plaintiff is entitled on the common counts, in the event he fails to establish his lien. *Bedsole v. Peters*, 79 Ala. 183; Code 1886, §§ 3034-3037. The second and third pleas to the amended complaint were bad, and the plaintiff's demurrers to them should have been sustained. This, however, as we shall see, was error without injury to the appellant.

2. The demurrer to the fourth plea, however, was properly overruled. This plea avers that the lumber and other materials in question were sold by plaintiff to W. T. Hodge, the husband of the defendant, on his sole credit, and without the defendant's knowledge or consent. The statute confers the lien only where the contract is with the owner or proprietor, or his or her agent, trustee, contractor, or subcontractor. Id. § 3018. This manifestly means on the part of the owner, as distinguished from his [or her] consent. 2 Jones, Liens, § 1236. Unless, therefore, the contract is made with the wife, or with her agent or trustee, her property cannot, in the absence of fraud or collusion, be subjected to the lien created by the statute, except in

those cases where the unpaid balance due the contractor by the owner is authorized to be subjected. Code, § 3018. The husband, being no longer the trustee of the wife's statutory separate estate in Alabama, as under previous Codes, cannot, as husband or trustee, create a mechanic's lien on the wife's property without her authority or consent. The case of *Ex parte Schmidt*, 62 Ala. 252, *supra*, was decided under the former statute. The contract of the husband was then sufficient to create such a lien on the wife's property because he was her statutory trustee, and under the statute a "trustee" of the owner was expressly empowered to make a contract of this nature. The contract must be either originally that of the wife, through herself or her authorized agent, or else the husband or other agent must assume to contract for her and in her own behalf, and such contract be subsequently ratified by her, with full notice or knowledge of its nature. In the absence of a contract of this character, no lien will attach to her property; and, where the credit is given solely to the husband, he alone is bound, although it may appear that the wife knew that the building or improvements were in process of erection on her land, and said nothing, or that she and other members of the family afterwards occupied the building as a dwelling. This view is not only consonant with reason and justice, but is also everywhere fully supported by the authorities. *Copeland v. Kehoe*, 67 Ala. 594; *Meyer v. Broadwell*, 88 Mo. 571; *Garnett v. Berry*, 3 Mo. App. 197; *Barker v. Berry*, 8 Mo. App. 446; *Hughes v. Anslyn*, 7 Mo. App. 400; *Looniev. Hogan*, 61 Amer. Dec. note, pp. 693-697; *Flannery v. Rohrmayer*, 46 Conn. 558; *Lauer v. Bandow*, 43 Wis. 556; *Woodward v. McLaren*, 100 Ind. 586; 2 Jones, *Liens*, §§ 1236-1238, 1253; *Phil. Mech. Liens*, § 112. The fourth plea was thus a complete defense in itself to the action for the enforcement of the lien claimed. The demurrer to this plea was an admission by the plaintiff of the facts pleaded. The failure of the plaintiff to take issue on it, after the demurrer was overruled, requires an affirmance of the judgment. Where there are several separate pleas pleaded by way of defense to a suit, each good in itself, as going to the entire action, the sustaining of either one of them is a bar to its further prosecution.

The judgment is accordingly affirmed.

LILES V. STATE.

(*Supreme Court of Alabama. Jan. 16, 1890.*)

INTOXICATING LIQUORS—SALES TO MINORS.

Where, at the suggestion of the seller of intoxicating liquors, a by-stander is induced by a minor to purchase liquor for him, and with his money, the effect is the same as if the sale had been made directly to the minor.

Appeal from circuit court, Covington county; JOHN P. HUBBARD, Judge.

W. L. Martin, Atty. Gen., for the State.

CLOPTON, J. Defendant was indicted and convicted under section 4038, Code 1886, for selling liquor to Lawrence Johnson, a minor. The court, *ex mero motu*, charged

the jury that if Johnson made application to defendant to buy liquor, and defendant asked him if he was 21 years old, and, on Johnson replying that he was not, defendant said he could not sell him any liquor, but he could give him money to Silas Fowler, who was near by, and he could buy the whisky for him, and thereupon Johnson gave the money to Fowler, and Fowler bought the whisky, and gave it to Johnson in the presence of defendant, the effect was the same as if he had made the sale directly to Johnson, and that he could not evade the law by that kind of device. There was evidence on the part of the state tending to prove the facts hypothetically stated in the charge. Its correctness is too manifest to require argument. Fowler was either the agent of Johnson to purchase the whisky, appointed in the presence and hearing, and at the suggestion, of defendant, or the latter's mere instrument in making the sale. In either case, defendant actually sold the whisky to Johnson.

But, if conceded that Fowler purchased the liquor, which is the phase of the case presented by the evidence of defendant, the proof satisfactorily shows that he purchased it for Johnson, and that this was known to, and done in the presence of, defendant. In such case, he was an aider, abettor, or procurer in the doing of the criminal act. He participated in the criminal design, and his suggestions and acts directly and immediately contributed to the commission of the offense. It was not essential that he should have sold the liquor to Johnson. As said in *Walton v. State*, 62 Ala. 197, it is enough that, intending that Johnson should have the use of the liquor, he sold it to another to be given him. "Nor is it true that a vendor of liquors has no right to dictate to a purchaser how he shall use liquors purchased at his bar. It is not only his right, but his duty, to see that in his bar, and in his presence, such liquors are not given to persons of the class to whom the statute interdicts a sale or gift." This ruling was affirmed in *Page v. State*, 84 Ala. 446, 4 South. Rep. 697. The charge requested by defendant ignored the evidence tending to show that defendant sold the liquor to Fowler intending it for the use of Johnson, and was therefore properly refused.

Affirmed.

CRADDOCK V. AMERICAN FREEHOLD LAND & MORTGAGE CO.

(*Supreme Court of Alabama. Jan. 27, 1890.*)

FOREIGN CORPORATIONS—MORTGAGES—SALES UNDER POWER—DEMURRER FOR WANT OF PARTIES.

1. The validity of a mortgage executed to a foreign corporation not having an office or known place of business or an agent in the state, prior to the act of February 28, 1887, "to give force and effect to section 4, art. 4, of the constitution of the state of Alabama," cannot be questioned, after foreclosure and consequent satisfaction of the debt, before the sale is disaffirmed. *Sherwood v. Alvia*, 88 Ala. 115, 8 South. Rep. 307, followed.

2. A demurrer for the want of parties, which does not specify those who should have been joined, should be overruled.

3. A mortgagee, who purchases either by himself or through an agent, at a sale made by himself under the power contained in the mortgage,

and which does not authorize him to become the purchaser, may come into equity to have the infirmity of his title, resulting from the mortgagor's right to disaffirm the sale, removed by a confirmation of the sale, if the mortgagor so elects, or by a resale under a decree of the court.

Appeal from chancery court, Tallapoosa county; S. K. McSPADDEN, Judge.

Bill in equity to compel an election to affirm or disaffirm a sale.

John A. Terrell and H. A. Garrett, for appellant. H. J. Gillam, for appellee.

MCLELLAN, J. The bill in this case was filed by the appellee to compel the appellant, George F. Craddock, to elect whether he would disaffirm the purchase by appellee of certain lands at a sale made in the execution of a power contained in a mortgage from appellant and wife to the appellee; and prayed, further, that, in the event Craddock should elect to disaffirm, the mortgage should be foreclosed, etc. The debt secured was created in the year 1884, the mortgage was executed on May 14th of that year, and the sale was made on the 10th day of December, 1888. The demurrers to the bill are that the complainant is a foreign corporation, and is not shown to have an office or known place of business in this state, and an agent; that one Martha Craddock was a material defendant, and is not made a party, and that the bill is without equity, in that it discloses that complainant has an adequate remedy at law. This appeal is taken from the decree of the chancery overruling these several demurrers.

In the case of *Sherwood v. Alvis*, 83 Ala. 115, 3 South. Rep. 307, which involved the validity of a mortgage executed to a foreign corporation not having an office or known place of business or an agent in this state, prior to the act of February 28, 1887, "to give force and effect to section 4, art. 4, of the constitution of the state of Alabama," it was held that the provision of the constitution in this regard did not render void a contract made by a corporation which had not complied with its terms, and that the other party to such contract, having received its benefits,—the contract being an executed one,—could not be heard to question the capacity, on this account, to make it. In the subsequent case of *Dudley v. Collier*, 87 Ala. 431, 6 South. Rep. 304, the conclusion reached in *Sherwood v. Alvis* was impliedly sustained, but so much of the opinion as had reference to the effect that should be accorded to the act of 1887, supra, was held to be *obiter dicta*; and stress was laid upon the fact that the contract there involved was an executed one, in a measure at least.

The present case, in so far as it is within the influence of the constitutional provision referred to, is, as now presented, identical with that of *Sherwood v. Alvis*. The mortgage was executed long prior to the act of 1887, and the contract now involved is, in some measure at least, an executed one. The case last cited, therefore, and not that of *Dudley v. Collier*, is decisive of the point raised by the assignment of demurrer under consideration.

If the respondent elects to disaffirm the sale, the contract may possibly cease to be

an "executed contract," as that term is used in the cases referred to; and in that event, it may be, the defense of incapacity, resulting from non-compliance with the constitution and laws, would be admitted. We decide nothing on this point, however further than that, as the matter now stands, there has been a foreclosure of the mortgage, and the debt thereby paid, and that while this state of things continues, and, at least, until the foreclosure and consequent satisfaction of the debt is opened up by a disaffirmance of the sale, this case comes within the influence of *Sherwood v. Alvis*, supra.

The bill alleges that George F. Craddock was seized and possessed of the lands embraced in the instrument, and that he and his wife, Matilda Craddock, executed the same for the purpose of securing the prompt payment of the debt evidenced by a certain promissory note, and the interest coupons thereto attached. This note and coupons which are made exhibits are in form obligations of George F. Craddock, but are signed by his wife. The mortgage, which is also exhibited, in form, is the joint conveyance of Craddock and wife, and contains the usual covenants of seisin, etc., as if made by them as owners in common of the land. The right of dower is expressly relinquished, and, by the terms employed to that end, it would appear that the relinquishment was made by the husband and wife jointly. We do not think that these exhibits necessarily imply or import that the wife had an undivided half interest in the land. It would seem that, at most, it is uncertain from the recitals and covenants of the mortgage, taken in connection with the note and coupons, whether the wife had any interest in the land, except her inchoate right of dower and homestead claim, and that this ambiguity is relieved by the averment of the bill that the husband owed the debt, and was seized and possessed of the land. Another principle which would incline courts to resolve the ambiguity in favor of the sole ownership of the husband is that the wife could not execute a valid mortgage on her undivided half interest held by her in the land to secure the debt sought to be enforced, and where two constructions may be adopted, one of which will support, and the other of which will defeat, the instrument, the former should be adopted. *Vincent v. Walker*, 86 Ala. 337, 5 South. Rep. 466. However all this may be, the demurrers intended to raise this inquiry were properly overruled, because they do not reach the point. The demurrer is for the non-joinder of Martha Craddock as a party defendant. No such individual is named in the bill or exhibits, and neither disclose or indicate in any way that she has any interest in the subject-matter of the suit. The bill shows that Matilda Craddock was the wife of George Craddock, and alleges that as such she joined in the execution of the mortgage. A demurrer for the want of parties, which does not specify those who should have been joined, should be overruled. *Chambers v. Wright*, 52 Ala. 444. In that aspect of the case in which it is sought to foreclose the mortgage, it may become necessary, or at least proper, to join the

wife of George F. Craddock as a defendant, even granting his sole ownership of the land. Otherwise it may be that foreclosure would leave the equity of redemption outstanding in her.

A mortgagee, who purchases either by himself or through an agent at a sale made by himself under the power contained in the mortgage, and which does not authorize him to become the purchaser, may come into equity to have the infirmity of his title, resulting from the mortgagor's right to disaffirm the sale, removed by a confirmation of the sale, if the mortgagor so elects, or by a resale under a decree of the court. This is the equity presented by the present bill, and the demurrer for want of equity was properly overruled. *McLean v. Presley*, 56 Ala. 211.

The decree of the chancery court is affirmed.

WERTH v. MONTGOMERY LAND & IMP. CO.
(*Supreme Court of Alabama*. Jan. 27, 1890.)

PLEADING—PLEAS.

When a plea assumes to answer the whole declaration, but fails to negative the cause of action set out in each count, it is demurrable.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Action of *assumpsit*.

Rice & Wiley, for appellant. *Tompkins & Troy*, for appellee.

SOMERVILLE, J. 1. The complaint contains three separate counts, the two first being common counts, respectively for goods and chattels sold, and on an account stated. The third declares on a special agreement in writing to pay a sum certain for 30 shares of the capital stock of the plaintiff corporation. The defendant answers by interposing a single special plea, which professes to go to the whole complaint. This plea alleges fraud in the procurement of the defendant's subscription to the said stock which constituted the consideration of the written instrument described in the third count. While the plea, therefore, professes to answer the whole complaint, including the three counts, it in fact answers only the third count. The settled rule of pleading is that, when a plea assumes to answer the whole declaration or complaint, but fails to negative the cause of action set out in each count, or, in other words, answers only a part of the complaint, it is demurrable. *Wilkinson v. Moseley*, 30 Ala. 562; *Tomkies v. Reynolds*, 17 Ala. 109; *White v. Yarbrough*, 16 Ala. 109; *Galbreath v. Cole*, 61 Ala. 139. The reason is that each count purports on its face to disclose a distinct right of action, unconnected with that stated in any of the other counts, and this is so whether the suit in fact embraces two or more causes of action, or only two or more different statements of the same cause of action. Whether, therefore, the plaintiff claims a recovery in such case, upon one right of action only, or upon several, cannot appear, except when disclosed by the evidence. It does not appear on demurrer. The plaintiff, by maintaining one good count, will establish his right of

recovery, although he fail on all the others. Hence a plea failing to answer every good count, is bad, and its insufficiency may be taken advantage of by demurrer. *Gould*, Pl. p. 159, c. 4, §§ 4-6; *Steph. Pl.* (Tyler,) 216; *Heard*, Civil Pl. 161; *Tabler v. Coal Co.*, 79 Ala. 377. On this principle the eleventh assignment of the plaintiff's demurrer to the special plea of defendant was properly sustained, without regard to any question affecting the merit or soundness of the other assignments. *Non constat* the common counts in the complaint might, on the evidence, have disclosed a valid cause of action entirely disconnected with the alleged subscription to the corporate stock, as to which the fraud was charged.

2. The record shows that the court sustained the entire demurrer, which contained 12 separate grounds. The defendant declined to plead further, and allowed final judgment to go against him on the demurrer. This court on appeal, therefore, is compelled to sustain the action of the primary court, inasmuch as one of the several grounds of demurrer was unquestionably well taken. *Gulford v. Kendall*, 42 Ala. 651. The judgment must accordingly be affirmed.

CLOPTON, J., not sitting.

MERIWETHER v. LOWNDES COUNTY.

(*Supreme Court of Alabama*. Jan. 28, 1890.)

BRIDGES—BOND FOR CONSTRUCTION—ACT OF GOD.

1. Where a bridge builder executes a bond conditioned that the bridge built shall be "kept in good repair," and shall "remain safe continuously for the period of five years, for the passage of travellers," etc., and said bridge is washed away by flood within less than five years, an action will lie on the bond for breach thereof, upon failure to rebuild.

2. Code Ala. 1886, § 1457, which provides that where a bridge is guarantied by the bond of the builder to stand for a stipulated period, and said bridge is washed away, the commissioners' court shall, upon the fact being made known to them by any freeholder of the county, notify the contractor to rebuild, and, in case of his refusal or neglect to do so in a reasonable time, shall order suit to be brought on such bond, does not make the giving of such information by a freeholder a condition precedent to the action of the court in giving notice to rebuild, or its authority to order suit brought, but it makes a duty, otherwise discretionary, mandatory on the court.

3. Where the bond of a contractor recites that the consideration paid by the county is both for the work of building a bridge and for the execution of the bond, and one of the undertakings of said bond is an obligation to keep the entire bridge in good repair for a stipulated period, the obligor cannot avoid his liability to rebuild as to the span because the county furnished all the materials for this part of the bridge, and paid him the additional sum of \$25 for superintending its erection.

Appeal from circuit court, Lowndes county; JOHN MOORE, Judge.

Action by Lowndes county against R. L. Meriwether, as administratrix of the estate of J. N. Meriwether, deceased, on a bond made by the defendant's intestate. The breach complained of is the failing of the contractor or obligor to rebuild a bridge which had been washed away, after having been notified to do so by the board of revenue of said county. The defendant

pleaded the general issue, and a special plea of "the act of God" in the bridge being washed away.

Rice & Wiley, for appellant. *G. Cook*, for appellee.

SOMERVILLE, J. The bond of the defendant's intestate, which is here sued on, for the consideration specified, bound him, by covenant, not only to build the bridge contracted for by the county of Lowndes, but also for five years to keep the structure in repair. The express condition of the undertaking is that said bridge shall be "kept in good repair" by the obligor, and shall "remain safe continuously from the time of its acceptance [by the county,] for the period of five years, for the passage of travelers and other persons, as well as for all purposes for which said bridge may be properly and lawfully used."

It is not denied, on the one hand, that the bridge in question was constructed in a skillful and workman-like manner, nor, on the other, that the county had the authority to contract generally for the construction of bridges, free or toll, and to take a bond to keep them in good repair for a stipulated period. Code 1886, §§ 1442, 1456, 1457. The breach of the bond assigned is that the bridge was washed away by a flood, within the period it was stipulated to stand, and thereby became impassable to the public, and that the defendant's intestate refused to rebuild and repair the bridge, although notified to do so by the board of revenue of the county, which was invested with the jurisdiction and powers conferred by the statute on courts of county commissioners in reference to the subject of bridges.

1. The main defense urged to the suit is that the bond imposed no duty on the obligor to rebuild the bridge, but only to keep it in repair so long as it stood; and that the structure was destroyed from no defect in the work, but by an extraordinary and unprecedented flood, which was an act of God, not covered by the covenants of the bond. This defense was clearly not good. There is a long line of cases, both in England and this country, which settle the proposition that an unconditional express covenant to repair or keep in repair is equivalent to a covenant to rebuild, "and binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger;" and that, while an act of God will excuse the non-performance of a duty created by law, it will not excuse a duty created by contract. *Abby v. Billups*, 35 Miss. 618, 72 Amer. Dec. 143, and note, p. 148; *Ross v. Overton*, 3 Call, 309; *Polack v. Pioche*, 95 Amer. Dec. 115, note, 121, 122; *Hoy v. Holt*, 91 Pa. St. 88; *Miller v. Morris*, 40 Amer. Rep. 814; *School-Dist. v. Dauchy*, 68 Amer. Dec. 371; *Beach v. Crain*, 49 Amer. Dec. 369, note, 374; *Van Wormer v. Crane*, 16 N. W. Rep. 686; *Warren v. Wagner*, 75 Ala. 188; *Nave v. Berry*, 22 Ala. 382. The courts have no authority to relieve contracting parties from the hardships often occasioned by such contracts, as it is within the power of obligors to provide in advance by excepting liability for casualties

of this nature from the terms of their contracts, if they so elect. The contract, moreover, shows that the duty of keeping "in good repair" is coupled with the covenant that the bridge shall "remain safe" for the period stipulated. And the statute clearly contemplates that when a bridge, constructed under such a contract, is "washed away, or so damaged [in any manner] as to become unsafe to the public," within the period covered by the bond, such accident shall be such a breach of the bond as to constitute a ground of action. Code 1886, § 1457. The second plea interposing this defense was bad, and the court did not err in sustaining the demurrer to it.

2. Where a bridge is thus erected by contract with the county, and contains a guaranty, by bond or otherwise, to stand for a stipulated period, the statute provides, if the structure is "washed away, or so damaged as to become unsafe to the public," that the commissioners' court "shall, upon the fact being made known to them by any freeholder of the county, notify the contractor to rebuild such bridge, if washed away, or repair it, if damaged, and, in case of his refusal or neglect to do so in a reasonable time, (to be judged by the court,) shall order suit to be brought in the name of the county on such bond." Code 1886, § 1457. It is contended on behalf of the appellant that the commissioners' court had no authority to notify the contractor to rebuild, or to bring the present suit, until the fact of the damage to the bridge was made known to the court by a freeholder. The statute is not susceptible of this construction. The giving of such information by a freeholder was not intended as a condition precedent to the action of the court in giving notice to rebuild, or its authority to order suit brought, but to make it a duty, otherwise discretionary, mandatory on the court. The authority to sue, and to take all preliminary steps necessary thereto, is an implied incident of the contract, and of the general statutory powers conferred on counties as bodies corporate, in any court of record. *Id.* §§ 886, 1457; *James v. Conecuh Co.*, 79 Ala. 304.

3. It is further contended that there was no consideration for the execution of the bond so far as concerned the construction of the span of the bridge, because the county furnished all the material for this particular part of the structure, and paid the obligor the additional sum of \$25 for superintending its erection. This fact does not, in our judgment, change the aspect of the case. The bond itself recites that the consideration of \$250, paid by the county to the obligor, was both for the work of building the bridge, and for the execution of the bond, which necessarily includes the assumption of its undertakings. One of these undertakings is the obligation to keep the entire bridge, and not a part of it, in good repair for the period stipulated. The authority of the commissioners' court was to make a contract for building a bridge, and to take a bond guarantying the sufficiency and permanency. It was immaterial whether the defendant's intestate furnished all or a part of the materials, or whether the county furnished them. It was equally unimportant whether, as contractor, he

built a part, and superintended the building of the other part, or whether he built the entire structure. He has, for a valuable consideration, contracted to guaranty the whole, and must abide by the terms of his agreement. That the commissioners' court had the authority to enter into such an agreement as that imported by the bond we entertain no doubt. It follows from the foregoing views that the rulings of the circuit court were all free from error, including the giving of the general affirmative charge requested by the plaintiff. Affirmed.

FARRIOR V. NEW ENGLAND MORTGAGE SECURITY CO.

(Supreme Court of Alabama. Jan. 30, 1890.)

FOREIGN CORPORATIONS—LOAN SECURED BY MORTGAGE—FORECLOSURE—EVIDENCE.

1. The single act of making one loan of money, and taking a mortgage to secure it, in Alabama, by a foreign corporation engaged in the business of loaning money on mortgages, when it has no place of business or agent in the state, is a violation of Const. Ala. art. 14, § 4, providing that no foreign corporation shall do "any business" in the state without having at least one known place of business, and an authorized agent, therein.

2. Where such foreign corporation thus lends money, and takes a mortgage therefor, in violation of the constitution, the promise of the mortgagor to pay is void, and a bill to foreclose the mortgage cannot be maintained.

3. Where the mortgage recites that it is "made," and the acknowledgment is taken, in Alabama, it is *prima facie* shown that the loan of the money and taking of the security by mortgage was transacted in said state, though the loan was made payable in another state.

Appeal from chancery court, Lowndes county; JOHN A. FOSTER, Chancellor.

Bill by the New England Mortgage Security Company against J. S. Farrior to foreclose a mortgage. Judgment for complainant. Defendant appeals.

Watts & Son, for appellant. *Caldwell Bradshaw and Webb & Tillman*, for appellee.

SOMERVILLE, J. The bill is filed by a foreign corporation for the purpose of foreclosing a mortgage on certain lands in the counties of Montgomery and Lowndes; said conveyance bearing date April 13, 1886, and being executed to secure a loan of money by the complainant to the mortgagor. This was prior to the act of February 23, 1887, passed to give additional force and effect to section 4 of article 14 of the present constitution of Alabama, which provides that "no foreign corporation shall do any business in this state without having at least one known place of business, and an authorized agent or agents, therein." Acts 1886-87, pp. 102-104.

1. The bill must be construed to aver that the complainant corporation had a duly-constituted agent, and a known place of business, in Alabama only when the suit commenced, and not when the money was loaned, or the mortgage was taken, which was more than three years before the filing of the bill. The rule is to construe pleadings more strongly against the pleader, on the principle that he will always make his allegations as favorable to himself

as his facts and his conscience will allow. It scarcely requires this rule to be invoked to hold that the allegations contained in the first paragraph of the bill on this subject were insufficient, and subject to the demurrer taken on this ground. The chancellor erred in not sustaining the demurrer. *Telegraph Co. v. Telegraph Co.*, 67 Ala. 26; *Dudley v. Collier*, 87 Ala. 431, 6 South. Rep. 304.

2. The bill shows on its face, with sufficient certainty, that the notes and mortgage were presumptively executed and delivered in this state. They all bear date April 13, 1886; the notes and the mortgage alike being dated in Alabama. There is contained, moreover, in the body of the mortgage, this declaration: "It is further agreed between the parties hereto that the notes herein described and this mortgage shall be governed and construed by and under the laws of the state of Alabama, where the same is made." The word "made" here obviously means "executed," and the latter word involves the act of delivery. The acknowledgment, moreover, taken before the notary, imports in express words that the grantor executed the mortgage on the day it bore date. As said in *Hill v. Nelms*, 86 Ala. 442, 5 South. Rep. 796, "the execution of a conveyance ordinarily includes its signing, sealing, and delivery, or the doing of every formal thing necessary to complete or carry it into effect." It was immaterial, therefore, that the notes were made payable in the state of New York. The loan of the money, and the taking of the security by mortgage, were *prima facie* transacted in Alabama.

3. The bill alleges that the complainant corporation, "under its charter and laws of incorporation, had full power and authority" to loan the money, and take the mortgage in controversy. In engaging in such a transaction, the complainant was in the exercise of its chief corporate function as imported by its very name, and as admitted by the bill. The prohibition of the constitution is against "doing any business in this state" without compliance with the conditions specified. The doing of a single act of business, if it be in the exercise of a corporate function, is as much prohibited as the doing of a hundred such acts; and it is just as much opposed to the policy of the constitution, which is to protect our citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from our courts in the event of any existing necessity to bring suit against them to vindicate a legal right, or to contest the validity of any contract made by or with them. The phrase "doing any business" is more comprehensive in meaning than the carrying on or engaging in business generally, which involves the idea of continuance, or the repetition of like acts. All the adjudged cases, so far as we have examined, in and out of this state, assume this to be true, except the case of *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. Rep. 739; 2 Mor. Priv. Corp. (2d Ed.) §§ 661-665, and cases cited. There it was said that a clause in the constitution of Colorado like the one here under consideration was not to be construed to

prohibit a single act, but only "the carrying on of business" by a foreign corporation. The act there done was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be delivered in the latter state for transportation to the purchasers in the former. The promise was a mere agreement to deliver goods in another state, and possibly was not the unlawful exercise of a corporate function. *Beard v. Publishing Co.*, 71 Ala. 60. However that may be, we do not concur in the construction given, in which, also, two of the judges of the court rendering the decision, it seems, did not agree. Their concurrence in the judgment was placed solely on the ground that the prohibition contained in the Colorado constitution, when directed against a sale of that character, would be an attempted regulation of commerce between the states, and on this account void for repugnancy to the Federal Constitution.

4, 5. In *Dudley v. Collier*, 87 Ala. 431, 6 South. Rep. 304, we discussed at some length this clause of our constitution, and the act of the legislature seeking to carry it into effect by the imposition of penalties on offending parties. We there distinguished *Sherwood v. Alvis*, 83 Ala. 115, 3 South. Rep. 307, as involving the case of a foreclosed mortgage by which the contract in question had become in a measure fully executed between the parties. This distinction is recognized also in the more recent deliverance of *Craddock v. Mortgage Co.*, ante, 196, (decided at the present term,) which was determined on the authority of that case. The legislative act cannot change the construction or meaning of the constitutional clause under consideration. It may throw light on its construction, and render its enforcement more effective; but it can neither add to nor take from the legal significance of its meaning, which was the same before as after the date of the enactment designed to give vigor to its execution. But the statute may be looked to as a legislative interpretation of the constitutional clause, and as such is entitled to much weight. *Manufacturing Co. v. Ferguson*, 118 U. S. 727, 5 Sup. Ct. Rep. 739; *Ex parte Hardy*, 68 Ala. 303.

This case, in our judgment, must be governed by the rule declared in *Dudley v. Collier*, supra. The loan of the money by the complainants to the defendant was an act of corporate business which was prohibited by the constitution, and this illegal act was the consideration of the defendant's promise to pay the borrowed money. The promise therefore was void, and, being executory, the courts will not lend their aid to its enforcement; for this would be in subversion of a regulation made for the public good.

Apparent injustice, it is true, often follows from the application of provisions of this nature, by which contracts are annulled for illegality, or as obnoxious to good morals or violative of public policy, or for repugnancy to positive statutes. But the law does not allow this result for the benefit of either of the offending parties as being less censurable or more favored than the other. It only lets the parties, who are in equal fault, severely alone, as

the surest mode of securing obedience to the authority of its mandates.

The chancellor erred in not sustaining the demurrer to the bill, and in the decree rendered.

Reversed and remanded.

MULLENS et al. v. AMERICAN FREEHOLD LAND & MORTGAGE CO.

(Supreme Court of Alabama. Jan. 30, 1890.)

FOREIGN CORPORATIONS—MORTGAGES—FORECLOSURE.

In a suit to foreclose a mortgage, a bill which states that complainant, who is a foreign corporation, has complied with the laws of the state which authorize a foreign corporation to do business in the state, and that the mortgage sued on was executed and delivered in the state, is not sufficient, as it does not aver that the corporation was authorized to do business in the state at the time the mortgage was executed and delivered. *Farrior v. Security Co.*, ante, 200, followed.

Appeal from chancery court, Pickens county; THOMAS W. COLEMAN, Judge.

Watts & Son, J. C. Johnston, and E. D. Willett, for appellants. *D. C. Hods*, for appellee.

CLOPTON, J. The appellee, the American Freehold Land & Mortgage Company of London, is a foreign corporation duly incorporated under the laws of Great Britain, and files the bill to foreclose a mortgage executed by appellant on certain lands in the county of Pickens, in this state. The averment of the bill is that complainant has complied with the laws of the state of Alabama which authorize a foreign corporation to do business in this state. Construing the bill most strongly against complainant, it shows with sufficient certainty that the notes and mortgage were executed and delivered in Alabama. In *Farrior v. Security Co.*, ante, 200, (decided at the present term,) the averment of the bill was that the corporation complainant has a duly-constituted agent, and a known place of business, in Alabama. It was held that the bill must be construed as averring that the company had a duly-constituted agent, and a known place of business, in this state only when the suit was commenced, and not when the money was loaned or the mortgage taken, and therefore was not an averment that the corporation had a duly-constituted agent and known place of business when the transaction took place, as required by the constitution and statute, and for this reason that the demurrer to the bill was erroneously overruled. On the authority of that case, the decree of the chancellor overruling the demurrer to the present bill must be reversed. Reversed and remanded.

SEAWRIGHT et al. v. PARMER.

(Supreme Court of Alabama. Jan. 27, 1890.)

MORTGAGES—REDEMPTION.

1. A creditor, to whom the holder of a legal title conveys land in which the debtor and his wife have a perfect equity, upon his agreement to reconvey to the debtor on the payment of the debt, and who afterwards enters, is only a mortgagee in possession, and a bill to redeem may be filed at any

time before the statutory bar of 10 years is complete.

2. Though the prayer to redeem the whole property may be for broader relief than that to which he is entitled, because the wife's undivided half interest does not pass by the conveyance,—she not having been a party to the arrangement, and as her mortgage to secure the debt of her husband would have been void under the statute then in force,—that is no reason for denying him that part of the relief to which he is entitled.

Appeal from chancery court, Butler county; JOHN A. FOSTER, Chancellor.

Bill by H. A. Parmer and Susan Parmer, his wife, against W. K. Parmer, for an accounting and for leave to redeem. The bill was subsequently amended by striking out the name of Susan Parmer as a complainant, and making her a defendant. The original defendant having died, the suit was revived against L. A. Seawright, as his administrator, and against his heirs. The defendants appeal from a decree overruling their demurrer to the bill.

Richardson & Steiner, for appellants.
Stallings & Wilkinson, for appellee.

MCCLELLAN, J. The case made by the averments of the bill is substantially this: H. A. Parmer, the complainant, and Susan Parmer, his wife, held a perfect equity in the land in controversy, the legal title being in Mrs. Allen. The complainant was indebted to W. K. Parmer in the sum of \$610, and, for the purpose of securing the payment of this sum, he procured a deed to be made by Mrs. Allen to W. K. Parmer, and took from the latter an agreement to convey the land to him (H. A. Parmer) upon the payment of said debt. This was in 1873. Three years afterwards,—that is, in 1876,—complainant and his wife continuing in possession meanwhile, W. K. Parmer entered without the consent of H. A. Parmer or his wife, the other tenant in common, and has since held the premises. In 1884 the present bill was filed by H. A. Parmer and Susan Parmer against W. K. Parmer, and was subsequently amended by striking out the name of Susan Parmer as a complainant, and making her a defendant; and, W. K. Parmer having died, the cause was revived against his representative and heirs. The bill proceeds on the theory that the deed from Mrs. Allen to W. K. Parmer, made at the instance of the complainant, covering land to which he and his co-tenant had an equitable title, and intended solely to secure the payment of the debt, is in truth and in fact only a mortgage in equity; and its prayer is that it be declared an equitable mortgage; that defendants be decreed to account for the rents and profits received while in possession; that, if upon such an accounting any balance be found due, he be let in to redeem, the alleged deed be canceled, etc.

The demurrers set up the defense of staleness of demand, the statute of limitations of 10 years, and the further special defense that the bill shows complainant had only an undivided half interest in the land, but seeks to redeem, not only that interest, but the whole of the property, and to have the rents of the whole interest accounted for.

We do not understand that the bill, in any sense, seeks to have W. K. Parmer's agreement to convey specifically performed.

Its sole purpose, so far as that agreement is concerned, is to have it considered with the deed of Mrs. Allen, as giving to that instrument the defeasible character which shows it to have been a mortgage, and not, as it would appear if considered alone, an absolute conveyance. We have no difficulty in concurring with the chancellor that the allegations of the bill clearly invest the conveyance with that character, and that the defendant's rights and duties are those simply of a mortgagee in possession before foreclosure. A bill to redeem, under this state of things, may be filed at any time before the statutory bar of 10 years gives repose to the title of the mortgagee. *Byrd v. McDaniel*, 33 Ala. 18; *Coyle v. Wilkins*, 57 Ala. 108; *Mewburn v. Bass*, 82 Ala. 622, 2 South. Rep. 520.

The present case is distinguishable from the cases of *Moseley v. Moseley*, 86 Ala. 289, 5 South. Rep. 732, and *Micou v. Ashurst*, 55 Ala. 607, where the transactions were held to be conditional sales, on two grounds: First, that the complainant here had a perfect equity, having fully paid the purchase money, whereas in each of those cases the party who claimed as mortgagor, and was held to be a vendor on condition, had not paid for the land, and hence did not have an equitable title; and, second, in those cases there was no independent debt between the original vendee and the person to whom the original vendor conveyed the premises, with a defeasance in favor of the vendee, when in this case there was an independent debt, which was not paid, but continued to be a subsisting liability with the conveyance, as a mere security for its payment. This last fact is usually one of the decisive tests by which the question whether the relation of mortgagor and mortgagee exists between the parties is decided. *Vincent v. Walker*, 86 Ala. 333, 5 South. Rep. 465.

The relation of mortgagor and mortgagee existing, on this state of facts, between H. A. and W. K. Parmer, does not extend to Susan Parmer, the wife of the former. Her undivided half interest in the land did not pass under the mortgage for the two reasons,—either one of which is sufficient,—that she was not a party to the arrangement under which Mrs. Allen executed the conveyance; and that the mortgage, being to secure the debt of her husband, would have been void as to her interest under the statute then in force, even had she formally executed it, the land presumably being a part of her statutory separate estate. *Steed v. Knowles*, 79 Ala. 446.

The mortgage, therefore, embraces only the complainant's undivided half interest, and his prayer to redeem the whole property, if indeed it is at last any more than a prayer to be let in to raise the mortgage off the premises in so far as it is really an incumbrance on any part thereof or interest therein,—which we do not decide,—may be for broader relief than he is entitled to; but, on the facts alleged, he is clearly entitled to some part of the relief he asks, and the fact that he is not entitled to all that is prayed is no reason for denying him that part. The same observation will apply with respect to the rents and profits of the

undivided half interest which belonged to his wife, even if it be conceded that these under the particular facts of this case did not belong to the husband, as to which it is not necessary that we should express an opinion. *Munford v. Pearce*, 70 Ala. 452.

There was no error in the decree overruling the demurrers, and it is affirmed.

CALDWELL V. GRIDER.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

LOCAL OPTION LAWS—NEW ELECTION.

1. Under Act Ala. March 19, 1875, (local option law,) providing, in section 11, that after the lapse of 12 months from an election establishing prohibition in a given district, or refusing to repeal it, "any citizen, being a freeholder within such limits, desiring to have the order revoked," may petition for a new election, the new election cannot be called for a territory forming a part only of that for which the first election was held.

2. A freeholder of that part of the original district in which the new election is sought to be held is entitled to intervene in the proceedings, by petition, to set aside the order for the new election for non-compliance with the statute.

Appeal from probate court, Jackson county; JOHN H. NORWOOD, Judge.

Petition by Amos Grider to the probate judge for an order directing a part of beat 10 of Jackson county to vote on the question whether or not a previous order establishing prohibition in the beats should be revoked as to that part of the beat described in the petition. The order for the election having been made, E. H. Caldwell interposed a petition asking that it be set aside on the ground that Grider's application did not conform to the statute. This petition having been denied, and the election held, Caldwell appeals.

W. L. Martin, for appellant. W. H. Norwood and J. B. Ashley, for appellee.

McCLELLAN, J. The act of March 19, 1875, applicable to Jackson county among others, authorizes elections to be held, by order of the judge of probate court, to determine whether the sale of intoxicating liquors shall be prohibited, in localities designated, by petitions, addressed to the probate judge, praying that the elections be ordered. It also provides that if, in a given instance, the result of the election shall be favorable to prohibition, the probate judge shall make and enter an order establishing prohibition in the particular territory, give certain notices of such order, etc., and thereafter it shall be unlawful to sell liquor within the district, etc. Section 11 of the act provides that after the lapse of 12 months from any prior election under which prohibition has been established, or in which the vote has been against revocation of the order establishing prohibition, "any citizen, being a freeholder within such limits, desiring to have the order revoked," may petition the probate judge, in the same manner as in the first instance, for an election to determine whether the order shall be revoked. Upon this petition being filed, it is made the duty of the probate judge to order an election, and if a majority of the votes cast therein are against prohibition, then the probate judge "shall make an order revoking the former order made by him, prohib-

iting the sale or giving away of spirituous or vinous liquors within such limits."

Under this act an election was held in and for beat 10, in Jackson county, in 1881, resulting in favor of prohibition, and an order was duly made and entered accordingly. In August, 1889, appellee, Grider, filed a petition praying that an order be made for an election to be held, in and by the voters of a part of said beat, to determine whether the order of 1881 should be revoked as to such part of the territory embraced in the former order. The election was ordered, and thereupon the appellant filed his petition before the judge of probate, insisting that the application for the order did not comply with the statute in several particulars, and, among others, in that it did not make a case or pray for an election as to whether the former order, covering the whole precinct, should be revoked, and praying that the order for an election be set aside, revoked, and annulled, etc. Appellant's petition was denied, the election held, resulting in favor of rescinding the former order so far as it related to that part of beat 10 which was described in Grider's petition, and, appellant's further objections thereto being also overruled, an order was entered up revoking the former order as to, and only as to, such part of the original territory; and from the rulings of the judge of probate in this behalf the present appeal is prosecuted.

We entertain no doubt that the order for an election in response to Grider's petition was absolutely void. The statute does not authorize the election for which he prayed, nor any election within and confined to the territory described in his petition. The language of the act in respect to a second election, *ex vi termini*, refers to the revocation, the rescission, the expunging of the order based on the first election, and applying to the whole of beat 10, and necessarily implies that this action shall be the result of an election participated in by all of the qualified voters of that precinct. We see no escape from this conclusion on the letter of the statute, and it is reinforced when reference is had to the natural and probable consequences of a different construction. If the order may be revoked in part, on the vote of the people in the limits described in Grider's petition, by the voters of that territory, it might with equal propriety be revoked in a much smaller area, or in two or three or a score of small areas, in the precinct, and by a majority of the votes in each of such areas, though the combined majority might still be a minority of the vote of the original territory, and thus the sale of liquor would be carried on throughout the beat, in the teeth of the avowed purpose of the law, that it should not be sold at all except upon a vote of a majority in favor of its sale. Nay, more. If the order may be thus revoked as to one-half of the beat, it may in like manner be expunged on the vote of one-fourth, or one-tenth, or one-hundredth, or any area which a petitioner may be pleased to describe, having in view the predilection of the voters therein; and thus, on the petition of a person desiring to sell liquor, an election might

be ordered for any plantation or farm in the beat, the voters resident upon which the petitioner conceived to be under his control, or favorable to his purpose to establish a groggery, and all the supposed evils of the liquor traffic would be visited upon a whole community, who had, it may be by an almost unanimous vote, declared in favor of prohibition, by the votes of a half dozen interested men. To adopt a construction which would not only admit of, but invite, such a result, would be to entirely emasculate the law, and to hold practically for naught the will of the people, which the statute provides shall control in this matter. We repudiate such an interpretation, and as a consequence hold that all action taken and orders made in response to Grider's petition were and are *coram non jure* and void.

The case of *Savage v. Wolfe*, 69 Ala. 569, is decisive of appellee's objection to the right of Caldwell to interpose in the proceedings in the court below in the manner shown by this record. He is a freeholder, not only of the beat, but of that part of the beat sought to be affected directly by the orders invoked, and he had a right to be heard in the premises. The appellee makes no other objection to the prosecution of this appeal than is involved in the alleged lack of interest on the part of the appellant.

The view we have taken of a vital point presented by the record renders it unnecessary to consider the assignments of error *seriatim*.

The order of the probate judge overruling and dismissing the petition of the appellant is reversed, and the cause remanded.

CHEATHAM V. STATE.

(*Supreme Court of Mississippi*. Feb. 3, 1890.)

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—REMARKS OF COUNSEL—CHANGE OF VENUE—HOMICIDE—INSTRUCTIONS.

1. On a trial for murder, defendant asked the court to charge that the testimony of an accomplice "comes in such questionable shape that it should, in the interest of truth and justice, be subjected to the severest scrutiny, and acted on with the greatest caution." He also requested the court to "advise the jury not to convict upon the uncorroborated evidence of accomplices." *Held*, that while long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach to a rule of law, a refusal to give it is not reversible error.

2. Where one of two accomplices has not been interrogated as to inducements offered them to testify against defendant, but the other has testified as to them freely, it is not competent to prove by a witness that other witnesses offered inducements to the accomplices, it not being proposed to prove that the accomplices accepted the inducements and testified, or promised to do so, but the sole purpose being to discredit the witnesses.

3. Where counsel, in commenting on the evidence, states a circumstance which has not been proven, and, on objection being made, states that the remark was inadvertently made, and withdraws it, and asks the jury to ignore it, and the court instructs the jury to disregard it, the verdict will not be set aside on account of the inadvertence.

4. Where defendant obtains a jury before exhausting his peremptory challenges, and his witnesses in large numbers respond promptly and testify freely, and the court, after seeing the temper and conduct of the jurors on their *voir dire*,

denies a motion for a new trial, the supreme court will take these matters into consideration in determining the question whether there was error in refusing a motion for a change of venue.

5. An instruction in a murder trial that the jury "might consider any threat against the deceased proved to have been made by the accused, and any motive to kill established by the evidence, together with all the evidence in the case, in making up its verdict," is not so erroneous as to entitle defendant to a new trial, though it might properly be refused.

Appeal from circuit court, Grenada county; C. H. CAMPBELL, Judge.

Wm. C. McLean, for appellant. T. M. Miller, Atty. Gen., for the State.

COOPER, J. Appellant has been convicted of the murder of one Tillman, and sentenced to capital punishment. We dispose of the errors assigned in their order.

The first assignment of error is upon the action of the court in refusing a change of venue, and upon this it is sufficient to say that no abuse of judicial discretion appears to have been committed. Upon the motion for the change of venue, a number of witnesses were examined, the majority testifying that in their opinion a fair and impartial trial could not be secured in the county. But a number of them declared that no reason existed known to them why an impartial jury might not be secured. Looking to the whole evidence upon this question, it seems to us that many of the witnesses believed a jury could not be secured from that section of the county in which the homicide occurred, and, not knowing the public sentiment in other portions of the county, assumed it to be hostile to the defendant, as it was in the section in which they were acquainted.

But the question of error or no error in this respect is not determinable alone from the stand-point occupied by the court in passing upon the question before the trial was commenced. On the motion for a new trial the court had before it the whole case as developed, including the examination of the jurors on their *voir dire*, the selection of the panel, the temper and conduct of the jurors and witnesses, and the evidence of the existence or non-existence of that pervading public sentiment known as "undue prejudice in the public mind," which, existing, entitles one accused of crime to a trial in another county. The record discloses that a *venire* of 50 names was drawn at the instance of the prisoner, and by the bill of exceptions it is certified that "a jury of twelve lawful men, to-wit, Charles Trimble and eleven others, taken from the special *venire*, the defendant not having exhausted his peremptory challenges," was selected.

The witnesses summoned in defendant's behalf seem to have promptly responded to the process of the court, and, so far as we can discover, testified fully, freely, and without any sort of hesitancy or reserve, in his favor. One witness for the state having testified to a conversation he claimed to have overheard between the defendant and one of his co-defendants, in effect confessing his guilt, was promptly contradicted by the testimony of the only other man who he stated was present

and within hearing. A great number of witnesses, apparently taken from the body of the community in which the homicide occurred, freely attacked the general credibility of the most important witnesses for the state. However honestly the witnesses on the preliminary motion for a change of venue may have felt that the accused could not secure an impartial trial in the county of the offense, the trial as surveyed from its conclusion, instead of its commencement, impresses us, as it did the court below, as entirely free from any bias against appellant.

The next assignment of error is upon certain remarks made by counsel aiding the district attorney in the course of his argument to the jury. One of the witnesses for the state stated, in reply to a question from the defendant's counsel, that some time after the arrest of appellant he (witness) told him (appellant) that Lamons (a defendant jointly indicted with appellant) was gone,—was not at home. It appears that when appellant was informed that suspicion rested upon Lamons he replied that Lamons could not have committed the murder, for he had slept with appellant the night of the murder. After this, and when appellant was arrested, he stated that he had spent the night of the murder with his mistress, (a Miss Robinson.) In his argument the counsel for the state, in speaking of these contradictory declarations by defendant as to where he had spent the night, said: "The reason why defendant changed his tactics was because he had intellect enough to know that the flight of Lamons was a circumstance of guilt, and evidence of it, and that neither Cheatham nor Lamons could explain it." Instantly upon this remark being made to the jury, counsel for appellant objected to it, because there was no evidence of the flight of Lamons, and that such evidence, if offered, would be incompetent, as against the appellant. Whereupon the court instructed the jury that it should disregard so much of the argument of counsel as had reference to the flight of Lamons, and counsel for the state also stated to the jury that he had inadvertently made the point, that he withdrew his remarks, and would ask the jury to ignore them. It is now strenuously urged that for this inadvertence of counsel, instantly corrected by both court and counsel, the verdict must be set aside, and a new trial awarded. It was impossible, says counsel, for the court or the state's attorney to expunge from the mind of the jury the effect of the suggestion. The jury could not forget the fact suggested, and would not ignore its existence in forming their verdict.

The standard sought to be erected by counsel by which to test the "fair and impartial trial" to which one accused of crime is entitled is too perfect and refined. It excludes not only appreciable error, but invades the field of metaphysics, and invites investigation of subjects with which neither courts nor juries are competent to deal. Courts must consider juries as bodies of plain men imbued with an honest desire to perform with fidelity the duty im-

posed on them, of discovering the truth from the evidence submitted to them, in conformity with the instructions as to the law given them by the court. Until the contrary is made to appear, it must be presumed that a jury performs its duty, and ignores incompetent testimony to which its attention is called by the court. We do not think the argument of the state's attorney subject to the criticism of counsel that it was an indirect and covert remark upon the failure of the defendant to testify as a witness.

The next assignment of error is upon the action of the court in rejecting certain testimony offered by defendant. The principal evidence for the state, connecting appellant with the murder of Tillman, was the testimony of two of his accomplices, Lee Irvin and Cornelius Robinson. By them his guilt was thoroughly established, if their testimony was credited by the jury. It appears that soon after the murder of Tillman suspicion became fixed upon Irvin and Robinson, and on Saturday or Sunday morning (the homicide having occurred on Thursday) they were arrested. On Sunday morning the body of Tillman was discovered in a stream, where it had been sunk by the murderers by attaching large rocks to its head and feet. After the discovery of the body, violence was used against them to extort a confession against others, and assurances were given Irvin, at least, that he should be protected if he would divulge all he knew of the crime. On cross-examination of Irvin, these facts were elicited; but it appears that neither he nor Robinson made any statements relative to the crime until after they had been removed to the jail at Oxford, Miss. The other defendants were in the mean time incarcerated in the jail of Grenada county. After Irvin and Robinson had testified, C. H. Perry was being examined as a witness, when the defendant's counsel asked him: "What, if any, inducements were offered and extended to Lee Irvin and Cornelius Robinson in order to get them to testify in the case?" And, further, counsel for defendant offered to prove by Perry, and also by members of the coroner's jury which was investigating the death of James Tillman, that members of the coroner's jury, and other influential citizens,—men of means and influence,—said to Lee and Cornelius: "We have the dead thing on you. It will be better for you to tell the truth about the matter, and if you will tell the truth—all you know about it—you shall not be hurt, but we will protect you, and will furnish money for you to leave the country when the trial is over." Upon objection by the state, this evidence was excluded, and the defendant excepted.

We agree with defendant in error that it is not always necessary to lay the foundation for evidence attacking the credibility of witnesses by first inquiring of the witness sought to be attacked whether the discrediting facts exist. It will, however, we think, be found that in all cases in which, without preliminary inquiry from the witness, it is competent to discredit him by evidence of other facts, the other

fact itself must of and by itself be of a nature to throw discredit upon his testimony. Thus one may prove that an adversary witness is of bad reputation for truth and veracity; or that he is unfriendly to the party against whom he testifies; or is nearly related to his adversary, or has been convicted of crime, or has accepted a bribe to testify. But the fact that some third person has offered a bribe or other inducement, not accepted by the witness, does not tend to discredit him. If such were the rule, the most spotless and disinterested witness would be at the mercy of the unscrupulous, without power or opportunity to defend himself from unjust aspersions.

The course of inquiry proposed by counsel for accused was not for the purpose of establishing suspicious circumstances the existence of which the state's witnesses had denied. Irvin had detailed what had transpired; had admitted the threats and force used against him; the promises of immunity that had been given on condition of his divulging all he knew of the killing. All of these things had proved unavailing to procure any statement from him, and it was not until after he and Robinson had been carried to another county that either made any confession or statement. Robinson had not been interrogated by the defendant touching these matters. It was not proposed to prove that either of the witnesses had, at the time of the inducements offered, accepted the same, and testified, or promised so to do. The sole purpose was to discredit the witnesses by evidence of proposed, but unaccepted, inducements, as to which the witness Irvin had been examined, and had freely spoken, and as to which Robinson had not been interrogated. Under these circumstances, the evidence was properly excluded.

The next exception taken was to the action of the court in rejecting the twenty-third instruction asked by the accused, and by withdrawing another instruction which the court had given touching the duty of the jury to acquit, if there was no corroboration of the testimony of the accomplices. The refused instructions pertain to the same subject, and will be considered together.

By the twenty-third instruction the defendant asked the court to tell the jury that "the act of an accomplice in testifying for the state, so as to criminate himself with others, is voluntary; he could not be compelled to do so. He testifies for the state under a promise of favor, expressed or implied, on condition that he will make a full confession and statement in regard to the matter. His testimony comes in such questionable shape that it should, in the interest of truth and justice, be subjected to the severest scrutiny, and acted on with the greatest caution."

By another instruction the court had been requested to advise the jury not to convict upon the uncorroborated evidence of accomplices. In acting on this instruction, the court struck out the word "advised," and inserted in lieu thereof the word "instruct." After counsel for the defendant had concluded his argument, the

state's attorney moved the court to withdraw this instruction, which was done. Counsel for defendant then asked the court to give it, with the word "advise" instead of the word "instruct," which the court refused to do. By the fifth and ninth instructions for defendant, the court had told the jury that it was its province to determine what weight should be given to the testimony of the accomplices, and that it should consider "all the circumstances in evidence which may tend to disprove the truth of the testimony or to throw suspicion upon or to cause its rejection; and also to consider all the circumstances which may explain the motive of the accomplices in testifying falsely, or which might tend to prompt colored or untrue statements from him; and it will be proper for the jury to consider such testimony in connection with any threats made against the accomplice prior to his testifying, or any violence threatened or attempted upon or towards him, or any promises of help or aid or relief made to him, or any intimidation offered against him, or any raising of hopes in any way in his breast of escape for himself, or any knowledge or apprehension on the part of accomplice of great feeling or prejudice against the defendant, or any other fact or circumstance naturally calculated to influence the fears or feelings of the accomplice, provided such circumstances, or any of them, appear in evidence, and the jury may, in view of any such circumstances, discredit the testimony of said accomplice, and wholly reject it, even if such rejection will lead to the acquittal of the defendant."

The suspicion with which the testimony of accomplices is received by the courts, and their unwillingness to sustain convictions resting wholly upon the uncorroborated evidence of such persons, has led to the very general practice of advising juries to act with great prudence and suspicion upon such evidence, and to acquit unless there is corroboration in material particulars. But our researches have failed to discover a case in which a conviction has been set aside by reason of the court refusing so to instruct or advise. In the case of *State v. Jones*, 64 Mo. 391, an instruction substantially that of the twenty-third here was refused by the court; and the supreme court, in passing upon the case, declared that the instruction "should have been given," but the judgment was reversed on other grounds, and we do not know that, in the absence of other error, the refusal of this instruction would have been held reversible error. In *State v. Haney*, 2 Dev. & B. 390, the supreme court of North Carolina declared what we understand to be the true rule upon the subject. The practice of giving such instructions or advice to the jury, it is there said, rests in the discretion of the presiding judge, and his refusal so to do is not assignable as error. "No one," said the court, "can require of the judge to give an instruction to the jury, except on the law of the case. The judge may caution them against reposing hasty confidence in the testimony of an accomplice.

It is usual, justifiable, and, we add, it is proper, to do so, where he has cause to apprehend that the jury may feel themselves bound to find a verdict conforming to the positive testimony of the witness, without weighing the circumstances of suspicion and distrust under which his testimony is rendered. Long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach to a rule of law. Jurors are advised that it is deemed hard, and that it is unsafe, to convict on the testimony of an accomplice, unless that testimony receive material support from evidence derived *aliunde*, coinciding with it in considerable circumstances so as to leave no rational doubt in their minds as to its truth. In what parts of the details of the testimony this confirmation should be had, in order to remove the jealousy and suspicion to which the testimony is exposed, and to create such a degree of confidence in the general credibility of the witness as to command faith in those parts of his narrative where he is not thus supported, the judge has not the right to direct or advise the jury. Speculative writers have, indeed, undertaken with much ingenuity to devise rules of faith on the subject, but the law is wholly silent concerning them. Tolerating and approving of the general caution, it trusts the application of the caution, under all the circumstances testified, wholly to the intelligence and integrity of the jury."

The learned annotator of the case of *Com. v. Price*, 71 Amer. Dec. 668, adopts the declaration made in this case that "long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach to a rule of law. It is questionable, however, if in any case its omission would be ground for a new trial;" and in its support cites many cases which will be found in the note to that case.

The remaining assignment of error is upon the giving of an instruction by which the court told the jury it might consider any threats against the deceased proved to have been made by the accused, and any motive to kill established by the evidence, together with all the evidence in the case, in making up its verdict. The instruction is not subject to the criticism that it is upon the weight of the evidence, for it does not tell the jury that such facts prove, or tend to prove, the issue in favor of the state. Nor does it announce any erroneous proposition of law. On the contrary, by admitting such evidence the court declared its competency, and it is true that the jury may and should consider all the evidence in forming its verdict. While we do not think the instruction erroneous in the sense of entitling the accused to a new trial, it is much to be hoped that the courts will reject such charges when asked. Counsel representing the state may very properly argue before the jury the effect of such evidence. But the field of argument is so nearly invaded by such instructions that the court may with propriety decline to give them.

We find no error for which the judgment should be reversed, and it is affirmed.

CROSSETT et al. v. CLEMENTS.

(*Supreme Court of Mississippi*. Jan. 20, 1890.)

WILLS—CHARGES UPON LAND.

A devise of land to M., "to have free from any incumbrance whatever, except that so long as my daughter Polly may live with him he shall board her and pay her a yearly stipend of twenty dollars," fixes a charge on the land for the board and yearly stipend of the daughter.

Appeal from chancery court, De Soto county; J. G. HALL, Chancellor.

One Clements died in 1871, leaving a will devising all his estate to his wife for life. Then follows the provision set out in the opinion. The wife died in 1886, but prior to her death appellant Crossett and another had acquired from her the life-estate in the realty, and had also acquired the fee from the son, Morton Clements. After the death of Mrs. Clements, the wife, in 1886, Morton Clements moved away, and neither board was given nor the stipend of \$20 paid, and in 1889 Polly Clements, the appellee, filed this bill for a construction of the provision of the will in controversy, and to have her rights declared thereunder, and a charge fixed upon said real estate from 1886 for her board and yearly stipend of \$20. The chancery court held that the board and yearly stipend were charges upon the land, and referred the matter to the clerk and master to take and state an account, from which this appeal is taken, and was granted, for the purpose of settling the principles of the case.

D. McKenzie, for appellants. Powell & Powell, for appellee.

WOODS, C. J. The appeal herein was taken from an interlocutory decree referring the cause, on bill, answer, and proof, to the clerk and master of the chancery court of De Soto county, to state an account herein, under certain specific instructions of the court, for the purpose of settling the principles of the cause. The contention arises solely upon the proper construction of a clause contained in the will of Laban Clements, father of appellee. After devising a life-estate in his real estate to Elizabeth Clements, his wife, and the mother of appellee, this provision is found in said will, viz.: "The realty, being my homestead, and containing some forty acres and odd, I wish my son, Morton, to have, free from any incumbrance whatever, except that so long as my daughter, Polly, may live with him, he shall board her, and pay her a yearly stipend of twenty dollars." On the part of appellee, it is contended that these words fix a charge upon the land so devised to Morton for board of appellee, and the stipend of \$20 per annum; and for appellants it is asserted that Morton took the remainder free from any incumbrance whatever, the words referring to board and a yearly stipend being merely suggestion and request addressed to Morton by the testator. In support of this latter contention, counsel for appellants insist that the manifest design of the testator was to confer a benefit on Morton by this devise, but that the income from the homestead would be insufficient to meet the charge for the board of Polly and the yearly stipend of \$20; and that, as the

testator must have known this, it should not be held that the testator would have frustrated his own desire to confer a benefit upon Morton by a provision in his will charging the realty so devised to an extent exceeding its income. The argument is plausible, but, we think, not at all convincing.

In the interpretation of every will, the prime object is always to ascertain what the real intention of the testator was. If the words of the testator are so clear and unambiguous as to leave no room for doubt as to what the testator's intention was, then the words of the will should be allowed to have their usual force and effect, and resort should not be had to circumstances arising *alunde*, or calculations that may be made as to the value of the property devised, or consequences of inconvenience which may flow from any adherence to the plain and unambiguous language of the will itself. What is the language of the will in this disputed devise to Morton? Does it give him the remainder in the homestead absolutely free from all incumbrance? It would clearly have done so, if the words, "except that so long as my daughter, Polly, may live with him, he shall board her, and pay her a yearly stipend of twenty dollars," were not subjoined; but, with these words added, it is equally clear that, construing the devise according to the plain and obvious import of its words, the intention of the testator was to incumber the property so devised with this charge upon it. The devise bears its own clear interpretation upon its face, and we cannot bend it to meet the exigencies of any hardships that may arise from giving it that construction which will accomplish the testator's intention.

The decree of the chancellor, referring the cause for an account, is affirmed, and the cause remanded.

SMITH v. STATE.

(Supreme Court of Mississippi. Jan. 20, 1890.)

DISTURBING RELIGIOUS WORSHIP—FORMER ACQUITTAL.

1. A plea of former acquittal to an indictment for disturbing religious worship by assault and battery and profane swearing is not sustained by proof of a former acquittal on a charge for the assault and battery, as defendant might properly be convicted on the indictment for disturbing religious worship by evidence of the swearing only.

2. A plea of former acquittal, in which it does not appear that the offense with which defendant was charged was committed in the district of the justice before whom the trial was had, will not protect defendant from further prosecution for the offense in the proper court, as the justice had no jurisdiction of the case under Code Miss. § 2216, (Laws 1888, p. 88,) which gives justices of the peace jurisdiction to try offenses only when committed in their several districts, unless there be no justice in the district in which the offense was committed, in which case the trial may be had in an adjoining district.

Appeal from circuit court, Tallahatchie county; GEORGE WINSTON, Judge.

W. S. Eskridge, for appellant. T. M. Miller, Atty. Gen., for the State.

COOPER, J. The demurrer to the plea of former acquittal was properly sustained.

The charge against appellant before the justice of the peace was for an assault and battery, and of that he was acquitted. The indictment against him is for disturbing religious worship by the assault and battery and by profane swearing. Upon this charge he might properly be convicted by evidence of the swearing only. It was not necessary that any evidence should be given of the assault and battery, for it may be that appellant so gently contended with his adversary that, but for the boisterous use of the language used, the congregation would not have been disturbed. But the proceedings before the justice did not operate to protect the defendant for the further reason that it does not appear that the offense with which he was charged before such justice was committed within the territorial limits of the justice before whom the trial was had. Justices of the peace have jurisdiction to try offenses only when committed "in their several districts," unless there be no justice in the district in which the offense is committed, in which case the trial may be had in an adjoining district. Code, § 2216; Acts 1888, p. 88. Since it does not appear from the plea that the defendant was tried before a justice having jurisdiction of the offense charged, the state was not precluded, if it had elected to do so, from prosecuting an indictment against him for the "assault and battery with brass knuckles upon Jennings." If "gentlemen" will fight and swear in church, they should see to it that the verdicts of acquittal secured before the justices of the peace are before those having jurisdiction, otherwise they may be subjected to further annoyance by indictment. The judgment is affirmed.

CHILES v. GALLAGHER et al.

(Supreme Court of Mississippi. Jan. 20, 1890.)

QUIETING TITLE—TRUSTS—FRAUDULENT TAX-TITLES.

1. In an action to cancel a deed as a cloud on plaintiff's title, the bill averred that plaintiff's father bought the land from G. and had the title made to plaintiff's grandfather, who paid the purchase money, which was afterwards accounted for by the father as an advancement, but failed to aver that G. had title, or that he was ever in possession. It was proved that plaintiff's father was never in possession. *Held*, that plaintiff failed to show a sufficient title as against an innocent purchaser, for value and without notice, of one in possession, who held under a fraudulent tax-title.

2. Where a father advances money to pay for land purchased by his son, and charges the amount, and by his will directs the same to be accounted for by the son in the distribution of his estate, the son is the equitable owner of the land.

3. One who conspires with the widow of a deceased owner of land to procure a fraudulent tax-title cannot deny the title of the deceased owner's heirs.

Appeal from chancery court, Lauderdale county; S. EVANS, Chancellor.

Walker & Hall, for appellant. R. P. Williams, J. S. Hamm, and Witherspoon & Witherspoon, for appellees.

COOPER, J. The complainant, alleging that she is the sole heir at law of John C. Higgins, exhibited her bill against the heirs at law of her grandfather, F. B. Higgins, and against the defendant Gallagher,

(who, it is charged, under the circumstances hereinafter named, secured by fraud a tax-title to the lands described in the bill,) and against Cameron, who has bought an undivided one-half interest in the land from Gallagher, and against Champenois and others, who are mortgages under Gallagher and Cameron. The purposes of her bill are to establish the title of herself, as heir at law of her father, as against the heirs at law of her grandfather, and to cancel, as clouds upon her title, the tax-deed to Gallagher, the conveyances by him to Cameron, and the mortgages executed by Cameron and Gallagher. Shortly stated, the facts upon which complainant relies are as follows: In the year 1859 her father purchased the land from one Gibbs; but, being unable to pay the purchase money, applied to his father, F. B. Higgins, to advance the amount. His father complied with his request, but required the conveyance to be made to himself, which was done. F. B. Higgins was accustomed to keep memoranda showing advances made to his children, respectively, and money lent to them; and among other sums noted by him as due from John C. Higgins was the money paid for the land in controversy. By his will, F. B. Higgins directed, in the distribution of his estate, that each child should be charged with all advances received, and with all debts due to him. He died in 1863, and his son John C. Higgins died in the year 1861. In the year 1867 or 1868, the mother of complainant (the widow of John C. Higgins) erected several small houses on the lands in controversy, which she rented to various persons, collecting the rents, and appropriating them to her own use, and paying the taxes upon the property. Several letters written by her to the widow of F. B. Higgins show that she recognized the land to be the property of his estate, and asked permission of his heirs at law to occupy the same. In the year 1875 she seems to have conceived the purpose of selling the land for the purpose of applying its proceeds to the education of her daughter, the complainant, who was then an infant of the age of 14 years. She proposed to Gallagher to sell the land to him, and he agreed to buy it; and upon the faith of this agreement he assumed pecuniary obligations for the education of complainant, which he afterwards discharged. Examination of the records by him disclosed the fact of the title being in F. B. Higgins, and he declined to consummate the purchase unless Mrs. Higgins would procure conveyances from the heirs at law. These she attempted to secure, but unsuccessfully. Gallagher then proposed that the land should be permitted to be sold for taxes, and that he should become the purchaser. This arrangement was carried into effect, and Gallagher paid out, for the tuition of complainant, about the value of the land as agreed on between himself and Mrs. Higgins. Soon after the sale for taxes, (January, 1876,) Gallagher entered into possession of the land, and has so continued, claiming it as his own, until January, 1886, when he conveyed the undivided half interest to Cameron, since which time Gallagher and

Cameron have been in possession. In January, 1886, and before the conveyance to Cameron, Gallagher and Cameron, who were partners in business, borrowed \$3,000 from Champenois, and, to secure the same, executed a mortgage upon the lands in controversy, and other lands in which Cameron had an interest. All the lands were included in a single mortgage; Gallagher executing it to convey the lands in controversy, and Cameron to convey the other lands.

The facts above set forth are extracted from a voluminous record, which contains much other matter not necessary to be stated. These facts are not undisputed; but careful scrutiny of the evidence convinces us of their truth, and that they are not controlled, or materially modified, by other facts and circumstances. With the facts thus found it is not difficult to apply clear and well-settled principles to the solution of the questions involved.

The controversy separates itself into three inquiries, which are: (1) What are complainant's rights as against the heirs at law of F. B. Higgins? (2) What are they as against Gallagher, the purchaser at the tax-sale? (3) What are they as against the purchaser and mortgagee from Gallagher?

The arrangement between John C. Higgins and his father, by which the father advanced the price of the land, and took title to himself, is not an unusual one, especially between parent and child; and its effect was to make the father mortgagee of the land. The son was the purchaser of the land, but not the grantee of the legal title. He was the meritorious or moving cause of the conveyance; but, being unable to pay the purchase price, secured it to be advanced by his father, at whose instance the conveyance was made to the father. The father charged the amount so paid in an account he kept against the son, making no discrimination between this particular sum and others which he had previously loaned to him, and by his will directed account to be taken of the whole sums due in distribution of his estate. Under such circumstances, the right of the son as owner of the land, subject to the charge for the purchase price, is clear. *Runnels v. Jackson*, 1 How. (Miss.) 358; *Evans v. Green*, 23 Miss. 294; *Robinson v. Leflore*, 59 Miss. 148; *Carr v. Carr*, 52 N. Y. 251; *Smith v. Cremer*, 71 Ill. 185. By his will, F. B. Higgins directed the debt to be treated as an advancement; and this was sufficient, as against the other heirs at law and devisees, to release the debt due for the price of the land. It appears that the estate of F. B. Higgins is insolvent; but, since no administration has been taken of his estate in this state we are not called upon to consider what would be the right of the administrator of the estate proceeding to charge the land with the payment of the debt.

It is not necessary for the determination of the cause to pass upon the validity of the proceedings under which the sale for taxes was made. Whether they were valid or invalid, the defendant Gallagher cannot avail of the title thereby derived to defeat the right of complainant; and, wheth-

er they are valid or invalid, the complainant has not, as against Cameron and Champenois, shown any right to call them in question. The widow of John C. Higgins was in possession of the land, receiving the rents and profits thereof, and therefore under obligation to keep down the taxes. This Gallagher knew; and, though it does not appear that he knew the facts relative to the original purchase by John C. Higgins, and that F. B. Higgins held the legal title as security for the purchase money paid by him, by reason of which the complainant, as heir at law of her father, was owner of the land, it is unquestionably true that default was made in payment of the taxes on the land to the end that by its sale for taxes he might secure the title which Mrs. Higgins had agreed to invest in him. Default in payment by the occupant, and a tax-sale as the consequence of such default, was essential to the consummation of the scheme. If Mrs. Higgins had bought at this tax-sale, she would have held the title as trustee *ex maleficio* for complainant; and Gallagher, confederating with her, stands in no better position than she would have sustained had she herself bought. *Joor v. Williams*, 38 Miss. 546; *Brockett v. Richardson*, 61 Miss. 766.

It becomes now necessary to consider another question, made pertinent by the connection of Cameron and Champenois with the property. Whether complainant is or is not the real owner of the land was wholly immaterial, so long as we were considering the rights of the heirs at law of F. B. Higgins and of Gallagher to defend against her claims. F. B. Higgins received the title conveyed to him by Gibbs as trustee for John C. Higgins, complainant's father. Whether it was a valid title was a matter of no concern to him, nor, since his death, to his heirs at law. It is not competent for them to controvert the validity of the title received. Upon the same principle, Gallagher, the purchaser at the tax-sale, cannot call upon complainant to show herself to be the real owner of the land. He is infected with the same disability as was the widow with whom he combined to defeat by tax-sale the title of the owner; and, since she might not have denied the title of complainant, this defendant may not do so. But these disabilities spring from the relations of trust and confidence in which these parties, in the eye of a court of equity, stand towards complainant. Neither Cameron nor Champenois is shown to have had any knowledge of the existence of complainant's right, nor have they done anything for the purpose of aiding the trustees, or either of them, in a breach of trust. They are purchasers for value, without notice of her interest in the property. If they must yield to her title, it is because it is superior in law to that asserted by them. Counsel for complainant, appreciating this, strive to show the sale for taxes to Gallagher to be void for want of a valid assessment and sale of the land, wherefore no title passed to him, and consequently none was conveyed by him to these parties. It may be conceded, for the purposes of this case, that the tax-sale was invalid. It does not

follow that these defendants must yield to the claim of complainant. Admitting they have no title, they may yet challenge her right to call them to account unless she is the owner of the land.

There is no more serious and prevalent error than that which seems to exist in relation to the right of parties to exhibit bills to cancel clouds upon titles. It is frequently assumed that if a complainant can show some antecedent claim, however vague and unsubstantial, he may assail and dispel anything which is a cloud upon the real title. We cannot conceive what has given rise to this erroneous view, for it is settled, by an unbroken current of decisions, that, to enable a complainant to cancel the defendant's title as a cloud, he himself must show as perfect a title, legal or equitable, as would enable him, the title being a legal one, to recover against the defendant in an action of ejectment. Tested by this rule, the complainant has failed to establish such title as entitles her to relief against these defendants.

As against the heirs of F. B. Higgins and Gallagher, she prevails, not because she shows title, but because they do not occupy a position to deny her title. As against the other defendants, against whom she must show a sufficient title, and recover on it, her showing is wholly insufficient. By her bill she avers that her father bought the land from Gibbs, and entered into possession, and so continued until his death. There is no allegation that Gibbs had title, nor even that he was in possession of the land he sold and conveyed. Assuming, as we must do, that she has stated her case as strongly as the facts would warrant, we find nothing but color of title claimed as derived from Gibbs. The averment that her father entered into possession under this deed, and died in possession, would have been sufficient, if proved, to show a *prima facie* right of recovery. Unfortunately for her, this allegation is denied by the answer, and is not only not proved, but is disproved, by the evidence. It is clearly shown that her father never entered upon the land, and therefore that he was never in possession, unless, being the true owner, which is not shown, his title drew to him its constructive possession. The only possession, in fact, that is ever shown to have existed, was long after the death of her father, when her mother took possession either as widow of John C. Higgins, or in recognition of the adverse title asserted by the heirs of F. B. Higgins, deceased. Viewing the evidence most favorably for complainant, it is more than probable she held in the latter right. Under such circumstances, it has never been held that the title of a defendant entering under conveyance from one in possession, who himself claimed under color of title, could be called in question.

The decree is affirmed in so far as it dismisses the bill as against the defendants other than Gallagher and the heirs of F. B. Higgins. As to them, it is reversed, and cause remanded.

WOODS, C. J., took no part in this decision, having been of counsel in the court below.

GIBSON v. STATE.

(Supreme Court of Mississippi. Jan. 20, 1890.)

LARCENY.

Where the record fails to show the value of property alleged to have been stolen, a new trial will be granted, without regard to irregularities in the bill of exceptions.

Appeal from circuit court, Tallahatchie county; GEORGE WINSTON, Judge.

Indictment of William Gibson for grand larceny. From a verdict of guilty and judgment thereon he appeals.

Sullivan & Whitfield, for appellant. *T. M. Miller*, Atty. Gen., for the State.

WOODS, C. J. Several questions are submitted to us by the assignment of errors. On a consideration of one only, we find ourselves constrained to reverse the judgment of the court below. There is no hint in the record touching the value of the property alleged to have been stolen. If it really had no intrinsic value, it was not the subject of larceny. If it possessed value, the record fails to disclose that fact. It may have been grand larceny, it may have been petty larceny, or it may have been no offense whatever. The value of the property must have been proved in order to ascertain—*First*, if any offense had been committed; and, *second*, what the grade of the offense was. The overwhelming force of this failure to show value is admitted, but it is suggested that the exceptions to the rulings of the court below do not appear in the bill of exceptions, and that, therefore, this court must decline to notice the errors assigned. It is true the record is defective and inartificially drawn, but we find in it a motion for a new trial, the order overruling the same, and defendant's exception thereto. In view of the absolute failure of the evidence to support the verdict, and judgment of the court below, and holding it our duty to decline to allow adherence to rules of practice to put in jeopardy the liberty of the citizen, we shall pass upon this vital error without regard to irregularities and inartificialities of the record. Reversed and remanded.

ROTENBERRY v. BOARD OF SUPERVISORS.

(Supreme Court of Mississippi. Jan. 20, 1890.)

COUNTY BOARDS—POWERS.

In Mississippi, the power of a board of supervisors over court-houses, and sites for court-houses, is complete and exclusive, and no court can interfere with the exercise of this power, so long as it is exercised only unwisely, and without discretion; and the purchase of a site for a court-house, the county having already a court-house site, is not such a usurpation of power as will warrant the interference of the courts.

Appeal from chancery court, Yalobusha county; J. G. HALL, Chancellor.

W. S. Chapman, for appellant. *Ro. H. Golladay*, for appellees.

WOODS, C. J. The appellant filed his original bill, in the first district of Yalobusha county, to enjoin the board of supervisors from making any contract for the building of a new court-house, and to have declared void the various orders of the board of supervisors made and entered on their min-

utes in the year 1889, condemning the old court-house, purchasing a new site for a new court building, and taking steps looking to the erection of it, and for the cancellation of the contract of purchase and sale made between said board of supervisors and George Boswell for the site selected by the board for the erection thereon of a new court-house. The allegations of the bill were fully met in the answers made by Boswell, and the president, and three members of the board. Much testimony was taken, and the matter was at length submitted to the chancellor on a motion of defendants to dissolve the injunction which had been granted complainant on his bill. The chancellor dissolved the injunction, and granted an appeal to this court, in order to settle the principles of the cause.

Looking at the entire case, we see nothing but the question of the jurisdiction of a court of chancery over the lawful exercise of the powers belonging, under our constitution and laws, to the boards of supervisors exclusively. The power of the board of supervisors over court-houses, and sites for court-houses, is complete and exclusive in this state, and no interference with the exercise of this power by the chancery courts can be upheld, so long as the power is alleged to be only exercised unwisely, and without discretion. No court could be permitted to invade the province of the board of supervisors, and undertake to direct the board's discretion or judgment in the exercise of its undisputed power.

The case, in all its parts, discloses nothing more than a want of sound discretion, in the action complained of, in the board of supervisors, according to the opinions of some citizens whose evidence was submitted. Even this condemnation of the discretion of the board in the exercise of its powers is vigorously, and perhaps successfully, combated by the evidence offered by the appellees. But we do not regard this difference of opinion among the witnesses, touching the wisdom and prudence of the board's action, as of any weight in determining the case; for, if the board is exercising the powers confided exclusively to its jurisdiction by our constitution and laws, the want of proper discretion and sound judgment in the board, in so exercising its functions, can never warrant an invasion of its jurisdiction by another tribunal, whose discretion and judgment, touching the exercise of the powers committed to and conferred upon the board, may not be harmonious with the mere discretion and judgment of such board. Granted the exclusive power in the board of supervisors over the subject-matter of this controversy, and it must follow that the exercise of the power must rest, likewise, exclusively in the discretion of the tribunal clothed with the power.

It is seriously contended, however, by counsel for appellant, that the county of Yalobusha, in the first district, has already one site for a court-house, and that therefore the purchase of another from Boswell was a bold act of usurpation of power, and wholly unauthorized in law. We are unable to give our assent to the proposition. In the absence of legislative limita-

tion upon the powers of the board in the original instance, it will not be insisted that any lot might not have been selected on which to erect the court-house, at the discretion of the board. What particular lot should be selected in the original instance was a matter left entirely to the discretion of the board. If left to the discretion of the board in the original selection of a site for the first court-house, a similar discretion would seem, necessarily, to be vested in the selection of a site when occasion arose for building another and new court-house.

We are clearly of opinion that the board of supervisors was clothed with the power, to be exercised at its discretion, to select a new site in which to erect a new court-house, beneficial to the public, and helpful to the general convenience and safety.

The decree of the chancellor dissolving the injunction is affirmed, and the cause remanded.

LOUISVILLE, N. O. & T. RY. Co. v. SMITH.

(*Supreme Court of Mississippi*. Jan. 27, 1890.)

RAILROAD COMPANIES—STOCK-KILLING CASES.

1. In an action against a railroad company for killing a mule, the engineer testified that while he was running his train about 23 miles an hour he saw the mule about 10 yards in front of his engine; that he blew the stock alarm, and did all in his power to prevent a collision, but could not avoid striking the mule. There was no conflict in the evidence. *Held*, that it was error to refuse to charge the jury to find for defendant.

2. It is not error to refuse to instruct the jury that, though plaintiff makes a *prima facie* case by proving the killing of his mule, yet, when the facts and circumstances are shown, they cannot find for him unless the facts and circumstances show negligence on the part of the company, as Code Miss. § 1059, places the burden on the railroad company to show a want of negligence in such cases.

Appeal from circuit court, Tunica county; GEORGE WINSTON, Judge.

Appellee, Henry Smith, sued the railway company for killing his mule. He made out a *prima facie* case against the railway company. The engineer of the railway company testified that he was running the train about 23 miles an hour; that he was attending to his duty as engineer; that he saw the mule about 10 yards in front of his engine; that he blew the stock alarm, and did all in his power to prevent a collision with the mule, but could not avoid striking the mule. The defendant asked the following two instructions, which were refused: "(1) The court instructs the jury to find for the defendant." "(3) The jury are instructed that where the R. R. Co. is shown to have killed stock there is a *prima facie* presumption of negligence on its part, but that, when the facts and circumstances of the killing are shown, they cannot find for the plaintiff unless those facts and circumstances show negligence on the part of the company." There was verdict and judgment in favor of the plaintiff, from which the railway company appealed.

W. P. & J. B. Harris, for appellant. F. A. Montgomery, for appellee.

CAMPBELL, J. The third instruction asked by the defendant was properly re-

fused, for the effect of the statute (section 1059 of the Code) is to devolve on the railroad company the necessity of exculpation from negligence in causing the injury shown to have been done, and unless it does this it is liable. The court should have given the instruction asked by defendant that the verdict should be for it. There is no conflict in the evidence, and that of the defendant, which consists with that for the plaintiff, exonerates the defendant from all blame.

Reversed and remanded.

MISSISSIPPI & T. R. Co. v. ARCHIBALD et al.

(*Supreme Court of Mississippi*. Jan. 27, 1890.)

RAILROAD COMPANY—OBSTRUCTION OF STREAMS—TRESPASS—RIGHTS OF PURCHASER.

1. In an action against a railroad company for obstructing water-courses by its levees and trestles, thereby causing plaintiffs' land to be overflowed, it appeared that two streams, each from 20 to 30 feet wide, and from 6 to 10 feet deep, ran through plaintiffs' land, and crossed defendant's road-bed, and that in one of them defendant erected and maintained for a few years a bulk-head which diverted the course of the water, and threw it on plaintiffs' land. Defendant also cut a ditch with its open face next to its road-bed, and threw up a levee from 1½ to 4 feet high across the entire western border of plaintiffs' land, which caused the water from both streams to be thrown back on the land; and, in repairing its trestles used for the outflow of the streams, defendant cut off the old piles which supported the trestles above the surface of the water, and left them to catch the drift, leaving but a small channel for the escape of the waters. *Held*, that the company was liable for the injury, though the flow of water and accumulations in the streams were increased by natural causes, such as the clearing of the land and loosening of the soil by cultivation.

2. The rule of law applicable to the control of rain and surface water, as distinguished from waters flowing in defined channels, has no application in this case, as long before the injury had been wrought these waters had mingled with the waters in the streams, and had ceased to possess any of the qualities of surface water.

3. One who purchases land subsequent to the building of the railroad, and with a full knowledge of the construction of the road-bed and trestles, may recover damages for the overflow of the land caused by obstructions erected by the company, though the company has done nothing to contribute to the injury since the acquisition of title by plaintiff, as the injury is a continuing one.

Appeal from circuit court, Panola county; W. M. ROGERS, Judge.

W. P. & J. B. Harris, for appellant. Sullivan & Whitfield, for appellees.

WOODS, C. J. This action was instituted by appellees, in the circuit court of Yalobusha county, for the recovery of damages alleged to have been sustained by reason of the negligence of appellant in the building and repair of certain trestles over certain water-courses which drained the lands of appellees, by means of which negligent building and repair the said water-courses were filled up and choked, and said lands overflowed and submerged, and their value destroyed. There was a plea of not guilty filed by the railroad company, and a change of venue to the second district of Panola county, by consent of parties. On this issue there was a verdict for plaintiffs below in the sum of \$1,500, and judgment accordingly. From

this judgment the railroad appeals to this court.

We do not understand that it is disputed that appellees' lands have been submerged and damaged by reason of the damming of the water-courses referred to and described in the pleadings and proofs. The controversy goes to the causes producing the overflow and damage. On the part of appellees, it is urged that the careless, negligent, and insufficient manner of building and repairing the trestles of the railroad where the road-bed crosses the water-courses, and the erection of a bulk-head in Alston creek by appellant, and the construction of a small levee on the railroad's right of way, and near to the lands in question, have gradually raised the beds of the streams, and partially filled and choked their currents, and, in seasons of rains, actually dammed the water-courses at the trestles, whereby the waters brought down in the channels were unable to flow and escape across the defendant's road-bed, and so were forced out of their beds, and driven back on the lands, covering them with a deposit of sand and gravel, and greatly depreciating, if not wholly destroying, their value. For appellant, it is insisted that the injuries complained of are the results of natural causes long operating, and now only reaching that stage of destructiveness of which appellees complain. It is said that the denuding the range of hills, which lie east of and inclose the lands in question, of their timber, and the subjecting the soil of these hills to the processes of cultivation, in ordinary agriculture, must result, with unerring certainty, in the rapid disappearance of the loamy top soil, and its transference to valleys below, and the gradual washing away of large parts of the looser material composing the bulk of the hills, and their deposit in the runs and ditches and water-courses into which the surface waters from the hills pour, and so by the operation of natural causes, in the changed condition of the hills, the streams have become, in process of time, filled with these deposits from the hills, and that hence the overflows upon appellees' lands, and their destruction by deposits of sand and gravel, result from agencies over which the railroad has no control whatever.

We think this statement fairly presents the real issue. While there is a vast mass of testimony, and some conflict in matters apparently important, stripped of all superfluities the case will be found to be of the character disclosed in the statement just made. It is not a question of obstructing or diverting or discharging surface water by one owner upon the lands of an adjacent owner. The law applicable to such cases finds no room for examination in the case before us. The controlling question here is this, viz., were these water-courses obstructed by the negligence of the railroad, whereby the lands have been overflowed and damaged; or are these obstructions the product of natural agencies, long operating, and just now making their hurtful power to be noticed and felt?

It must be admitted, we think, that the stripping of uplands of their timber, and the

stirring and loosening of their soils by the processes of cultivation, has the natural effect of carrying off, in a rapid manner and in large measure, the lighter portions of the hills so loosened and made ready to be carried away to the lowlands by storm and rain. It is doubtless true, too, that the operation of these natural causes contributed materially to the overflows which are alleged to have damaged the lands in question. Indeed, it is manifest that without such contribution by natural causes there could be no choking of channels, and damming of water-courses, ordinarily. We can scarcely conceive of any stream ever becoming choked and dammed with boughs and leaves, and sand and silt, unless natural causes are taken into the account.

Granting the full operation of natural causes in the case at bar the vital question yet remains unanswered. That question is, did the defendant railroad, with presumable knowledge of the changed conditions of the lands, and their environment, and of the unfailing operation of the natural agencies we have adverted to, do or omit to do anything, in the line of its duty, whereby the flooding of appellees' lands, and their consequent destruction, were made probable, not to say inevitable, after every heavy rain-fall? A glance at the uncontroverted proofs will answer the question. Two of the water-courses under consideration, Alston's creek and Bates creek, were streams, with well-defined channels, in width from 20 to 30 feet, and in depth from 6 to 10 feet. In one of these water-courses, in an effort to protect its road-bed from inundation, appellant erected, and for a few years maintained, a bulk-head, whereby the waters in that stream were diverted from their channel, and bodily thrown on the lands of appellees. By way of further protection to its road-bed, appellant cut a ditch with its open face next to the road-bed, and threw up a levee ranging from $1\frac{1}{2}$ to 4 feet in height across the entire western border of appellees' lands, whereby the diverted waters from Alston's creek, and the overflowed waters from the other creek, were thrown back on the lands alleged to have been damaged; and at each of the three trestles, built by the railroad, in its road-bed, for the outflow of the three creeks, there is shown to have been three replacements of such trestles, and on each occasion the old piles which supported the trestles were not removed, but were cut off above the surface of the water ready to catch any drift brought down by the waters from above, with the result of having left a small opening for the escape of the waters in these streams, whereas the depth of such channels, as we have already seen, was originally 6 to 10 feet. Conceding the action of natural causes, and the legitimate effects of such action, as contended by appellant's counsel, can it be successfully maintained that the conduct of the railroad in the particulars just above mentioned was such as to free it from liability? To ask the question, in the light of the facts of the case, is to answer it. The railroad, in our opinion, directly contributed to the creation of those obstructions in the water-courses which flooded appellees' lands;

and resulted in the injuries complained of. Moreover, the consideration of the conduct of appellant, as showing proper care, or the want of it, in these various particulars, as well as the consideration of the action of natural causes operating in this case, was properly matter to be submitted to the determination of a jury. It was so submitted, and the finding of the jury is abundantly supported by the evidence in the case, and meets our approbation.

It is asserted by counsel for appellant that, appellees having bought the lands subsequent to the building of the railroad, and with full knowledge of the evil, and it not having been shown that anything has been done by the railroad since appellees' acquisition of title to cause the injury complained of, the railroad company cannot be held liable in this action. We think counsel misconceives. The wrongs done by appellant are continuing wrongs. The action of appellant of which complaint is made has been silently and slowly operating, but without hurt or damage until recently. The causes which have resulted in this injury have been continuously working, and the injury itself is a continuing one. In the very section in Angell on Water-Courses to which appellant's counsel refer us for support of their proposition, we find it declared that a plaintiff is entitled to recover although the dams producing such injury were erected before the plaintiff had any interest in the property to which the injury was done, and the dams had not since been raised. See Ang. Water-Courses, § 465; *Brown v. Railroad Co.*, 12 N. Y. 486.

Let us examine briefly the law on which the court below submitted the case to the jury. Complaint is made that the fourth instruction for plaintiff below was improperly given, inasmuch, as is said, there was no evidence to support it. The charge, in effect, instructs the jury that if the defendant railroad, since October, 1885, had carelessly obstructed the waters in the water-courses so as to cause them to overflow the lands of plaintiffs, and to damage them, then the jury should find for plaintiffs. The charge, as it seems to us, is clearly correct, and is not wholly inapplicable for want of evidence on which to rest. The evidence unmistakably shows that at some one or all of these three trestles, several times in each year, after heavy rains, the water-courses are so obstructed as to prevent the outflow of the currents across the railroad, through these trestles, whereby the floods were backed upon these lands, and that this injurious condition remained until the railroad hands removed the drift-wood and other obstructing materials, and opened the outlets. The exception, as it appears to us, is therefore not well taken.

We disagree with counsel, also, in their views as to the first, second, and third instructions given for plaintiffs below. As in the fourth, so here in these three, we think there was evidence which warranted the trial judge in giving the charges. The propositions of law embraced in these four instructions are conceded to be correct in the abstract, and we are of the

opinion that they were correct in their concrete application also.

The action of the court below in refusing certain charges asked by the railroad company having reference to the law applicable to the control of rain-water and surface water, as distinguished from waters flowing in defined channels of streams, is assigned for error, likewise. The most cursory examination of the record will demonstrate that this was not a case in which any question concerning surface water was presented. It is undeniable that the great body of the waters which flowed through these water-courses was hastily gathered into the channels of the streams from the rain-falls on the hills and other lands adjacent to them; but it is equally undeniable that when once this surface water has found its way to the beds of well-defined streams, and has joined their currents, it ceases to possess any of the qualities of surface water, and is regarded only as part and parcel of the volume that flows in the channels of the water-courses. The waters which flooded the lands of the appellees, doubtless, were largely gathered from the hills ranged to the east of the scene of their destructiveness; but long before the injury had been wrought they had mingled with all other waters in the torrent, and had been stamped with all the distinctive marks of waters gathered into water-courses. Entertaining this view, we think the court below properly refused these instructions, touching the powers and rights of owners over surface water, as tending, in all likelihood, to confuse and mislead the jury.

Looking at the entire case, we are unable to say that the proper conclusion was not reached; and the judgment of the court below is therefore affirmed.

WESTERN U. TEL. CO. v. GOODBAR et al.
(*Supreme Court of Mississippi*. Feb. 8, 1890.)

TELEGRAPH COMPANIES—NEGLIGENCE.

A message was received by a telegraph company to be sent to plaintiffs' attorney at N., and the agent at the transmitting office informed the agent at N. of the number of words contained in the message, and, having sent the message, received from the agent at N. the signal indicating that it had been properly received, and contained the number of words indicated. In an action for negligent delivery, the agent at N. admitted that the word "six" had been omitted before the words "hundred and sixty-three," and that the word "answer" was dropped, but testified that the atmospheric conditions at N. were not favorable when the message was received. *Held*, that the evidence showed gross negligence on the part of the company.

Appeal from circuit court, Union county; *W. M. ROGERS*, Judge.

W. P. & J. B. Harris and *Sykes & Richardson*, for appellant. *J. W. Buchanan* and *Z. M. Stephens*, for appellees.

COOPER, J. Appellees, merchants in the city of Memphis, Tenn., were creditors of the firm of *Cooper & Bone* of New Albany, Miss., who, on November 20, 1888, were in failing circumstances, and had been attached by other creditors. At about 8:30 A. M. on that day the appellees delivered at the office of appellant at Memphis the

following dispatch, addressed to their attorney residing at New Albany:

"Memphis, Tenn., 11, 20, '88.

"To Z. M. Stephens, New Albany, Miss.: Cooper & Bone owe us account not due, six hundred and sixty-three dollars. Cooper & Hodges account past due, two hundred and five dollars. Attach, or otherwise secure claims. See George S. Mitchell for bond. Answer. GOODBAR & Co."

The dispatch as delivered to Mr. Stephens was this:

"Cooper & Bone owe us account not due, hundred and sixty-three dollars. Cooper & Hodges account past due, two hundred and five dollars. Attach or otherwise secure claim. See George S. Mitchell for bond. GOODBAR & Co."

Acting upon the message as delivered to him, the attorney saw Cooper, one of the debtors, and, saying to him that he held claim in favor of Goodbar & Co. against Cooper & Bone for \$163, received from the debtor security in the shape of notes and accounts therefor. Before the mistake made in transmitting the dispatch was discovered, other creditors of Cooper & Bone had seized their whole assets, including their books of account, and Goodbar & Co. failed to realize anything on \$500 of their claim. The present suit is to hold the telegraph company liable for the loss, and the appellees having secured verdict and judgment for \$250, the telegraph company appeals.

The defendant brought into court with its plea, and tendered to the plaintiffs, the sum of 75 cents, that being the amount paid by them to it for the transmission of the message, and pleaded that said message was received by it from the plaintiffs under a special contract, by which it was agreed that the company should not be "liable for mistake or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; that the message was an unrepeatd message; and that the mistake did not occur by reason of the gross negligence of the defendant or of its servants." On this plea issue was taken, and the evidence disclosed these facts: The message was received by the agent at Memphis. It was plainly and legibly written, and correctly read and understood by the agent there. The weather at the transmitting office was fair, the instruments in good condition, and working smoothly, and no trouble was experienced at that end of the line. The agent there called the agent at New Albany and informed him of the number of words contained in the message, and, having sent the message as written, received from the agent at New Albany the signal indicating that it had been properly received and contained the number of words indicated. The agent at New Albany testified that the atmospheric conditions at New Albany were not favorable for the receipt of messages at the time this was received, the instrument dragging, and working indistinctly. He stated, however, that the operator at Memphis had informed him of the number of words contained in the message, and that his re-

ply indicated that he had received the full number. He was unable to explain why he failed to get the number sent and admitted that the word "six" had been omitted before the words "hundred and sixty-three," and the word "answer," with which the message concluded, dropped.

Counsel for the company concede the liability for mistakes flowing from the gross negligence of its servants, notwithstanding the terms of the contract under which the service was performed, but contend that no such negligence is disclosed by the evidence. We are of a different opinion. It would be unprofitable in so plain a case to consider within what limits telegraph companies may lawfully stipulate for non-responsibility for mistakes occurring in the transmission and delivery of messages. So long as there is any limit beyond which these companies may not pass; so long as engagement in public employment carries with it any duty to render any service for the compensation taken,—it cannot be competent for the public agent to stipulate that it may grossly neglect the performance of the duty it undertakes. On the facts disclosed by this record the jury could not have found that the agent at New Albany exercised the slightest degree of care in reference to the receipt of the message. He was informed that the message contained a certain number of words. He took down and delivered one containing two words less as and for the whole message. This was gross negligence, and rendered the company responsible for the resulting injury, notwithstanding the exemption it had sought to secure.

The verdict is supported by sufficient evidence of injury flowing from and traceable to the neglect, and it is affirmed.

THURMAN *et al.* v. POINTER.

(*Supreme Court of Mississippi*. Feb. 3, 1890.)

SPECIFIC PERFORMANCE—DAMAGES FOR DELAY.

Where defendant leases land to a third person, reserving the right to cancel the lease in case a broker, to whom he had already given the right to sell the land within a certain time, should effect a sale, and the broker contracts a sale within the specified time, which is agreed to by defendant, who fails to cancel the lease, the purchaser is entitled to a decree for specific performance, with damages for the delay.

Appeal from chancery court, Tunica county; W. R. TRIGG, Chancellor.

The appellee, Pointer, owned some land which he leased to one Cox, early in 1887, for a term of three years, but reserving the right to cancel the lease at any time up to November 15, 1887, for the reason that he had arranged with one Martin, a broker in Memphis, to sell the land, provided he could do so by said date of November 15, 1887. On November 14, 1887, Martin contracted to sell the land to the appellants, Thurman and others, and on the next day, November 15, 1887, Pointer went to Memphis, and agreed to the contract of sale made by Martin to appellants, but failed to exercise his right to cancel the lease to Cox, though he had the opportunity, and could have done so. Thurman and others desired the execution of the conveyance to the land pursuant to the contract agreed

on, but Pointer would only agree to perform the contract if Thurman and others would take the land subject to the lease, whereupon Thurman and others exhibited this bill in the chancery court, praying for a specific performance of the contract. Pointer answered, insisting that the appellants knew of the existence of the lease, etc. On final hearing the chancery court dismissed the bill, from which Thurman and others appealed.

Perkins & Percy, for appellants. *Shands & Johnson*, for appellee.

CAMPBELL, J. This is a clear case for specific performance, with damages for unwarranted delay. The unmistakable interpretation of the contract of the parties is that delivery of actual possession of the land was stipulated for. This is the primary meaning of the term, and the natural suggestion from its use, when nothing is shown to vary it; and any other meaning is excluded in the dealing between these parties. The fact that Mr. Pointer bounded the time when his agent might sell the land by the period in which he (Pointer) might lawfully cancel the lease to Cox shows that he had in contemplation a sale that would give the purchaser possession free from the lease, and the failure of Thurman to mention the rent-notes in his offer to buy shows that the possession he had in view was an actual one.

The stipulation for good title had reference to the fee in the land, and not to the possession. If Pointer had canceled the lease to Cox, and Thurman had refused to comply with his contract on the ground that his purpose in buying was to secure the benefit of the lease for the next two years, and that the cancellation of the lease by Pointer had defeated his object, and released him from his contract, his position would have been utterly indefensible. Upon the facts shown, he would have been compelled to perform his contract; and, as such would have been his liability, he must have a corresponding right.

This is not the case of one contracting for what he knew the seller could not convey. As Pointer proposed to sell, Thurman had just ground to assume that Pointer could deliver possession, as well as convey title; and in truth it was in the power of Pointer to cancel Cox's lease, and he cannot avail of his failure to do what he could have done as an excuse for his refusal to execute the contract which he could undoubtedly have enforced against the other party.

It is not inequitable to specifically enforce the contract, and justice demands that it shall be done with damages for the unjustifiable delay to do what should have been promptly done.

Reversed and remanded to be proceeded with in accordance with this opinion.

HOWARD V. LOUISVILLE, N. O. & T. RY. CO.
(*Supreme Court of Mississippi*. Feb. 3, 1890.)

RAILROAD COMPANIES—STOCK-KILLING CASES.

Evidence that the tracks of a horse which was killed by a train were seen several hundred steps on the track, but that the engineer and fireman were both engaged at their duties on the en-

gine, and neither of them saw the horse until he was struck, is insufficient to justify a verdict against the company.

Appeal from circuit court, De Soto county; *W. M. ROGERS*, Judge.

Appellant, *W. E. Howard*, sued the Louisville, New Orleans & Texas Railway Company for killing a fine mare. The tracks of the mare showed that she had entered upon the railroad, and run several hundred steps, when she was overtaken by the engine, and killed. The engineer and fireman both swore that they were engaged about the engine in the regular performance of their duties, and that neither of them saw the mare before she was struck. The court instructed the jury to find for the defendant, which was done. Judgment was so entered; and Howard appealed, insisting that a lookout should be continuously kept while train is in motion.

Buchanan & McKay, for appellant. *W. P. & J. B. Harris*, for appellee.

CAMPBELL, J. The engineer and fireman were both engaged at their duties on the engine, and neither saw the animal on the track. While a lookout should be kept when running, it is not want of proper care for the servants of the company to give needed attention to their primary duty, which is the operation of the engine; and the fact that, for a short time, neither the engineer nor fireman was looking out for animals on the track, did not make the company liable for the death of the animal killed. Upon the undisputed facts, the judgment of the law is that the loss of the mare should fall on her owner, rather than upon the railroad company; and, as there was nothing to be found by a jury, the court rightly instructed for the defendant. Affirmed.

CADY *et al.* v. CADY.

(*Supreme Court of Mississippi*. Feb. 10, 1890.)

WILLS—LEGACIES CHARGED ON LAND.

1. Testator, after devising certain lands to each of his three children, *W., J., and M.*, directed his executor to sell the residue of the estate, real and personal, and to apply the money to debts of the estate, and divide the residue in certain proportions, among his three children. He then provided that *J. and M.* should bear the care and expense of maintaining and educating his two grandchildren, and that the grandchildren, on coming of age, should each receive \$500, to be paid jointly by *J. and M.* The grandchildren were infants of tender years, and orphans; and testator had stood to them *in loco parentis*. Held, that the legacies given to the grandchildren were charges primarily on the land specifically devised to *J. and M.*

2. Equity has jurisdiction to enforce the charge of a legacy on land, though an action at law would also lie.

3. Where lands devised are charged with a legacy, the lapse of the devise by the death of the devisee in the testator's life-time does not cause the lapse of the charge in favor of the legatee.

Appeal from chancery court, Lowndes county; *T. B. GRAHAM*, Chancellor.

J. E. Leigh, for appellants. *Wm. Baldwin & G. A. Evans*, for appellee.

COOPER, J. This is a bill exhibited by a legatee to enforce payment of his legacy by

fixing a charge upon certain real estate devised by the testator.

The testator, William Cady, at the time of his death, had three living children,—William, James M., and Mary Adella. Two grandchildren of his deceased wife, who were infants of tender years, and orphans, were members of his family, and he stood to them *in loco parentis*.

By the first clause of his will, the testator appointed James B. Bell his executor and trustee of that portion of his estate devised to his son William Cady. By the second clause, he gave to said Bell, as trustee, a parcel of land, known as the "Eclipse Stable," in trust for his son William; by the third clause, he gave to his son James M. Cady a parcel of land, and the improvements thereon, designated as the "Horse Mansion;" by the fourth clause he gave to his daughter, Mary Adella, his residence, together with its furniture, etc., but provided that said residence should continue to be used as the home of his children and grandchildren so long as they should remain as one family, and declared that "the necessary supplies and provisions for the family to be a charge upon the property devised in items two and three, unless my son William, and his son Burton, shall cease to live with the family, in which case it shall be a charge upon the property devised to my son James M. alone in item three." By the fifth clause, he directed his executor, at his discretion, to sell the residue of his estate, real and personal; and the money arising therefrom, and from collections of debts due him, and from all other sources, was first to be applied to the payment of all debts due by his estate, and the residue to be distributed, one-fourth to William Cady, and the remaining three-fourths equally between James M. and Mary Adella. The sixth clause of the will, which gives rise to the present litigation, is as follows: "My son James M., and my daughter, Mary Adella, are to have and bear jointly the care and expense of the education and maintenance of my grandchildren, Robert Cady and Julia Riddick. The said Robert and Julia are each to receive the sum of five hundred dollars when they become of age, to be paid jointly by the said James M. and Mary Adella Cady." By the seventh and last clause the testator provided that, in the event of the death of either of his children, the property devised to such child should be equally divided between the survivors.

Mary Adella died in the life of the testator. Robert Cady and Julia Riddick were maintained and educated as provided in the sixth clause of the will; and, upon her reaching majority, Julia was paid by James M. Cady the legacy given to her.

In January, 1885, James M. Cady executed a mortgage upon a portion of the property known as the "Horse Mansion," which has been foreclosed, and the land sold; and it is now owned by Mrs. Julia A. Short. In December of that year, James M. Cady conveyed to his wife, Fannie L. Cady, for life, with remainder to his daughter Annie L. Cady, in fee, the interest taken by him in the residence of the testator, which had been by the will devised to Mary Adella, and which upon her death passed,

by the seventh clause of the will, to the surviving children of the testator. In the year 1888 an execution issued under a judgment which had been on the — day of December, 1887, rendered against James M. Cady, and was levied on that part of the property known as the "Horse Mansion," which had not passed by the mortgage executed by said Cady; and at the execution sale thereof Mrs. Short became the purchaser. William Cady, the son of the testator, has died, leaving one child, Burton Cady.

Robert Cady, the legatee, having reached his majority, demanded payment of his legacy, which not being paid, he exhibited this bill against Burton Cady, James M. Cady, Fannie L. Cady, Annie L. Cady, and Mrs. Short, for the purpose of charging the lands devised by the testator to James M. and Adella Cady for the payment of the same.

The chancellor decreed that Burton Cady, who held the undivided one-half interest in the lands devised to Mary Adella, should pay one-half of the legacy, in default of which the lands so held by him should be sold therefor, and that the remaining half should be paid by James M. Cady, in default of which the lands specifically devised to him, the Horse mansion, and the undivided one-half interest in the residence which had passed to him by reason of the death of Mary Adella, which property was then owned by Mrs. Short, and by Mrs. Cady and her daughter, should be sold for the same.

Burton Cady has paid the portion directed to be paid by him. Mrs. Fannie L. Cady has died since the rendition of the decree. James M. Cady, Annie L. Cady, and Mrs. Short prosecute this appeal.

The positions taken by appellants are: First, that the legacy sued for is not, by the will of William Cady, charged upon any of the real estate devised by the will. If mistaken in this, then that it is a charge only upon the land not specifically devised. If mistaken in this, then that it was primarily chargeable upon the personal estate, and the realty cannot be subjected until after the personalty is exhausted. If mistaken in this, then that the charge was intended to be fixed on the land only as a joint charge against James M. and Adella Cady; and, since Adella died in the lifetime of the testator, the devise to her lapsed, and so, also, the charge lapsed in so far as it bound the land devised to her, wherefore to enforce it as against the land of James M. Cady alone would be to enforce a several charge, and not a joint one, as intended by the testator. And, finally, it is said that the legatees might have sued at law for his legacy, wherefore a court of chancery has no jurisdiction.

We note the positions assumed by counsel, but consider at length only the question whether the legacy was charged upon the lands devised to James M. and Mary Adella, as the primary source from which payment should be made. It is too well settled to require discussion, or the citation of authorities, that if the legacy is a charge upon the land it is an equitable charge, to enforce which a court of chancery has jurisdiction, even though the leg-

atee may have a right to sue at law. It is equally clear that, if the lands devised to Mary Adella were charged with the legacy, the lapse of the devise to her by reason of her death in the life-time of the testator did not cause, also, the lapse of the charge in favor of the legatee. 1 Jarm. Wills, 627; Hills v. Wirley, 2 Atk. 605; Wigg v. Wigg, 1 Atk. 382; Oke v. Heath, 1 Ves. Sr. 185.

While the books are full of cases in which discussion is had upon the question whether pecuniary legacies are or are not chargeable upon the real estate of the testator, and there is conflict in the conclusions reached, the diversity of opinion is not greater than that which exists in other controversies, where courts seek to discover the intention of a party, from the language he has used, by the application of arbitrary rules of construction. The sole difficulty is in discovering the intent of the testator, which, being found, is to be enforced. Ordinarily, pecuniary legacies are payable by the executor, and out of the personal estate. The claim of the heir at law, or of the devisee, is ordinarily as much in the mind of the testator as that of the legatee; and, unless a contrary purpose appears from the will, it will be assumed that the testator intended that legacies are to be paid only out of his personal estate, and that, upon that being insufficient, the legacies must abate in whole or in part. But the single inquiry always involved is, what was the intent of the testator? This, being discovered, must be effectuated by the courts. Where the testator, for the purpose of paying his debts or legacies, blends his real and personal estate, giving to his executor equal power over each, and thus obliterates the distinction which the law makes between the real and personal estate, the courts accept this as indicating a general purpose on his part to charge both real and personal estate with the payment of debts and legacies; and under such circumstances the real estate is held to be operated, in aid of the personalty, in payments of debts and legacies. Knotts v. Bailey, 54 Miss. 235; Turner v. Turner, 57 Miss. 775; Heatherington v. Lewenberg, 61 Miss. 372.

There frequently arise cases in which, looking to the will and all its parts, some uncertainty remains as to the real intent of the testator,—cases in which there is not a clear and express charge upon the real estate, but where the implication more or less strongly appears on the face of the will to charge it with legacies. It is frequently said that, in the absence of an express charge, the lands are free, unless, by clear implication, the purpose of the testator is found to charge it. But it is not necessary that this undoubted inference shall be found on the face of the will itself. In cases of doubt, it is proper to look to the character of the legatee; for this may aid in discovering the purpose of the testator. If the legatee is a stranger, or a child for whom other provisions are found in the will, the purpose of the testator to charge the real estate must more clearly appear than if the legatee is one having a natural claim upon the bounty of the testator, and to whom no other provision is made. *Rop. Leg.* 682.

Looking at the will in the light of these principles, we think it clear that the testator intended the legacies to Robert Cady and Julia Riddick to be paid in any event, and that they are by the will charged upon the real estate of the testator. They were dependent infants, members of his family, and standing to him in the relation of adopted grandchildren. He speaks of them as his grandchildren, and exhibits a clear purpose to provide for their education and support during minority, and for small legacies upon their attaining majority. After having given devises of lands to his three children, the testator blended the residuum of his estate, real and personal, in one mass, charged it with payment of his debts, and directed the remainder to be distributed in unequal parts to his children.

It is manifest that the legacies were to be paid out of some part of the testator's estate. It cannot be seriously contended, as is suggested by counsel for appellants, that the purpose was to give the legatees no right to subject any part of the estate to the payment of the legacies, but only a personal right of action against James M. and Mary Adella Cady. There is neither principle nor authority to support such view.

If the purpose of the testator was that these legacies should be paid out of his estate, the question is, upon what part was it primarily charged? We have seen that the real and personal estate was blended, and the presumed freedom of the real estate overthrown. But, looking at the residuary clause, it is entirely certain that it was not the purpose to charge the property thereby dealt with, in the hands of the executor, in bulk, with the legacies. The residuum, after payment of debts, was to be distributed, one-fourth to William Cady, and the remaining three-fourths to James M. and Mary Adella. To charge the residuary estate would be to diminish the distributive part of William Cady therein to the exoneration of the portions of James M. and Mary Adella, who were directed to pay the legacies. Unless, therefore, the purpose of the testator be thwarted, either in denying to the legatees the sums given to them, or by fixing them in part upon the portion devised to William by the residuary clause, it is clear that they must be fixed upon the portions specifically devised to James M. and Mary Adella, or upon that part passing to them under the residuary clause. We think the charge is primarily upon the lands specifically devised. The executor is directed to convert the remainder of the estate into money. This would carry with it freedom in the hands of the purchaser. *Turner v. Turner*, 57 Miss. 775.

It is to be noted that distribution of the residuum was to be made at once by the executor, while the legacies given were payable only upon the majority of the legatees. The charge, therefore, upon the property specifically devised more certainly effectuates the intent of the testator by securing the ultimate payment of the legacies.

We therefore conclude that the legacies were primarily chargeable upon the lands

devised to James M. and Mary Adella Cady; that James M. Cady was liable to the payment of one-half, thereof, (\$500,) and the portion devised to Mary Adella to the remaining \$500; that James M., by reason of his reception of one-half of the devise to Mary Adella, was chargeable with one-half of said sum; and that the decree of the chancellor properly apportioned the liability.

Mrs. Short and Annie L. Cady, who are now the owners of all the property devised to James M., and of one-half of that devised to Mary Adella, join in the appeal, and assign error through the same counsel. No error is assigned to the action of the chancellor in fixing the liability as between these parties. We do not, therefore, consider how it should have been apportioned as between them.

Decree affirmed.

VICKSBURG BANK v. WORRELL, Tax Collector.

(*Supreme Court of Mississippi*. Jan. 20, 1890.)

BANKS—PRIVILEGE TAX—CONSTITUTIONAL LAW.

1. Code Miss. 1880, §§ 557, 558, as amended by Laws 1888, which provide for a privilege tax to be paid by banks, and vary the amount with reference to the capital stock or assets, and declare that "the privilege taxes imposed upon and paid by such banks, * * * shall be in lieu of all other taxes, state, county, and municipal, upon the shares and assets of said banks," are not unconstitutional as in violation of Const. Miss. art. 12, § 13, which declares that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals," as the legislature has the power to exempt property from taxation whether the owners be corporations or natural persons.

2. The sections as amended do not violate section 20, art. 12, of the constitution, which declares that "taxation shall be equal and uniform throughout the state," and that "all property shall be taxed in proportion to its value, to be ascertained as directed by law," as the legislature, having the power to exempt property from taxation, may also prescribe that a privilege tax shall be a substitute for all taxes on the property to be taxed.

3. Nor do they violate section 16, which declares that "no county shall be denied the right to raise, by special tax, money sufficient to pay for * * * conveniences for the people of the county, * * * provided the tax thus levied shall be a certain per cent. on all tax levied by the state," as by this section the right of the counties under it is limited to the levy of "a certain per cent. on all tax levied by the state," and the subjects of taxation are to be determined by the legislature.

4. Under the sections of the Code cited, the privilege tax imposed on and paid by a bank is a substitute for all other taxes on the shares and assets of the bank, including real estate owned by the bank, which constitutes part of its assets, without regard to the question as to the right of the bank to acquire and hold real estate.

Appeal from chancery court, Warren county; W. R. TRIGG, Chancellor.

Appellant, the Vicksburg Bank, owned a building in the city of Vicksburg, in part of which it carried on its business, and part of which it had rented out. The building was assessed by the city and county; and, the bank refusing to pay taxes claimed by the city and county, on the ground that it had paid the privilege tax under the law mentioned in the opinion, and was exempt from city and county taxes, the building and lot were adver-

tised for sale for delinquent taxes, as alleged, by the tax collector, when the bank enjoined the sale for taxes, alleging that it had paid its taxes under the law, and was therefore exempt from further taxes. Appellee answered the bill, attacking the constitutionality of the law. The chancellor dissolved the injunction, and gave decree for the amount of the taxes claimed, from which the bank has prosecuted this appeal.

Birchett & Gilland, for appellant. *J. Hirsh, Murray F. Smith, Nugent & McWillie*, and *Edward Mayes*, for appellee.

CAMPBELL, J. This case presents questions as to the validity and interpretation of that part of the act to amend sections 557 and 558 of the Code of 1880, so as to increase the public revenue, approved March 8, 1888, which relates to banks. It provides for a privilege tax to be paid by banks, and varies the amount with reference to the "capital stock or assets," and declares that "the privilege taxes imposed upon and paid by such banks * * * shall be in lieu of all other taxes, state, county and municipal, upon the shares and assets of said banks."

The act is assailed as being violative of the constitution of the state, which declares that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals," (article 12, § 13;) and "no county shall be denied the right to raise, by special tax, money sufficient to pay for * * * conveniences for the people of the county, * * * provided the tax thus levied shall be a certain per cent. on all tax levied by the state," (Id. § 16;) and "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law," (Id. § 20.) These provisions of the constitution have been the subjects of discussion and adjudication by this court in several instances; and we refer to *Mississippi Mills v. Cook*, 56 Miss. 40; *Beck v. Allen*, 58 Miss. 143; and *Murray v. Lehman*, 61 Miss. 238,—as presenting what has been said and held, and proceed to state the conclusions we have reached in this case, after full examination and consideration.

The legislature may select the subjects of taxation, and everything not designated as taxable is exempt, for the time being. The subjects of taxation may be classified at the discretion of the legislature, and if all of the same class are taxed alike there is no violation of the equality and uniformity required by the constitution. It is admissible for the legislature to tax a business, and to provide that payment of a tax prescribed for the privilege of pursuing it shall be a substitute for, and in lieu of, all other taxes on the means employed in it. The liability to abuse is not an argument against the existence of this power. The constitution establishes the rule of equality and uniformity in the imposition of taxes, but absolute equality is not attainable, and large discretion must be left to the legislature in its effort to execute the constitutional mandate; and it is only where there is a plain disregard of it that the courts can properly interpose to

annul legislative action. If the legislature deems it wise to compound for all other taxes on a particular kind of business by receiving a prescribed sum as a substitute for all taxes, it must be assumed by the courts that it was the legislative determination that the sum fixed was a proper equivalent for the taxes obtainable in a different mode, and that it was a proper exercise of legislative power. This results, necessarily, from the legislative control over the subjects of taxation, restrained only by constitutional requirements, obligatory alike on the legislature and the courts. Where the particular arrangement of taxation provided by legislative wisdom may be accounted for on the assumption of compounding or commuting for a just equivalent, according to the determination of the legislature, in the general scheme of taxation, it will not be condemned by the courts as violative of the constitution.

It follows from these views that the act under consideration cannot be condemned under section 20, art. 12, Const. Nor is it assailable under section 16, Id.; for it is clear that the right of the counties under it is limited to the levy of "a certain per cent. on all tax levied by the state," and the subjects of taxation are to be determined by the legislature. It was held in *Mississippi Mills v. Cook*, 56 Miss. 40, that the legislature may exempt property from taxation whether the owners be corporations or natural persons; and this disposes of the suggestion of an objection to the act under examination because of section 13, art. 12, of the constitution.

We do not find any valid objection to the law as being beyond the power of the legislature; and the remaining inquiry is as to its meaning,—the legislative intent deducible from its language. We cannot resist the conviction that its plain purpose was to release all taxes on the entire assets of the bank for payment of the prescribed tax, *i. e.*, a tax measured by the capital stock, and assets of the bank, which includes profits, surplus, undivided profits, or by whatever name any of its assets may be known or called, and all the real and personal property of the bank. The manifest purpose of the act is to accept in full of all other taxes a sum determinable by the entire wealth of the bank; and it results that the entire assets of the bank, in whatever shape, should be estimated in determining the amount of the privilege tax. The privilege tax imposed upon and paid by a bank on this basis is made a substitute for all other taxes on the shares and assets of the bank. Shares and assets represent or express everything a bank has. Real estate bought with funds of the bank, and constituting part of its assets, is exempted as real estate, but is a factor in fixing the basis on which the amount of the privilege to be paid by the bank to secure immunity from all other taxes is determinable. The provision of the Code of 1880, that "in no case shall the payment of the privilege tax on any bank have the effect to exempt any real estate of such bank from taxation as other real estate," was stricken from the law by the act of March 18, 1886, amendatory of sec-

tion 585, and was not restored by the act of 1888, now under review, which makes clear the legislative purpose we have declared to be shown by the law, to increase the privilege tax by the assets of the bank in every form and of every kind, and to exempt its assets, because of payment of such privilege, in whatever shape they might be.

The right of the bank to acquire and hold real estate cannot be considered in the matter of taxation. The intent of the legislature was to tax its assets, where they exceed its capital stock, without regard to its right to have them. The question in taxation is, what are its assets? and not the rightfulness of its possession of a given piece of property by the bank.

In tracing the history of taxation in this state, it is discoverable that bank-stock has not been taxed as such, by name, in the hands of the shareholder or owner, but was assessable to the bank. This was the case under the Codes of 1857 and 1871, and is true under the Code of 1880, which adopted the privilege tax it provides as a substitute for other taxation, with a provision, already mentioned, for the taxation of the real estate of banks notwithstanding payment of the privilege tax.

As we cannot find any conflict between the act of the legislature and the constitution, and the meaning of the law is unmistakable, however unwise and unjust it may be regarded, it must prevail according to its plain reading; and every bank which paid under it, according to its provisions, must be held to have secured the immunity from other taxation which it assures. Any bank which did not estimate all of its assets beyond the amount of its capital stock, and pay the privilege on the larger basis, is in default, and did not secure the exemption from taxation declared by the law in favor of those which conformed to its terms.

Decree reversed, and cause remanded to the chancery court.

JONES V. STATE.

(*Supreme Court of Mississippi*. Jan. 20, 1890.)

CRIMINAL LAW—SENTENCE—WITNESS—CROSS-EXAMINATION.

1. Where on an indictment charging, in two counts, (1) selling liquor to a minor, and (2) selling liquor without license,—there is a general verdict of guilty, but the court, on motion for new trial, finds that the second count is not sustained, while the first is, and sentences defendant on that only, defendant cannot complain that the verdict is broader than was warranted by the evidence.

2. Where defendant, on cross-examination of a witness for the prosecution, asks him a question as to a collateral and immaterial matter, not tending to impeach him, he is bound by his answer.

Appeal from circuit court, Yalobusha county; W. M. ROGERS, Judge.

Lee Jones was indicted, in two counts, (1) for selling whisky to a minor; and (2) for selling without license. There was a general verdict of guilty. A motion in arrest of judgment was overruled. A motion for a new trial, on which it was shown that Jones had license to sell whisky, was made, and refused; and the court sentenced Jones for the offense under the

first count only. Brooks, a witness for the state, was asked on cross-examination, in order to show his bias, if he had not said, prior to the indictment of Jones, that he knew where he could get half of \$3,000, the penalty for selling without license, and he answered, "No." Another witness was then introduced, and asked if Brooks had not made such statement. Jones appeals.

W. S. Chapman and H. K. Martin, for appellant. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. There is no objection to the practice of joining in one indictment counts for separate misdemeanors. Under the indictment in this case, the defendant, upon sufficient evidence, might have been convicted of one act of retailing without license, and of another act of selling to a minor. The fact that the person to whom both sales were made was the same is immaterial. So, also, the same act of sale might have been the subject of the two counts. The verdict finds the defendant guilty as charged, which means guilty on both counts. On the motion in arrest of judgment, the court, looking only to the record, finds a valid indictment, and a verdict of guilty, responsive to the whole charge. There is nothing in the record proper that would prevent sentence on each count. But, on the motion for a new trial, the court, looking at the whole case, discovered that the evidence is sufficient to uphold the conviction on the first count, and insufficient to uphold that on the second. It therefore proceeded to impose the penalty of the law for the conviction on that count only. There is no uncertainty either in the verdict or in the sentence; nor can the appellant complain that the verdict is broader than that warranted by the evidence, since the punishment has been confined to that offense for which he was properly convicted.

The question put by the defendant to the witness Brooks on cross-examination was in reference to a collateral and immaterial matter. Whether he had or had not made the declaration specified was wholly irrelevant, and neither tended to contradict any statement he had made in testifying, nor to show bias against the accused. Under such circumstances, the defendant was bound by the reply made by the witness. The judgment is affirmed.

FOX v. STATE.

(*Supreme Court of Mississippi. Jan. 20, 1890.*)

CRIMINAL LAW—APPEAL—RECORD.

A judgment of conviction in a criminal case will be reversed, on appeal, where the record fails to show where the court was held in which the indictment was found and the trial held.

Appeal from circuit court, Yalobusha county; *W. M. ROGERS*, Judge.

Jackson Fox appeals from a conviction of assault and battery.

R. H. Golladay, for appellant. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. The record fails to show where the court was held in which the indictment was found, and appellant con-

victed. For this the judgment must be reversed. *Lusk v. State*, 64 Miss. 850, 2 South. Rep. 256; *Carpenter v. State*, 4 How. (Miss.) 163; *Sam v. State*, 13 Smedes & M. 189. Reversed and remanded.

DUNCAN v. MOORE.

(*Supreme Court of Mississippi. Jan. 20, 1890.*)

HOMESTEAD—MORTGAGE BY HUSBAND—SUBSEQUENT CONVEYANCE BY WIFE.

Under Code Miss. § 1258, providing that no mortgage of a homestead shall be valid unless signed by the wife of the owner, if he be married and living with his wife, where the husband executes a mortgage on the homestead, and the wife does not sign it, her subsequent conveyance of her interest in the homestead to the mortgagee, without her husband's consent, imparts no validity to the mortgage.

Appeal from chancery court, Chickasaw county; *B. MCFARLAND*, Chancellor.

W. G. Orr, for appellant. *Miller & Baskin*, for appellee.

COOPER, J. We yield to the urgent solicitation of counsel to pass upon both questions presented by this appeal, though the decree might be affirmed upon the single point on which we are advised the bill was dismissed in the court below, viz., that, conceding the invalidity of the conveyance sought to be annulled, the complainant is not of right entitled to the intervention of a court of equity, except upon condition of himself doing equity.

It appears from the record that the complainant, being indebted to the defendant, Moore, executed a deed of trust upon his homestead as security for the debt due, but his wife, who was at the time living with him on said land, did not "sign" the deed. Afterwards, at the instance of the creditor, and, so far as appears, without the consent of her husband, she executed a separate conveyance to the creditor of her interest in the homestead. The question presented is whether this subsequent deed of the wife is sufficient to give validity to the former invalid incumbrance of the husband.

By the Code, § 1258, it is declared that "no conveyance, mortgage, deed of trust, or other incumbrance upon the homestead, exempted from execution, shall be valid or binding, unless signed by the wife of the owner, if he is married and living with his wife." There is much force in the argument of defendant's counsel that the statute does not require a joint deed of husband and wife for the conveyance of the husband's homestead, but only that the wife should "sign" the husband's deed to signify her consent to the disposition made by the husband of his property; that the substantial thing is the written evidence of such consent; and that this may be as certainly shown by a separate instrument as by signing the deed of the husband. The present controversy does not call for a decision of what would be the effect of such separate deed made by the wife under the direction or consent of the husband, and we express no opinion on the subject. We are, however, of opinion that whatever be the form, it is, at least, essential to show the contempo-

aneous assent of both husband and wife to the conveyance. To permit the wife, without the knowledge or consent of the husband, to give validity to an invalid incumbrance or conveyance, would be, in effect, to give her the power of disposal, rather than the veto power provided by the law.

Affirmed.

McCain v. White.

(Supreme Court of Mississippi. Jan. 27, 1890.)

DIVISION FENCES—INJURIES TO TRESPASSING CATTLE.

Under Code Miss. 1880, § 988, providing that, where the joint owner of a partition fence has failed to keep his portion of it in proper repair, he shall not be entitled to damages against his co-owner for any injury done to his animals which have broken through such fence, the former can recover no damages, although the animals were shot by the latter.

Appeal from circuit court, De Soto county; W. M. ROGERS, Judge.

McCain sued White for damages for shooting some of his stock while trespassing on his (White's) land, which was fenced. The suit resulted in a verdict and judgment in favor of White, from which McCain appealed.

Powel & Powel, for appellant. H. R. C. Foster and I. D. Oglesby, for appellee.

WOODS, C. J. This was an action brought for the recovery of damages for injuries resulting from the shooting of appellant's stock by the appellee. That the stock was shot while trespassing on the fenced grounds of appellee is undisputed, and that the premises of the parties to the suit were divided by a partition fence is likewise undisputed. Whether the portions of this partition fence belonging to the parties, respectively, were lawful fences, and in good repair; whether the stock found its way into defendant's close through McCain's part of the partition fence, or in some other way,—were points much disputed, and concerning which much evidence was taken. These were questions of fact, to be determined by the jury; and the verdict has determined them adversely to appellant's theory.

It is only necessary for us to consider the assignment of error which calls in question the charge given for the defendant by the court below. This charge substantially informed the jury that, if McCain and White were joint owners of a partition fence, each bound to keep in proper repair his part of the same, and that McCain had failed to so keep in repair his part of such partition fence, whereby his stock had broken through into White's premises, then plaintiff was not entitled to recover damages, even on proof of White's having shot McCain's stock.

The consideration of this instruction involves the construction of section 988, Code 1880, and especially the concluding member of the last sentence. After providing for the payment of double damages for injuries done to trespassing stock by any person not having a lawful fence, and, after providing for a settlement by reference to disinterested neighbors, we find this pro-

viso: "Provided the foregoing provisions shall not extend to any joint owner of a partition fence, who has failed to make the proper repairs thereof, as against his co-owner, and such joint owner shall not be entitled to any damages for injury to his animals which have broken through such partition fence." The italicized words first appear in the Code of 1880, the antecedent portion of the section having been incorporated in our other Codes in 1857 and 1871. These italicized words create a new rule of diligence in duty for joint owners of partition fences, and offer the strongest incentive to faithfulness of performance. The purpose of the legislature was, doubtless, to protect the provident and painstaking against the improvidence and indifference and thriftlessness of irresponsible joint owners of partition fences. It by express terms deprives the indolent and improvident joint owner of a partition fence of any damages—not double damages nor any damages provided in that section, but any damages—for injuries done his stock by reason of their having broken through the partition fence because of his failure to keep his part in proper repair.

The statute seems incapable of any other interpretation without wresting the words from their obvious meaning. This construction of the statute is conclusive of the case. Affirmed.

Mackey et al. v. Smith.

(Supreme Court of Mississippi. Jan. 27, 1890.)

CONSTABLES—FAILURE TO PAY OVER MONEY COLLECTED UNDER EXECUTION.

1. In an action against a constable for money collected under final process, and not paid over, and for statutory damages, it is no defense to allege that he retained the money merely because the defendant in execution insisted on its application to some other debt.

2. Where a constable levies an attachment for rent on cotton, corn, and potatoes, and the tenant replevies the two latter, but leaves the cotton, which is sold, it is no defense to an action against the constable for failure to turn over the proceeds, that he desired the direction of the court as to their application, as such attachment is in the nature of final process, and returnable to no court.

Appeal from circuit court, Yalobusha county; W. M. ROGERS, Judge.

I. T. Blount, for appellants. A. T. Smith, pro se.

WOODS, C. J. This cause was submitted to the judge of the court below without the intervention of a jury, and judgment was rendered for appellee. There were two motions, which appear to have been submitted together, made by the appellee against appellant Mackey, a constable, and others, sureties on his official bond, for money alleged to have been made by the said constable under final process, and not paid over by him on demand, with statutory damages. In one case there was an execution levied by the constable, and the property sold, and the constable attempted to justify his refusal to pay over the money so made under execution, because, in a return made after the sale, he asserts that the defendant in execution is insisting that the proceeds of this execution sale shall be applied to some other debt due by

him. There was no pretense that any other creditor had any senior judgment or decree, and that the constable was in doubt as to the application of the money in his hands. There was no pretense that the judgment debtor was asserting, in any legal proceeding, any sort of right to control the money. It is the simple statement that the debtor is insisting on the constable's applying the money made under execution to another debt. We are aware of no law which authorizes the officer, under these circumstances, to refuse for 12 months to pay over the money to the judgment creditor.

The other case is even weaker in its pretext of right to hold money made under final process. In this instance, a writ of attachment for rent was caused to be issued by Smith, the appellee, against one Hendrix, (the execution debtor in the former case,) and levied on about one bale of lint cotton, and about 80 bushels of corn and 50 bushels of potatoes. Hendrix replevied the corn and potatoes, and prevailed in his suit for them. He did not replevy the cotton, and the same was sold, and the proceeds retained by the constable for about 12 months, because, as is alleged, of a return he made on the attachment writ to the effect that he had sold the cotton, but that he desired the direction of the court as to its application. Seeing this writ in attachment for rent was in the nature of final process, and that it was returnable to no court, and remembering that the tenant did not replevy this cotton, but left the constable to treat it as his writ commanded, we think the judgment of the court below was correct on this branch of the case also. It is assigned for error, likewise, that the court below erred in its calculation and allowance of the amount due the plaintiff in execution. As no calculation is submitted to us, nor any suggestion made as to the nature and amount of the alleged error, and as it must necessarily be insignificant in value, we decline to enter upon this assignment of error. There was no error in the action of the court below in allowing statutory damages.

Affirmed.

RUCKER v. STATE.

(*Supreme Court of Mississippi*, Jan. 20, 1890.)

SUNDAY LAWS—GAMES.

Playing at cards or dice on Sunday is not within the prohibition of Code Miss. 1880, § 2951, forbidding "farces or plays of any kind, or any games, tricks, juggling, * * * or any such like show or exhibition," etc., on that day, as this refers to public exhibitions, etc.

Appeal from circuit court, Chickasaw county; L. E. Houston, Judge.

W. G. Orr, for appellant.

WOODS, C. J. Tobe Rucker was indicted, convicted, and sentenced for unlawfully playing at cards or dice on Sunday. The charge is not one of gaming, nor is it embraced in the definition of offenses denounced in section 2951,¹ Code 1880, in our

opinion. That section, by its terms, is confined to "farces or plays of any kind, or any games, tricks, juggling, sleight of hand, or feats of dexterity, agility of body, or any bear-baiting, or any bull-baiting, horse-racing, or cock-fighting, or any such like show or exhibition," etc. While the word "games" is used, it is manifest, from the entire section, that it was intended to apply to such sports or contests as are exhibited as spectacles to the people, and not to such private diversions as card-playing, chess-playing, and the like.

The judgment of the court below is reversed, the indictment quashed, and the defendant discharged.

KANSAS CITY, M. & B. R. Co. v. FITE.

(*Supreme Court of Mississippi*, Jan. 27, 1890.)

CARRIERS OF PASSENGERS—FAILURE TO STOP AT STATION.

Where a train fails to stop at a flag station which is a passenger's destination, and he jumps from the train, receiving no injury, he cannot recover exemplary damages, but can recover nominal damages only.

Appeal from circuit court, Marshall county; W. M. ROGERS, Judge.

Appellee, Fite, bought a ticket for Miller's station, which was a "flag station" on the Kansas City, Memphis & Birmingham Railroad. The conductor took up the ticket, but, through some inadvertence, the train failed to stop at Miller's Station, and Fite jumped from the train at said station, and sustained no injury whatever, but brought this suit for damages. Under the instructions of the court, there was a verdict for exemplary damages, on which a judgment was entered for \$200, from which the railroad company appealed.

J. W. Buchanan, for appellant. Fant & Fant, for appellee.

CAMPBELL, J. The court below should have instructed the jury to find a verdict for nominal damages only. There was no actual damage shown, and there was not a circumstance in evidence on which to found a claim for exemplary damages. In this state of case, the court should not have permitted exemplary damages.

Reversed and remanded.

CLARK et al. v. GRESHAM.

(*Supreme Court of Mississippi*, Feb. 2, 1890.)

GARNISHMENT—COSTS.

Garnishees in an attachment suit, who are entitled to attorney's fees and a *per diem* under the statute, are entitled to satisfy such claim from the moneys of the debtor in their hands.

Appeal from circuit court, Lee county; L. E. Houston, Judge.

In an attachment suit between other parties, in which appellee, Gresham, was claimant, appellants, Clark Hood & Co., were garnished, and answered that they had money in their hands, which money they held till the litigation between the parties was settled. The result of the litigation was in favor of the claimant, Gresham, whereupon Clark, Hood & Co. made claim for an attorneys' fee, and their *per*

¹This section makes it unlawful to do the things quoted on Sunday.

dilem under the statute, which was allowed by the court; but the court refused to allow this claim paid out of the money in the hands of Clark, Hood & Co. as garnishees, from which they appealed.

J. A. Blair, for appellants. *Allen, Robins & Stribling*, for appellee.

CAMPBELL, J. If the appellants were entitled to the allowance made, in view of the fact that they had the money in their hands during the litigation, they were entitled to it out of the money in their hands, and should not have been put to a recovery of the allowance from the plaintiff in the attachment. It is true that these plaintiffs are the parties ultimately liable for all costs, but their adversary in the litigation, rather than the garnishees, should take the risk, great or small, of realization of costs out of the plaintiff. Reversed and remanded.

CLARK *et al.* v. GRESHAM.

(*Supreme Court of Mississippi*. Feb. 3, 1890.)

APPEAL—JURISDICTIONAL AMOUNT.

An appeal to the Mississippi supreme court in a case begun before a justice, and appealed to the circuit court, lies only when the judgment, exclusive of costs, cannot be discharged on payment of less than \$50.

Appeal from circuit court, Lee county; L. E. HOUSTON, Judge.

This suit was begun in the justice of the peace court, where it was dismissed. An appeal was taken to the circuit court, where the same result followed, and Clark, Hood & Co. were taxed with the costs, from which they appealed.

J. A. Blair, for appellants. *Allen, Robins & Stribling*, for appellee.

COOPER, J. The test of the jurisdiction of this court in a case commenced before a justice of the peace, and appealed thence to the circuit court, and judgment there rendered against the defendant, is whether the judgment, exclusive of costs, may be discharged upon payment of less than \$50. *Ward v. Scott*, 57 Miss. 826. Applying the test to the present case, it appears that no appeal lies to this court.

The appeal is dismissed.

KANSAS CITY, M. & B. R. CO. v. MABRY.

(*Supreme Court of Mississippi*. Jan. 20, 1890.)

RIGHT TO COSTS.

Code Miss. 1880, § 1497, providing that, if plaintiff shall not recover more than \$150, he shall not recover costs, unless the judge certifies that plaintiff had reasonable ground to expect to recover more than that sum, has reference to actions *ex contractu* only, and no such certificate is necessary to carry costs in an action for damages to land by improper construction of defendant's railroad.

Appeal from circuit court, Lee County; L. E. HOUSTON, Judge.

Action by E. B. Mabry against the Kansas City, Memphis & Birmingham Railroad Company, for damages to land alleged to have been caused by an improper construction of defendant's railroad. Plaintiff recovered a judgment for \$15 and

costs, but the judge did not enter on the record or certify that he was of opinion that plaintiff had reasonable ground to expect to recover more than \$150. Defendant paid the judgment for \$15, but appeals from the judgment as to costs. Code Miss. § 1497, provides that if plaintiff shall not recover more than \$150, he shall not recover any costs, unless the judge shall be of opinion, and so enter on the record, that plaintiff had reasonable ground to expect to recover more than \$150, etc. Section 2376 provides that, in all cases where the court before trial shall not be satisfied and enter upon the minutes that the action was neither frivolous nor vexatious, if the jury find under \$10, the plaintiff shall not recover more costs than the sum found, etc.

J. W. Buchanan, for appellant. *Clayton & Anderson*, for appellee.

COOPER, J. The purpose of section 2376 of the Code of 1880 is to discourage frivolous and vexatious litigation, while section 1497 is to discourage resort to the circuit courts in those cases in which relief might be fully secured by suit before justices of the peace. The latter section has reference only to actions *ex contractu*. Since this action is not of that character, no certificate from the judge was necessary to carry costs.

The judgment is affirmed.

WEST *et al.* v. ROBERTSON *et al.*

(*Supreme Court of Mississippi*. Feb. 3, 1890.)

POWER OF TRUSTEES—INFANT'S FUNDS.

Where land is devised and money bequeathed in trust for testator's granddaughter for life, with remainder to her children, the trustee has no power, at the instance of the granddaughter, and with the consent of a court of chancery, to invest the money in land, so as to conclude the rights of the remainder-men. Code Miss. 1880, § 2112, which permits a conversion of property belonging to a ward for the purpose of changing the character of the investment, where it is to the interest of the ward, has no application.

Appeal from chancery court, De Soto county; J. G. HALL, Chancellor.

In 1880 one Robertson died, having made a will in which he gave certain property and \$3,200 in cash in trust to the appellee Robertson (his son) for his granddaughter Mrs. West (mother of the minor appellants) during life, with remainder to her children (appellants) at her death. Mrs. West desiring a home, a bill was filed in the chancery court to invest the money in the hands of the trustee in real estate. The prayer of the bill was granted, and appellee Robertson, the trustee, in pursuance thereof, invested the money in land, buying from himself the "Home Place," which Mrs. West, the granddaughter, desired as a home, and other land adjoining, taking deeds to himself as trustee, and reported his action to the chancery court, which in 1884 the court approved, and entered a decree accordingly. Mrs. West, the mother of appellant minors, and owner of the life-interest, having died, an appeal has been prosecuted by a guardian *ad litem* for said minors from said decree. Section 2112 of the Code of 1880 permits the guard-

ian to improve land of ward on authority of the chancery court, when said court is satisfied that the interest of the ward will be promoted thereby; and for conversion of any property of the ward for the purpose of changing the character of the investment, where it is to the interest of the ward.

Powel & Powel, for appellants. *McKenzie & Wall*, for appellees.

CAMPBELL, J. It was error to decree an investment of money in the hands of the trustee in which the infants had the remainder after the life-estate of their mother. Passing by the question of power in the chancery court to permit such a conversion, under the circumstances of this fund, we fail to find any ground for the exercise of such power in its situation. The testator had devised land and bequeathed money in trust for the mother for life, with remainder to her children. No sufficient reason appears for defeating the testamentary scheme by converting the money, which was ultimately to go to the children, into land. It is true that the mother, who was entitled to enjoy the land and the income of the money during her life, desired the change in the investment, which was approved by the court; and it was binding on her, but the rights of the remainder-men were not concluded by the decree. Their rights were then in expectancy. Now that the life-interest has expired, they are entitled to call for the money secured to them by the will. The decree complained of is not saved by section 2112 of the Code, because the facts do not make it applicable.

Reversed and remanded.

ADAMS v. BERG.

(*Supreme Court of Mississippi*. Feb. 10, 1890.)

CONDITIONAL SALES.—EXECUTION.—DEFECTIVE CORPORATION.

Plaintiff sold machinery to A., reserving the title until the same should be paid for, and A. and defendant formed a manufacturing company, and advertised under the name of A., with the addition of the words "Manufacturing Co." The articles of incorporation were never approved. Defendant afterwards became a creditor of the company, and had the machinery sold under execution to satisfy his debt. *Held*, that the machinery was not liable for the company's debts under Code Miss. 1880, § 1300, which provides that, if any person shall transact business as a trader, or otherwise, with the addition of the words "and Company," "and Co.," or like words, and fail to disclose the name of his principal or partner, all the property used or acquired in such business shall be liable for his debts, as the machinery was not used in such business with the consent of plaintiff.

Appeal from circuit court, Monroe county; L. E. HOUSTON, Judge.

This case was once before appealed to and decided by this court, and will be found reported in 3 South. Rep. 465.

The facts are, in short, that appellant, W. T. Adams, sold to one R. H. Adams, of Aberdeen, some machinery, taking notes for payment of the same, and reserving legal title to the machinery in himself till the notes were paid. R. H. Adams went into the possession of the machinery, and at-

tempted to form the R. H. Adams Manufacturing Company, but the articles of incorporation were never approved. The corporation elected officers. R. H. Adams was president, and appellee, S. H. Berg, was one of the directors of the "corporation" which was not a corporation. Berg became a creditor of the "corporation," sued for his debt, and got judgment, and had execution issued and levied on the machinery bought from appellant, W. T. Adams by R. H. Adams. The appellant, W. T. Adams, brought this action of replevin to recover the same; but the court held that under section 1300 of the Code of 180 the machinery was properly sold under the execution of Berg, at which sale Berg had bought, and so instructed; and judgment was so entered, from which Adams appealed.

Section 1300 is as follows: "If any person shall transact business as a trader, or otherwise, with the addition of the words, 'Agent,' 'Factor,' 'and Company,' or 'and Co.,' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name, without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated, in favor of his creditors, as his property."

R. H. Adams was manager as well as president of the supposed corporation, and advertised business under the name of the "R. H. Adams Manufacturing Company."

W. B. Walker, for appellant. E. H. Bristow and Sykes & Richardson, for appellee.

CAMPBELL, J. Section 1300 of the Code does not apply except where the thing sought to be treated as the property of him who transacted business with it was in his possession, in such business, with the consent of the owner. One who puts his property in the possession of another, for use in his business, whereby that other is made to appear to be the owner, may justly be denied the right to assert his secret claim of ownership to such property as against a creditor of him who used it in his business, and that is the provision of the statute.

The appellant sold the articles to R. H. Adams, reserving title until they should be paid for. They might have been seized under execution against R. H. Adams, and held liable for his debts, by section 1300, but they could not be subjected, by virtue of this section, for the debts of any person deriving title from him, and not having the consent of W. T. Adams, in whom the title was, to the arrangement. The evidence shows that Berg was a director of the R. H. Adams Manufacturing Company, and that the articles were purchased of the appellant by R. H. Adams individually, and it does not appear that the appellant had any dealings with the company, or any knowledge of its existence, which is matter of dispute. It would be a perversion of justice, as well as of section 1300 of the

Code, to permit a defeat of the right of the appellant by Berg.

Reversed and remanded.

SIMS v. WARREN.

(*Supreme Court of Mississippi*, Feb. 10, 1890.)

TAXATION—ASSESSMENT.

Forty acres of a quarter section of land was assessed for taxation at \$2.50 per acre, and the other 120 at \$1 per acre, but no description was given by which either portion could be identified. Plaintiff owned the north half of the quarter section, while the south half was owned by two persons. *Held*, that the assessment was void for uncertainty, and that Act Miss. March 5, 1878, which provides that where part of the land in a particular section has been assessed by a proper description, and a portion by a description which does not identify the land, the assessment of that portion which is not properly described shall be held to embrace all the land in the section, has no application.

Appeal from chancery court, Itawamba county; B. McFARLAND, Chancellor.

In 1879 there was an assessment of lands in Itawamba county, and section 10, township 8, range 8, was assessed to several parties at different prices per acre. The S. E. $\frac{1}{4}$ was owned by three persons. Sims owned the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and two other parties owned the balance. Forty acres of the 160 (S. E. $\frac{1}{4}$) was assessed at \$2.50 per acre, and the other 120 acres at \$1 per acre. It is shown that taxes were paid on 80 acres in the S. E. $\frac{1}{4}$, and that no taxes were paid on the other 80 acres; and the sheriff sold for the taxes, and appellee Warren bought 80 acres, the balance in S. E. $\frac{1}{4}$ not paid on, and brought this suit in chancery to confirm his title to the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, attempting to identify the land by testimony showing that taxes had been paid on the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$. There was a decree confirming his title, from which Sims, the owner of the land, has appealed.

Clifton & Eckford and Brame & Alexander, for appellant. *Newman Cayce*, for appellee.

CAMPBELL, J. The validity of the assessment under which the sale was made is to be tested by section 18 of "An act in relation to public revenue," approved March 5, 1878. It provides "that no failure to designate the precise locality of any subdivision of land within a section * * * shall be held to vitiate the assessment, * * * if the section, township, and range * * * be properly entered upon the roll; * * * and it may be shown by parol testimony * * * to what particular subdivision such assessment * * * was intended to apply; and where part of the land in a particular section * * * has been assessed by a proper description, and a portion by a description which does not identify the land, the assessment of that portion which is not properly described shall be held to embrace all the land in the section * * * not embraced in the assessment by proper legal subdivision." The substance of this is that giving section, township, and range shall be a sufficient description on the roll for any subdivision of the section; parol testimony may be resorted to for the ascertainment of the particular subdivision intended to be as-

essed; and that the proper description of part of a section shall make the assessment of the other part of it, by whatever description, being insufficient to identify, embrace all the rest of the section. We are not called on now to consider the effect of the first clause quoted, for there is no evidence in the record as to what land was intended to be assessed. The question is as to the other clause.

It is for the legislature to prescribe the mode of ascertaining the value of property for taxation. Some way of identifying the land taxed is indispensable. Ascertainment of value in some mode directed by law is a constitutional prerequisite to valid taxation. Article 12, § 20, Const. Without identification of the land, in some way, there cannot be a fixing of value, which is essential as a means of proportioning the burden of taxation. This might be by the number of acres, where no element of uncertainty as to the particular land arose from variation in value for different parcels owned by different persons of a given tract; but an assessment of 80 acres of a larger number, where one parcel is valued at one sum per acre, and another at a different sum, is liable to be referred to the one or the other, and makes it impossible to tell what was assessed, or at what value.

In this case 40 acres of S. E. $\frac{1}{4}$ were assessed at \$2.50 an acre, and 120 acres at \$1 an acre, and it is impossible to determine at what value the 80 acres sold were assessed, for it is not known which 80-acre parcel was sold. It was 80 of the 160, but was it the 40 valued at \$2.50 per acre and another 40, or was it 80 acres valued at \$1 an acre? This element of uncertainty renders the assessment insufficient on its face, because of the necessity for ascertainment of value of property taxed. The provision of the act of 1878 quoted above must be held applicable to assessments which do not create uncertainty as to the charge on the land. The right of the owner to be free from any but his just proportion of taxation according to value cannot be infringed, and the law quoted must be confined in its operation to cases in which no uncertainty exists as to the amount of the charge on property. A man should know whether he has 80 acres, or any other number, in a section or other tract; and, if his is part of a larger tract, all valued at the same per acre, there is no uncertainty as to the tax, and no injustice or violation of constitutional right in requiring him to know his own, and pay the charge upon it. But until there is a valid charge there is nothing to pay, and a valid sale cannot be made for failure to pay what was not due.

Reversed and remanded.

STATE ex rel. CITY OF NEW ORLEANS v. NEW ORLEANS & N. E. R. Co.

(*Supreme Court of Louisiana*, Feb. 10, 1890.)

MANDAMUS TO CORPORATIONS—STATUTE—CONSTRUCTION.

The writ of *mandamus* being a harsh remedy to be substituted in extraordinary and clearly specified cases for the ordinary modes of judicial proceeding, it follows that any legislation, hav-

ing for its object the application of such a remedy to matters and things not hitherto included within its scope, should be strictly construed, without extending its effect by implication. Hence, Act 133 of 1888, which purports to provide a summary remedy by *mandamus* to enforce the obligation of certain corporations with reference to the paving, grading, repaving, reconstructing, or care of any street, highway, bridge, culvert, levee, canal, ditch, or crossing, cannot be construed as extending to an obligation to construct a new levee or embankment.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

Francis B. Lee, for appellant. Harry H. Hall, for appellee.

POCHE, J. The city seeks by *mandamus*, under the provision of Act 133 of Acts 1888, to compel the defendant company to construct a certain embankment on the outskirts of the city, in accordance with an ordinance numbered 7,483, adopted by the city council in December, 1881. The proceeding was met by a peremptory exception, based on the ground that there is no warrant in law for the application of the writ of *mandamus* in the case set forth in the relator's petition. The exception was maintained, and relator appeals.

The pivotal allegations of the petition are substantially that, under the ordinance herein sought to be enforced, the railroad company obtained certain valuable franchises, among which was the right to occupy for its purposes certain streets of the city, and certain embankments constructed within its limits, in consideration of which the said company agreed to continue a pre-existing embankment, so as to extend it on and through a certain thoroughfare known as "Florida Walk," from its intersection with People's avenue to the Fisherman's canal, on the lower limits of the city of New Orleans, and that the company has failed to comply with its obligation in the premises. The work required of the company is described in the ordinance as follows: "From the intersection of the embankment of the canal of the People's avenue and Lake Pontchartrain, to the intersection of said People's avenue canal embankment with Florida walk, which said embankment shall be elevated above high-water mark, according to lines and levels to be furnished by the city surveyor, and to be kept in good repair by said company at its expense, with the right to deepen said People's avenue canal, to obtain earth for the said elevation and repairs, and that said company shall continue said embankment along Florida walk, from the intersection of People's avenue to the Fisherman's canal, to the lower limits of the city of New Orleans, in accordance with lines and levels to be furnished by the city surveyor." The words herein italicized by us are descriptive of the work sought to be enforced, and the specifications of the same prepared by the city surveyor are annexed to, and made part of, relator's petition.

Defendant's contention, under its exception, is that the provisions of Act 133 of 1888 do not contemplate or justify recourse on the part of the city to the writ of *man-*

damus, to compel the company to construct a new embankment or level, as provided for in that portion of the ordinance now under discussion. On that point the act reads: "That in all cases where any corporation has heretofore contracted with, or may hereafter contract with, or shall be otherwise legally bound to, any parish or municipal corporation in this state, with reference to the paving, grading, repairing, reconstructing, or care of any street, highway, bridge, culvert, levee, canal, ditch, or crossing, and shall fail or neglect to perform said contract or obligation, the said parish or municipal corporation * * * shall have the right to proceed by a writ of *mandamus* to compel the performance of said contract or obligation."

The language of the section is not entirely free of ambiguity, and a proper construction of its true meaning may be facilitated by considering the cause which induced the legislature to enact it. Civil Code, art. 18. It is asserted by relator's counsel, and we believe, that the propriety and usefulness of that legislation grew out of the decision of this court in the case of *State v. Railroad Co.*, 37 La. Ann. 539. In that case the city applied for a writ of *mandamus* to compel the defendant company to make certain repairs to a street in the city, to which it had bound itself by contract. The writ was refused, on the main ground that "the writ of *mandamus* does not lie to compel corporations to perform obligations arising simply from contract." From the leading idea which prompted the act, it is quite apparent that its object was to extend the application of the writ as a remedy for the enforcement of contract obligations against corporations, and thus to supplement the absence of such power, as indicated by that decision.

The court had said that, from the nature of the writ of *mandamus*, and under the rules of the law then in force, which controlled and restricted its application, it could not be invoked as a remedy to cause a corporation to comply with its contract obligations; and such was the law up to the enactment of Act 133 of 1888. Under its terms, such obligations, contractual or otherwise, as are enumerated in the act may now be enforced by means of the writ of *mandamus*. But the statute goes no further, and it does not purport to disturb any other judicial construction or exposition of the nature and scope of the writ of *mandamus*. In the opinion above referred to the court took occasion to say, on abundant legal and judicial authority: "The writ of *mandamus* is the most arbitrary of all the forms in which judicial authority is exercised. It shuts out the right of trial by jury. It substitutes for the ordinary and cautious modes of judicial proceeding an extremely harsh and summary procedure. Instead of a mere judgment, settling simply the rights of litigants and subject to execution by ordinary process, it invokes an arbitrary judicial mandate to be executed by the judge himself, and disobedience to which is punishable by imprisonment for contempt, or

by the harsh remedy of *distringas*." It is properly characterized as an extraordinary remedy, only to be applied in extraordinary cases, which law and jurisprudence have carefully defined and subjected to close limitations. The language first quoted, which is but an echo of numerous adjudications previously made by this and other courts of the land, clearly justifies the conclusion that legislation which proposes to extend the application of the writ to cases hitherto not within its reach is a law in derogation of common right. Now jurisprudence has securely consecrated a wise rule of construction of such laws, which has been promulgated as follows: "It is a principle universally recognized that laws in derogation of common right are to be strictly construed, and cannot be extended beyond their clear and precise import, so as to reach persons, cases, or things other than those they legally and specifically embrace. *Of this character are those laws which are designed to substitute a mode of procedure in derogation of the ordinary rules of practice.*" (Italics are ours.) Succession of Irwin, 33 La. Ann. 68; State v. Schuchardt, 42 La. Ann. —, ante, 67. Hence we are not favorably impressed with the suggestion of relator's counsel, that the statute now under discussion should be liberally construed, so as to hold that the provision which applies the rule of the writ of *mandamus* to coerce a corporation to reconstruct a certain thing or object necessarily implies the power to use the same remedy to enforce an obligation to construct the same.

It is conceded that in this case the obligation sought to be enforced is to construct an embankment which has never existed, and not to reconstruct an embankment which had once existed, but which had been destroyed or demolished; and the question, as already stated, is to determine whether, under the terms of the statute, the obligation of a corporation, flowing either from a contract or from the effect of law, to construct a new embankment or levee can be enforced by means of the writ of *mandamus*. "Embankment," which is the term used in the ordinance, is not synonymous with the term "levee," used in the statute. An embankment is "an artificial bank or mound of earth," (Webster.) It may be used either exclusively, as road-way, or as a railroad bed, or exclusively as a protection from overflow, or as both. A levee is an artificial mound of earth, intended exclusively as a protection from overflow. Every levee is therefore an embankment, but every embankment is not a levee. It would therefore not be a violent presumption to hold that in referring to a levee, the reconstruction of which, without delay, would prevent a great disaster from an overflow, the law-maker did not contemplate the same hasty necessity in the case of the reconstruction of an embankment used as a road-way, which would involve only a question of use or convenience. But, for the purposes of this discussion, counsel for the defendant consents that the terms may be used as meaning precisely the same thing. The question therefore recurs, af-

ter that concession, which we make only for the sake of argument, as to the application of the remedy, under the statute, to coerce the construction of a new levee or embankment. Every act, as the subject of an obligation, which, under the statute, can be enforced by *mandamus*, presupposes the existence of the object or thing to be affected thereby. It is clear beyond question that the word "paving" refers exclusively to a street, and that a street not laid out and not in existence cannot be paved. Conceding, next, that the word "grading" was meant by the law-maker to apply to a levee, can a levee not yet constructed or thrown up be graded? Evidently not. The verb "grade" is defined to mean: "To reduce to a certain degree of ascent and descent; to level and prepare, as ground, for placing the rails on a railroad." Webst. Dict. As applied to a levee, the operation of grading would be to reduce the mound of earth, necessarily unshapely and lacking uniformity when first thrown up, to a uniform and prescribed degree of ascent and descent. Of course the operation presupposes the existence of the levee or mound of earth. It may be the completion of, or the finishing touch to, the levee, but it can in no sense be deemed a construction thereof. And yet this is the only term in the statute which the city's counsel can hold up as including the word "construction" within its meaning. The very reverse is the truth. The proper construction of a levee may include the grading thereof, but surely the grading of a levee no more includes the construction thereof than the painting of a house includes the construction of the same.

But in this arguing and contending counsel for relator lose sight of their pleading, to which the specifications of the city surveyor are attached as part hereof. In that document the surveyor, after directing the mode of constructing the embankment, and prescribing its dimensions, proceeds to direct that "the crown and slopes shall be neatly graded." Manifestly, that officer contemplated that construction, as an independent operation, should precede grading as a finishing touch, and so did the city's counsel when they prepared their pleadings. Hence their present argument must fall of its own weight.

The reasons which induced the law-maker to make a distinction in the application of the writ of *mandamus* between the obligation to construct and that to reconstruct a levee are not a subject of necessary consideration in this case. But several suggest themselves to the legal mind. As the statute was intended to affect the country parishes as well as the city of New Orleans, it occurred to the legislature that, under existing laws, the parishes have no authority touching the construction of levees,—a power which is delegated to other functionaries; the duty of the parish being restricted to the repair, the preservation, and protection of already constructed levees. Act 33 of 1879, § 10. It is therefore clear that the parishes need not be clothed with the power to enforce obligations which primarily they could not enter

into. Hence it was deemed sufficient to enable them to enforce only contracts touching the reconstruction of destroyed and damaged levees, for which they had legal authority to stipulate.

In the reconstruction of a levee the dimensions and other requirements are known in advance, and no question affecting the same could arise between the contracting parties, and hence such a reconstruction was deemed a well defined, indisputable, and clear obligation, falling within the well understood scope of the writ of *mandamus*, and this would not be the case with a new construction, as illustrated by this very case, in which it appears that the dimensions of the contemplated work were left to the judgment, discretion, and direction of the city surveyor.

We therefore conclude that the district judge committed no error in maintaining defendant's exception.

Judgment affirmed.

STRINGER v. MATHES.

(Supreme Court of Louisiana. Nov. 18, 1889.)

ASSUMPSIT—EVIDENCE.

1. A woman who keeps a room in her house to be visited and occasionally occupied by her concubine, without any contract for the payment of rent by the latter, cannot enforce such payment.

2. The evidence in this case satisfying us that the services for which payment is claimed had no other motive than the pre-existing concubinage of the parties, and were merely incidental to such relation, the plaintiff cannot claim remuneration therefor.

3. The evidence showing that there was no intention on the part of the plaintiff to claim, or of the concubine to make, any payment of rent, or for services, no obligation to pay was created; especially when it appears that plaintiff received, in other ways, a pecuniary *quid pro quo* for the benefits conferred.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

Branch K. Miller, for appellant. H. P. Dart, for appellee.

FENNER, J. Joseph Mathes, a bachelor, died on April 1, 1887, leaving an estate of about \$20,000, which was inherited by the defendant as his sole legal heir. The plaintiff, a lodging-house keeper in this city, claims \$1,644.90 for room rent due by Joseph Mathes from May 1, 1884, to the date of his death, and \$500 for services rendered to him as a sick-nurse during the same period. The defenses are a general denial, and the special defense that plaintiff had, for many years, been the concubine of Joseph Mathes, and that he had, on that account, expended large sums of money in her behalf; that he visited her house, during the time for which remuneration is claimed, solely for the purpose of such concubinage; and that, if the room was retained for him, it was solely for that purpose.

The evidence leaves not the slightest doubt upon our minds as to the relations existing between plaintiff and Joseph Mathes. They were those of concubines. From 1867 to 1878 Mathes lived in the houses kept by plaintiff. In 1878 he desired to break off his open relations with plain-

tiff, in order to maintain relations with his brother, and, from that time, he roomed and boarded elsewhere. Nevertheless he continued to make regular weekly visits to the house of plaintiff, spending there Saturday night, Sunday, and Sunday night. It was on these occasions that he occupied the room for which rent is claimed, and which was, undoubtedly, retained for his occupancy, and not rented to others. We are satisfied that the sole motive of the visits or occupancy of the room by Mathes, and of its retention by plaintiff, was the relation of concubinage existing between them. What other motive does the evidence suggest? He had his room elsewhere which he paid for and occupied. Why did he want another room? It is suggested that he wanted it in order to receive the care of plaintiff as a nurse. But did he only require nursing on Saturday and Sunday nights? He went without nursing during the rest of the week. There is no pretense that there was any contract that he should pay rent for the room. If there were such a contract, it might be that the concubinage would be no defense. That he did not pay rent for the room is evidenced by this suit. If the plaintiff can recover it must be on the ground that there was an implied contract on the part of plaintiff, resulting from his occupancy. But are we to hold that a woman or man who keeps a room in his or her house to be visited occasionally, and occupied by a concubine, without any contract to pay rent, can claim or enforce such payment? The cases cited by plaintiff clearly exclude such an allowance. In *Viens v. Brickle*, 8 Mart. (La.) 11, the court overruled a defense of concubinage, but the opinion said, after admitting the fact of concubinage: "This, however, does not seem to have been the motive of their coming together, but rather the consequence of the familiarity which a close union of interest is apt to create between persons of different sexes. We, therefore, cannot view this circumstance as preventing or destroying any right which she may have on the defendant for a remuneration," etc.; clearly implying that had the concubinage been pre-existing, and been the motive of their coming together, the defense would have been good. In *Succession of Pereuilhet*, 23 La. Ann. 294, the court said: "An employer cannot pay off a female employe by robbing her of her virtue; such a method of extinguishing an obligation is not known to the law. If concubinage had been alleged, and proved to have been the motive and cause of the parties living together in the same house in the first instance, and the services in question to have been merely incidental to such a state of living, our conclusion might have been different."

The evidence in the case fully convinces us that there was no intention on the part of plaintiff to require, or of Mathes to make, any payment for the occupancy of the room, or for services. It further satisfies us that Mathes did not enrich himself at plaintiff's expense, but, on the contrary, that he gave in other ways a pecuniary *quid pro quo* for all the benefits received from her. The plaintiff failed to tes-

tify in her own behalf, and if she might, by her testimony, have strengthened her claim, its absence is her own fault. As it stands on this record we agree with the judge *a quo* that it is not sustained. We have not discussed the conflicts in the evidence, but we have carefully considered and weighed them, and have contented ourselves with announcing our conclusions.

Judgment affirmed.

Rehearing refused December 31, 1889

**PITTSBURGH & SOUTHERN COAL CO. V. SLACK
et al.**

(Supreme Court of Louisiana. Jan. 29, 1890.)

CONTRACTS—MUTUAL ASSENT.

1. No disputed question of law arises in this case. The only issue is to the terms of an oral contract sued on. The plaintiff carries the burden of proof. The evidence is contradictory. The judge *a quo* determined the issue of fact in favor of defendant.

2. Contracts arise from the agreements of parties, not from their disagreements; and, the evidence showing that, for want of clear explanation, the parties misunderstood each other, and really disagreed, instead of agreeing, the obligation of the alleged contract cannot be enforced.

(Syllabus by the Court.)

W. S. Benedict and H. C. Cage, for appellant. John M. Baldwin, for appellee.

FENNER, J. Appeal from the civil district court for the parish of Orleans. On August 17, 1888, the plaintiff and defendant entered into a contract concerning the sale of one boat and two barges of coal. It is admitted that under the terms of the contract the sale of the two barges was only to take effect as a completed sale on Monday, August 20th; but it is claimed on the part of plaintiff that the contract with reference to the boat was different, and that the sale of the boat was to take effect, and did take effect, August 18th.

On the 19th of August the boat and barges were all sunk and lost in a cyclone. The plaintiff set up no claim on account of the barges, assuming the burden of their loss, but brings this action to recover the price of the boat of coal.

Defendant contends that there was but one contract covering the boat and the barges, and identical in its terms as to both, and that the whole sale was to take effect as completed only on Monday, August 20th. This presents a simple issue of fact, involving no question of law whatever. There is no question as to the completeness of the contract between the parties. The issue is as to the terms of the contract. If, as defendant contends, the contract was for a sale, to take effect as such only on August 20th, covering alike the boat and barges, plaintiff would admit that the loss of the boat fell on him, just as he does admit that he must bear the loss of the barges. If, on the other hand, the contract was that the sale of the boat was to take effect on the 18th, the Civil Code would inform the defendants, unmistakably, that, the "agreement for the object, and the price thereof, being complet-

ed," the thing sold was at their risk, "although the object had not been delivered, or the price paid," the seller not being in default for non-delivery. Rev. Civil Code, arts. 1909, 2456, 2457, 2470, 2552.

There is no dispute about the elementary principles of law. The question involved in the case is what were the terms of the contract, as a matter of fact. The dealings between the parties were verbal. Their evidence on the subject is contradictory, and the plaintiff carries the burden of proving his case. The learned judge *a quo* concluded that the plaintiff had failed, and that the weight of the evidence was on the side of defendant. After a careful study of the record, we agree with him. While we admit that the defendant's agent intended to make an immediate sale of the boat of coal, to be perfect from the date of designation of the particular boat, we are equally convinced that the defendant did not so understand it. The boat and barges were included in the same contract; and, if the plaintiff's agent intended to make different terms, as to the time when the sale of the boat was to take effect, from those as to the sale of the barges, it was his duty to have stated the difference very clearly, so that there should have been no room for misunderstanding. This, his own evidence satisfies us, he failed to do. It was not until the 18th, the day after the contract, when the agent called on defendant, and designated the particular boat, and presented the papers for signature, that it was, for the first time, clearly presented to defendants that the agent considered the sale of the boat as taking effect at that date. The evidence is clear that at that time, the day before the loss, the defendants asserted their understanding of their contract, and repudiated that of the agent. Contracts are founded on the agreements of parties, not on their disagreements.

Judgment affirmed.

Rehearing refused.

KLEIN V. STATE TREASURER.

(Supreme Court of Louisiana. Feb. 10, 1890.)

STATE WARRANTS—RIGHTS OF HOLDERS—CONSTITUTIONAL LAW.

1. Holders of state warrants drawn against the general fund of any year, out of the state treasury, under the general appropriation act of that year, have a standing in court to contest the validity of other warrants issued under a special appropriation act, drawn against the same fund, if said fund is shown to be insufficient to pay and satisfy all warrants drawn against the same.

2. Under the provisions of article 53 of the constitution, the general appropriation bill alone may embrace several items or objects of expenditures of state revenues. All other appropriations shall be made by separate bills, each embracing but one object. Act No. 51 of 1888, entitled "An act making appropriations to pay deficiencies due by the state for the years 1885, 1886, and 1887," not being a general appropriation bill, and embracing in its body four different and distinct objects, is unconstitutional, null, and void.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

W. H. Rogers, for appellant. Chas. Carroll, for appellee.

POCHE, J. This controversy involves the question of the validity, or of the proper rank, of certain warrants drawn by the auditor on the treasurer, under the provisions of Act 51 of 1888, entitled "An act making appropriations to pay deficiencies due by the state for the years 1885, 1886, and 1887." The contention on the part of plaintiff, who is joined by three intervenors, is that, as holders of warrants drawn against and payable out of the general fund of the general appropriation act of 1886, their prospects of being paid are affected by the plan adopted by the state treasurer, who places the warrants drawn under Act 51 of 1888 on the same footing with theirs. They allege that the treasurer thus erroneously construes the meaning and effect of said Act of 1888, which does not purport such a party; and they further charge that the act in question is unconstitutional; hence they pray that the warrants issued thereunder be declared null and void. The defense is practically a general denial. The judgment below is in favor of plaintiff, and of intervenors, sustaining the injunction which they had prayed for to the extent that their warrants be given preference over the warrants issued under Act 51 of 1888. The treasurer appeals, and the plaintiff and intervenors pray for an amendment, with the view to a decree pronouncing the unconstitutionality of said act of 1888.

By the terms of the general appropriation act of 1886, the treasurer is required to pay warrants drawn against the general fund, in the following order: "*First*, Warrants issued for salaries of officers, employes, and office expenses of the various departments of the government, including assessors; *second*, warrants issued for agricultural and mechanical college, university for education of persons of color, and state printing; *third*, warrants issued for miscellaneous purposes."

It is in proof that all warrants belonging to the first two classes, as hereinabove enumerated, have been paid in full; and that the warrants held by plaintiff and by the intervenors, as well as those which have been drawn under the provisions of Act 51 of 1888, belong to the third class. It also appears from the record that the revenues to be credited to the general fund of 1887 will not be sufficient to pay more than the warrants issued under the general appropriation act of 1886, which are yet outstanding; and hence it appears that ranking with them the warrants issued under Act 51 of 1888 would injuriously affect them, and would have a tendency to depreciate their value. That is the source of the cause of action which plaintiff and intervenors set forth in the premises.

Among other grounds of unconstitutionality, they charge that Act 51 of 1888 is in violation of article 53 of the constitution, which reads: "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the government, interest on the public debts, public schools, and public charities, and such bill shall be so itemized as to show for what account each and every appropriation shall be made. All other appro-

priations shall be made by separate bills, each embracing but one object."

The contention urged by appellees is that the act in question, which is not a general appropriation act, contains several objects embraced in one and the same bill, in direct violation of the last clause of the article of the constitution hereinabove transcribed. As indicated by its title, the act was intended to make appropriations to pay deficiencies due by the state for the years 1885, 1886, and 1887. It then proceeds to appropriate \$11,057.28 for four different and distinct purposes, as follows: (1) To pay the salaries of certain registrars of voters, for services rendered in connection with a congressional election held in November, 1887, the sum of \$2,600, out of the revenues of 1887; (2) to pay for transporting state troops in the field during the labor strikes in November, 1887, the sum of \$7,657.28 out of the revenues of 1887; (3) to pay expenses of a special election in June, 1885, \$600, out of the revenues of 1885; (4) to pay expenses of a special election held in August, 1885, \$200, out of the revenues of 1885.

A mere comparison of the constitutional requirements with the terms and purposes of the act under discussion is sufficient to demonstrate the fatal constitutional defect of the statute. It is too plain for argument that the act is not, that under the very nature of things it could not, and that it never was intended to be, a general appropriation act. Hence it cannot be shielded under the first clause of article 53, which has reference exclusively to a general appropriation bill, which under its very nature must embrace a large number and a great variety of objects and items, as numerous as the many and various purposes of government requiring expenditures of money are themselves.

But, in so far as all other appropriations are concerned, the framers of the constitution have deemed it wise to provide and to require that they be made by separate bills, each embracing but one object. By another article (29) the constitution applies the same rule to all laws enacted by the general assembly. The reason of the rule is founded in long experience in legislation, and has for objects "to obviate confusion in legislation, by mingling in the same act entirely distinct and heterogeneous provisions," (Walker v. Caldwell, 4 La. Ann. 298;) to prevent "hodge-podge" or "log-rolling" legislation, bringing together in one bill diverse subjects, with a view to combine in the support of the entire bill the advocates of each particular provision, (People v. Mahaney, 13 Mich. 494;) to prevent surprise or fraud upon the legislature or the people, by smuggling provisions into bills of which the title gave no intimation, and which might therefore be carelessly and "unintentionally adopted," (State v. Henderson, 32 La. Ann. 780.)

Experience has demonstrated that the rule is a wise one; and that it has prevented much mischief in general or ordinary legislation; and it must commend itself to greater favor, where the object of the act is to disburse the revenues of the state,—the people's money. Should it be conceded

that Act 51 was intended to be a supplement to, or an amendment of, a general appropriation act, it would yet be unconstitutional, as a legislative attempt to amend two distinct appropriation bills by one act; because Act 51 proposes to appropriate revenues of 1885, covered by the general appropriation bill of 1884, and it also disposes of revenues of 1887, covered by Act 47 of 1886. The act would thus embrace two objects, neither of which is expressed in the title, and would then present a double violation of article 29 of the constitution, which is also invoked by appellees in their pleadings.

As the purposes contemplated in the act under consideration appear to be reasonable and equitable, it is perhaps to be regretted that the law-maker in drawing the bills did not comply with the constitutional requirement, as he did in several appropriations made at the same session of the general assembly, embracing objects apparently not more meritorious than each of the four separate and distinct purposes which were carelessly blended together in Act 51. But our plain and paramount duty is to obey and to enforce the constitution, in the face of which all other considerations must yield, and carry no weight.

The foregoing reasons lead us to conclude, without making any comments as to the correctness of the views of the learned judge of the district court,—which, however, appear very doubtful,—that appellees are entitled to a decree nullifying the entire act, and canceling the warrants issued thereunder. It is therefore ordered that the judgment of the lower court be amended, by declaring that Act No. 51 of 1888 is unconstitutional, and that all warrants issued under its authority are null and void; and that, as thus amended, said judgment be affirmed, at the cost of appellant in both courts.

CADIERE V. GUIDRY, (THOMPSON, Intervenor.)

(*Supreme Court of Louisiana.* Feb. 10, 1890.)

FRAUDULENT CONVEYANCES—CONFIDENTIAL RELATIONS.

1. In questions of fraudulent simulation, the relation between the parties, such as those of brother-in-law and employe, are circumstances entitled to due weight; but they are not inconsistent with the honest relation of debtor and creditor, nor do they deprive the creditor of legal recourse for the enforcement of his debt.

2. In this case the evidence circumstantially explains the origin of the debt, and the motive of the proceeding is uncontradicted, and is supported, not only by the testimony of the parties, but by numerous collateral facts proved by other witnesses.

(*Syllabus by the Court.*)

Walter J. Suthorn and L. A. Moise, for plaintiff. L. F. Suthorn, for defendant. W. S. Parkerson, for intervenor.

FENNER, J. Appeal from the district court for the parish of Terre Bonne. On January 29, 1889, the plaintiff, Cadere, brought suit against Guidry on two notes, —one for \$2,100, the other for \$500,—and

attached the property of defendant. This was followed by numerous other attachments at the suit of the creditor, and, among them, one of Philip Thompson, the present intervenor and appellant. Thompson, after having instituted his own attachment proceeding, intervened in this suit by a petition, in which he averred, substantially, that Cadere was not a creditor of defendant; that the notes sued on by him, which purported to have been executed in 1886, were not executed at that time, but were issued only a few days before the suit, with the view of instituting said suit under a scheme concocted between said Guidry and said Cadere to cover up the property of said Guidry, and to defraud his creditors." He prayed for judgment decreeing that Cadere was not a creditor; that his claim was fraudulent and simulated,—the result of a fraudulent conspiracy; that Cadere's attachment should be set aside; and that intervenor's attachment be ranked as the first privilege on the property. These allegations were denied by Cadere, and on these issues the case went to trial. The judge *a quo* rejected the demand of the intervenor, and maintained Cadere's attachment.

We have critically examined the evidence. Cadere is the brother-in-law of Guidry, and had been his employer prior to the suit. These are circumstances which have their weight in controversies of this nature, but they are not inconsistent with the honest relation of debtor and creditor, nor do they deprive the creditor of legal recourse for the enforcement of his debt. There are no other circumstances that we have been able to discover in the evidence that throws the slightest suspicion upon the verity of Cadere's debt, and the honesty of his proceeding. On the contrary, the evidence circumstantially explains the origin and nature of the debt, and the motive of his proceeding, sustained not only by the testimony of the parties, but by collateral facts fully proved by other witnesses. We need not detail the evidence. It is uncontradicted, and fully satisfies us that intervenor's charges are unfounded. Intervenor's counsel quotes Judge MANNING's epigrammatic expression that "simulation is sometimes difficult of detection, but dunderheads are sure to furnish the means for unweaving their awkwardly concocted schemes." *Walsh v. Carrene*, 36 La. Ann. 199. We are convinced there is no simulation in this case, but, if there be, the parties to it are certainly not dunderheads.

Judgment affirmed.

WEILL V. TROSCLAIR *et al.*

(*Supreme Court of Louisiana.* Feb. 10, 1890.)

ACCOMMODATION PAPER—BONA FIDE PURCHASERS.

1. The holder of accommodation paper acquired before maturity, without notice or knowledge of any equities or agreement existing between the maker and the payee of the note, is entitled to the same protection which is extended to the holder of negotiable paper acquired before maturity.

2. The defense, in a suit on the note, that the maker is not liable thereon, on the ground that

the note was extended as an accommodation for the payee and the suing holder, must be clearly proved, in order to prevail. In such a case, the burden of evidence is on the maker urging that defense.

(*Syllabus by the Court.*)

Appeal from district court, parish of La Fourche; TAYLOR BEATTIE, Judge.

O'Sullivan & Knoblock, for appellants. Knoblock & Moore, for appellee.

POCHE, J. Defendants resist the payment of a promissory note, executed by them, jointly, in December, 1884, payable, 10 months after date, to the order of, and indorsed by, the agricultural firm of Coulon & Bernard, and now held by plaintiff. Their defense is that they received no consideration for the note, which they executed as an accommodation, "*for the purpose of assisting the payees thereof, Coulon & Bernard, and the plaintiff herein, of which fact the said plaintiff was fully cognizant, and received said note fully aware, at the time said note was transferred to him, became his, that your defendant received no consideration therefor.*" The words herein italicized are transcribed from their answer. They prosecute this appeal from a judgment in favor of plaintiff.

The undisputed facts of the case are that, in 1884, plaintiff, who was the commission merchant of Coulon & Bernard, sugar planters, having made advances on their crop for that year, and being called on for an additional loan, refused to make the same without security, whereupon the note now sued on was produced by Coulon for his firm, for whose account it was discounted by plaintiff, who placed net proceeds to their credit. It is in proof that Coulon represented to the defendants that the note, which they executed at his urgent request, was purely in accommodation to be used by Weill in borrowing money thereon, with the full and distinct understanding that Weill would never look to the makers for payment.

The testimony is very conflicting on all other points in the case, principally on the alleged knowledge of and satisfaction by plaintiff of the representations made of the matter by Coulon to the defendants. As the note was acquired by plaintiff long before maturity, proof of that knowledge on his part is a legal requisite to defeat his right of recovery on the note. He admits that he knew that the note was an accommodation, and he states that he advanced his money on that very consideration; but he disclaims all knowledge of any equities or agreement which might have been stipulated between the makers and the payees of the note, as contended for by the defendants.

In such cases, the rights of the holder of accommodation paper are settled as follows: "A defendant may, in general, make the defense of a want of consideration against a remote party, if he could have made it against a nearer party, and the remote party took the paper from the nearer party with a knowledge that it was open to this defense. But a very important exception to this rule prevails in the case of

accommodation paper. The plain reason of this is that the accommodation maker, acceptor, or indorser intends to lend his credit, and does it as a favor to some party who pays him nothing. This party therefore, can never sue him; or if he does, the want of consideration will be a perfect defense. But if this accommodated party uses the credit he has borrowed by selling the note, or getting it discounted, the holder may say 'I bought the note, or discounted it, for the very reason that you had lent your credit on it; and I took it on the faith of your credit.' We must therefore understand the legal definition of an accommodation party to negotiable paper to be one who puts his name there, without any consideration, with the intention of lending his credit to the accommodated party." Pars. Notes & B. 183; 1 Edw. Bills, 316; Bank v. Cason, 39 La. Ann. 865; 2 South. Rep. 881; Sadler v. White, 14 La. Ann. 177.

After a careful study of the record, we conclude that defendants have not only failed to prove that plaintiff knew, and acted on the knowledge, that the note was executed and intended as an accommodation to himself, but that the preponderance of the evidence goes far to establish the reverse or negative of that proposition.

From the testimony of one of the defendants himself, it appears that after several conversations with Weill, in which he understood the latter to have released him, and his brother and partner, from any liability on the note, in the last interview on the subject, Weill had offered to "knock off" the sum of \$500 on the amount of the note in capital and interests. Such an offer clearly and conclusively negatives the idea of any intention on the part of the plaintiff to entirely release the makers of the note from liability thereon; and that fact, in connection with the proof that he discounted the note himself; that he never used it either as a pledge or collateral security, either to borrow money or to secure any indebtedness of his; that he never parted with it at any time; that, on account of the crop of 1884, Coulon & Bernard remained his debtors in a sum exceeding \$3,500,—all contribute to satisfy us, as it did the district judge, that the note had been executed solely and exclusively for the accommodation of Coulon & Bernard, and that plaintiff is entitled to the protection which law and jurisprudence extend to the *bona fide* holder of negotiable paper, acquired before maturity, without notice or knowledge of any equities which might or did exist between the parties to the note. *Cochrane v. Dickenson*, 40 La. Ann. 127, 3 South. Rep. 841.

We understand that the firm belief in defendants' minds that they are not, and never were, bound for the payment of the note in suit, results from an honest misunderstanding of the contract which they had entered into, and an unfortunate misconception of the obligation which they had thereby incurred; but we leave the case with a clear conviction that plaintiff had no connection, directly or indirectly, with any deception practiced on them, or any misrepresentation made to them in the premises.

It may be a hard case on the defendants; but courts must apply the law, even though they may regret consequences.
Judgment affirmed.

FENNER, J., absent.

DOLLINS et al. v. LINDSEY et al.

(*Supreme Court of Alabama*. Feb. 1, 1890.)

ATTACHMENT—CREDITORS' BILL—RECEIVERS.

Where property has been seized on attachment, and the claim of a third person thereto interposed, it is in the custody of the law, and cannot be transferred to a receiver appointed on the filing of a creditors' bill at the suit of other creditors of the attachment defendant.

Appeal from chancery court, Marengo county; THOMAS W. COLEMAN, Judge.

Geo. W. Taylor and John C. Anderson, for appellants. *Taylor & Johnston*, for appellees.

STONE, C. J. The present suit is by creditors of Price Bros. It is not pretended that A. J. Dollins & Co. are debtors of the complainants, nor is the bill so framed as that relief can be obtained against them as debtors. The bill charges that Price Bros. are insolvent; that they are indebted to the several complainants in separate amounts; that they were merchants, carrying on business, owning a stock of goods, a store-house, store fixtures, and some other chattels; that on December 29, 1888, they pretended to sell their store-house, store fixtures, and merchandise to A. J. Dollins & Co.; and that said pretended sale was made with intent to delay, hinder, and defraud their creditors. The bill avers many facts and circumstances tending to show fraudulent intent of Price Bros., and that A. J. Dollins & Co. knew of and participated in that fraudulent intent. If these averments stood alone, they are probably sufficient for an equitable attachment for the seizure of such of the property as can be properly classed as having belonged to Price Bros. It could go no further. If A. J. Dollins & Co. were *mala fide* purchasers by reason of the fraud, that could not fasten a liability on their property not acquired from Price Bros. further than to render them personally liable for the property thus acquired to the extent they had sold, consumed, or otherwise converted it. The bill does not stop with the averments noted above. It shows that soon after the alleged sale to A. J. Dollins & Co., to-wit, January 4, 1889, three several creditors of Price Bros. sued out attachments against them, which were levied on the entire property conveyed to A. J. Dollins & Co.; that the latter company interposed a claim to the property, (personal,) under the statute, and executed claim bonds with two sureties and retook possession of the property. This was the inauguration of collateral suits, which, in our jurisprudence, are called "Trials of the Right of Property." A. J. Dollins & Co. also executed a mortgage to their sureties on the claim bonds, to indemnify them against their suretyship. In this mortgage they conveyed all the property they had acquired from Price

Bros., and additional property. There is no averment in the bill that the property conveyed by Price Bros., on which the attachments at law had been levied, were of greater value than the aggregate of the claims under which they had been attached.

This bill was filed in November, 1889, and one of its prayers is that the older attaching creditors be required to exhaust the property of A. J. Dollins & Co., mortgaged to their sureties, before utilizing the property acquired from Price Bros. There was a prayer for the appointment of a receiver, and that the property conveyed by Price Bros. to A. J. Dollins & Co., including the store-house, store fixtures, and all the merchandise and bills receivable which were in the store, be placed in the hands of such receiver. This prayer was granted, the receiver appointed and placed in possession, and from that order the present appeal is prosecuted.

The property which had been attached, and to which statutory claim had been interposed, was in the custody of the law, and it was error to take it away from such custody, and place it in the hands of a receiver. It was alike prejudicial to the rights of the claimants and their sureties, and to the prior acquired jurisdiction of the law court over the *res*, which was the subject of contention. *Rives v. Wilborne*, 6 Ala. 45; *Langdon v. Brumby*, 7 Ala. 53; *Kemp v. Porter*, Id. 188; *Read v. Sprague*, 34 Ala. 101. The only exception to this rule is when the second seizure is under process which has a paramount lien. And, though not necessary to be decided, lest we be misunderstood, we will state it should be a very strong case, sustained by strong affidavit, or affidavits of fact and urgency, to justify the appointment of a receiver, and the dispossession of the owner of his presumptive right to control his own property, with no bond to compensate him for its wrongful seizure, when, as in this case, there was no notice of the application. *Iron Works v. Foster*, 54 Ala. 622; *Hughes v. Hatchett*, 55 Ala. 631; *Weiss v. Goetter*, 72 Ala. 259; *Moritz v. Miller*, 87 Ala. 331, 6 South. Rep. 269; *Thompson v. Manufacturing Co.*, 87 Ala. 733, 6 South. Rep. 928.

Decretal order appointing the receiver reversed, and the appointment vacated.

KEITH et al. v. HAM et al.

(*Supreme Court of Alabama*. Jan. 8, 1890.)

PARTNERSHIP—ASSIGNMENT—CHattel MORTGAGES—TROYER AND CONVERSION—LANDLORD'S LIEN.

1. An assignment by one member of a firm of all the interest he has in and to the stock of goods, notes, and accounts due to the firm, vests the assignee with the interest of the assignor in a mortgage held by the firm to secure a note due to it.

2. The assignee is properly joined with the other partner in an action for the conversion of the mortgaged property.

3. Though a landlord's lien is superior to a mortgage on the crop, a purchaser from the mortgagor is not, in an action for conversion by the mortgagee, entitled to show, in reduction of damages, that part of the amount paid by him was by the mortgagor paid to his landlord. *STONE, C. J.*, dissenting.

4. A mortgage on the crop to be grown on the land, to be thereafter selected under a contract for the rental of a given quantity, or one tract out of a larger tract, is a valid mortgage, in equity, of the crops grown on the land selected, and an instruction that, at the time of giving the mortgage, the mortgagor must have rented a definite place on which the crop was grown, is properly refused as misleading.

Appeal from circuit court, Geneva county; J. M. CARMICHAEL, Judge.

Action of trover by J. N. & P. J. Ham against W. J. & C. R. Keith, to recover damages for the alleged unlawful conversion by the defendants of two bales of cotton. The complaint averred the transfer by one John S. Collins, as member of the firm of Ham & Collins, of all his right, title, and interest in the mortgage and mortgage debt, which are the foundation of the suit, to one P. J. Ham, one of the plaintiffs. The defendants demurred to the complaint, on the ground that "there is a misjoinder of parties plaintiff in said complaint, in this: Said complaint issued out in the name of J. N. & P. J. Ham, while it avers a transfer from John S. Collins to P. J. Ham alone, and shows no interest in the mortgage in the said J. N. Ham." The court overruled this demurrer, and the defendants excepted. Upon the trial the plaintiffs introduced in evidence a mortgage executed by one J. F. Martin, given to the firm of Ham & Collins, composed of J. N. Ham and John S. Collins, to secure a note for advances to be made to him by said firm during the current year, and given, among other things, on the crops to be grown by the said J. F. Martin during that year. The plaintiffs next introduced in evidence the "agreement and sale" by John S. Collins to P. J. Ham, which assigned to said P. J. Ham "all the right, title, and interest he [Collins] has in and to the stock of goods and note and accounts now owed and due to the said firm of Ham & Collins, and authorizing him to sue for and recover the same." The defendants objected to the introduction in evidence of said assignment, "because the same is ineffectual to pass any title or interest in and to said mortgage to P. J. Ham, one of the plaintiffs in this action." The court overruled defendants' objection, allowed the assignment to be introduced in evidence, and the defendants thereupon excepted. The evidence for the defendants tended to show that a part of the cotton alleged to have been converted by defendants was raised by the said Martin on lands which were rented by him from one Motley; that the rent due said Motley for the rent of such land had not been paid; and that, after said sale of the cotton to the defendants, the said Martin applied \$20 of the proceeds from said cotton to the payment of the rent due said Motley.

This being all the evidence in the case, the defendants requested the court to give the following charges in writing: "(1) The jury must believe, from the evidence, that at the time Martin executed the mortgage to Ham & Collins, that he, Martin, had rented some definite place, and that the cotton in controversy was made on said rented place. (2) If the jury believe from

the evidence that one Motley had a landlord's lien for rent on a portion of the cotton sold to defendants by Martin, and Martin applied twenty dollars of the proceeds of said cotton to the payment of said rent, then defendants are entitled to a credit of the amount so paid to Motley." The court refused to give each of these charges requested by the defendants. From the judgment on a verdict for the plaintiffs, the defendants appeal.

M. E. Millegan and H. L. Martin, for appellants.

MCCLELLAN, J. It is immaterial what effect the assignment by Collins of his interest in the property belonging to the firm of Collins & Ham had upon the partnership, or whether the assignee and Ham constituted a new partnership. The assignment, at least, operated to vest Collins' interest in the assignee, and to make him, jointly with the other partner, the owner of the assets which had belonged to the partnership, among which was the mortgage covering the cotton alleged to have been converted; and this suit was instituted, and properly so, by these joint owners, or owners in common as such, and not upon any theory of a new and continuing partnership. It was shown that the mortgage, and a note for the amount secured by it, were executed to Collins & Ham. The transfer by Collins to P. J. Ham was sufficiently specific to invest the latter with the former's interest. It further appeared that both the note and mortgage came to the possession of P. J. & J. N. Ham. The objections taken in the court below, on the ground of a want of interest in P. J. Ham, were therefore properly overruled.

The evidence tended to show that, at the time of the execution of the mortgage, the mortgagor had made a contract for the rental of the lands on which the cotton alleged to have been converted was subsequently grown. It does not appear that this contract referred, nor was it essential, in our opinion, that it should have referred, to "a definite place," in the sense that term is used in the charge requested by the defendants. A valid contract for the rental of a given quantity of land out of a larger tract, or for the rental of one or another of several tracts, the particular tract or place to be thereafter selected by the tenant, or determined upon in any practical way, would carry such a present interest in the land, afterwards segregated and subjected to the contract, as would give vitality and validity in equity to a mortgage of the crops to be planted and grown thereon. The charge requested was misleading, and there was no error in its refusal.

A part of the cotton alleged to have been converted had been, according to some of the testimony, raised on rented land, and was, at the time of the conversion, subject to a landlord's lien, which was, of course, superior to plaintiffs' mortgage. The evidence tended to show, further, that \$20 of the proceeds of the sale to defendants was paid by the mortgagor to the landlord in satisfaction of the claim for rent. The court was requested in writing and refused

to charge the jury that this state of facts, if found to exist, entitled the defendants to a reduction of damages to the amount so paid. It is insisted that, inasmuch as this is an equitable action and open to equitable defenses, the payment thus made, not by the defendants, or as a part of the transaction in which the conversion was consummated, but by a third person, and subsequent to the conversion, was in satisfaction of a prior lien, and hence inured to the benefit of the plaintiffs, and their recovery, in equity and good conscience, should be mitigated to the extent their security was freed from this incumbrance. Had this action been against the mortgagor, there would be more force in this position; for clearly he not only had the right, but it was his duty, to discharge the landlord's lien for rent. Or had the case been one involving the general ownership of the property, and it had appeared that the fruits of the conversion had been applied, by the consent, express or implied, of the plaintiffs, or through legal proceedings, had at the instance of a third person, to the payment of their debt, or in relieving their property from a lien, the damages recoverable by them in trover might be mitigated by the amount thus paid for them. *Bird v. Womack*, 69 Ala. 392; *Street v. Sinclair*, 71 Ala. 110. Or, had a recovery been had in favor of the landlord against the defendants, it may be that evidence of that fact might go in reduction of the mortgagee's damages. But here, even conceding that the payment was in some way to the advantage of the plaintiffs, we cannot conceive how the fact can avail the defendants in this action. The *gravamen* of this action is the wrongful purchase and conversion by Keith & Son. Their wrong was fully consummated, the injury resulting from it had been sustained, and the plaintiffs' right to sue had attached, before the alleged payment to Motley, the landlord. The payment was not made by the defendants, but by the mortgagor. To hold that they are entitled to a credit for the amount would be to subrogate them to an equity created, if it exists at all, by an act with which they have no connection, and to give them the benefit of a payment which they have not made. Whatever may be the rule elsewhere, in Alabama it has long been settled that this species of subrogation will not be allowed. Thus, in an action of trover against the purchaser of a slave sold by an executor *de son tort*, it was sought to mitigate the damages by evidence that the purchase money had been applied by the executor to the debts of the estate, but the right was denied. Chief Justice DARGAN, delivering the opinion of the court, said: "We do not intend to deny the common saying, that trover is an equitable action, and that the plaintiff can recover damages only to the extent of the injury actually sustained; as, if the mortgagee bring trover against the mortgagor, he can recover only the amount of the debt; or, if goods be sold illegally to discharge a lien, the owner can recover of the purchaser only the value of the goods, deducting the amount of the lien. But we hold that this equity or right must be personal to the defendant himself; that

is, it must have existed in him at the time he became liable to the action, or, if acquired afterwards, it must have been acquired by his own act. * * * It is clear that at the time of defendant's purchase, when he paid the price to Mrs. Woolfolk, [the executor *de son tort*,] he was then liable in trover to the extent of the value of the slave, for at that time no equitable defense existed, either in his favor or in favor of Mrs. Woolfolk; and to allow him to set up the subsequent acts of Mrs. Woolfolk (the executor) as his equity would not only be to subrogate him to the rights of another, but would often lead to inquiries so embarrassing and complicated that a court of law would never be assured that the ends of justice had been attained. * * * I do not, however, intend to decide that such an equity could be asserted at law, even by the executor *de son tort* himself; but, even conceding that he may, we all concur in this: that his vendee cannot, by showing payments after his purchase." *Carpenter v. Going*, 20 Ala. 587. We are unable to draw any line of distinction between the case quoted from and that under consideration, on the point involved in the second instruction requested. Its refusal was free from error, and the judgment of the circuit court is affirmed.

STONE, C. J., dissenting on point last considered.

STREET *et al.* v. SELIG.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

VENUE—NECESSARY PARTIES.

1. A suit to enjoin a suit brought to subject the proceeds of a judgment to the payment of a claim against the judgment creditor, to declare an attorney's lien on the judgment and a resulting trust in the balance in favor of complainant, is improperly brought in the district of the residence of the attorney in whose favor the lien is alleged, if the other defendants resident in the state are necessary parties, as Code Ala. § 3431, requires the bill to be filed in the district in which defendants, or a material defendant, resides, and the attorney, though a proper, is not a necessary, party defendant.

2. The judgment debtor, against whom the garnishment proceedings were instituted in the first suit, is a material defendant in the second, though the relief sought may not add one cent to his liability, and though no decree is prayed against him.

Appeal from chancery court, Talladega county; S. K. McSPADDEN, Chancellor.

Bill by J. Selig to enjoin a suit in the Jefferson circuit court brought by the defendants Hochstadter Bros. against defendant Emil Selig, as surviving partner of Cohen & Selig, in which suit defendant Merit Street was garnished as a judgment debtor of Emil Selig, as such surviving partner. The defendants Knox & Bowle had a lien for professional services on the judgment of Selig against Street. The defendants other than Knox & Bowle appeal from a decree for complainant.

J. D. Brandon and W. D. Bulger, for appellants. Knox & Bowle, for appellee.

McCLELLAN, J. The case presented by the bill is this: Merit Street was indebted to Cohen & Selig in the sum of about \$800.

That firm failed, and made a general assignment, among the assets assigned being their claim against Street. This claim was transferred by the assignee to J. Selig for value. J. Selig put the account in the hands of Bowden & Knox, attorneys for collection. By a mistake of the clerk of J. Selig, the statement of account sent to the attorneys was on a bill-head of Cohen & Selig, and, supposing from this fact that the claim belonged to that firm, the attorneys instituted suit on it in their names. This mistake was not discovered until an action in the name of J. Selig was barred by the statute of limitations. The pending action was prosecuted to judgment with the consent of Emil Selig, and in his name, as surviving partner of Cohen & Selig, and with full knowledge on the part of Street that the claim belonged to J. Selig, and was being vicariously prosecuted in his interest. Some time after judgment Hochstadter Bros., a firm resident in the city and state of New York, instituted suit against Emil Selig, as surviving partner of Cohen & Selig, in the circuit court of Jefferson county, and summoned Street to answer whether he was indebted to the firm of Cohen & Selig. Street answered the indebtedness evidenced by the judgment referred to, but made no suggestion of the beneficial ownership of that judgment in J. Selig, a fact which the averments of the bill clearly show he had knowledge of. Knox & Bowle, successors to Bowden & Knox, had a lien on the judgment for professional services rendered in securing it. The purpose of the bill is to enjoin the suit in the Jefferson circuit court, in which it is sought to subject the proceeds of the judgment to the payment of the Hochstadter's claim against Cohen & Selig, to declare the lien of Knox & Bowle for services, and have an account taken as to the amount of their fees, and to have a resulting trust in the balance of the judgment against Street declared in favor of, and "the right and title" to said judgment vested in, J. Selig. J. Selig is sole complainant, and Hochstadter Bros., Emil Selig, surviving partner, etc. John B. Knox and Sydney J. Bowle, composing the firm of Knox & Bowle, and Merit Street, are made parties defendant. All the defendants, except Knox, Bowle, and Street, are non-residents of the state. Of the latter, Knox resides in Calhoun county, Bowle in Talladega, and Street in Clay county, in this state. The bill is filed in the chancery court of Talladega county, where the defendant Bowle alone resides.

The first assignment of demurrer raises the inquiry whether the bill was filed in the proper district. So much of the statute as bears upon this inquiry provides that "the bill must be filed in the district in which the defendants, or a material defendant, resides." Code, § 3421. In construing this statute, it has been held that, in case no material defendant is a resident of the state, the suit may proceed in the district of the residence of any proper defendant. *Waddell v. Lanier*, 54 Ala. 440. Sydney J. Bowle, in the district of whose residence the cause is pending, is a proper, but not a material or necessary, party defendant. He has a lien on the

proceeds of the judgment in question, to the amount of his fee for services rendered in securing the judgment, which would not, in any degree, be affected by the determination of the real matter in controversy. Whether that judgment is decreed to be the property of Emil Selig, surviving partner, etc., or J. Selig, and of consequence, whether a resulting trust in it be declared in favor of J. Selig, or the debt for which it was rendered be subjected to the claim of Hochstadter Bros. the lien of Bowle would still attach to it, and his right in the premises would remain unimpaired. "Necessary parties," as defined by Judge Story, are those concerning whom "no decree can be made respecting the subject-matter of litigation until they are before the court, either as plaintiffs or as defendants, or where the defendants already before the court have such an interest in having them made parties as to authorize those defendants to object to proceeding without such parties." Story, Eq. Pl. § 136. It is manifest that the substantive relief sought by J. Selig, the complainant, could be granted without Bowle's being heard; and it is equally clear that no other defendant in the cause has any right to object to proceeding in his absence. He was therefore not a material party, within the statute referred to, and the bill was improperly filed in the district of his residence, if the other defendant resident in the state was a necessary party.

Our opinion is that Street was a material defendant. The relief prayed, while it may not, if granted, add one cent to his ultimate liability, yet fixes that liability, and gives definite direction to it, so to speak. As the case now stands, the judgment against him is, in effect, claimed by two parties, and nominally by a third. It stands in the name of Emil Selig, surviving partner, etc. Hochstadter Bros. claimed the proceeds of it as creditors of Cohen & Selig; and J. Selig claimed to be the equitable and beneficial owner of it as a purchaser of the debt for which it was rendered from Cohen & Selig. The conflict between these claimants, moreover, is accentuated, and Street's peril of enforced double payment made more critical, by the garnishment proceedings now pending against him ancillary to the suit of Hochstadter Bros. against Emil Selig, which is sought to be enjoined. It is very clear, we think, that Street is a necessary, as distinguished from a merely proper, party to this bill, which seeks to determine these several conflicting claims to the sum which he originally owed Cohen & Selig, and, in effect, to have a decree passed relieving him from liability to Emil Selig, and, from the alleged liability now in process of judicial ascertainment in the suit at law, to Hochstadter Bros. as creditors to Cohen & Selig, and adjudging, the debt which he confessedly owed to one or another of the parties to be due to the complainant. It is quite true that no decree is prayed against him. The court is not asked to adjudge, in terms, that he pay the judgment to the complainant. But that is the substance and effect of the relief sought, and we are unable to see that it could be granted with respect to the subject-matter

involved so as to protect, as well as to finally conclude, him, without being afforded an opportunity to be heard. On the facts and from these views, it follows that the bill should have been exhibited in the district of Street's residence, he being a material defendant, and the only material defendant resident in the state. *Harwell v. Lehman*, 72 Ala. 844; *Waddell v. Lanier*, 54 Ala. 440. As the bill will have to be dismissed in the court below on the point considered, it is unnecessary to discuss the remaining assignments of demurrer.

For the error pointed out, the decree of the chancery court is reversed, and the cause remanded.

ALEXANDER et al. v. HILL et al.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

MORTGAGES — SALES UNDER POWER — DISAFFIRMANCE — LACHES — INFANTS.

1. Where a mortgagee has purchased at his own sale under a power, which did not authorize him to become the purchaser, the infant heirs of the mortgagor, who was dead at the time of the sale, will be allowed to disaffirm it any time within two years after attaining their majority, provided 20 years have not elapsed.

2. The limitation of two years, within which sales under a power in a mortgage must be disaffirmed for irregularities, is not a statutory, but a judicial, limitation, and rests on the presumption of ratification, after the lapse of two years, "in ordinary cases."

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Bill to vacate mortgage and be let in to redeem, filed by George A. Alexander and others, as minor heirs of Zeno Alexander, the mortgagor, against Fannie M. Hill, the mortgagee, and those claiming under her. The mortgage was made May 10, 1875, to secure the payment of notes, and authorized the mortgagee, on default in the payment of the notes, as they respectively fell due, to sell the land. The mortgagor died July 18, 1876. Under the power contained, in the mortgage, the mortgagee, on February 20, 1876, sold one of the tracts conveyed by it, and on February 8, 1877, she sold the other tract, becoming the purchaser in both instances, and afterwards obtained possession of the land; she, and those claiming under her, remaining in possession, claiming under those sales. The bill was filed February 16, 1888, and defendants demurred on the ground of laches. Plaintiffs appeal from a decree sustaining the demurrers.

W. D. Bulger, for appellants. *Hewitt, Walker & Porter*, for appellees.

McClellan, J. The purchase by a mortgagee at his own sale, under a power which does not authorize him to become the purchaser, "arms the mortgagor with the option, if expressed in a reasonable time, of affirming or disaffirming the sale," and, if he elects to disaffirm, he is entitled to redeem the land so sold from the mortgagee. *Garland v. Watson*, 74 Ala. 324; *Harris v. Miller*, 71 Ala. 26; *Ezzell v. Watson*, 83 Ala. 120, 3 South. Rep. 309; *Knox v. Armistead*, 87 Ala. 511, 6 South. Rep. 311. What is a reasonable

time within which, to thus disaffirm such sale, must ordinarily be availed of, has, by analogy to the statute giving that period to redeem after a valid foreclosure, been held to be two years from the date of sale. *Comer v. Sheehan*, 74 Ala. 452; *Ezzell v. Watson*, 83 Ala. 120, 3 South. Rep. 309. Whether the fact that the party upon whom the right to disaffirm has devolved is an infant should extend the time within which the sale may be avoided,—that is, would make such an extraordinary case as would not fall within the rule limiting the exercise of the option to two years,—has never been decided by this court. The second head-note in the case of *Mewburn's Heirs v. Bass*, 82 Ala. 622, stating that the exception in favor of infants, contained in the statute of limitations, did not apply to such a case, is not supported by the opinion; and, moreover, the question was not involved in that case.¹ Neither the statute of limitations, nor any exceptions provided for therein, have any bearing on the question. The limitation of two years, within which sales of the class under consideration must ordinarily be disaffirmed, is not a statutory, but a judicial, limitation. It is not the result of legislative mandate, but of judicial opinion, that such period is usually a reasonable time for the exercise of the option of affirmance or disaffirmance, with which a purchase by the mortgagee at his own sale arms the mortgagor. The basis of the doctrine is laches, and not staleness of demand. The sale cuts off the equity of redemption as long as it is permitted to stand, but leaves in the mortgagor, and those claiming under him, the right to disaffirm it, and the consequent right to redeem upon such disaffirmance. But the law requires diligence of the mortgagor in the assertion of this right, and, in the absence of special circumstances, holds him to have waived the right, and to have affirmed the sale, unless he elects to the contrary within two years. The whole theory of the limitation, therefore, rests on the presumption of ratification after the lapse of two years, "in ordinary cases." In extraordinary cases,—cases involving peculiar circumstances, which rebut the presumption,—it will not be indulged. Instances may be readily imagined in which, for a want of knowledge on the part of the mortgagor that the mortgagee was the purchaser at his own sale, he could not be held to a ratification within two years; for it would be anomalous to a degree to hold him estopped by his non-action with respect to a state of facts of the existence of which he was, without fault, wholly ignorant. And so, too, in cases in which the peculiar exigency is the legal capacity of the mortgagor, or those standing in his right, not only to know the facts, but also to act upon them if known, it is manifest the presumption of ratification cannot be indulged. This class of cases embraces all persons not *sui juris*; as infants, idiots, lunatics. Should an infant or an idiot or a lunatic be held to know that a mort-

¹ But see same case in 2 South. Rep. 520, where the syllabus is properly limited to the facts involved.

gatee of his lands has purchased at a sale under a power which did not authorize him to purchase, and be chargeable with laches if he fails for two years to repudiate the transaction? Can a person not *sui juris*, wholly incapable of making or ratifying any contract, with certain exceptions based on principles having no application to contracts of this character, be held to a binding and legal affirmation of a voidable act of his mortgagee, and this solely on the ground that he, although legally incapable of exercising the option to affirm has failed for two years to disaffirm the sale? We do not think so. We can conceive no state of facts which would authorize the presumption from mere lapse of time short of 20 years that a person not *sui juris* had ratified and affirmed a sale made under the circumstances shown in the present bill. Before such presumption can be admitted—before the “ordinary case,” referred to in our adjudications, is made out,—it must appear that the person who has the option to affirm or disaffirm must for two years have been cognizant of the facts from which the option springs, and for a like period legally competent to make a binding election. This doctrine would allow infants two years after they attained full age to disaffirm such a sale, provided, always, that the period was not extended beyond 20 years from the date of sale. This rule may work a hardship on mortgagees, but, after all, the hardship results from their own unauthorized acts, and not from the law. Moreover, we entertain no doubt of the right of the mortgagee, who has thus purchased at his own sale, to come into a court of equity at any time by bill filed against the persons having the option of affirmation or disaffirmance, whether *sui juris* or not, and compelling an election and foreclosure of his mortgage, if the sale is disaffirmed. In such cases, the chancery court, by proper decree, is competent to make an election for infants which will bind them and give repose to title, just as the decree of that court in the present case, should complainants be held, on final hearing, entitled to relief, bind them to an election which they could not otherwise have made. *Goodman v. Winter*, 64 Ala. 410; *Robinson v. Robinson*, 19 Beav. 494. In re *Chesham*, 31 Ch. Div. 466, 472; *Storring v. Borren*, 55 Barb. 595; 1 Pom. Eq. Jur. § 509; 8 Pom. Eq. Jur. § 1176. We need hardly say that if at the time of such sale the person entitled to make the election is free from disability, the time in which the option is to be expressed will not be extended in favor of infants, who subsequently succeed to his right. This bill is filed by infant heirs of a mortgagor. Its purpose is to have a sale of the premises under the mortgage vacated, and redemption allowed, on the ground that the mortgagee purchased at the sale. Demurrers were filed which set up laches, and the long delay of complainants in making their election to disaffirm. The city court sustained these demurrers, and its decree in that behalf is alone assigned as error. It follows from the views we have expressed that the decree in question must be reversed, and the cause remanded.

Howze et al. v. Dew.

(Supreme Court of Alabama. Jan. 28, 1890.)

MORTGAGE ON SHARE OF CO-TENANT—PARTITION—TAX-SALES.

1. Where one of seven co-heirs to several parcels of land mortgages all of his interest as heir in one of the parcels, and afterwards, in a suit for partition, one-half of the parcel is allotted to the mortgagor as his share of the whole estate, the lien of the mortgage covers only the one-seventh originally conveyed, and does not extend to the whole allotment.

2. A general warranty in the mortgage vests in the mortgagee the title to the one-seventh which the mortgagor afterwards acquired by the decree of partition, but cannot extend the title to the whole allotment.

3. When the jury, by limiting the recovery to five-sevenths, necessarily finds for appellant on the issue whether the debt secured by the mortgage had been paid, erroneous rulings on that issue are harmless.

4. Where the verdict is for “five-sevenths of the land described in this complaint, to-wit, certain land in “range 8 east,” when in fact the land is described in the complaint as being in “range 7 east,” it is not error to reject the description under the *videlicet* in the verdict as surplusage, and render judgment for the land as described in the complaint.

5. Where a statute requires notice to be given to the owner of land before it can be sold for taxes, notice must be given to all the co-tenants, and a sale under a notice given to only one co-tenant is void.

Appeal from circuit court, Perry county; JOHN MOORE, Judge.

Watts & Son, for appellants. *Taylor & Johnston*, for appellee.

MCCLELLAN, J. William S. Phillips died in 1872, owning sundry parcels of land in Dallas county, and one tract of 320 acres situated in Perry county. He left surviving him seven children, to whom all of his lands in both counties descended as tenants in common. William M. Phillips, one of the co-tenants, while residing on the Perry county tract of land, on January 20, 1874, executed a mortgage to appellant Howze, the granting clause of which, so far as it concerns the property involved here, is in the following language: “We do hereby grant, bargain, sell, and convey to the said John Howze the following personal property, to-wit: * * * Also the following real estate, lying in the county of Perry and state aforesaid, to-wit: All of the interest of the said Wm. M. Phillips, as heir and distributee of Wm. S. Phillips, deceased.” This conveyance contains only the following express covenant: “And the said Wm. M. Phillips hereby declares that the above-conveyed property is his own, and that there is no lien or incumbrance upon the same, except” a certain mortgage conveying a part of the personalty. About September, 1876, a bill was filed in the chancery court of Dallas by some of the tenants in common against William M. Phillips and the other co-tenants for partition among them of all the lands which they held as heirs of William S. Phillips in both counties, and also for partition of a parcel of land lying in Perry county, and containing 320 acres, which had descended to them from their mother, Louisa J. Phillips. The final decree in that cause, rendered July 2, 1877, allotted to William M. Phillips, as his one-seventh share of all

the lands in both counties and descending from both ancestors, 160 acres of the 320 acres in Perry county, which had belonged to William S. Phillips. William M. Phillips devised this land to his wife, Amanda C., (now Amanda C. Dew,) and departed this life in October, 1881. His will was duly probated. The appellant Howze, default having been made in the payment of the debt secured by the mortgage, sold the land thus allotted to William M. Phillips, under the power contained in the instrument, in March, 1882, and himself became the purchaser. He entered into possession on the day of sale, and has since held it. This suit is by Mrs. Dew, formerly Amanda C. Phillips, claiming under the will of her first husband, for the recovery of possession of the land, and damages for its detention.

One of the prominent questions presented by the exception reserved on the trial involves the construction of the mortgage in respect to the quantity of land conveyed by it. The evidence is without conflict that, at the time of executing the instrument, the mortgagor, as an heir of William S. Phillips, deceased, owned an undivided one-seventh interest in each of the several parcels of land lying in Dallas county, and in one tract of 320 acres situated in Perry county, and that he was seised of no other or greater estate or interest in any one of said parcels. He thus held an undivided one-seventh interest, in common with his brothers and sisters, in a house and lot in the city of Selma; a like interest in a plantation lying on the Cahaba river, in Dallas county; and the same interest and estate, and no more, in the tract of 320 acres lying in Perry county. There is no controversy but that it was competent for William M. Phillips to have conveyed his entire interest in these lands, or that, had he done so, his grantee would have taken upon partition whatever was allotted to him in severalty, whether lying in the one or the other county. It is equally clear in principle and on authority that a conveyance by Phillips of his undivided interest in any one of the separate parcels would have constituted his grantee a tenant in common with the holders of the other undivided interests, and entitled him on partition to have allotted to him in severalty one-seventh of that parcel. *Freem. Co-Tenancy*, § 208; *Butler v. Roys*, 25 Mich. 53; *Primm v. Walker*, 38 Mo. 98; *Markoe v. Wakeman*, 107 Ill. 262. It may be, too, that had Phillips undertaken to convey the tract in Perry county as an entirety, his deed would have been allowed to operate primarily so as to pass a one-seventh interest to his grantee, and on partition, if his allotment in severalty was carved out of this tract, the title he acquired thereto would inure to the benefit of his grantee, and vest the fee in the latter. This result is denied by some authorities which hold such a deed absolutely void, though the weight of adjudication and the better reason support the proposition that such a conveyance should be accorded full force and effect as against any interest the grantor has or subsequently acquires in the land. *Freem. Co-Tenancy*, § 199 et seq.; *White v. Sayre*, 2 Ohio, 112;

Robinet v. Preston, 2 Rob. (Va.) 278; *Gates v. Salmon*, 35 Cal. 588; *Stark v. Barrett*, 15 Cal. 370; *Barnhart v. Campbell*, 50 Mo. 599.

It is manifest that the mortgage executed by appellee's devisor, and under which appellants claim title to the whole allotment made to him out of his father's lands, is neither a conveyance of the mortgagor's interest in all the lands of his ancestor, for it is in terms confined to "real estate lying in Perry county," nor of the entirety in the lands so situated, for it covers only "all the interest of the said Wm. M. Phillips, as heir and distributee of Wm. S. Phillips, deceased," therein. Giving to these limitations the effect which their terms naturally and reasonably enforce, there remains but one possible field of operation for the granting clause of the conveyance. It passes, not one-seventh of all the lands, the effect of which, upon division, would be to vest in the mortgagee title in severalty to whatever part falls to William M. Phillips; and not the entirety of the Perry county lands, which would operate to vest any part of that tract, which is allotted to the mortgagor, in the mortgagee; but the interest of one of seven heirs in the tract of 320 acres lying in Perry county; and that interest alone became vested in the mortgagee as a tenant in common with the other co-tenants. William M. Phillips still owned and held, wholly unaffected by the mortgage, an undivided one-seventh interest in each of the parcels lying in Dallas county. *Williams College v. Mallett*, 12 Me. 398; *Randell v. Mallett*, 14 Me. 51. The grant was not enlarged or extended by the subsequent partition and allotment to William M. Phillips of more than one-seventh of the Perry county land, in consideration, so to speak, for his surrender of his interest in the Dallas county parcels. If he had exchanged other property lying in Dallas county or elsewhere—property which did not come to him through his father—for the excess over the one-seventh in the Perry lands, it would scarcely be insisted that the land thus coming to him by exchange or purchase would pass under the mortgage; and his interest in the Dallas lands was palpably as foreign to his conveyance to Howze, as wholly excluded from its terms, as such other property would have been. The excess over his aliquot share allotted to him in the Perry lands was therefore not only not embraced in his grant to Howze, but it was not vested in him by way of substitution for any land, or interest in land, which was so embraced.

Nor do we conceive that any different result will flow from an invocation of the principles of warranty. It may be conceded, indeed, we entertain no doubt, that the mortgage contains or imports a covenant of warranty. Our statute attaches to its language, "grant, bargain, sell, and convey," *prima facie* the force and effect of a general warranty; and there is nothing in the instrument inconsistent with or repugnant to the meaning which the statute thus gives them. Code, § 1839. But we do not understand that the office of a warranty can ever be to extend a grant to lands not embraced in its terms. Its office,

in cases like this, is to perfect the grantee's title to the land embraced in the conveyance, by drawing to him any title which the grantor subsequently acquires to that particular land, and not to vest in the grantee title to lands not covered by the conveyance. Its precise effect here was to vest in Howze the title which Phillips acquired by the decree of partition in one-seventh of the 520-acre tract lying in Perry county, which before partition had been held by Phillips as co-tenant with his brothers and sisters, and not to extend this title to the whole allotment made to the mortgagor. *Nolen v. Gwyn*, 16 Ala. 725; *Carter v. Chaudron*, 21 Ala. 72; *Loomis v. Riley*, 24 Ill. 307; *Williams College v. Mallett*, 12 Me. 398; *Randell v. Mallett*, 14 Me. 51. The court below construed the mortgage in consonance with these principles, and its rulings in this regard are free from error.

If the sale and purchase by the mortgagee be treated as a valid foreclosure of the mortgage, vesting in the purchaser the land conveyed, as perhaps it should be when reference is had to the doctrine of ratification by the devisee of the mortgagor, its effect was to make appellant Howze and appellee tenants in common of the tract of land sold. It is one of the well-settled general principles pertaining to this relation that notice to one co-tenant of facts affecting the common property is no notice to the other or others, and the latter's estate will in no way be prejudiced, nor the assertion of their rights precluded, thereby. *Freem. Co-Tenancy*, § 171 et seq. This principle is applicable to notices required by statute to be given to the owners of land of proceedings to subject it to sale for the payment of taxes, and a sale made without such notice to all of the co-tenants is void. *Thurston v. Miller*, 10 R. I. 358. Under the statute in force at the time of the tax-sale relied on in this case notice of the proceeding in the probate court to condemn land to sale for the payment of taxes was required to be served on the owner. Without such notice, the court acquired no jurisdiction, and its judgment of condemnation and consequent sale was void. The proof in this case was clear that this notice was not served on Mrs. Dew, one of the co-tenants in this land; and no title, at least as against her, passed by the sale to the appellant. *Riddle v. Messer*, 84 Ala. 236, 4 South. Rep. 185. Whether, even had the proceedings in the probate court been in all respects regular and its decree valid, one tenant in common, under the facts of this case, should be allowed to set up against his co-tenant the title he acquired through the tax-sale, otherwise than as a basis for contribution to the amount thus paid for the common benefit, is open to grave doubt, which the exigencies of this appeal do not require us to decide. *Van Horn v. Fonda*, 5 Johns. Ch. 388; *Brown v. Hoglee* 30 Ill. 119; *Picot v. Page*, 26 Mo. 398; *Wright v. Sperry*, 21 Wis. 331; *Matthews v. Bliss*, 22 Pick. 48. On the other hand, if the fact that the mortgagee became the purchaser at his own sale under the mortgage be considered to have defeated foreclosure,—as doubtless it would, in the absence of ratification,—it

was still a mortgage as to him at the time of the tax-sale, and he, being in possession under it, could not acquire a tax-title which would be good against the mortgagor or his devisee. *Johnston v. Smith*, 70 Ala. 108; *Bailey v. Campbell*, 82 Ala. 342, 2 South. Rep. 646; *Blake v. Howe*, 15 Amer. Dec. 684. So that it is, we think, clear from any point of view, that the tax-sale passed no title to the appellant Howze which can be relied on to defeat appellee's recovery.

The land in controversy is described in the complaint, its possession admitted by the plea of defendants, and it is identified in evidence as lying in "range 7 east." The verdict was "that the plaintiff is entitled to five-sevenths of the land sued for in this complaint, to-wit: N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 7; N. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 8,—all in township 18, [this far following the description of the complaint,] range 8 east," etc. It is thus seen that the jury properly returned a verdict for five-sevenths of the land described in the complaint. This was sufficient to support judgment. They then went further, and affirmed that the land described in the complaint was situate in range 8. This matter of more particular description, even if it in reality be such, was not essential to the verdict, which was complete without it. The assertion is untrue,—the complaint described no land lying in that range; and being unnecessary to a sufficient finding, and separated from that part of the finding which constituted a perfect verdict by a *videlicet*, the court committed no error in treating it as surplusage, and rendering judgment for land sued for lying in range 7.

The only other exceptions insisted on by appellants go to the correctness of the circuit court's rulings on the issue whether the debt secured by the mortgage had been paid at the time of the sale under it. The jury, in confining plaintiff's recovery to five-sevenths of the land sued for, must of necessity have found this issue in favor of the defendants; as otherwise it would have been their duty, under the charges which the court gave, to have returned a verdict for the entire tract. It is manifest, therefore, that if the court committed error in its rulings on this inquiry, they were lacking in that element of injury to the appellants without which error is never available to reverse. *Thomason v. Gray*, 82 Ala. 291, 3 South. Rep. 38; *City of Eufaula v. Simmons*, 86 Ala. 515, 6 South. Rep. 47; *Campbell v. Lunsford*, 88 Ala. 512, 3 South. Rep. 522.

The judgment of the circuit court is affirmed.

KIMBRELL *et al.* v. RODGERS.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

APPEAL—TIME OF TAKING—FINAL ORDERS—ASSIGNMENTS OF ERROR—MORTGAGE—FORECLOSURE—PARTIES—HUSBAND AND WIFE.

1. An appeal is taken within a year from the rendition of the decree when a sufficient undertaking has been filed within that time, there being no other condition precedent; as by Code Ala. § 3831, the citation does not issue until after the appeal is taken, and need not be served more than 10 days before the return-day of the appeal.

2. In an action to foreclose a mortgage, that decree which adjudges that a certain amount is due under the mortgage, and decrees a sale of the property, is final; and all prior decrees are interlocutory, and come up for review on appeal from the final decree.

3. Under Act Ala. Feb. 28, 1887, the husband is not a necessary party defendant to a bill filed to foreclose a mortgage upon lands in which the wife has an interest as her separate estate. *Marshall v. Marshall*, 5 South. Rep. 475, followed.

4. Where a mortgage is executed by a wife in the manner prescribed by statute for the relinquishment of her inchoate right of dower, she is a proper party defendant to a suit to foreclose the mortgage, and cut off that right by a sale of the fee.

5. The mortgage conveyed "the following-described tract or parcel of land, to-wit, the property known as 'K.'s Grist and Saw Mill and Gin,' together with all the privileges and appurtenances belonging thereto. * * * The evidence showed that two acres of land on which the mill and gin were situated had always been used in connection therewith, and were necessary to the enjoyment. Held, that they were embraced in the description, 'the tract or parcel of land known as 'K.'s Grist and Saw Mill and Gin Property,' or, if not, was appurtenant thereto.

6. Assignments of error, made jointly by all the appellants, as to matters which are injurious to some of them only, will be disregarded.

Appeal from chancery court, Marengo county; THOMAS W. COLEMAN, Judge.

Bill by William D. Rodgers against Roland Kimbrell, Sallie Kimbrell, his wife, Edward B. Rentz, Richard E. Rentz, and Alice E. McGee, formerly Alice E. Rentz, praying the foreclosure of a mortgage which had been given to him by the defendants Roland and Sallie Kimbrell to secure certain notes which were signed by both of them. There was a demurrer by the respondents on the ground that there was a misjoinder of parties, in that Sallie Kimbrell was not a proper and necessary party defendant to the bill, and on the ground of non-joinder of parties, in that Alice E. McGee, formerly Alice E. Rentz, is a married woman, and her husband is a necessary party defendant. Upon the hearing of these demurrers the chancellor overruled each one of them.

Eugene McCaa, for appellants. *Taylor & Johnston*, for appellee.

MCCLELLAN, J. The decree appealed from was rendered on the 28th day of March, 1888. The respondents below prayed the appeal, and executed security for the costs thereof, on the 28th day of March, 1889. The undertaking to secure costs was approved by, and filed in the office of, the register on that day. The citation of appeal was not issued, however, until the following day, March 29, 1889, and not served until April 2, 1889.

Upon this state of facts it is insisted that the appeal was not taken within a year from the rendition of the decree, is consequently barred by the statute, and that appellee's motion to strike out the assignment of errors should be granted. We cannot concur in this view. An appeal is "taken," within the meaning of our statute, when the party desiring to prosecute it has complied with the conditions upon which the law gives the right. The only condition precedent in this case was the filing with the register, within one year from the ren-

dition of the decree, a sufficient undertaking to secure costs. This was done, and the right fully perfected, within the time limited. Whatever else remained to be done in effectuating a review of the case by this court depended upon the discharge of duty by a public officer, and not upon any act of the appellants. The appeal having been taken on March 28th, it became the register's duty to cite appellee to its defense in this court, and make out and file here a transcript in the cause. The citation is no part of, nor does it constitute any step in, taking the appeal. Section 3631 of the Code demonstrates that it issues only after the appeal has been taken, and accomplishes its office if it carries notice of the appeal to the appellee 10 days or more before the day on which the appeal is returnable. The duty of the officer is fully performed if the citation is issued in time to accomplish this purpose, as was done in this case. *Moore v. Spier*, 80 Ala. 129.

The decree from which the appeal is prosecuted was the final decree in the cause. That of January 18, 1888, was interlocutory. It adjudged that complainant was entitled to relief; that he had a lien on the land for the payment of any sum still due on the note and mortgage; and that for the satisfaction of such balance he was entitled to have the land sold. Whether there was anything due on the mortgage was a disputed question in the case. The indebtedness claimed was denied by the answer of R. Kimbrell. The issue thus presented involved one of the equities upon which complainant's right to relief depended. This issue of indebtedness *vel non* was not determined by the decree of January 18th, but was by that decree referred to the register; and the essence of the relief prayed—the sale of the land for the satisfaction of the mortgage—could not be, and was not, granted until after the coming in of the register's report ascertaining indebtedness under the mortgage, the confirmation thereof, and the decree of sale of March 28, 1888. *Garner v. Prewitt*, 32 Ala. 13. The January decree was therefore interlocutory. It did not settle all the equities between the parties, nor fully adjudge the relief for which complainant prayed. That of March was final; and the appeal brings it, and all previously-rendered interlocutory decrees, up for review. *Walker v. Crawford*, 70 Ala. 567.

There was no error in the decree overruling demurrers for non-joinder and misjoinder of parties. Under the act of February 28, 1887, which was of force when the bill in this case was filed, the husband is not a necessary party defendant to a bill filed against a married woman, and seeking to subject or charge her separate estate. *Marshall v. Marshall*, 86 Ala. 383, 5 South. Rep. 475.

The theory of the bill is that the lands embraced in the mortgage belonged to Roland Kimbrell. The conveyance having been executed by his wife in the manner prescribed by the statute for the relinquishment of her inchoate right of dower, she was a proper party defendant to the suit to foreclose the mortgage, and cut

off that right by a sale of the fee. *Sims v. Bank*, 73 Ala. 248; *McGehee v. Lehman*, 65 Ala. 320.

The mortgage in terms conveys "the following-described tract or parcel of land, to-wit, the property known as 'Kimbrell's Grist and Saw Mill and Gin,' together with all the privileges and appurtenances belonging thereto, lying in Marengo county," etc. It was in evidence that two acres of land, upon which the mill and gin were situated, had always been used in connection therewith, and were necessary to the enjoyment thereof. This land, we think, is embraced in the descriptive words of the conveyance, as "the tractor parcel of land known as the 'Kimbrell Grist and Saw Mill and Gin Property.'" But were this otherwise, the land manifestly is appurtenant to the mill and gin, and essential to their reasonable use; and while, ordinarily, land cannot be said to pass as appurtenant to land if the land expressly granted does not admit of reasonable enjoyment without certain adjacent land which has been constantly used with the land granted, it will also pass. *Woodman v. Smith*, 53 Me. 81; *Riddle v. Littlefield*, 53 N. H. 508; *Voorhees v. Burchard*, 55 N. Y. 102; *Eaty v. Currier*, 98 Mass. 502; *Allen v. Scott*, 21 Pick. 26. The contention of appellants that the mortgage is void proceeds upon the assumption that the land in controversy belonged to the statutory separate estate of Mrs. Kimbrell. The proof fails to support this assumption. On the contrary, there is no dispute but that the property belonged to her first husband, and passed to his heirs, who are defendants to this bill. Her claim to have acquired title by adverse possession cannot be allowed. The evidence is free from conflict that she at no time claimed to hold otherwise than as the widow of Benjamin Rentz, and in recognition of the title of his heirs. Her only right, therefore, was to have dower assigned out of the land, and to occupy it until that could be done. This right lies in action only, and constitutes no estate in the premises. *Reeves v. Brooks*, 80 Ala. 26.

Whether her right to dower was barred by the lapse of 20 years from the date at which it might have been asserted, (*Barksdale v. Garrett*, 64 Ala. 280,) or whether, if still subsisting, it was, or could have been, made available in resisting the present bill, are questions which are not presented by this record, as will be seen further on, in such way as that we can consider them.

The land in controversy was sold and conveyed in April, 1880, by the heirs of Benjamin Rentz, deceased, to the respondent Roland Kimbrell. Two of the three grantors in that conveyance were of full age at the date of its execution. The third, Alice Rentz, now Alice McGee, was a minor. That part of the purchase money which belonged to the adults was paid. This deed, it is very clear, vested all the right, title, and interest of the adult heirs in the respondent Roland Kimbrell. The mortgage executed by the latter and his wife, it is equally clear, passed all his estate in the land, conditionally, into the complainant. The decree foreclosing the mortgage, and ordering sale of the land, for its satisfaction, is certainly free from

any taint of error which could prejudice or impair any right or interest of the adult heirs or their grantee, the defendant Kimbrell. The plaintiff was beyond question entitled to have their interests foreclosed, and their estates in the property subjected to the payment of his debt. It may be conceded that the undivided one-third interest of Alice McGee did not pass by the deed of 1880 to Roland Kimbrell, because of her disability of infancy, which is pleaded in this case, and that of consequence this interest did not pass by the mortgage to the complainant. It may be also conceded, without affecting the result of this appeal, that there was some outstanding property right in Mrs. Kimbrell, resulting from her survivorship of her first husband, which the mortgage was not efficient to convey. And, as a deduction from these concessions, the decree may be admitted to be erroneous, in that it forecloses, and orders to be sold, the property rights of Alice McGee and Mrs. Kimbrell. Yet, manifestly, the error in this regard affects only these two respondents. They alone have a right to complain of it, and to ask this court to reverse that action of the chancery court by which their rights are prejudiced. The error, if any, is without injury to the other appellants; and no reversal on account of it can be had at their instance. *Norwood v. Railroad Co.*, 72 Ala. 563; *Gilman v. Railroad Co.*, Id. 566; *Walker v. Jones*, 23 Ala. 449.

This appeal is taken and prosecuted by all the defendants below. The assignments of error in this court are made by them jointly. The decree appealed from involves no error injurious to the appellants E. B. Rentz, R. E. Rentz, or Roland Kimbrell. If it involves error working injury to the rights of the other appellants,—an inquiry which is not necessary to enter upon,—they should have severed in the assignment of it. The former adjudications and settled practice of this court impel us to disregard assignments of error, made jointly by all the appellants, as to matters which are available, if at all, to some of them only. *McGehee v. Lehman*, 65 Ala. 320.

Those assignments which are directed against the decrees of July 2, 1888, ordering petition for writ of assistance, and October 16, 1888, confirming report of register, must be stricken out in response to motion of appellee. The record shows that no appeal was taken from either of these decrees. *Atkinson v. Railway Co.*, 34 N. W. Rep. 63; *Horn v. Water Co.*, 18 Cal. 142; *Bornheimer v. Baldwin*, 38 Cal. 671.

Affirmed.

BASS et al. v. BASS et al.

(Supreme Court of Alabama. Jan. 29, 1890.)

RESULTING TRUSTS—LACHES.

1. B. gave money to W. with which to enter certain land for him, and W. neglected to enter the land, but retained the money. B. died, leaving all his property to J. for life, remainder over. J. qualified as administratrix, obtained the money from W., entered the land in her own name, and sold it. A suit was brought 88 years after the entry to establish a resulting trust in the land in favor of the remainder-men. Held, that the legal status of the transaction was a conversion of the

money, and the suit was barred by the lapse of time.

2. Twenty years' acquiescence or non-action is a bar to the right to trace money into property in which it has been invested, and thereby to fasten a trust in, or a lien on, it.

Appeal from chancery court, Jefferson county; THOMAS COBBS, Judge.

Webb & Tillman, for appellants. *Tall-ferro, Smithson & Vaughan* and *Hewitt, Walker & Porter*, for appellees.

STONE, C. J. This case was decided on demurrer, which was an admission of the truth of the averments of facts as found in the bill. We will treat them as facts.

Andrew Bass, a resident of Jefferson county, died August 19, 1854. He left a last will, which was duly probated and established; the time of the probate not positively stated. The language of the bill bearing on this subject is as follows: "That, shortly after the death of said Andrew Bass, the said Jane Bass, widow, etc., and your orator W. J. Bass, caused the will of said Andrew Bass to be probated as hereinbefore stated, and letters testamentary, or of administration *cum testamento annexo*, to be issued to the said Jane Bass as administratrix, and the said W. J. Bass as administrator, of the estate of the said Andrew Bass, deceased, and duly qualified as such administratrix and administrator, as aforesaid, and took upon themselves the joint administration of the estate."

Testator left his widow, Jane Bass, and nine children, surviving him, one of whom, George Bass, died without issue, never having married. The widow, Jane Bass, also died, April 14, 1887, near 33 years after the death of Andrew Bass. The following are extracts from Andrew Bass' will: "I give all my property belonging to me, both real and personal, to Jane Bass, my beloved wife, her life-time. * * * It is my desire that at the death of my wife, Jane, that my property, both real and personal, be sold, and equally divided among my heirs," etc.

The present suit was instituted March 26, 1889, by W. J. Bass and four others, children of Andrew Bass, against the remaining three children, of whom Martha E. Bass is one. Its purpose and prayer are to have a resulting trust declared in certain lands, and in certain moneys, the proceeds of other lands. We will not enter into a discussion of the requisites of a resulting trust. The averments of the bill clearly bring this case within the rule, if it is not barred by lapse of time. 3 Brick. Dig. 785.

The following extracts set forth the *gravamen* of the present bill: "That, a few days before the death of the said Andrew Bass, he * * * placed in the hands of one Willis Burns * * * the sum of fifty-two dollars and fifty cents, in lawful money, with which he directed the said Willis Burns to enter the north-west quarter of the south-west quarter of section five, in township seventeen, of range one west, in Jefferson county, but by reason of some accident or mistake the said Burns failed to enter the said lands at the land-office in Tuscaloosa, Ala., for the said An-

drew Bass, * * * but at the death of said Andrew Bass he, the said Burns, retained the said money in his hands; * * * that, soon after the said Jane Bass had so qualified as the administratrix of her said husband's estate, she, the said Jane Bass, went to Tuscaloosa, and filed in the land-office of the United States then located in the said city of Tuscaloosa her application to enter, and did enter, in her own name, the following described lands, situated in said county of Jefferson, * * * to-wit, the south-east quarter of the north-east quarter of section six, (6,) and the north-west quarter of the south-west quarter of section five, (5,) and the east half of the north-west quarter of section eight, (8,) all in township seventeen, (17,) of range one (1) west, in said county of Jefferson; that in order to make said entry, and for the purpose of paying for the said lands so entered, she, the said Jane Bass, obtained the said money which had been so deposited and left by the said Andrew Bass in the hands of the said Willis Burns; that the said lands above described, under the laws of the United States, then in force, then known, and commonly known, as the 'Bit Law,' were subject to entry at twelve and a half cents per acre, and were entered at that price by the said Jane Bass in her own name, but the same were paid for out of the fifty-two 50-100 dollars which she, the said Jane Bass, had obtained, or at the time of the entry did obtain, from the said Willis Burns, and which your orators and oratrix aver was the identical money which had been left with said Burns by the said Andrew Bass for the purposes aforesaid." The bill then charges that during the life-time of said Jane Bass she sold off fractional parts of said lands, and that about the 12th day of August, 1879, the said Jane Bass made a deed of gift of the residue of said lands to her daughter, Martha E. Bass, less the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 8, and that about — day of March, 1889, the said Martha E. Bass sold the parts of said lands which are in sections 5 and 6 for the sum of \$7,000 cash. There was a demurrer to the bill on the ground of staleness or lapse of time, which the chancellor sustained.

The contention of complainants below, appellants here, is that inasmuch as Jane Bass, the widow, had a life-estate under the will of Andrew Bass in all the estate he left, real and personal, with remainder to the children, she had by force thereof a life-estate in the money invested in the land, which gave her an equitable life-estate in the land itself, and, the legal title being in her, they were not required to assert their claim until by her death their right to present enjoyment accrued. It is certainly the general rule that neither a statutory bar nor prescription runs against a remainder-man until the termination of the estate of the life-tenant. There must be a right to sue before the bar begins to run. 2 Brick. Dig. p. 220, § 35; *Id.* p. 221, § 54; 3 Brick. Dig. p. 618, § 10.

The present case, however, rests on a different principle. When Andrew Bass died, the authority he had given Burns to invest the money deposited with him in the purchase of the 40 acres of land in sec-

tion 5 died with him. After that event, no one was lawfully authorized to carry out his wish. 1 Wait, Act. & Def. 290. Mrs. Jane Bass, being personal representative of testator, was entitled to demand and receive the money from Burns; and when she received it she held it in precisely the same right as she held any other money belonging to the estate. It was money; and in that money, thus held, she was entitled to a life-estate, after the payment of debts and funeral expenses. Till these paramount claims were satisfied, she had no right to the money, save in her representative capacity; and even after the debts and funeral expenses were paid she had no absolute, personal right to the money until its restoration to the remainder-men at her death was secured. We mean the principal of the money, for the interest was hers. *Mason v. Pate*, 34 Ala. 379. Putting the money in land did not *per se* substitute the land for the money, or place its title where the will had placed the right to the money. It was a conversion; and, if nothing more was done, the administratrix rendered herself liable for it, on settlement of her administration, as for a *devastavit*. The remainder-men alone could elect to claim the land in lieu of the money; and until their election was declared the land remained the property of Mrs. Bass, and she was liable for the *devastavit* in misapplying the money. *Parks v. Parks*, 66 Ala. 326; 3 Brick. Dig. p. 785, §§ 50, 51.

If it be contended that, because the remainder-men had no right to the actual possession until the death of Mrs. Bass, therefore they could not assert their election and right to take the land in lieu of the money, the answer must be that they labored under no such disability. They had the clear right to hold her, on her settlement, liable for the money as money converted, or, on a bill properly framed, to make their election to claim the land in lieu of the money, and, either by the chancellor's decree or by reformation of the deed, have their rights in remainder secured to them. Relief to this extent they were entitled to at any time after Mrs. Bass invested the money in land, taking the title in her own name. Such relief is akin to a proceeding to perpetuate testimony. *Bone v. Lanaden*, 85 Ala. 562, 6 South. Rep. 611. Or, on her settlement, they could charge her with the money converted, which would be an election not to claim the land.

Giving a liberal interpretation to the expressions in the bill, "shortly after the death of said Andrew Bass," and "soon after the said Jane had so qualified as the administratrix," a very long period—more than 30 years—elapsed between the entry of said land and the filing of this bill. During all that time the legal status of the transaction was a conversion of the money of the estate by Mrs. Bass, and a purchase of land by and for her. No one save the remainder-men had the right or power to change that status, and they could only do it by electing to claim the land in lieu of the money. The bill is silent as to any act of administration done by Mrs. Bass save her appoint-

ment and qualification as administratrix. Whether she performed any acts of administration or not, or, if she did, whether any of them were performed within 20 years before the bill was filed, we are without any guide for determining. In the absence of averment, taking the case without the influence of the 20-years presumption, we must and do presume that Mrs. Bass settled her administration, and accounted for the money converted by her; and in the absence of such averment the presumption is conclusive that she did so. *Austin v. Jordan*, 35 Ala. 642; 1 Brick. Dig. p. 807, § 65; 3 Brick. Dig. p. 409, §§ 48, 51.

We may add that 20 years' acquiescence or non-action is a bar to the right to trace money into property in which it has been invested, and thereby to fasten a trust in, or lien upon, it. Affirmed.

JOHNSON v. DURNER *et al.*

(Supreme Court of Alabama. Jan. 29, 1890.)

PLEADING—AMENDMENT—VENDOR'S LIENS—ATTORNEY'S FEES.

1. Where a bill alleges that certain land was sold to respondent, and that six notes were given for the unpaid purchase money, and copies of two of the notes, which are averred to have been assigned to complainant for value, are filed as exhibits, an amendment which strikes out the averment of assignment, adds a co-complainant, and attaches as exhibits copies of two more notes, which had matured before the bill was filed, does not constitute a new case, and is not a radical departure from the case originally stated.

2. Attorney's fees can be recovered in a suit in equity to enforce a vendor's lien, when the notes given for the unpaid purchase money contain a stipulation by vendee to pay a reasonable attorney's fee in case of a suit on the notes.

Appeal from chancery court, Etowah county; S. K. McSPADEN, Judge.

Suit by Michael Durner and Alfred R. Mullens against Thomas L. Johnson. Decree for complainants, and respondent appealed.

Abercrombie & Bilbro, for appellant.
Amos E. Goodhue, for appellees.

CLOPTON, J. The bill, as originally framed, avers that the lands were sold and conveyed by appellees to appellant for \$10,000, one-half of which was paid in cash, and for the balance appellant gave six several promissory notes, payable to appellees, which are described by date, amount, and when payable. It was originally filed by Michael Durner, one of appellees, as sole complainant. Copies of two of the notes described in the bill were attached as exhibits, which, it is alleged, had been transferred to complainant for a valuable consideration. The amendment of the bill, by striking out this averment, adding the other appellee as co-complainant, and attaching copies of two other notes, the same having matured when the original bill was filed, did not constitute a new case, nor was it a radical departure from the case made by the bill as originally framed. The subject-matter of the suit (the contract for the purchase of the lands) and the relief sought (the enforcement of the payment of the purchase money) continued the same, and the same defenses are

applicable. *Bolman v. Lohman*, 74 Ala. 507; *Pitts v. Powledge*, 58 Ala. 147.

Each of the notes contained a stipulation by which the vendee promised to pay all costs of collection and reasonable attorney's fees in case of suit on the note. This promise presents the only material question in the case. It is contended that complainants are not entitled to recover the attorney's fees on a bill in equity to enforce a vendor's lien for the purchase money. It is true that the lien which the vendor of lands, making an absolute conveyance, retains, is not created by express agreement for that purpose, and extends only to the unpaid purchase money. The lien, independent of agreement other than the contract for the purchase, rests on the principle of equity that it is unconscionable for the vendee to get and keep the land of the vendor without paying the agreed consideration money. The contract of purchase was that defendant would pay the complainants the sum of \$10,000, and conditionally the costs and expense of a suit upon the notes; in other words, that defendant should pay, and the vendor should receive, the specified amount of the consideration price without abatement or deduction of the costs and expenses which they would have to pay if the collection of the notes was enforced by suit. The promise was made to no attorney, nor other third person, but to complainants; the object being to reimburse them whatever sum they would have to pay their attorneys. A mortgage given to secure a note, containing a stipulation to pay attorney's fees in the event of its foreclosure by suit, or of suit upon the note, is a valid security for the payment of such fees. *Munter v. Linn*, 61 Ala. 506; *Shelton v. Aultman*, 82 Ala. 315. Had complainants brought an action at law upon the notes, which they had the right to do, reasonable attorney's fees would have entered into and constituted an element of the recovery to which they would have been entitled; and subsequently they could have filed a bill to subject the lands to the satisfaction of the judgment so recovered. In *Kelly v. Payne*, 18 Ala. 371, it was held that the land was equally bound in equity for the costs of a suit at law upon the purchase-money note, as for any other portion of the judgment obtained in such suit. We can see no difference in principle between the liability of the land to the costs of the suit at law, and its liability for reasonable compensation to the attorney for bringing and conducting the suit, when there is a promise to pay the same. In such case, the attorney's fees constitute a part of the debt which the vendor is entitled to recover of the vendee. In equity, the promise to pay attorney's fees, in the event of a suit to enforce the payment of the purchase money, is a part of the consideration agreed to be paid for the lands, the payment of which equity and good conscience require, and without the payment of which the vendor does not receive the full consideration money agreed to be paid. Such promise constitutes a part of the consideration on the same principle on which a promise to pay, in addition to the amount specifically expressed in the

conveyance, a debt of the vendor to a third person, constitutes a part of the price of the land. *Bunkley v. Lynch*, 47 Ala. 210. It was in the power of defendant to avoid such conditional enlargement of the consideration by a voluntary payment of the notes.

There is no error in overruling the demurrer to the bill. Affirmed.

MOODY v. WALKER.

(Supreme Court of Alabama. Jan. 30, 1890.)

MONEY HAD AND RECEIVED.

Assumpsit for money had and received does not lie against one who has purchased cotton alleged to have been mortgaged to plaintiff, when it does not appear that defendant has sold the cotton, or held it long enough to raise a presumption of its sale.

Appeal from circuit court, Henry county; J. M. CARMICHAEL, Judge.

Action by B. J. Moody against F. M. Walker. It appeared that G. B. Wilkerson had mortgaged his crop to plaintiff, and that a minor son of Wilkerson had raised cotton on his father's land, and sold it to defendant. Judgment was rendered for defendant, and plaintiff appealed.

J. W. Foster, for appellant. *Walker & Espy*, for appellee.

STONE, C. J. If the question was properly raised, we are not prepared to affirm that the attempted emancipation of his minor sons, made by Wilkerson, would or ought to prevail against the claims of his creditors. He did not cast them loose on their own resources, but fed and supported them as members of his own household, and that largely from the very advances for which their crop was sought to be held liable under his mortgage. He also surrendered to them the use of the land and stock, in addition to supporting them, and all this in consideration that they would cultivate lands which yielded for him about as much as they produced on lands they cultivated for themselves. This was a gift to them of more than their time. It was unquestionably a gift of their support, and of the use of his stock; and, for the privilege of cultivating his land and enjoying its crops, they agreed to give and did give him what was already his, and which he did not surrender,—their half-time labor on the land cultivated for him. This case is unlike any we have decided, and is not supported by the current of authority. *Godfrey v. Hays*, 6 Ala. 501; *Stovall v. Johnson*, 17 Ala. 14; *Donegan v. Davis*, 66 Ala. 362; *Boyett v. Potter*, 80 Ala. 476, 2 South. Rep. 534; *Field, Infants*, §§ 67, 68; *Atwood v. Holcomb*, 39 Conn. 270; *Morse v. Welton*, 6 Conn. 547; *Cloud v. Hamilton*, 11 Humph. 104; 6 Amer. & Eng. Cyclop. Law, 448, note 3.

The present suit is *assumpsit* for money had and received. It cannot be maintained, unless Walker received money, or property in lieu of money, which *ex equo et bono* belonged to Moody, or unless he is shown to have held the cotton long enough to raise the presumption he had converted it into money. The record affirms it contains all the evidence. The ot-

ton was grown in 1888, and this suit was commenced December 7, 1888. The testimony shows that Walker purchased the bale of cotton from young Wilkerson, and paid him for it. It does not show when he purchased it. It is not shown that Walker ever sold the cotton, or that he had held it long enough to raise the presumption of its sale. There is no proof that he received any money which belongs to Moody, nor in fact that he received any money at all. He paid out money, if the testimony be believed. Moody's claim was, at most, an equitable lien on the cotton, which, if valid, would authorize him to bring an action on the case. It could not maintain *assumpsit*. *Thompson v. Merri-man*, 15 Ala. 166; *Price v. Pickett*, 21 Ala. 741; *Hussey v. Peebles*, 53 Ala. 482; *Westmoreland v. Foster*, 60 Ala. 448. The plaintiff showed no right to recover in *assumpsit* and the circuit court, if thereto requested in writing, might and should have given the general charge to find for the defendant. We will not, therefore, inquire into the correctness of the court's rulings. Right or wrong, they could not harm the plaintiff. 3 Brick. Dig. p. 109, § 42 et seq.; *Id.* p. 405, § 22.

Affirmed.

RAMAGUANO v. CROOK, Judge.

(Supreme Court of Alabama. Jan. 30, 1890.)

INTOXICATING LIQUORS—REFUSAL TO LICENSE—APPEAL—MANDAMUS TO PROBATE JUDGE.

1. An order refusing to grant a license to sell liquor is not a final order or decree, within the meaning of Code Ala. 1886, § 3640, which provides that an appeal may be taken from "any final decree of the court of probate, or from any final judgment, order, or decree of the judge of probate."

2. The supreme court will not grant a *mandamus* to a probate judge, when an application for the writ has not been first made to and refused by a circuit court or other court of commensurate jurisdiction.

3. Acts Ala. 1886-87, p. 671, provide that when, at an election in regard to the local prohibition of the liquor traffic, a majority of the voters are in favor of prohibition, it shall be the duty of the probate judge to record the result in his office, and give notice of it for 80 days in all the newspapers published in the county. *Held*, that a peremptory *mandamus* to grant a license would not be issued to a probate judge when it appears that the notice was in process of publication at the time of application for the license, as the effect of its issue would be to decide the constitutionality of the prohibition law before a proper case is presented.

Appeal from probate court, Calhoun county; E. F. CROOK, Judge.

John H. Caldwell, for appellant.

PER CURIAM. The statute allows no appeal from the action of a probate judge refusing to grant a license to retail spirituous liquors, and hence, if this be regarded as a direct appeal from such order of refusal, as in form it appears to be, it must be dismissed. The case is not covered by section 3640, Code 1886, which allows an appeal to this court from "any final decree of the court of probate, or from any final judgment, order, or decree of the judge of probate." An order refusing to grant a license, whether the act be the exercise of a ministerial or quasi judicial function,

would no more be a final order or decree than a like refusal to approve a bond of an officer would be. It is no such adjudication of the right involved as would be a bar to a subsequent renewal of the same application by the same person, on the same state of facts, and this is the test of a final decree. It could be reconsidered at any time, without regard to the act of previous refusal. This has heretofore been the universally accepted interpretation of this section of the Code in the practice before this court.

So the case is equally bad for want of jurisdiction, if we regard the proceeding as an application for a peremptory writ of *mandamus* to issue directly from this court to the probate judge of Calhoun county to compel him to issue such license; the issue of a rule *nisi* being expressly waived by the respondent. We have decided that we will not grant a *mandamus* from this court to a probate judge in the first instance. The application must be first presented to the circuit court, or other court of commensurate jurisdiction, and be refused by that tribunal, before the supervisory action of this court can be invoked. The petitioner having failed to make any application whatever to that court for relief, we must decline to entertain his petition here. *Ex parte Pearson*, 76 Ala. 521; *State v. Williams*, 69 Ala. 311.

There is another ground which would also justify the refusal of a peremptory writ, such as is sought by the petitioner. The record shows that the popular vote has been taken in Calhoun county, under the provisions of the act of December 7, 1886, (Acts 1886-87, pp. 671-678,) relating to local prohibition of the liquor traffic in that county, and that a majority of the voters were in favor of such prohibitory measure. This act provides that, in such event, it shall be the duty of the probate judge to record the result in his office, and to "give notice for thirty days by publication in all the newspapers published in the county that a majority of the qualified voters who voted at said election voted for prohibition." This notice is shown by the record to have been inserted in all the newspapers published in Calhoun county on December 27, 1888, and was in process of being perfected at the time the case was decided by the probate judge. At this time, (January 30, 1890,) when this opinion is promulgated, it is fair to infer that the requisite notice has been completed.

Under these circumstances, if we had jurisdiction of the case, we should decline to issue a peremptory *mandamus*, the effect of which would be to pronounce on the constitutional validity of the law in advance of a proper case being before us justifying such a decision. The only motion we would be disposed to entertain would be one for an alternative writ or rule *nisi* to enable the applicant to test the regularity and legal validity of the proceedings seeking to put the law into operation. On this subject it would be improper for us to express any opinion until a case involving the point comes regularly before us for our consideration.

The application is accordingly dismissed.

C. AULTMAN & Co. v. GAMBLE.

(Supreme Court of Alabama. Jan. 31, 1890.)

PROMISSORY NOTES—PAYMENTS.

1. In an action on a note, defendant cannot set up an agreement that certain counter-claims against the payee of the note would be considered as payments, where it appears that he afterwards recovered judgment in an independent action against payee for those claims.

2. Testimony as to the advice which induced defendant to procure judgment for the counter-claims is not admissible.

Appeal from circuit court, Blount county; JOHN B. TALLY, Judge.

Action by C. Aultman & Co. against John Gamble. Plaintiffs requested the court to charge that, "if the jury believe from the evidence that the items forming the account on which the judgment in the justice court was rendered and the items claimed as credits on the note sued on are the same, then defendant is not entitled to a credit on this note for such items." The charge was refused, judgment was rendered for defendant, and plaintiffs appealed.

Dickinson & Hull, for appellants.

STONE, C. J. This case was tried alone on pleas of payment. It is nowhere denied that the paper sued on represented at one time a *bona fide*, subsisting debt from Gamble to Pruitt, the payee. This note (the paper sued on) was traded and transferred to Kelton, who continued its owner for some time. The precise shape the defense assumed is as follows: Defendant, Gamble, claimed, and testified to its truth, that while Kelton held his note, he (Kelton) became indebted to him (Gamble) in several amounts, the aggregate of which was equal to the amount of the note sued on, and that by mutual agreement between him and Kelton said cross-demands were to stand and be treated as payments on the note. Kelton denied this, and testified, not only that no such agreement was made, but that all he owed Gamble had been credited on the note. There were two credits indorsed on the note, amounting to \$46. Cross-demands are not payments, unless there is a mutual agreement to that effect. *Wharton v. King*, 69 Ala. 365. Against the allowance of this alleged payment, plaintiff proved by the defendant himself, and by an exemplification of the proceedings before the justice of the peace, that Gamble sued Kelton on the alleged items of payment which he claims in this case as an indebtedness to him, and recovered judgment for their amount. This, it is claimed, precludes the defendant from setting up said demands as payment in this suit. We think this contention sound. Those items or claims could not be a payment on Gamble's note held by Kelton, and at the same time remain an indebtedness from Kelton to him, that would support an independent action against the former. The two categories are incompatible with each other. And Gamble, having elected to treat the claim as an independent cause of action, and having brought suit and recovered judgment upon it as such, has estopped himself from setting it up as payment.

Hill v. Huckabee, 70 Ala. 133; *Caldwell v. Smith*, 77 Ala. 157.

The first charge asked by plaintiffs asserts the law correctly, and should have been given.

Defendant's counsel asked the witness Whorton, the justice of the peace, what he had advised Gamble in reference to bringing suit on the account; and, against the objection and exception of plaintiff, he was permitted to answer that he had advised that suit be brought. This testimony was illegal, and could in no sense impair the force of Gamble's election to sue the claim to judgment against Kelton. It was the act which determined the election and worked the estoppel, and not the motive or advice which brought it about.

Reversed and remanded.

GAFFORD *et al.* v. STROUSE.

(Supreme Court of Alabama. Jan. 31, 1890.)

ADVERSE POSSESSION—HUSBAND AND WIFE—PAROL GIFT.

Where a husband mortgages land after a parol gift of it to his wife in payment of loans to him from her separate estate, the possession of the wife while residing on the land with her husband is not an adverse possession, under the statute of limitations, as against the mortgagee.

Appeal from circuit court, Butler county; JOHN P. HUBBARD, Judge.

J. C. Richardson, for appellants. *Charles L. Wilkinson*, for appellee.

CLOPTON, J. Both parties concede that J. M. Gafford was formerly seized and possessed of the land in controversy. Appellee, who was the plaintiff in the circuit court, derives title under a mortgage executed by him, February 22, 1873. Defendants do not claim that title ever passed from Gafford to them, or either of them, by any legal conveyance. Their defense is that Gafford, being indebted to Mrs. Sally Gafford, who was his wife, for money of her separate estate which he received and used, gave her, in February, 1872, by parol, the lands on which he then lived, including the land in controversy, in payment thereof, putting her in possession; and that she has been in continuous possession, claiming the land as her own, for the length of time prescribed by the statute of limitations as a bar to the entry of plaintiff. The court having given the affirmative charge in favor of plaintiff, the main inquiry arises whether, from the undisputed facts, the conclusion of law is that Mrs. Gafford did not and could not have such adverse possession as by its own mere force could ripen into a title.

The legal title in the lands, being vested in Gafford when the mortgage was executed, thereby passed to plaintiff. There is no pretense that he had notice of Mrs. Gafford's claim. The possession of the mortgagor thereafter was referable and in subordination to the mortgagee's title, unless rendered adverse by an open and positive disclaimer of his title, brought to his knowledge. *Coyle v. Wilkins*, 57 Ala. 108. So long as the mortgagor holds in subserviency to the title of the mortgagee, the possession of his vendee under a parol con-

tract of sale cannot become adverse to the mortgagee, unless there is a disclaimer of the title of the mortgagor, and a holding adversely to him. Counsel invoke the principle pronounced in *Collins v. Johnson*, 57 Ala. 804, and *Vandiveer v. Stickney*, 75 Ala. 227, that an uninterrupted possession of a donee, under a parol gift, or by a vendee under a parol agreement to purchase when the purchase money is paid, accompanied by a claim to the lands, is adverse to the donor or vendor, and will be protected by the statute of limitations, maturing into a perfect title if continuous for the period prescribed by the statute. But, to have such effect, the facts essential to constitute an adverse holding must enter into and characterize the possession. The mere assertion of a hostile claim or right, and of possession, unaccompanied by adverse actual occupancy, is insufficient.

There is no dispute that Gafford entered into possession of the lands in 1862, and continued in possession, claiming them as his own, until February, 1872, the time of the alleged parol contract of sale. While Mrs. Gafford testifies that she was put into possession at that time, and thereafter claimed the possession and ownership, she also states that there was no change of possession, but she and her husband continued to reside on and occupy the lands, and he controlled them, until his death, which occurred in 1882. Ten years not having elapsed after his death before the institution of the action, the bar of the statute can become complete only by tacking her possession during the continuance of the marital relation to her possession after the death of her husband. The direct question, then, is whether the wife can hold premises adversely to her husband, which she claims to have derived from him under a parol agreement of purchase, and on which they continued to reside and jointly occupy as husband and wife. The statement and application of a few elementary principles furnish an answer.

Possession, to be adverse, so as to vest title in the possessor after the lapse of the requisite time, must be not only open, notorious, and continuous, but also exclusive. It must operate to oust or dispossess any other person who may claim title or right of possession. In order to fall within the operation of the statute of limitations, the possession must be sufficiently exclusive to put the dispossessed claimant to his action or entry. This can never be the case where the party having the title is in possession, though it may be joint. Two contemporaneous possessions of the same property, each adverse to the other, is a legal absurdity not conceivable. Hence when two persons are in possession, claiming under different and hostile rights, the law refers the possession to the party having the title. *Pickett v. Pope*, 74 Ala. 122; *Bragg v. Massie*, 38 Ala. 89; *Farmer v. Estava*, 11 Ala. 1028.

It may be that, under the laws in force at the time of the transaction in question, a title would vest in a married woman by the mere force of an uninterrupted possession of real estate for the statutory period under a parol gift or purchase, where the husband never had nor claimed any title,

nor interfered with her possession. There is a clear distinction between a possession of that nature and a possession under a gift or purchase directly from the husband. There being no actual change of possession, the oral agreement between Gafford and his wife was void. It vested no right nor equity, and created no separate estate. It is material only to the extent it may constitute the origin and basis of an adverse possession. Had Gafford executed a conveyance directly to his wife, it would have been inoperative as a transfer of the legal title. Their continuance in joint possession thereafter, for no length of time, could have availed to divest him of the title, and vest it in her. Certainly a continuance of joint occupancy, without a conveyance, merely under a parol gift or agreement of purchase, can have no greater effect. The elements essential to an adverse possession in that sense, which can ripen into a title by its own force and the lapse of time, do not and cannot exist in such case. The husband is not ousted or dispossessed, actually or constructively. The possession of the wife does not exclude or encroach upon his possession. The possession of Mrs. Gafford, during coverture, was the possession of her husband, and did not become antagonistic to his rights. *Bell v. Bell*, 87 Ala. 536; *Hendricks v. Ransom*, 53 Mich. 576, 19 N. W. Rep. 192; 1 Amer. & Eng. Cyclop. Law, 250. It results that the statute of limitations did not commence to run until the death of her husband.

Affirmed.

ELYTON LAND CO. v. MORGAN et al.

(Supreme Court of Alabama. Jan. 30, 1890.)

PLEADING—DEMURRER—JUDGMENT BY DEFAULT.

1. The sufficiency of an affidavit to an account filed with the declaration, cannot be considered on a demurrer to the declaration.

2. A demurrer which is not called to the attention of the court, and is not ruled on, must be considered as abandoned.

3. Parties permitting a suit to be tried in their absence, and without counsel, cannot complain of being treated as in default.

4. That a judgment is by default instead of *nil dict* is harmless error.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Action by W. J. Morgan & Co. against the Elyton Land Company. Judgment was rendered for plaintiffs, and defendant appealed.

Lane & White, for appellant. *Weatherly & Putnam*, for appellees.

STONE, C. J. There is no merit in the present appeal. The objection sought to be raised by demurrer cannot be presented in that way. Demurrer raises the question of the sufficiency of the complaint, and the present complaint is sufficient. If the affidavit to the account was insufficient, that could be raised when it was offered in evidence. Code 1886, § 2773. The defect, if any, went to the evidence, not to the pleadings. The demurrer was frivolous. But if the demurrer had been well taken, it could not avail the appellants. It was not enough that a sufficient issue was formed. Counsel should have been present

to invoke the action of the court, and to represent his client. A demurrer found in the file, and neither called to the attention of the court, nor ruled on, must be regarded as abandoned; and parties permitting their suits to be tried in their absence, and without counsel, cannot complain if they are treated as in default. *Lehman v. Hudmon*, 85 Ala. 185, 4 South. Rep. 741.

The objection that the judgment was by default instead of *nil dicte* relates to a mere matter of form, and is without merit. *Glass Co. v. Paulk*, 88 Ala. 404, 3 South. Rep. 800; *McLaren v. Anderson*, 81 Ala. 106.

Affirmed.

WINTER V. ELMORE.

(*Supreme Court of Alabama*. Jan. 31, 1890.)

PARTIES—EXAMINATION BEFORE TRIAL.

Code Ala. 1886, § 2823, which provides that "the testimony of a witness may be taken conditionally and perpetuated, as provided in this article," applies only to witnesses who are not parties.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Application by Joseph S. Winter for a *mandamus* to Vincent M. Elmore, as register of the chancery court of Montgomery, to take the testimony of certain persons who were expected to be parties to a suit to be instituted by petitioner. The writ was refused, and petitioner appealed.

Winter & Winter and Marks & Massie, for appellant. *Roquemore, White & McKenzie, Jones & Falkner*, and A. A. Wiley, opposed.

SOMERVILLE, J. The statute provides proceedings for the perpetuation of the testimony of witnesses, which provisions are contained in sections 2823-2831 of the present Code, (1886.) It is declared in section 2823 that "the testimony of a witness may be taken conditionally, and perpetuated, as provided in this article." It is made applicable alike to suits actually pending, and to those anticipated, both at law and in equity. Section 2824.

The inquiry raised is whether the word "witness" is here to be construed to include a party. The statute was intended, in our judgment, to apply only to witnesses who are not parties. So far as its letter is concerned, this is manifest from a most casual inspection of it. The whole article of nine sections is preserved in the exact phraseology in which it appeared in the Code of 1852, (Code 1852, §§ 2337-2348.) At that time parties were not competent witnesses, and were clearly excluded both by the letter and spirit of the then existing law. Now, as then, the statute refers, no less than three several times, to the "adverse party," or "expected adverse party," as a person distinct and separate from the witness whose deposition is allowed to be perpetuated. And as "a party" provision is made for giving him notice of the proceeding by serving on him, if resident in this state, a copy of the application, and notice of the time and place of such examination, and, if a non-resident, it provides for notice to him by publication. It is manifest that this stat-

ute, like similar ones in other states, was intended as a simple and inexpensive substitute for suits in equity, both to perpetuate testimony and to take depositions *de bene esse*. The former proceeding was allowed to be instituted only by an expected party to a suit who had no present immediate right of action, and when he, (1) either being in possession of property, expects some future aggression upon his enjoyment, or else, (2) being out of possession, without a present right of action, designs to commence proceedings at law when his right shall accrue. The latter was authorized only where the complainant had an existing cause of action or defense, and was party to an action at law then pending, but not at issue, and desired to examine the only surviving witness, who is aged or sick, or about to leave the jurisdiction, or other analogous reason to prevent the evidence being lost. 1 Pom. Eq. Jur. §§ 211, 213; 1 Greenl. Ev. § 325; Adams, Eq. 23-25. If any facts were within the knowledge of a party, or documentary evidence was in his possession, a bill of discovery was the only mode provided for securing his admissions. These two classes or branches of equity jurisdiction are clearly and succinctly distinguished by Mr. Pomeroy. "The first," he says, "contains the modes by which the parties themselves are compelled to disclose facts and produce documents, and thus to furnish the evidence needed by their adversaries; while the second contains the modes by which evidence of witnesses generally is procured and preserved, under particular circumstances, for which the common law made no provision." 1 Pom. Eq. Jur. § 190. The Code provides a statutory mode of examining, by interrogatories, parties to pending suits, but not parties to anticipated suits. Code 1886, §§ 2816-2822.

In bills of discovery many difficulties and complicated questions often arise, not easy to be solved except by a court of chancery. This may have been a sufficient reason for not embracing a party, or expected party, within the provisions of the statute relating to the perpetuation of the testimony of witnesses, although a party is now a competent witness, except as to certain transactions with deceased persons. It is easy to show that the contrary practice of allowing parties to be harassed with experimental fishing-bills could be made the instrument of much annoyance, if not oppression, by its perversion to improper uses.

It is our opinion that the chancellor committed no error in refusing the writ of *mandamus* to the register, seeking to compel him to proceed with the examination of Pollak, and other expected parties, to a suit anticipated by the appellant.

Affirmed.

LYONS *et al.* v. CAMPBELL *et al.*

(*Supreme Court of Alabama*. Jan. 31, 1890.)

WILLS—CONTEST—UNDUE INFLUENCE.

1. C., the sole business agent and confidential advisor of testatrix, who was a woman of about 80 years of age, simple-minded and timid, and without any family, not even brother or sister, had his son write a will, and induced her to

sign it, without either having it read by or to her. The will gave C. the residuary legacy, which he represented to testatrix would not exceed \$2,000; when in fact it exceeded \$20,000. *Held*, that the presumption was that the legacy was procured by C. through undue influence.

2. Testatrix devised to L., who was rector of the church in which she was a communicant, over \$100,000. L. had the will written, suggested its provisions, and induced her to sign it, and then left the state, and saw testatrix afterwards but once in 20 years. In a subsequent will, made at the suggestion of C., the legacy to L. was reduced to less than \$40,000. There was no allegation that L. used any undue influence over testatrix, or knew of any being used by others in his favor. *Held*, that these facts did not authorize the inference that the legacy to L. was obtained through undue influence.

3. Code Ala. 1886, § 1989, provides that a will may be contested by a person interested therein by filing in the court where it is offered for probate allegations that the will was not duly executed or other valid objection. Section 2000 provides that any person interested in a will, who has not contested the same in the probate court, may contest the validity of the same by bill in chancery. *Held* that, to contest in chancery, it is necessary to state some valid objection to the will.

4. Under Code Ala. 1886, §§ 2000, 2001, providing that any person interested in a will may contest the validity of the same by bill in equity, certain legacies may be declared invalid by a court of chancery, leaving the remainder of the will unaffected.

Appeal from chancery court, Madison county.

This was a bill filed by the appellants against the appellees to contest the last will and testament of one Mary P. Rice. The defendants demurred to the bill, original and as amended, on the ground that the complainants sought by said bill to annul certain items of said will, while others should remain as made by the testator; and on the further ground that the complainants did not allege in said bill facts which went to show that there was any undue influence used upon the testator, but only alleged conclusions. The chancellor, upon the submission to him for decree on the demurrers, sustained them, and it is from this decree that the present appeal is prosecuted, and the same is here assigned as error.

E. W. Godbay, F. P. Ward and D. D. Shelby, for appellants. *Lawrence Cooper, W. L. Clay, and L. W. Day*, for respondents.

CLOPTON, J. The statute which prevailed in this state prior to the adoption of the Code of 1852 provided: "Within five years from the time of the first probate of any will, any person interested in such will may, by bill in chancery, contest the validity of the same; and the court of chancery may thereupon direct an issue or issues in fact to be tried by a jury as in other cases, and in all such trials the certificate of the oath of the witnesses, at the time of taking the original probate, shall be admitted as evidence to the jury, to have such weight as they may think it deserves." *Clay*, Dig. p. 598, § 15. In *Johnston v. Glasscock*, 2 Ala. 218, this statute was construed, and it was held that it provided a new mode, by which the heir at law or the next of kin can contest the will in such manner that one suit will be conclusive and final; and for this purpose

the court of chancery was invested with the jurisdiction, authorized to call in aid the assistance of a jury, as in other cases; which suit in chancery was given in place of the proof in solemn form when the will was of personal property, as practiced by the ecclesiastical courts, and of the action of ejectment in a court of common law, when the will was of real estate. The person claiming under the will stood in the situation of an actor, and was bound to support the will affirmatively. It was said: "It is true that, under the statute we are considering, the heir at law or next of kin is necessarily the complainant; but his condition is such that, after establishing his heirship or kinship, he occupies precisely the same position as the heir at law, when he is the plaintiff in an ejectment, or the next of kin, when he seeks to call in the probate, in common form, of a will. Such being the condition of a complainant under the statute, nothing is necessary in his bill, more than to allege the title, by which he has the right to investigate the probate, and a prayer for relief." This construction of the statute was reaffirmed in *Johnston v. Hainesworth*, 6 Ala. 443.

The present statute provides: "Any person interested in any will, who has not contested the same under the provisions of this article, may, at any time within five years after the admission of such will to probate in this state, contest the validity of the same by bill in chancery, in the district in which such will was probated or in the district in which a material defendant resides." The chancery court is authorized in such case to direct an issue to be tried by a jury, and on the trial by the jury, or the hearing before the chancellor, the testimony of the witnesses reduced to writing by the judge of probate, when the will is first admitted to probate, is evidence to be considered by the chancellor or jury. Code 1886, §§ 2000, 2001, 1982. These sections were first incorporated in the Code of 1852, at which time the statutes, now constituting sections 1980 to 1999 of the Code of 1886, were adopted, providing for the contest of any will propounded for probate in the probate court, and regulating the proceedings on such contest. Section 1989 provides: "A will, before the probate thereof, may be contested by any person interested therein, or by any person who, if the testator had died intestate, would have been an heir or distributee of his estate, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of the unsoundness of mind of the testator, or of any other valid objections thereto; and thereupon an issue must be made up, under the direction of the court, between the person making the application as plaintiff, and the person contesting the validity of the will as defendant; and such issue must, on application of either party, be tried by a jury."

By the statute under which *Johnston v. Glasscock* was decided, the clerk was required, on application for the probate of any will, or for letters of administration, to issue citation, requiring the sheriff to summon the widow or next of kin of the

deceased to appear at some return-day in the process named, and show if they have anything to allege against such application; but no detailed proceedings for the contest of a will were provided. The application was the same, whether to probate a will or for letters of administration. And though it is said in *Kumpe v. Coons*, 63 Ala. 448, in which the will was made after section 1989 was first enacted, that the character of the suit is not changed, if there is no contest in the probate court, and the heirs at law or next of kin resort to the statutory remedy, which is the substitute for proof of the will in solemn form, or for the action of ejectment, if the will is of real estate, we do not understand by this it was intended to assert that it was not necessary that any valid objection should be stated in the bill; and, if it was intended in *Johnston v. Glasscock* that all that was necessary was to allege the heirship or next of kinship, the rule therein declared must be regarded as is modified by the present statute. A material and controlling change has been made. A decree in the probate court, establishing a will on contestation, is final and conclusive, as against all persons who joined therein. Those only who do not contest in that court can resort to chancery. To contest in the probate court it is necessary to state some valid objection to the will; the same rule applies when the will is contested in chancery. The heir or distributee must not only allege his title, but also some valid ground of objection. It may be, however, in the same general terms as when the contest is inaugurated in the probate court; otherwise he will be permitted to take an advantage by declining the contest in the probate court, and invoking the chancery jurisdiction. This requirement sound equity pleading demands.

But we cannot assent to the proposition, contended for by counsel, that a bill is without equity which seeks to have a certain legacy declared invalid, because procured by fraud and undue influence, at the same time affirming other legacies. The contention is that a party adversely interested, if he would contest one or more items, leaving the remainder of the will unaffected, must contest in the probate court; and when the contest is in chancery the will must stand or fall as an entirety. When the investigation is in chancery, the same general rules prevail as when the contest is in the probate court, and the same general laws are applicable in both courts as when a will is probated in the ecclesiastical courts in solemn form, only changed so as to be adapted to the particular remedies. It is well settled that, where a legacy has been given through undue influence, it does not necessarily have the effect of rendering the whole will void. *Florey v. Florey*, 24 Ala. 241. In chancery, equally as well as in the probate court, there may be valid reasons for contesting one or more items, leaving the remainder of the will unaffected. If not allowed this privilege or right, the heir or distributee would oftentimes be debarred from contesting such items, though procured by fraud or undue influence, be-

cause unable to show the entire will to be tainted thereby. Such denial would violate the principles of natural justice, and, under the clauses of the will which are the result of the free will of the testator, furnish protection to fraud or undue importunity on the part of one legatee.

Appellants seek by the bill to contest certain specified items of the will of Mary P. Rice. In considering the sufficiency of the objections to these legacies as stated in the bill, we must assume their truth, being on demurrer. The bill alleges that the testatrix was about 80 years old, had lost a husband and a large family of children, and was without brother or sister or descendants. She had always been simple-minded, though sensible, of a timid and shy nature, shrinking from the responsibility of business transactions, and disposed to select some one to make and look up to, as her sole business agent and confidential adviser. At the time of the death of her previous business agent, she occupied rooms in a tenement-house, and soon thereafter defendant Campbell, who is the residuary legatee, rented other rooms in the same building, occupying them with his family for about two years. During their residence in this building, he ingratiated himself with her, became her sole business agent and confidential adviser, and acquired such influence over her that she would follow his advice in business matters implicitly; that Campbell had the will and codicil written by his son, from his own directions, and induced the testatrix to sign them, without either having been read by or to her, and without advice from or consultation with any relative, friend, or counsel, under the false impression, purposely and fraudulently produced by him, that the residuary legacy would not exceed \$2,000, when in fact it exceeded 10 times that amount.

The salient facts, as charged in the bill, are: (1) That Campbell ingratiated himself into the favor of the testatrix; (2) he sustained to her the relation of trusted agent and confidential adviser; (3) he procured the will to be written by his son from his own directions, and that testatrix did not read or hear it read; (4) misrepresentation as to the amount of the residuary legacy. While the mere fact that a will is written by a party who takes a benefit under it does not invalidate it, if the benefit is large, and especially if the beneficiary is a stranger to the testator's blood, the instrument will be scrutinized with suspicion, and clear proof that the testator knew its contents will be required to admit it to probate. Proof of testamentary capacity and of formal execution are insufficient. Because of its accuracy and guarded limitations, we quote the statement of the rule as made by Baron PARKES: "If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of

the deceased." *Barry v. Butlin*, 1 Curt. Ecc. 637. Evidence in the shape of instructions for the preparation of the will, or reading or hearing it read, is the most satisfactory, but not the only precise, species of evidence of the testator's knowledge of the will. Circumstantial evidence may be sufficient, but the party claiming under the will, whatever mode of proof he may adopt, must satisfactorily establish that the testator knew the contents. The *onus probandi* is on him.

It is true that the undue influence which will invalidate a will must be such as, in some measure, destroys the free agency of the testator, and causes him to dispose of his property contrary to his desire. The question here is not as to the quantity of proof requisite to establish undue influence, but one of inference from the particular facts averred. Whenever a confidential relation exists, such as principal and agent, during the life-time of the deceased, continuing to his death, and the agent is a favored legatee under the will, the presumption or inference is that by improper acts or circumvention—by the exercise of some undue influence—the testator was induced to bestow the gift or legacy contrary to his desire and free will, and the burden of proof is cast on the legatee to show that the will was the result of his own volition, and not procured by fraud or undue influence. When the allegations of the bill as to the confidential relation between Campbell and testatrix, the procurement of the writing of the will, and the representation as to the amount of the residuary legacy, in connection with the extreme age and timidity of the testatrix, are considered, they are calculated to excite vigilance on the part of the court, and call for satisfactory proof in rebuttal or explanation or disproof. Had decrees *pro confesso* been rendered against the residuary legatee, or should he decline to offer any evidence in avoidance of the inferences which the law draws from the foregoing facts, the court would unhesitatingly pronounce against the validity of the residuary legacy. Sufficient grounds are shown on which to invoke the jurisdiction of chancery. *Hill v. Barge*, 12 Ala. 687; *Daniel v. Hill*, 52 Ala. 430; *Waddell v. Lanier*, 62 Ala. 347; *Shipman v. Furness*, 69 Ala. 555. *Moore v. Spier*, 80 Ala. 129.

Though it may be sufficient in a bill of this kind to charge that the will was the product of undue influence exercised by a named person, dispensing with allegations as to the proofs, when the bill avers special facts, it becomes the duty of the court to determine whether from such special facts undue influence is established or may be inferred. This observation applies to the several legacies given to the persons who may be classed as the Lay legatees. It appears from the bill that in 1862 the testatrix made a will, bequeathing to Bishop Lay, his wife and children, more than \$100,000. The bill charges that Bishop Lay, who was the rector of the church in which she was a communicant, being about to remove from Alabama, induced her to make the will, suggested its provisions and had it written, and soon thereafter removed from the state. So far as appears from the bill, dur-

ing an absence of nearly 20 years he visited the testatrix but once. Construing the bill most strongly against the complainants, the allegation is not that he exercised undue influence, but, at most, used earnest solicitations. The will made in 1862 remained unrevoked and unaltered, save a codicil giving a small bequest to a servant, until the one in controversy was made. Under these circumstances, it is reasonable to presume that all improper influence was removed, and she well knew the disposition she had made of her property.

It is true the bill further avers that she had expressed dissatisfaction with the former will, and announced her intention to revoke it, should she outlive Bishop Lay; but in what respects, and to what extent, she was dissatisfied is not averred. It is averred that Campbell's purpose, in suggesting the bequests to the Lays, severally, was partly to enable him to deceive Mrs. Rice as to the amount he would receive as residuary legatee, and partly to conciliate the Lays, and prevent the will of 1862 from being propounded for probate. His interest as residuary legatee was to diminish the amounts of the legacies to the Lays, so as to increase his own. If, in accomplishing this purpose, he used arguments by which to convince the testatrix of the expediency of giving legacies to the Lays in order to prevent the first will being propounded for probate, and she comprehended the disposition she was making of her property in this regard, which is not negated by the bill, this does not constitute such undue influence in obtaining the legacies as would invalidate them. The bill simply alleges that Campbell suggested to her the gift of legacies to the Lays. It does not aver that he communicated to her his motive or purpose for doing so. A mere suggestion does not amount to undue influence. With the exception of Bishop Lay's connection with the first will, there is no allegation that either of the Lay legatees ever attempted to use any influence over the testatrix, or encouraged or knew of any being used by any other person in their favor. The legacies were diminished from over \$100,000, given in the will of 1862, to less than \$40,000, in the will in controversy. This does not savor of undue influence. We are of opinion that the averments of the bill do not authorize any inference that the legacies were obtained by the exercise of any "undue influence" in the legal sense of the term, and are insufficient to call upon these legatees to contest them in chancery.

The decree, so far as relates to the demurrers of Beirne Lay and others, is affirmed, but reversed in all other respects, and a decree here rendered overruling the demurrers of Archibald Campbell.

JOHNSON v. STATE.

(*Supreme Court of Alabama. Jan. 27, 1890.*)

CORPORATIONS—CORPORATE PRIVILEGES—EXEMPTION OF EMPLOYEES FROM ROAD DUTY—FOREIGN DECISIONS.

1. Under Act Tenn. Feb. 1848, incorporating a railroad company, and providing that the "officers and servants of said company shall be exempt from military duty except in cases of inva-

sion or insurrections, and shall also be exempt from serving on juries, and working on public roads," and under Act Ala. Jan. 1850, incorporating the same road, and allowing the company "all the rights, powers, and privileges" granted by the former charter, a servant of the company is exempt from working on public roads in Alabama.

2. The exemption from such duty is not a mere personal privilege to the officers or servants of the company, but is a right or privilege of the corporation itself.

3. In a prosecution of an employe of such company for failure to work the road, a decision of the supreme court of Tennessee, declaring the exemption to be unconstitutional, cannot be considered by the court in Alabama unless it is put in evidence.

Appeal from circuit court, Limestone county; JOHN MOORE, Judge.

Humes, Walker & Sheffey, for appellant.
W. L. Martin, Atty. Gen., for the State.

CLOPTON, J. The first section of "An act to incorporate the Memphis & Charleston Railroad Company," passed by the general assembly of Alabama in January, 1850, declares: "Said company shall have and enjoy all the rights, powers, and privileges granted to them by the acts of incorporation above mentioned, and shall be subject to all the liabilities and restrictions imposed by the same." The acts above mentioned are recited in the preamble as an act passed by the state of Tennessee in February, 1846, and an act amending the same passed in February, 1848, "for the formation of a company under the name and style of the Memphis & Charleston Railroad Company for the purpose of establishing a communication by railroad between Memphis, Tennessee, and Charleston, South Carolina." The thirty-fifth section of the act of February, 1846, provides: "The president, directors, clerks, agents, officers, and servants of said company shall be exempt from military duty except in cases of invasion or insurrection, and shall also be exempt from serving on juries and working on public roads." Defendant, who was indicted for failing to work on a public road in the county of Limestone after legal notice, claims that the exemption from road duty was conferred on the company by the provisions of the Alabama act of incorporation conferring the rights and privileges granted by the Tennessee act of incorporation.

Notwithstanding military duty, serving on juries, and working on public roads are duties devolved by law upon the people as individuals, who alone are responsible for failure to perform them, we do not concur in the position insisted on, that the exemption from such duties is a mere personal privilege to the officers, agents, and servants of the company, and not a right or privilege of the corporation. In *Zimmer v. State*, 30 Ark. 677, the defendant claimed freedom from liability to work on public roads under a similar exemption contained in the charter of the company of which he was an employe and servant, and the same position now insisted on was taken. It is said: "The exemption claimed by the defendant is not a mere personal privilege; but it is a valuable right of the company, granted to it by the state, to save and protect it against such serious inconveniences and

injuries as would necessarily happen were those upon whom it must depend for that vigilance, promptness, and dispatch indispensable in its business liable to be called away to the performance of other duties." It is true that charters of corporations are to be construed strictly against the corporators, and that doubts as to the proper construction are to be solved in favor of the state, and, "where it is susceptible of two meanings,—the one restricting, and the other extending, the powers of the corporation,—that construction is to be adopted which works the least harm to the state." *The Binghamton Bridge*, 3 Wall. 51. But the construction should not be so strained as to defeat the legislative grants, if expressed in terms free from ambiguity, when construed in the light of the attendant circumstances, and the purpose of the parties. That the most eligible route for the road was through a portion of this state, and that great and lasting benefits would accrue to its inhabitants, are recited in the preamble of the act as forming the consideration of its enactment. The purpose was to confer powers, rights, and privileges co-extensive with those granted by the Tennessee act of incorporation; and the language employed is comprehensive enough to include, by necessary construction, each and every right, power, and privilege granted thereby.

It is also contended that no right or privilege is conferred by the Alabama act which the legislature of Tennessee had not authority to grant under the constitution of that state, though it may be specially mentioned in the act; and we are referred to the case of *Neely v. State*, 4 Lea, 316, in which the supreme court of Tennessee held a special exemption, in a charter of incorporation, from service as jurors and road hands, in favor of the officers and employes of the company, to be unconstitutional. It may be that comity requires that we should accept as binding the decision of the court of last resort in our sister state as to the constitutionality of such exemptions; and, on the principle that a statute adjudged to be unconstitutional is to be regarded as having never at any time been possessed of any legal force, and as having never existed, that the exemption claimed was never granted. But the decision of the supreme court of Tennessee was not put in evidence, and for this reason cannot be considered by us.

Reversed and remanded.

GOODBAR *et al.* v. DANIEL *et al.*
(*Supreme Court of Alabama*. Jan. 16, 1890.)

EXECUTION—PROPERTY SUBJECT TO—HUSBAND AND WIFE—NOTICE TO AGENT.

1. A judgment debtor who pays out of his own effects most of the purchase money for land which is conveyed to his wife has no interest in the land which is subject to sale under execution, under Code Ala. 1886, § 2892, which provides that "executions may be levied on real property to which the defendant has a legal title or a perfect equity, having paid the purchase money, or in which he has a vested legal interest in possession, reversion, or remainder."

2. Where a judgment creditor buys property at sheriff's sale to which the judgment debtor has

no title, and credits the amount of his bid on his judgment, the credit is *pro tanto* a satisfaction of the judgment, and a court of equity cannot vacate the sale on the ground that the judgment debtor has no title.

8. Where a husband purchases property for his wife, the presumption is that the money invested is the wife's separate estate; and under Code Ala. 1876, §§ 2706, 2709, making the husband the trustee of the wife's statutory separate estate, and charging him with the duty of reinvesting the proceeds of its sale, he is the agent of the wife in making the investment; and any knowledge of the husband as to a fraudulent intent of the vendor, acquired while engaged in the transaction of the business as the wife's agent, is imputed to the wife as her knowledge.

Appeal from chancery court, Cherokee county; COBBS, Chancellor.

The bill in this case was filed on the 16th of February, 1889, by the appellants, Goodbar, White & Co., against the appellees, J. W. Daniel and Mira J. Daniel, his wife, and seeks to have the sale of certain lands described in the bill set aside as fraudulent, the lands resold, and the proceeds thereof applied to the payment of debt due the complainants by one J. B. Mackey. The bill makes a case of a debtor investing his money, to which the complainants, as his creditors, had a prior right, in certain real estate, which he had conveyed to his wife as a gift, to the prejudice of the rights of the creditors; and the theory of the bill is that the complainants, therefore, have the right to follow that money into the property so purchased, and may, if necessary, have the property resold for the purpose of having the proceeds thereof, to which they are rightfully entitled, applied to the payment of their debt.

The facts upon which the equity of the bill is alleged to rest, and as disclosed by the bill, are substantially as follows: During the year 1881 the said J. B. Mackey was engaged in the mercantile business in Cherokee county, Ala., and his place of business was located upon the lands described in the bill, and now involved in the controversy, and he and his wife were living on the said lands. The complainants were also engaged in the mercantile business in Nashville, Tenn., and sold goods to Mackey on credit. In the latter part of the year 1881 said Mackey became insolvent, and failed in business. While in this failing condition, said Mackey executed mortgages to some of his creditors on his stock of goods and choses in action; and finally, on December 20, 1881, he made what purported to be an assignment of his stock of goods for the benefit of his creditors. Just before and after this alleged assignment several of the creditors of said Mackey sued out attachments against his stock of goods, and had them levied thereon, the ground of such attachments being that the said Mackey was fraudulently disposing of his property. On the 27th of January, 1882, the complainants sued out an attachment against the said Mackey, on the ground that he was fraudulently disposing of his property. This attachment was placed in the hands of the sheriff of said county, and by him levied on the lands described in the bill, together with other property belonging to said Mackey, on the 1st day of February,

1882. This attachment was levied on the land in controversy as the property of said J. B. Mackey, the defendant J. M. Daniel being present when said levy was made. Judgment was obtained by the complainants on this attachment in the circuit court, whence the same had issued, on February 21, 1884, for something over \$1,250, and condemning the said land for the satisfaction of such judgment. On the 24th of March, 1884, a *venditioni exponas* was issued upon said judgment, and on the 5th of March, 1884, the said lands were sold by the sheriff under this writ issued upon the judgment recovered by the complainants. At this sale the complainants, being the highest bidders, purchased the lands in controversy for \$250, and entered a credit for that amount on their judgment against said Mackey, and the sheriff made a deed to them for said lands. The bill then alleges that said attachment was levied, the writ of *venditioni exponas* was issued, the lands were sold by the sheriff, and purchased by complainants, and said credit was entered upon said judgment, in total ignorance, on the part of the complainants, of the legal title not being in said Mackey, and that this ignorance was not the result of any fault or laches on their part, but that they had exhausted every resource of information in order that they might find the *status* of the title. The bill then alleges that, subsequent to this said sale of the lands in controversy by the sheriff, the complainants obtained information which showed that the legal title to the said lands had never been in the said Mackey, but, on the contrary, said J. B. Mackey obtained the possession of said lands from one Silas Neal and wife; that the Neals obtained possession from one Lybass, who obtained possession from one Jeff Pullin, who was a brother of J. B. Mackey's wife. The purchase from said Pullin by Lybass was never consummated, for the reason that said Lybass never paid the purchase money, and no deed from Pullin to him was ever made. Said Mackey obtained possession from the Neals as aforesaid, and in consideration thereof conveyed to them a certain tract of land belonging to his wife, Sallie C. Mackey, and during the year 1881 made other payments on said lands in goods out of his store, and in money which was the proceeds of goods sold by him out of his said store; and, as the bill avers, on the 28th of January, 1882, after his said failure and assignment, paid the balance of the purchase money which was due for said lands, before it was due, to the said Pullin, and took a conveyance of the title thereto in the name of his wife. The bill shows that on the same day, or on the next day, the said J. B. Mackey and his wife, Sallie C. Mackey, conveyed the lands in controversy to the defendant Mira J. Daniel, in pursuance of a previous agreement entered into between said J. B. Mackey and the other defendant, J. M. Daniel, the husband of the said Mira J. Daniel. The bill alleges that the said J. B. Mackey took the title to the said lands in the name of his wife, for the purpose of defrauding, etc., his creditors, without any consideration therefor except the tract of land exchanged, which was

worth only about \$500; and that the said J. M. Daniel, as agent for his wife, with a knowledge of said J. B. Mackey's fraudulent intent and purpose in conveying said lands, or with a knowledge sufficient to put him on inquiry, which would have led to the discovery of the fraudulent intent on the part of J. B. Mackey, purchased the said lands, and took a conveyance of the title to the same in the name of his wife, Mira J. Daniel, who is also made a defendant to the bill.

There were two separate assignments of demurrers by the defendant to the bill. In the first, the following grounds were assigned: (1) "There is no equity in the bill;" (2) "the want of equity is patent on its face;" (3) "the bill shows on its face that complainants have an adequate remedy at law by ejectment;" (4) "non-joinder of parties;" (5) "the bill fails to attach exhibits of mortgages;" and (6) "the bill attaches exhibits of assignment." The second demurrer contained the following grounds: (1) "Said bill is without equity, in this:" (2) "It fails to aver, and does not aver, any collusion or knowledge of any wrong or fraud on the part of the grantee, Mira J. Daniel;" (3) "because the levy and sale of land was a satisfaction *pro tanto* of the complainants' judgment and execution, which a court of equity cannot vacate;" (4) "the bill is not definite in its statements of any frauds;" (5, 6) the bill does not show that the complainants and defendants are of full age; (7) "the complainants having purchased at the sheriff's sale at his own suit, the doctrine of *caveat emptor* applies, and complainants cannot be heard to avoid this, and undo their transaction, and set aside their deed, because of mistake."

Upon the submission of the cause on demurrer, the chancellor sustained the third ground of demurrer in the first assignment, and the second, third, and seventh in the second assignment, of demurrers, and overruled all the other grounds. The complainants prosecute this appeal, and assign this decree on the demurrers as error.

Matthews & Daniel, for appellants.
Walden & Son, for respondents.

SOMERVILLE, J. 1. The court, in sustaining the third ground of the first demurrer, ruled that the complainants, under the facts stated in the bill, had a plain and adequate remedy at law by the action of ejectment. This view can be supported only on the theory that, when the complainants purchased the land in controversy at the sheriff's sale under the execution issued against J. B. Mackey on their judgment, they bought the legal title. We have many times held that a purchaser of the legal title to land, sold under execution at a sheriff's sale, has a plain and adequate remedy at law by ejectment, although the land had been fraudulently conveyed by the judgment debtor prior to such sale. *Smith v. Cockrell*, 66 Ala. 64; *Teague v. Martin*, 87 Ala. 500, 6 South. Rep. 362. In this case, however, assuming the allegations of the bill to be true, as we must do on demurrer, Mackey never acquired the legal title to the land, but an equity only. One

Pullen formerly owned the land, and conveyed it to Mrs. Mackey, the wife of said J. B. Mackey, the judgment debtor; her husband being alleged to have paid most of the purchase money out of his own effects. Mackey and wife afterwards conveyed to Mrs. Mira J. Daniel, one of the defendants in the bill. One of the questions which arose in *Smith v. Cockrell*, 66 Ala. 64, was whether precisely such an interest was subject to levy and sale under execution, as a "perfect equity," within the meaning of section 3209 of the Code of 1876, which is now section 2892 of the present Code of 1886. We held that it was not subject to sale, and consequently that the purchaser at such execution sale acquired no title of any kind, legal or equitable, at such sale. On the authority of that case, the complainants, under the facts stated in their bill, acquired no interest of any kind in the land, and certainly not the legal title. They had no remedy, therefore, at law, by ejectment or otherwise. The third ground of the first demurrer was erroneously sustained.

2. The complainants are shown to have bid at the sheriff's sale for the land the sum of \$250, and they credited this sum on their judgment against Mackey, which was for something more than \$1,250. The chancellor properly ruled, in sustaining the third and seventh grounds of the second demurrer, that this credit was *pro tanto* in satisfaction of the complainants' judgment, which a court of equity would not vacate on the ground that the defendant in execution had no title, and the complainants acquired nothing by their purchase at the sheriff's sale. The question whether a purchaser at sheriff's sale will be relieved from the effect of his bid, on its being made to appear that the defendant in execution had no title whatever to the thing supposed to be sold, or whether his bid is an irrevocable satisfaction of the judgment to the extent of the sum bid at the sale, is one on which the authorities are about equally divided. *Freem. Judgm.* (8d Ed.) § 478; 1 *Freem. Ex'ns* (2d Ed.) § 54.

The question was settled in this state as far back as the year 1854. In the case of *McCartney v. King*, 25 Ala. 681, it was held that the amount bid by a judgment creditor for certain slaves sold at sheriff's sale, to which the judgment debtor had no title, was properly credited upon the execution, and was a satisfaction of it against which a court of chancery would give no relief by vacating the sale. The principle was thus stated by Judge GOLDTHWAITE: "The true doctrine, we think, is this: The purchaser, where the sheriff is not indemnified, buys at his own risk, and, if it should turn out that the defendant in execution has no title to the property, he is notwithstanding liable for the amount of his bid. This is on the ground of contract. The officer sells, and the purchaser buys, [not the thing itself, but] the real or supposed right which the defendant in execution has to it; and the purchase operates precisely the same as if he had bargained for and obtained a quitclaim." It appeared in that case that the purchase was made with notice of the defect of title. That, in our opinion, can make no difference in the absence of fraud.

The basis of the whole doctrine is the rule of *caveat emptor*, which is the established and well-understood rule of sheriff's sales. This rule puts every holder upon inquiry as to the defendant's title. It proclaims to the purchaser that there is no warranty of title, and if he buys he must do so at his own risk. It warns him to go and inquire before purchasing, so that, if he makes a poor bargain by parting with his money without getting anything in return for it, he must enter no complaint, no more than if he had bargained for and obtained a mere quit-claim deed. *Smith v. Painter*, 5 Serg. & R. 225. In the language of Chief Justice GIBSON in *Freeman v. Caldwell*, 10 Watts, 9: "The plaintiff's case may be thought a hard one; but it is not more so than would be the case of a stranger, and to say that every sheriff's vendee, who is deprived of the property by title paramount, shall have his money again, would destroy all confidence in the stability of judicial sales." And again, as observed in another case, (*Smith v. Painter*, 5 Serg. & R. 225:) "If this were not the law, an execution, which is the end of the law, would only be the commencement of a new controversy." The doctrine of these cases has long been supposed to be the law of Alabama, and we adhere to them as sound. *Jones v. Burr*, 53 Amer. Dec. 699, and note on pages 701-705; 1 *Freem. Ex'ns*, (2d Ed.) § 54, and cases cited.

3. The bill shows that the defendant J. W. Daniel acted as the agent of his wife, Mrs. Mira J. Daniel, in making the purchase of the land, in taking the deed of conveyance for it, and in paying the purchase money over to the vendor. He thus acted for her in the whole transaction of purchase as her authorized agent. This was in January, 1882, when the statutes of this state made the husband the trustee of the wife's statutory separate estate, with power to control and manage the same, and charged him with the duty of reinvesting the proceeds of its sale in other property, which also became the separate estate of the wife. Code 1876, §§ 2706, 2709. As husband, therefore, Daniel was the agent of his wife for the purpose of making this investment, independently of his appointment by her to such agency. The bill does not allege positively that the purchase money used was Mrs. Daniel's statutory separate estate, but, taking its averments most strongly against the pleader, the inference is that the money and notes invested by her alleged agent were hers, and, if hers, presumptively it was her statutory separate estate. *Steed v. Knowles*, 79 Ala. 446.

The alleged fraudulent deed from Pullen to Mrs. Mackey, and the one from Mackey and wife to Mrs. Daniel, are stated to have been executed on the same day, January 28, 1882. The averment, then, that J. W. Daniel had knowledge of the fraudulent character of the deed taken from Pullen to Mrs. Mackey by necessary implication charges that this knowledge was acquired during the time of his agency, and within the scope of his duty and power as trustee of his wife's separate estate. There are cases which hold to the doctrine that knowledge of a material fact acquired by

an agent in a former transaction, comparatively recent in point of time, such as he is bound to communicate, if present in his mind and memory while engaged in a second transaction, shall operate as constructive notice to his principal in the second transaction. 2 Pom. Eq. Jur. § 672. But there is a long line of decisions in this state which adopt the rule that notice to an agent, to bind his principal, must have been acquired by the agent during his employment, *i. e.*, while he is actually engaged in the prosecution of his duties as agent, and not at a time antecedent to the period of his agency. *Wheeler v. McGuire*, 86 Ala. 398, 5 South. Rep. 190; *McCormick v. Joseph*, 83 Ala. 401, 3 South. Rep. 796; *Reid v. Bank*, 70 Ala. 199; *Pepper v. George*, 51 Ala. 190; *Terrell v. Bank*, 12 Ala. 502; *Mundine v. Pitts*, 14 Ala. 84; *Lucas v. Bank*, 2 Stew. (Ala.) 321. This principle is one based on expediency and sound policy. A different rule, as long ago suggested by Lord HARDWICK, "would make purchasers' and mortgagees' titles depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions." In other words, a contrary rule would render it hazardous for persons to employ efficient agents, of broad knowledge and wide experience, and force selections to be confined to men of ignorance in affairs, and with narrow or no experience. 2 Pom. Eq. Jur. §§ 670, 671. Moreover, a designing agent would be armed with the power of bringing financial ruin on his innocent principal by the intentional, or even fraudulent, refusal to communicate to him his previously acquired knowledge of a secret equity in property or other latent defect of title, the concealment of which was dictated by the agent's greed in earning his commissions, or other equally selfish end. In this case, the knowledge of the husband as to the alleged fraud must be constructively imputed to the wife as her knowledge. *White v. King*, 53 Ala. 162; *Dunklin v. Harvey*, 56 Ala. 177; *Wade, Notice*, § 679. Under these principles the court erred in sustaining the second assignment of the second demurrer.

The decree of the chancellor is reversed and the cause is remanded, that a decree may be rendered on the demurrers in conformity to the principles announced in this opinion.

BLACKSHEAR V. STATE.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

HOMICIDE—INSTRUCTIONS.

In a prosecution for murder, it is not error to refuse to charge: "If the witness J. fabricated a falsehood in order to shield his own guilt, that the jury may look to that in explanation of the evidence of defendant, and then may acquit."

Appeal from circuit court, Dale county; J. M. CARMICHAEL, Judge.

W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. The defendant was convicted of murder in the first degree, and was sentenced to imprisonment in the penitentiary for life. One Jenkins testified as a witness for the state; and his testimony

was not only contradicted in several particulars, but left room for the inference that he may himself have been implicated in the crime charged.

The only ruling of the court to which exception is taken is the refusal to give the following charge, requested by the defendant: "If the witness Jenkins fabricated a falsehood in order to shield his own guilt, that the jury may look to that in explanation of the evidence of the defendant, and they may acquit." The refusal of this charge was proper on several grounds; (1) It was argumentative merely, announcing no distinct proposition of law; (2) it was misleading, in the intimation that the defendant might properly be acquitted if Jenkins' testimony was fabricated and untrue, without regard to the probative force of the other evidence in the case; (3) it gave undue prominence to a single feature of the evidence; (4) it was ambiguous in meaning.

The record is free from any discoverable error, and the judgment is affirmed.

BREDEN V. STATE.

(*Supreme Court of Alabama. Jan. 27, 1890.*)

CRIMINAL LAW—JURY—SERVICE OF VENIRE—STATUTES—REPEAL.

1. Under Act Ala. Feb. 28, 1887, § 2, which provides that "no act passed at the present session of the general assembly shall be repealed or affected in any manner by the adoption of this Code," (Code Ala. 1886, § 4449,) which prescribes the *venire* to be served on defendant, is modified by the act of February 28, 1887, prescribing the organization of juries in certain counties, though the Code did not go into effect until December 25, 1887.

2. Though the record fails to show that a copy of the *venire* and indictment was served on defendant as ordered, it will be presumed to have been done, in the absence of objection in the trial court.

Appeal from circuit court, Lawrence county; H. C. SPEAKE, Judge.

Indictment against Major R. Breden for the murder of Philip Terry. From the minute entry it appeared that, "defendant being in open court, the court caused the box containing the names of the jurors for the county to be brought into the courtroom, and, after having the same well shaken, the presiding judge, in the presence of the defendant, then and there publicly drew from said box the names of fifty jurors, as follows, [stating them,] a list of which was immediately made out by the clerk of the court, and the sheriff ordered to summon the said fifty jurors to appear on the said 6th day of November, the day set for the trial of this cause; and it is ordered by the court that said fifty jurors so drawn and ordered summoned, together with the panel of petit jurors organized for the present week of this court, shall constitute the *venire* from which the jury to try this cause should be selected. And it appearing that the defendant is in actual confinement in the county jail, it is ordered by the court that the sheriff shall serve a copy of the special jury, drawn and ordered summoned to try said case, together with a copy of the jurors organized for the present week of this court, together with a copy of the indictment, up-

on the defendant in person, one entire day before the said 6th day of November, the day set for the trial." There is no bill of exceptions in the transcript.

W. P. Chitwood, for appellant. W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. This is a capital case, being an indictment for murder. The jury was organized under the act of February 28, 1887, (Acts 1886-87, p. 151,) which is applicable to the county of Lawrence. The trial of the defendant was set for the week during which the order was made, and not for a week subsequent. Such being the case, section 10 of this statute requires that the presiding judge shall, in open court, draw from the box containing the names "not less than 25 nor more than 50 of said names for each capital case," a list of which the clerk is required to make out, and the sheriff is thereupon required to summon them. It is provided that "the names of the jurors so drawn, together with the panel of petit jurors organized for the week, shall constitute the *venire* from which the juries to try said capital case or cases shall be selected." There is a proviso to the section which does not affect this case.

1. The order and proceedings of the court in regard to the organization of the jury substantially conform to the requirements of this statute. *Goley v. State*, 85 Ala. 333, 5 South. Rep. 167; *Morrison v. State*, 84 Ala. 405, 4 South. Rep. 402.

2. The order given as to the service of the *venire* on the defendant was equally free from objection. It was that "the sheriff shall serve a copy of the special jury drawn [by the judge] and ordered [to be] summoned to try said case, together with a copy of the jurors organized for the present week of the court," including also a copy of the indictment. This embraced the persons from whom the defendant was required to select his jury, and necessarily constituted the list, to the service of which he was entitled in order to enable him intelligently to make such selection.

3. Section 4449 of the Code of 1886, which describes the *venire* required to be served on the defendant as "a list of the jurors summoned for his trial, including the regular jury summoned for the week in which his case is set for trial," must be considered as modified by the above-cited act of February 28, 1887, so far as concerns the counties to which the latter act is applicable. The Code, it is true, went into effect on December 25, 1887, a later day than the act in question; but the act is made operative as a law of superior force by section 2 of the act of February 28, 1887, adopting the Code, which section provides as follows: "No act passed at the present session of the general assembly shall be repealed or affected in any manner by the adoption of this Code."

4. The record fails to show affirmatively that a copy of the *venire* and indictment was served on the defendant by the sheriff, as ordered. But, in the absence of any objection in the trial court, based on this alleged defect, we will presume that the sheriff discharged his duty by serving these papers in due time, in obedience to the or-

der of the court. *Spicer v. State*, 69 Ala. 159; *Paris v. State*, 36 Ala. 232; *Shelton v. State*, 73 Ala. 5; *Clarke v. State*, 78 Ala. 474; and other cases cited on brief of attorney general.

We discover no error in the record, and the judgment is affirmed.

PRESTWOOD *et al.* v. STATE.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

INTOXICATING LIQUORS—PROHIBITION—POWERS OF COUNTY COMMISSIONERS.

Under Acts Ala. 1880-81, p. 148, which prohibits the sale of liquor in "beat number two, known as 'Fairfield Beat,' in Covington county," an order of the commissioners' court of the county, changing the boundaries of the beat so as to add a portion of it to an adjoining beat, does not authorize the sale of liquor in that portion.

Appeal from circuit court, Covington county; JOHN P. HUBBARD, Judge.

Indictment against James A. Prestwood and Norman McIntosh for unlawfully selling spirituous liquors. Defendants were convicted, and appealed.

W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. The act of February 28, 1881, (Acts 1880-81, p. 148,) prohibits the sale, giving away, or otherwise disposing of any kind of spirituous, vinous, or malt liquors in "beat number two, known as 'Fairfield Beat,' in Covington county." The effect was to establish prohibition as the law of the beat, with the boundaries and area as it was then constituted. If the act had declared the boundaries of the beat it would not have been more definite or fixed in its operation as a rule of civil conduct. The description was certain, because perfectly capable of being rendered certain by record evidence.

It necessarily follows that the commissioners' court had no right to suspend or limit the operation of the law by narrowing the area of the beat. If so, they might entirely repeal it, within their mere discretion, by abolishing the beat. The only power that could repeal or suspend the law was the one by which it had been established, — the general assembly, — in which alone is vested the constitutional authority to make and unmake laws. *Ashurst v. State*, 79 Ala. 276; *Const. Ala. 1875*, art. 1, § 22.

The conviction, under the facts stated in the record, was proper, and the rulings of the court were free from error.

Affirmed.

DOTSON v. STATE.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

CRIMINAL LAW—CONFESSIONS—FORGERY—INSTRUCTION—ORGANIZATION OF GRAND JURY.

1. A statement by the officer who arrested defendant for forgery, made to him: "I have known you a long time, and will help you all I can; and, if you say you did not forge that paper, I'll see M., and get him to compromise it with you. If you did do it, it might be best for you to say so; but, if you did not, stick to it that you did not," — is not sufficient to render a confession made by defendant to the officer inadmissible.

2. On a trial for forgery the defendant requested the following charges: "(1) If the jury

believe from the evidence that the writing offered in evidence is so imperfect and obscure that it is unintelligible without reference to extrinsic facts, they should find defendant not guilty; (2) if the jury believe from the evidence that proof outside of the writing was necessary to explain it, they should find defendant not guilty;" and "(3) if the jury believe that the facts necessary to explain the written instrument are not averred in the indictment, and it is necessary to resort to these facts to explain said writing, then they should find defendant not guilty." *Held*, that they involved the interpretation of a paper writing by the jury, and were properly rejected.

3. Though the record fails to show that any member of the grand jury was appointed foreman by the judge, yet, if the indictment was returned indorsed "A true bill," and signed by one of the grand jury, styling himself "Foreman of the grand jury," he will be presumed to have been appointed by the judge.

4. In such a case, the question cannot be raised in the appellate court when no objection was made in the trial court.

Appeal from city court of Decatur; W. H. SIMPSON, Judge.

Indictment against John Dotson for forgery. One of the witnesses, the police officer by whom defendant was arrested, testified that he said to defendant, while locking him up in the jail: "John, I have known you a long time, and will help you all I can; and, if you say that you did not forge that paper, I'll see Mr. Morx, and get him to compromise it with you. If you did do it, it might be best for you to say so; but, if you did not, stick to it that you did not." The witness further testified "that he made no promise except as above stated, and did not threaten defendant in any way, and that defendant then said he forged the paper, and that he wanted to fix it up." The court refused defendant's request to charge that "(1) if the jury believe from the evidence that the writing offered in evidence is so imperfect and obscure that it is unintelligible without reference to extrinsic facts, they should find defendant not guilty; (2) if the jury believe from the evidence that proof outside of the writing was necessary to explain it, they should find defendant not guilty; (3) if the jury believe that the facts necessary to explain the written instrument are not averred in the indictment, and it is necessary to resort to these facts to explain said writing, then they should find defendant not guilty; (4) if the jury believe the evidence, they must find the defendant not guilty." Defendant was convicted, and appealed.

Wert & Speake, for appellant. W. L. Martin, Atty. Gen., for the State.

STONE, C. J. The question of the admissibility of defendant's confessions as evidence against him is not distinguishable in principle from the same question considered and decided in *Dodson v. State*, 88 Ala. 60, 5 South. Rep. 485. In that case, following our former rulings, we held the confessions admissible. We might possibly go further in this case, and hold that, if any inducement was held out, it was that the defendant should not confess. The inducement offered was in substance, that if defendant was not guilty he (the witness) would intercede for him, and thought he could bring about a settlement of the difficulty, but, if he

denied his guilt, to stick to it. There is nothing in this objection.

The first three charges asked for defendant were severally faulty. Each invoked an interpretation of paper writings by the jury; and for that reason, if for no other, each was properly refused. 3 Brick. Dig. p. 107, § 4. There was certainly enough criminating testimony to authorize the submission of the case to the jury. The charge on the effect of the testimony was rightly refused.

In the organization of the grand jury, of 15 persons, the record fails to inform us that the trial judge appointed any one of them to be foreman of the body. Code 1886, § 4337. The indictment was returned by the grand jury into court, having upon it the indorsement, "A true bill," signed by one of the members, styling himself "Foreman of the Grand Jury." The record fails to state that this question was raised in the court below. Probably, the proper method of raising such question would be by motion in the court below to quash the indictment, or to strike it from the file, and this before plea to the merits. To quash it, under such circumstances, would delay or embarrass the progress of the prosecution much less than a ruling sustaining the motion, if made in this court. Code 1886, § 4394.

The indictment was returned into court by the grand jury so organized, had on it the proper indorsement, "A true bill," signed by one of the body, styling himself "Foreman of the Grand Jury;" and in that condition it was handed to and inspected by the judge presiding, who a few days previously had organized the body. Can it be supposed that an official function as important as that of indorsing and signing the grand jury's finding would pass the eye of the presiding judge unnoticed and unrebuked? In *Floyd v. State*, 30 Ala. 511, the record sent up to this court failed to disclose that any of the grand jurors by whom the indictment was found, except the foreman, had been sworn as such. This court said: "The objection that it does not appear from the record that any of the grand jury besides the foreman was sworn comes too late when made for the first time in this court." In support of that principle, section 3591 of the Code of 1852 was cited. That section, without change that affects this case, is section 4445 of the Code of 1886, and has never been impaired since its enactment. This case was followed in *Roe v. State*, 82 Ala. 68, 3 South. Rep. 2, and in *Harrington v. State*, 83 Ala. 9, 3 South. Rep. 425. There is nothing in this objection.

Affirmed.

COLLINS V. STATE.

(*Supreme Court of Alabama*. Jan. 27, 1890.)

CONSTITUTIONAL LAW—TRIAL BY JURY.

1. Acts Ala. 1888-89, p. 501, which confers on the county court of Barbour county jurisdiction of all misdemeanors committed in that county, and provides that the petit juries "shall consist of two panels, of eight men each, and shall be selected as herein provided," and adopts the general jury law, "except as modified or repealed by this act," confers on the county court power to try misde-

meanors on an indictment by a jury of only eight men.

2. Const. Ala. 1875, art. 1, §§ 7, 12, which provide that "the right of trial by jury shall remain inviolate," and that in all prosecutions by indictment the accused shall have "a speedy public trial, by an impartial jury" of the county or district in which the offense was committed, contemplates a common-law jury of twelve men, and a statute prescribing that a jury for the trial of a misdemeanor on an indictment shall consist of eight men is unconstitutional.

3. The act conferring jurisdiction to try misdemeanors on indictment, without a constitutional provision for a trial by jury, is void.

Appeal from county court, Barbour county; A. H. ALSTON, Judge.

H. D. Clayton, A. H. Merrill, W. C. Swanson, and G. L. Comer, for appellant. W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. The controlling point of contention in the present case is the alleged unconstitutionality of the act approved February 20, 1889, entitled "An act to regulate the trials of misdemeanors in Barbour county." Acts 1888-89, pp. 501-508. This statute confers on the county court of Barbour county jurisdiction of all misdemeanors committed in that county, and provides for the transfer to that tribunal of all indictments pending and untried in the circuit court on the day of adjournment of any term, and regulates in detail the procedure authorized to be adopted on such trials. The vital objection urged to the act is that it expressly provides for the trial of such cases by a jury of only eight persons, instead of twelve, and authorizes an appeal upon conviction directly to the supreme court only, thus depriving the defendant of his constitutional right of trial by jury. The constitution of Alabama declares that "the right of trial by jury shall remain inviolate," and in all prosecutions by indictment that the accused shall have "a speedy public trial, by an impartial jury" of the county or district in which the offense was committed. Const. 1875, art. 1, §§ 7, 12. It does not admit of controversy that the jury contemplated by these clauses of the constitution is a common-law jury of twelve men, and that a jury constituted of a less number than this is not a constitutional jury. *Iron Co. v. Cabaniss*, 87 Ala. 328, 6 South. Rep. 300; *Cooley*, Const. Lim. (5th Ed.) 391; *Sedg. St. & Const. Law*, (2d Ed. Pom.) 493, and note; *Steamboat Co. v. Roberts*, 48 Amer. Dec. 178, 193, note; *Wynehamer v. People*, 13 N. Y. 373; *Work v. State*, 2 Ohio St. 296; *Vaughn v. Scade*, 30 Mo. 600; *State v. Kaufman*, 1 Crim. Law Mag. 57, note 61.

There are cases, it is true, where the general assembly is constitutionally authorized to dispense with a grand jury, and to authorize by law the prosecution of certain misdemeanors before justices of the peace and other inferior courts. Const. 1875, art. 1, § 9. And in such case, the statute authorizing the waiver of jury trial by the defendant, after transfer of an indictment for misdemeanor to an inferior court, has been held to be free from constitutional objection. *Connely v. State*, 60 Ala. 89. So, where a right of appeal is secured to a higher court, with a right of trial there

by a common-law jury, the right may even thus be practically preserved. Sedg. St. & Const. Law, (Pom. 2d Ed.) 491. This case falls within none of these exceptions or modifications of the general rule under discussion.

A close inspection of the statute under consideration leaves no doubt as to what was the legislative intent as to the composition of the only kind of jury authorized to be organized under its provisions. It is a jury of eight persons, and none other. It is declared that, "if a jury is demanded, the court shall make an entry thereof on the record, and proceed as herein provided;" meaning thereby in the mode prescribed by the act. Acts 1888-89, p. 502, § 6. It is thereupon provided that the petit juries "shall consist of two panels, of eight men each, and shall be selected as herein provided," but may be impaneled under the general law. So the authority to order special *venires*, and select tales jurors, under the general jury law as it stands in the Code, is coupled with the limitation, "except as modified by this act." Page 507, § 24. And again, the general jury law is declared applicable, "except as modified or repealed by this act." A guarded caution is thus manifest that the authority of the county court to organize juries shall be limited to juries composed of eight persons. The intention to exclude the power to increase the number to twelve is as clear as language can make it, short of express prohibition. By necessary implication, we are driven to the conclusion that the jurisdiction attempted to be vested in this court embraced the power to organize but one sort of jury, and that is a jury of eight men. This feature of the law, under the authorities cited above, is palpably unconstitutional.

Striking out the section authorizing the organization of these imperfect juries as void, and we have an act authorizing the trial of a defendant on an indictment, without providing for a trial by jury in any mode, either directly by the court on which jurisdiction is conferred, or by appeal to another tribunal in which the right is secured. This was not the legislative intention, and, if it were, the act is repugnant to the clauses in the declaration of rights above cited, which provide for a jury trial by twelve men in all prosecutions by indictment, and the purpose of which was to preserve the right inviolate. In this view of the case, under the authorities, the whole act must fall. Railroad Co. v. Morris, 65 Ala. 198; Powell v. State, 69 Ala. 13; Stewart v. Commissioners, 82 Ala. 209, 2 South. Rep. 270; Allen v. Louisiana, 103 U. S. 80; Ex parte Roundtree, 51 Ala. 42; Elsberry v. Seay, 83 Ala. 614, 3 S. W. Rep. 804.

The judgment must be reversed. We cannot remand the cause to the county court, because the statute above discussed, purporting to give that tribunal jurisdiction, is void and inoperative, and confers no jurisdiction. We do not decide the question whether the cause has or has not been discontinued in the circuit court by the attempted removal therefrom, but leave this an open inquiry. Ex parte Rivers, 40 Ala. 712.

LINTON v. STATE.

(Supreme Court of Alabama. Jan. 27, 1890.)

MISCEGENATION—INDICTMENT—EVIDENCE—NEGRO.

1. An indictment which avers that "B., a negro man, and L., [defendant,] a white woman, did intermarry or live in adultery or fornication with each other," sufficiently charges the crime of miscegenation.

2. In a prosecution for miscegenation, it is not error to allow the state to make proffer to the jury of the person charged in the indictment to be the paramour of defendant, in order that they may determine his color by inspection.

3. Under Code Ala. 1886, § 2, cl. 5, which makes the term "negro" to include the term "mulatto," a conviction on an indictment charging cohabitation with a negro is supported by proof of cohabitation with a mulatto.

4. Proof of the parties living together in adultery for a single day with the intention to continue the relation is sufficient, and it is not necessary to establish any agreement or understanding between them that sexual intercourse should continue.

5. The state cannot attack the character for chastity of female defendant.

Appeal from circuit court, Pike county; JOHN P. HUBBARD, Judge.

Indictment against Martha Linton. The indictment charged "that John Blue, a negro man, and Martha Linton, a white woman, did intermarry, or live in adultery or fornication with each other, against the peace," etc. The court refused to give the following charges requested by defendant: "(1) If the jury believe the evidence, they must find the defendant not guilty of felonious adultery, as charged in the indictment. (2) In adultery cases it is permissible for the state to show that the female defendant is a lewd woman; that her character for chastity is bad. (3) If the jury believe the evidence, they must find the defendant not guilty. (4) If the evidence leaves in the mind of the jury a doubt whether John Blue is a negro or a mulatto, they must find the defendant not guilty. (5) The evidence must not only show beyond a reasonable doubt that John Blue and the defendant had sexual intercourse with each other, but also that there was an agreement between them to keep up or continue such intercourse. (6) If the circumstances in evidence conduce as strongly to show that the act of sexual intercourse was committed with George Blue as with John, and the jury have a doubt as to which, it is their duty to acquit; or, unless the jury are satisfied from the evidence beyond a reasonable doubt that the sexual intercourse, with an agreement to continue, was committed with John Blue, they must acquit. (7) The state must prove beyond a reasonable doubt that John Blue is a negro; and, if the evidence shows that he is a mulatto, then the defendant is not guilty. (8) It is not sufficient to convict to show that the defendant had one act of sexual intercourse with John Blue without more, but the evidence must show beyond a reasonable doubt that there was an agreement between the two to continue that illicit relation. (9) It is competent for the jury to look to the fact, if it be proved, that the defendant was at the house which was the home of two men, one of whom (John Blue) was married; and if they have a doubt as to which one of the two the defend-

ant had sexual intercourse with, if with either, then they must acquit her."

W. L. Martin, Atty. Gen., for the State.

MCCLELLAN, J. The indictment in this case sufficiently charges the crime of miscegenation against the appellant, a white woman, and John Blue, a negro man. *Pace v. State*, 69 Ala. 231; Code, § 4189.

There was no error in allowing the state to make proof of the person of John Blue to the jury, in order that they might determine by inspection whether he was a negro, as charged in the indictment. There had been a severance in the trials of the appellant and Blue, and evidence of this character is clearly competent to show sex, (*White v. State*, 74 Ala. 31;) age, (*State v. Arnold*, 13 Ired. 184;) personal resemblance, (*State v. Woodruff*, 67 N. C. 89; *State v. Britt*, 78 N. C. 439;) color and race, (*Garvin v. State*, 52 Miss. 207; *Gentry v. McMinnis*, 3 Dana, 385;) and many like facts in regard to the personality of the defendant himself, or of any other individual involved in the issue, (*Whart. Crim. Ev.* § 311 et seq.)

Clause 5, § 2, of the Code, defines the terms "negro" and "mulatto," when and as used in the Code, and makes the former include the latter, and the latter to mean "a person of mixed blood, descended on the part of the father or mother from negro ancestors to the third generation inclusive, though one ancestor of each generation may have been a white person." Interpreted in the light of these definitions, section 4018, for a violation of which the appellant was convicted, may be read as if the words, "or the descendants of any negro," etc., to the word "intermarry," were omitted, since the preceding word, "negro," embraces all descendants of a negro to the third generation, though one ancestor of each generation be a white person. And a conviction had on proof that one of the parties was a mulatto would not be bad for variance, since "mulatto" and "negro" are interchangeable terms throughout this body of laws. The contention of appellant, that she could not be convicted of the felonious grade of the offense charged, if it appeared that her paramour was a mulatto, the indictment charging cohabitation with a negro, proceeded, doubtless, on the meaning of those terms, unaffected by the statute to which we have referred; that is, that a negro, generically considered, is a descendant of the whole blood from the black, woolly-headed race of southern Africa, (*Felix v. State*, 18 Ala. 726,) and that a mulatto is of the half-blood,—a person who is the offspring of a negress by a white man, or of a white woman by a negro," (*Thurman v. State*, 18 Ala. 278.) Upon whatever ground the contention was predicated, it is untenable, and the charges of the primary court, to the effect that conviction of a felony could be had if the man were shown to be a mulatto, as well as its refusals of charges requested which asserted or were based on the contrary proposition, were free from error.

The charges requested by the defendant, to the effect that there could not be a verdict of guilty unless the jury should find

there was "an agreement" or "understanding" between the parties that sexual intercourse should continue, palpably tended to mislead the jury into a belief that, although the parties for a given time (a single day it may be) lived together in adultery, intending to continue that relation, yet they could not be convicted unless this intention to so continue was evidenced by an agreement—a compact—to that effect, and notwithstanding the circumstances might have clearly indicated such intention, aside and apart from any agreement. The charges were properly refused. *Hall v. State*, 53 Ala. 463; *Smith v. State*, 39 Ala. 554.

Charge No. 4 asked by the defendant, and refused, was purely an argument, based on the failure of the state to show that the character of the defendant for chastity was bad. Moreover, the charge was affirmatively bad. On the trial of the female defendant (and she alone was on trial here) it is not competent for the state to attack her character for chastity. *Blackman v. State*, 36 Ala. 295.

The remaining requests for instructions base defendant's right to an acquittal upon the jury's having a doubt—whether reasonable or not is not hypothesized—as to whether she lived in adultery with John Blue, as charged, or with another named person. Their refusal was manifestly proper. *Humbree v. State*, 81 Ala. 67, 1 South. Rep. 548; *Jones v. State*, 79 Ala. 23.

We discover no error in the record and the judgment of the circuit court of Pike is affirmed.

WINSLOW V. JONES *et al.*

(*Supreme Court of Alabama*. Feb. 1, 1890.)

CHattel Mortgages—ALTERATION BY CONSENT.

Under Code Ala. 1886, § 1731, which provides that "a mortgage of personal property is not valid unless made in writing, and subscribed by the mortgagor," when, by request of the mortgagors, part of the property embraced in the mortgage is released, and other property substituted by interlineation, the mortgage, as altered, is valid.

Appeal from circuit court, Butler county; JOHN P. HUBBARD, Judge.

Action by W. A. Winslow against J. C. Jones and Harvey Jones. Judgment was rendered for defendants, and plaintiff appealed.

C. L. Wilkinson and Richardson & Steiner, for appellant.

CLOPTON, J. Appellant, as mortgagee, brings against appellees, as mortgagors, the action of detinue for the recovery of a horse. The mortgage, which was of personal chattels, was executed February 11, 1888, and included at that time two horses. Some months after, by request and consent of the mortgagors, both being present, one of the horses originally included in the mortgage was released therefrom, and in lieu thereof the horse now sued for was, by interlineation, substituted. The sole question presented is whether, under section 1731 of the Code, which declares, "a mortgage of personal property is not valid unless made in writing, and subscribed by the mortgagor," the mortgage is valid,

and passed the title to the horse in controversy.

The general rule, that parties may alter or modify at pleasure their contract after its consummation, applies to deeds and mortgages. An insertion of other personal property in a mortgage is but a modification or alteration of the contract, which is not prohibited by any rule of law, and which the parties are competent to make. In reference to alterations and interlineations in a conveyance of real estate, made in the handwriting of the grantor, BRICKELL, C. J., says in *Sharpe v. Orme*, 61 Ala. 263: "If it had been shown they were made after the delivery of the deed, the conclusion would be that they were made by consent, and the validity of the deed would be unaffected by them, if it were not that an attestation by witnesses, or an acknowledgment of execution before a proper officer, is essential to the valid execution of a conveyance passing the legal estate in lands." Neither attestation by witnesses, nor acknowledgment before an officer, is essential to the valid execution of a mortgage of personal property; hence the insertion of other personal property by consent of all the parties does not affect its validity. A resubscription would be a mere formal and useless ceremony. In note 1, § 568a, 1 Greenl. Ev., the annotator remarks: "Whenever, therefore, a deed is materially altered, by consent of the parties, after its formal execution, the grantor or obligor assents that the grantee or obligee shall retain it in its altered and completed form, as an instrument of title; and this assent amounts to a delivery or redelivery, as the case may require, and warrants the jury in finding accordingly." When the mortgage to plaintiff was interlined in the manner here shown, and again delivered to the mortgagee, with intent that he should retain it as thus altered, it became operative as an instrument of conveyance, having the same effect, as between the parties, as if a new mortgage had been made. *Bassett v. Bassett*, 55 Me. 127. Reversed and remanded.

YOUNGBLOOD *et al.* v. STAGE *et al.*

(*Supreme Court of Alabama*. Feb. 1, 1890.)

MARRIED WOMEN—MECHANICS' LIENS.

Code Ala. 1886, § 2846, provides that "the wife has full legal capacity to contract in writing as if she were sole, with the assent or concurrence of the husband expressed in writing;" section 3018 provides for a material-man's lien for materials furnished for the construction or repair of any building, "by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor;" and section 3046 provides that "every person, including married women and *cestuis que trust*, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor,' as used in this chapter." *Held*, that a lien may be acquired under a contract with the agent of a married woman.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Parson, Darby & Burney and Watts & Son, for appellants. *F. S. Ferguson and W. R. Houghton*, for appellees.

CLOPTON, J. By this action appellants seek to enforce a lien for lumber and other materials furnished for the erection of a building on a lot in the city of Birmingham, of which the defendant Mrs. McAnally is the owner. The materials were furnished to W. N. Stage, who was engaged in erecting the building under a contract with Mrs. McAnally. To the action she filed a plea of coverture, to which plaintiffs demurred. The demurrer having been overruled, and plaintiffs declining to take issue on the plea, or to plead over, judgment was rendered for the defendants.

In *Ex parte Schmidt*, 62 Ala. 252, it was ruled that, under the statutes in force at the time the contract in that case was made, a lien attached to property, which was the statutory separate estate of a married woman, for materials furnished, under a contract with her husband, in the erection of a dwelling thereon for her immediate use, benefit, or enjoyment. In *Schmidt v. Joseph*, 65 Ala. 475, the same ruling was made in respect to property the title of which was in a trustee for the sole and separate use of Mrs. Joseph; being an equitable, as then distinguished from a statutory, separate estate. The correctness of these rulings, under the statutes as they stood at that time, is not questioned or controverted; but it is contended that they are inapplicable to a contract made by the wife, without the assent or concurrence of the husband, since the act of February 28, 1887, went into effect. The argument is that the conclusion in *Ex parte Schmidt*, *supra*, is rested on the trusteeship of the husband, and his general power as such trustee to improve the wife's separate property; and that the act of February 28, 1887, which composes sections 2341-2351, inclusive, of Code 1886, introduced a new system of laws, which abolished the trusteeship of the husband, and abrogated the existing distinction between equitable and statutory separate estates, except as to property conveyed to an active trustee for the benefit of the wife. The insistence is that, the trusteeship being abolished, the decision is inapplicable.

The full extent and effect of the decision in *Ex parte Schmidt* is made manifest by reference to sections 3440, 3460, Code 1876, which were being considered and construed as compared with the sections of the same Code creating and regulating separate estates, and by reference to the complaint in that case. The first section provided that every mechanic or other person, who shall do or perform any work or labor upon, or furnish any material for any building or improvement upon, land, under or by virtue of any contract with the owner or proprietor thereof, or his agent or trustee, contractor or subcontractor, shall have, upon complying with the provisions of the statutes, a lien to the extent and in the manner provided upon the building or improvement, and upon the land upon which the same is situated, for his work and labor done or material furnished. The other section declared: "Every person, including all *cestuis que trust*, for whose immediate use, enjoyment, or benefit any building, erection, or improvement shall

be made, shall be included by the words 'owner or proprietor thereof,' under this chapter, not excepting married women, as to their separate property." The complaint did not aver that the contract was made by the husband as trustee, nor that he was trustee, but it substantially alleged that the contract was made by him as agent, and that the work was done on the house and materials furnished for the immediate use, benefit, and enjoyment of the wife. It was held that these averments brought the case directly within the provision of sections 3440 and 3460. It is true that, in the opinion rendered, reference is made, *arguendo*, to the trusteeship of the husband, and his power as such to contract for the improvement of the wife's separate property, without her participation in making the contract; and it was held that under the statute a mechanic who did work or a material-man who furnished materials in the erection of a building, or in making improvements on the wife's separate property, under a contract with the husband as trustee, had the statutory lien on such property, if the requirements of the statute were complied with. But it is also said: "We hold, further, that the wife, by her own contract for building, improvement, etc., may fasten a lien on her separate property, if the building, erection, or improvement be for her immediate use, enjoyment, or benefit." A contract with the husband as trustee was not essential to create the lien; a contract by the wife or her agent was sufficient.

Sections 3440 and 3460 were first enacted by the act of March 6, 1876, the provisions of which act were incorporated in sections 3440-3460, inclusive, Code 1876, (Acts 1875-76, p. 165.) Prior thereto the sections of that Code in relation to separate estates had been enacted, and were in force at that time. Under these sections, the wife had not capacity to contract, or to charge her statutory separate estate with any debt. Even its liability for articles of comfort and support of the household did not arise from the contract of the wife, but was created and fixed by the statute, dependent upon the contract of the husband, express or implied. His personal liability was an indispensable element. In this state of the legislation respecting the capacity of the wife, sections 3440 and 3460 were adopted. The intent of the legislature, and their operation and effect, were to confer authority on the wife to fasten a lien on her separate property, by her own contract, for building on or improving the same. The act of February 28, 1887, does not operate to diminish, but enlarges, the capacity of the wife to contract. Section 2346, Code 1886, declares: "The wife has full legal capacity to contract in writing as if she were sole, with the assent or concurrence of the husband, expressed in writing." That act did not repeal or modify the operation of sections 3440 and 3460 of the Code of 1876, either expressly or by implication. They are not mentioned in the repealing clause, by which several of the other sections are expressly repealed by numbers. They are carried and incorporated in the Code of 1886 in language

more succinct, but more explicit. The words, "under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, or contractor, or subcontractor," are retained in section 3018 of the latter Code. And section 3046 defines who is the owner or proprietor, as used in section 3018, in the following terms: "Every person, including married women and *cestuis que trust*, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor,' as used in this chapter." When we bear in mind that the trusteeship of the husband was abolished, and the wife was clothed with power to manage and control her separate property without the intervention of a trustee, it seems that the changes in the language and in the collocation of phrases in those sections were made in view of the provisions of the new system of laws in relation to separate estates. Sections 3440 and 3460 were re-enacted by the adoption of the Code of 1886, without material change or modification and are therefore presumably a legislative adoption of the judicial construction which had been placed upon them. These sections, and the sections of the Code relating to separate estates, being *in pari materia*, should be construed in reference to each other,—the former, so as to give full effect to the just policy of enactments declaring liens securing to the mechanic compensation for his labor, and to the material-man payment for the materials furnished for the benefit and enjoyment of others; and the latter, if it can be reasonably done, so as to place it within the power of the wife to improve her separate property. Sections 3018 and 3046 of the Code of 1886 may be afforded the same field of operation and the same effect, in connection with sections 2341-2351, as the corresponding sections of the Code of 1876 in connection with the statutes then in force regulating separate estates. Under the present statutes, the statutory lien in favor of mechanics and material-men may be created and fastened upon the separate property of the wife by her own contract. Authority to make a contract, sufficient to constitute a basis on which the specific lien may be raised, is necessarily implied from the terms of the statutes declaring such lien, though the contract may not be made so as to bind her personally. Coverture is no defense to an action brought to enforce such lien. This question has been expressly decided at the present term in *Wardsworth v. Hodge*, ante, 194.

Reversed and remanded.

SIMPSON *et al.* v. HINSON.

(Supreme Court of Alabama. Feb. 1, 1890.)

CHATTEL MORTGAGES—NOTICE—TROVER AND CONVERSION.

1. S. mortgaged his crop to plaintiffs, but the deed was not recorded until he had executed another mortgage, to defendant. Defendant, before taking his mortgage, inquired of S. whether plaintiffs did not hold a mortgage against him, and was informed that they did, but that it was on other property, and did not include the crop. Held, that the information was not sufficient to put de-

defendant on inquiry as to what was included in the prior mortgage.

2. When the action is for the conversion of the crop, the excess of the proceeds of the sale of the crop over the debt secured by defendant's mortgage cannot be recovered as money had and received.

Appeal from circuit court, Lowndes county; JOHN MOORE, Judge.

Action by Simpson & Hall against J. L. Hinson. Judgment was rendered for defendant, and plaintiffs appealed.

Girard Cook and Gamble & Powell, for appellants. *W. R. Houghton*, for appellee.

CLOPTON, J. Both plaintiffs and defendant derive claim to the cotton in controversy under mortgages executed to them, respectively, in February, 1887, by T. A. Simmons. The one to plaintiffs was first executed, but was not recorded until after the execution of defendant's mortgage. Conveyances of personal property to secure debts being, under the statute, inoperative against creditors and purchasers without notice until recorded, defendant's claim must prevail, unless it be shown that he had notice of the prior mortgage. The only evidence on which plaintiffs claim notice is that before defendant took his mortgage he inquired of the mortgagor whether the plaintiffs did not hold a mortgage against him, and was informed that they did, but that it was on other property, and did not include his crop. It turned out that their mortgage did include the crop. It is insisted that this information, being communicated by the mortgagor, was sufficient to put the defendant upon inquiry as to what property was embraced in the prior mortgage, which inquiry he should have made of plaintiffs, and not relied on the statement of the mortgagor. The court gave the affirmative charge in favor of defendant.

In determining whether a purchaser is excused or justified in relying and acting upon an entire communication, consisting in part of information which, unexplained or contradicted, would amount to actual notice, and in part of explanatory or contradictory statements invalidating the effect of such information, the relation of the person making the communication to the subject-matter, and his interest therein, is a material element entering into the consideration. If the information and the explanatory and contradictory declarations are communicated by a stranger, having no interest to serve or promote, the purchaser, in the absence of further information, or special reasons for rejecting the latter statements, may rely on the whole communication; but, if the person with whom the purchaser is dealing as the owner of the property informs him that there had been an outstanding, conflicting lien or claim, he is not warranted in relying and acting on such person's contemporaneous declaration that such lien or claim has been paid, rescinded, abandoned, or otherwise removed. Information of an outstanding lien or claim, coming from one thus interested, is sufficient to put the purchaser upon inquiry as to the truth of his explanatory or contradictory statements. This, however, is not the question involved in this case. No information pointing to

the existence of a prior mortgage on the crops was given; the declaration being that no such mortgage had been made.

The precise question raised by the affirmative charge is this: Whether information of the existence of a mortgage held by plaintiffs, communicated by the mortgagor, who at the same time declared that it was on other property, and did not affect the crop, which statement defendant believed and acted on, but which was untrue and misled him, is sufficient, in the absence of other information, or grounds for suspicion of the truth of the mortgagor's statement, to charge defendant with notice of the prior mortgage. This question was expressly decided in *Jones v. Smith*, 1 Hare, 43. In that case the equity of the plaintiff arose under a marriage settlement between his father and mother. Smith, before taking his mortgage, inquired of the mortgagor and his wife, who were the father and mother of the plaintiff, whether any marriage settlement had been made between them, and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate, which he proposed to mortgage. The mortgagee took a mortgage on the husband's property, which was in fact included in the marriage settlement, as security for the money advanced, without having seen the settlement, or having ascertained its contents. It was held that he was not chargeable with notice of the contents of the settlement, or that it comprised the husband's estate. On appeal to the chancery court his decision was declared to be right, and the appeal was dismissed. 19 Eng. Ch. 243. The lord chancellor, in reference to the sufficiency of the information to charge the mortgagee with notice, said: "Undoubtedly, where a party has notice of a deed which, from the nature of it, must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed, and of all other deeds to which it refers; but, where a party has notice of a deed which does not necessarily—which may or may not—affect the property, and is told that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision that goes the length of saying that if he is misled he is fixed with notice of the instrument." The facts in the case of *Jones v. Smith*, and in the case under consideration, are substantially the same. They are parallel cases.

Much contrariety is found in the decisions as to what collateral facts are sufficient to put a party upon inquiry, so that he may be charged with notice of the main fact. The criterion most generally adopted and applied is whether the particular facts would lead a reasonably prudent man, acting honestly, to make further inquiries before consummating a transaction concerning the property. Though this test leaves a broad margin for the exercise of discretion and judgment, it is perhaps as definite as can be laid down, and applicable in the greater number of instances. Information, personally communicated,

which constitutes actual notice, proved by positive evidence, must assert the existence of a conflicting claim or right as a fact, though it need not impart full information of its details, nature, or extent. Information of facts which put a party upon inquiry, when such inquiry, if prosecuted with due diligence, would certainly lead to knowledge or discovery of a conflicting claim or right, is an equivalent or substitute for actual notice, or, as generally defined, circumstantial evidence from which actual notice is absolutely inferred. The logical sequence is that the particular facts, in order to authorize the inference of actual notice, or to constitute a failure to inquire a substitute for actual notice, must at least suggest the probability of an adverse interest or right,—must be of kind and amount as would excite in the mind of a prudent man a reasonable apprehension of the existence of some antagonistic incumbrance or claim.

In *Rogers v. Jones*, 8 N. H. 264, Newhall, the mortgagor, had executed and delivered to Mrs. Jones a deed conveying the premises to her. It was returned to him, that he might acknowledge it before the proper officer. While the deed was in his possession, he applied to Rogers to dismiss some attachments which had been sued out, sell the personal property, and take a note for the balance of the debt, secured by a mortgage of the premises, which he proposed to give, and at the same time informed Rogers that he had prepared a deed conveying the premises to Mrs. Jones, but it had never been acknowledged or delivered, and exhibited the deed. Rogers accepted the mortgage. It was held that the mortgagee had the better title. Also, where the only proof of notice was that the trustee had prepared a draft of a deed of appointment to be executed by another, under a power, but it was not shown that he ever heard of it afterwards, it was held that the trustee was not bound by notice of the deed, though it was in fact executed. *Cothay v. Sydenham*, 2 Brown, Ch. 391. These decisions rest on the principle that a party who is merely informed that a deed had been prepared, but not delivered, or that a deed was contemplated, but never heard of its execution, is not put upon inquiry as to the actual delivery of the one, or the actual execution of the other. In *Cothay v. Sydenham*, supra, Lord THURLOW says: "If the notice had been of a deed actually executed, it certainly would do; but, where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise. There is no case or reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation." The principle is that, to devolve the duty to make further inquiry, it is essential that the facts of which the party is informed reasonably point to or indicate the existence of a conflicting right or claim affecting the particular property. The present case is stronger than either of those last cited.

The question is whether defendant, having been informed by the mortgagor that plaintiffs had a mortgage on other property, his omission to make inquiry of them

as to its contents, by the prosecution of which he would have discovered that it included the crops, is conclusively charged with notice, as effectively as he would have been by its registration prior to the execution of defendant's mortgage. If the mortgagor had simply asserted that there was no mortgage on his crops, it is manifest that defendant would not have been affected with notice. The additional statement, that plaintiffs had a mortgage relating to other property, did not qualify such assertion so as to destroy its effect and consequence, unless special reasons existed for rejecting, or at least doubting its truthfulness. The extraneous facts, sufficient to fix upon a party dealing in respect to the property notice of an unrecorded incumbrance, involve fraud or negligence in failing to make inquiries obvious to a prudent man. Had plaintiffs' mortgage necessarily affected the crops, or had defendant been told that it did affect them, but was invalid or inoperative for any cause, a different case would have been presented. But it is a harsh rule, tending to obstruct and defeat daily business transactions, which declares a party to be a *mala fide* purchaser, or charges him with notice of a prior unrecorded incumbrance, because of failing to make inquiry as to its contents, when the same person who informed him of its existence also informed him at the same time that it does not affect the subject-matter of his purchase, in the absence of any probable cause to suspect the truth of the latter statement. A rule of such stringency would go so far as to exact inquiry as to the contents of all unrecorded conveyances which the party proposing to purchase was informed, or may have heard, had been previously made by the person with whom he is dealing as owner, because of a bare possibility that they may affect the particular property. No special reasons are shown why the defendant should have doubted or suspected the truth of the statement of the mortgagor. Its apparent candor was rather calculated to induce confidence. There being no evidence tending to show any ground of distrust, the fact of which defendant was informed was not, under the circumstances, sufficient to put him upon inquiry. The registration of the mortgage subsequently made by plaintiffs was not notice to defendant. The record has no retrospective effect. 1 Jones, Mortg. § 562.

It is also insisted that the affirmative charge should not have been given, it appearing that the proceeds of the sales of the cotton were in excess of the amount due on defendant's mortgage, and there being a conflict in the evidence whether plaintiffs directed it to be sent by the mortgagor, by whom defendant testified he sent it, and that he was so directed by plaintiffs. The action is founded on a tort,—the wrongful conversion of the cotton; one count of the complaint being in trover, and the other in case. Under such complaint, plaintiffs cannot recover the excess as money had and received. Giving the affirmative charge worked no injury to them in this regard.

Affirmed.

DYER v. STATE.

(Supreme Court of Alabama. Jan. 29, 1890.)

CHattel Mortgages—CONSIDERATION—PROPERTY COVERED—OFF-SPRING OF ANIMALS—ACTS OF AGENTS.

1. A mortgage purporting on its face to have been given "in consideration of advances made for the year 1884, and to secure the same," reciting the amount to be the sum of \$100, is *prima facie* sufficient, as to consideration, between the immediate parties to the instrument, there being no evidence in rebuttal of the recital.

2. An indictment for removing mortgaged property charged that the mortgage lien covered two cows and two calves. The mortgage purported to be given on two cows. *Held* no variance, as the offspring of mortgaged animals, which are born after the making of the mortgage, are subject to the lien of such incumbrance.

3. The recalling of a witness to prove the value of the mortgaged animals, which was permitted to the state after the giving of the oral charge by the court, was within the discretion of the court, and furnishes no ground of reversible error.

4. The mortgagee's letter of instruction to defendant's wife was to have a bale of the mortgaged cotton shipped to Rome, Ga., and his verbal instruction to defendant himself was to "haul the cotton to Owen's Landing, and ship it to Rome." *Held*, that the delivery of the cotton at Owen's landing, where it was destroyed by fire, was not a delivery to the mortgagee, at his subsequent risk.

5. It appearing that defendant's wife acted as agent both of her husband and the mortgagee in having the cotton shipped to Rome via Owen's Landing, her acts, within the scope of her agency, should have been received in evidence.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge.

Indictment for removing mortgaged property. The indictment in this case was found on the first of October, 1886, and charged that the defendant, Cap Dyer, with the intent to hinder, delay, and defraud James D. Kirkpatrick, "did sell or remove personal property, consisting of two cows and two calves, and 1,100 lbs. of seed cotton, of the value of \$35," on which property said Kirkpatrick had a mortgage, or written lien for advances, of which lien or mortgage defendant had knowledge. The verdict of the jury was in these words: "We, the jury, find the defendant guilty as charged in the indictment, and assess the value of the property as follows, to-wit, two cows and calves, at \$20;" and the court thereupon sentenced the defendant to the penitentiary for a term of one year.

On the trial, as the bill of exceptions shows, Kirkpatrick was introduced as a witness for the prosecution, and testified that the defendant was indebted to him in about the sum of \$57, balance due for advances to make a crop, during the year 1884, on a small tract of land in the county, on which the defendant then lived; and, having produced the mortgage the defendant gave that year, he further testified that the defendant was not indebted to him at that time for past advances, and that no advances were then made to him. The mortgage, which was dated April 7, 1884, recited an indebtedness of \$100 for advances "this day received from James D. Kirkpatrick." The defendant objected to the admission of the mortgage as evidence, on the ground that it is shown to be without consideration, and void; and he duly excepted to the overruling of

his objection thereto by the court. The mortgage conveyed the tract of land, containing 80 acres; all the crops raised on it during the year 1884; and two cows, described as "one red cow and one pied cow." It appeared that the defendant, with his family, moved, in October, 1884, across the line, into Georgia, his boys driving "the cattle," as the witnesses called the animals. Kirkpatrick, who owned a store in Alabama and another in Georgia, 10 or 15 miles apart testified that he saw defendant after his removal into Georgia, "and asked him about the cattle;" and that defendant replied they were "down at the house." W. Farmer, another witness for the state, testified: "I know defendant, and knew some of his cattle. One was a red pied cow, and another was a spotted cow, but I don't remember the other." A. Brooks, another witness for the state, testified: "In 1884-85 defendant lived this side of the Cross Roads, and owned two cows. One was a pale red, with spots on her. Don't recollect the color of the other. Last saw them on the road going towards Georgia, when two of the defendant's children were driving them. I have not seen the cattle since." This being all the evidence in reference to the cattle, the defendant moved the court "to exclude the mortgage as evidence because there was a variance between it and that described in the indictment as being on cows and calves, and there was no proof that the cows were the same;" but the court overruled this motion, and the defendant duly excepted. It appeared, also, that the cotton raised on the place (about two bales) was hauled to Owens' gin-house, where one bale was ginned and delivered to Kirkpatrick, or forwarded by his order to Rome, Ga.; and the residue was destroyed by fire, with the gin-house and all of its contents. On removing to Georgia, in 1884, the defendant went to Kirkpatrick's house, at Cave Springs, Ga., and as to the interview between them Kirkpatrick thus testified, on cross-examination: "He came to my house, and said he was going down to Carrollton, Ga., to make brick. He told me he had shipped a bale of cotton for me to Rome, from Owen's Landing; but I never got it. He said there was a bale or more in the patch, and at the gin, and wanted to know what to do with it; and I told him to haul it to Owen's Landing, and ship it to Rome." Being afterwards recalled, he said: "I got one bale of cotton, and gave credit for it." On October 6th, the day after his interview with defendant, Kirkpatrick wrote a letter to Mrs. Dyer, defendant's wife, which was produced on the trial, and in these words: "Mr. Dyer was here yesterday, and told me to write to you about the bale of cotton. Says for you to ship it to Rome, Georgia, to Montgomery, McLaurin & Co. Mark it 'J. D. K.,' and ship it in my name." W. Farmer, a witness for the state, who hauled the cotton to Owen's gin-house, thus testified, on cross-examination: "Kirkpatrick got some of the cotton, and I delivered about one-half bale more, which was burned with the gin. All the cotton made on Dyer's farm was carried to that gin, and there was enough for two good heavy bales.

Dyer had employed me to haul his cotton, and said Mrs. Dyer would instruct me what to do with it. Mrs. Dyer told me the first bale was for Kirkpatrick. Dyer was not at home. He got me to haul the cotton before he left, and Mrs. Dyer was to tell me what to do with it. She told me it was for Kirkpatrick, and to tell Owen that she wanted it shipped to Rome for Kirkpatrick; that he had written to her to deliver it at Owen's." The bill of exceptions then proceeds thus: "On rebutting examination, and in answer to a question by the solicitor, the witness stated that Mrs. Dyer gave him some instructions about the remainder of the cotton, after shipping one bale for Kirkpatrick; to which evidence the defendant objected, and moved to exclude it from the jury. Thereupon the solicitor moved the court to exclude all Mrs. Dyer had said, as related by witness; which motion the court sustained, and excluded all the instructions and statements of Mrs. Dyer, as related by witness, and the defendant duly excepted." After the evidence was closed, and the court had charged the jury orally, Farmer was recalled, by leave of the court, and testified that the cows were "worth ten dollars each;" and the defendant excepted to the admission of this evidence.

The defendant requested the following charges in writing, and duly excepted to the refusal of each: (1) "If the jury believe the evidence, they must acquit the defendant. (2) There is no proof that the defendant sold or removed any cotton. (3) If the jury believe from the evidence that the defendant delivered the cotton in the bale, and at the gin, enough to pay the mortgage debt, that was a discharge of the mortgage lien on the cows, and his removal of the cows would be no offense. (4) If the defendant delivered for Kirkpatrick, and to him, cotton sufficient to pay the mortgage debt, and part of it was burned up, this would be a discharge and satisfaction of the debt, and the defendant must be acquitted."

J. A. Walden, for appellant. *Atty. Gen. Martin*, for the State.

SOMERVILLE, J. 1. The mortgage introduced in evidence purports on its face to have been given "in consideration of advances made for the year 1884, and to secure the same;" reciting the amount to be the sum of \$100. Whether these advances had already been made, or were agreed to be made, by the mortgagee, the consideration recited was *prima facie* sufficient, as between the immediate parties to the instrument. 1 Jones, Mortg. (3d Ed.) § 364; Collier v. Faulk, 69 Ala. 58; Huckaba v. Abbott, 87 Ala. 409, 6 South. Rep. 48; Lawson v. Warehouse Co., 80 Ala. 341. There being no evidence in rebuttal of this recital, the objection that the mortgage was void for want of a legal consideration was properly overruled.

2. The mortgage purports to be given on two cows, besides the crop of cotton and corn raised by the defendant, as mortgagor, during the year 1884, on his plantation in Cherokee county. The indictment charges that the mortgage lien covered

two cows and two calves. This was no variance, as the mortgage on the cows might cover calves which were the offspring or increase of the female parents after the execution of the conveyance. It is a settled rule that the offspring of mortgaged animals, which are born after the making of the mortgage, are subject to the lien of such incumbrance, under the maxim, *partus sequitur ventrem*. Meyer v. Cook, 85 Ala. 417, 5 South. Rep. 147; Gans v. Williams, 62 Ala. 41; Jones, Chat. Mortg. §§ 149, 150. The inference is that the witness, in speaking of "the cattle," had reference to those described in the indictment, including both cows and calves.

3. The recalling of the witness Farmer, to prove the value of the mortgaged animals, which was permitted to the state after the giving of the oral charge by the court, was within the discretion of the presiding judge, and furnishes no ground of reversible error. Insurance Co. v. Moog, 78 Ala. 286; Drum v. Harrison, 83 Ala. 384, 3 South. Rep. 715.

4. The court erred, however, in excluding the evidence as to the instruction given the witness Farmer by Mrs. Dyer, the wife of the defendant, as to hauling and shipping the mortgaged cotton. The evidence tended to show that she was acting as the agent both of the mortgagor, Dyer, and the mortgagee, in having the cotton shipped to Rome via Owen's Landing. Dyer, before leaving home, had also authorized the witness Farmer to haul the cotton, and the latter was to get instructions from Mrs. Dyer. Under these circumstances, the instructions and acts of Mrs. Dyer, within the scope of her agency, ought to have been allowed to go to the jury.

5. There is no evidence from which it can be inferred that the mortgagee was to take the risk of the cotton while at Owen's gin, so as to cast on him the loss there sustained through its destruction by fire. His letter of instruction to Mrs. Dyer was to have a bale of cotton shipped to Rome, Ga., and his verbal instruction to Dyer himself was to "haul the cotton to Owen's landing, and ship it to Rome." The delivery at the gin, therefore, was not a delivery to the mortgagee at his subsequent risk. The charges, based on this theory of the case, were properly refused. We have examined the exceptions taken to the other rulings of the court, and think they were properly overruled.

The judgment is reversed, and the cause remanded for a new trial. In the meanwhile, the defendant will be retained in legal custody until discharged by due course of law.

BOYD V. STATE.

(Supreme Court of Alabama. Jan. 29, 1890.)

SCHOOL-TEACHERS—CHASTISEMENT OF PUPIL.

On the trial of a schoolmaster for assault and battery committed upon a pupil, the evidence showed that, after a severe chastisement administered in the school-room, defendant followed the pupil into the school-yard, and struck him with "a limb or stick," and then "put his hands in his pocket as if to draw a knife;" that he "afterwards struck him in the face three licks with his fist, and hit him several licks over the head with the

butt end of the switch." From these blows the eye of the boy was "considerably swollen," and was "closed for several days." Defendant was apparently very angry all the time, and was very much excited; and, after he got through with the whipping, he remarked, in an excited, angry voice, in the presence of the school, and others, that he "could whip any man in China Grove beat." *Held*, that there was ample room for the inference of legal malice, such as to warrant a verdict of guilty.

2. Acts Ala. 1888-89, pp. 631-634, § 15, organizing the criminal court of Pike county, confers upon convicted parties the right of appeal to the supreme court. But where a jury is waived, and the judge tries the facts, the decision of the court upon the facts is, in legal effect, equivalent to the verdict of a jury, and will not be reviewed on appeal.

Appeal from criminal court, Pike county; W. H. PARKS, Judge.

The defendant in this case, Benjamin Boyd, a school-master, was indicted for an assault and battery on Lee Crowder, who was one of his scholars; and, the case being submitted to the court without a jury, he was convicted, and fined \$25.

W. L. Parks, for appellant. *Atty. Gen. Martin*, for the State.

SOMERVILLE, J. The defendant, a school-master, being indicted, was convicted of an assault and battery on one Lee Crowder, a pupil in his school, who is shown to have been about 18 years of age. The defense is that the alleged battery was a reasonable chastisement inflicted by the master in just maintenance of discipline, and in punishment of conduct on the part of the pupil which tended to the subversion of good order in the school.

The case involves a consideration of the proper rule of law prescribing the extent of the school-master's authority to administer corporal correction to a pupil. The principle is commonly stated to be that the school-master, like the parent, and others *in foro domestico*, has the authority to moderately chastise pupils under his care, or, as stated by Chancellor Kent, the "right of inflicting moderate correction, under the exercise of a sound discretion." 2 Kent, Comm. *208-209. In other words, he may administer reasonable correction, which must not "exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for the purpose." If he go beyond this extent, he becomes criminally liable; and, if death ensues from the brutal injuries inflicted, he may be liable, not only for assault and battery, but to the penalties of manslaughter, or even of murder, according to the circumstances of the case. 1 Archb. Crim. Proc. *218; 1 Bish. Crim. Law, (7th Ed.) §§ 881, 882.

This power of correction vested by law in parents is founded on their duty to maintain and educate their offspring. In support of that authority, they must have "a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." 2 Kent, Comm. *208. And this power allowed by law to the parent over the person of the child "may be delegated to a tutor or instructor, the better to accomplish the purpose of education." *Id.* *205; 1 Bl. Comm. *507. The better doctrine of the adjudged cases, therefore,

is that the teacher is, within reasonable bounds, the substitute for the parent, exercising his delegated authority. He is vested with the power to administer moderate correction, with a proper instrument, in cases of misconduct, which ought to have some reference to the character of the offense, the sex, age, size, and physical strength of the pupil. When the teacher keeps within the circumscribed sphere of his authority, the degree of correction must be left to his discretion, as it is to that of the parent, under like circumstances. Within this limit, he has the authority to determine the gravity or heinousness of the offense, and to mete out to the offender the punishment which he thinks his conduct justly merits; and hence the parent or teacher is often said *pro hac vice* to exercise judicial functions. All of the authorities agree that he will not be permitted to deal brutally with his victim, so as to endanger life, limb, or health. He will not be permitted to inflict "cruel and merciless punishment." Schouler, Dom. Rel. (4th Ed.) § 244. He cannot lawfully disfigure him, or perpetrate on his person any other permanent injury. As said by GASTON, J., in *State v. Pendergrass*, 2 Dev. & B. 365, a case generally approved by the weight of American authority: "It may be laid down as a general rule that teachers exceed the limits of their authority when they cause lasting mischief, but act within the limits of it when they inflict temporary pain."

There are some well-considered authorities which hold teachers and parents alike liable, criminally, if, in the infliction of chastisement, they act clearly without the exercise of reasonable judgment and discretion. The test which seems to be fixed by these cases is the general judgment of reasonable men. *Patterson v. Nutter*, 78 Me. 509, 7 Atl. Rep. 273. The more correct view, however, and the one better sustained by authority, seems to be that when, in the judgment of reasonable men, the punishment inflicted is immoderate or excessive, and a jury would be authorized, from the facts of the case, to infer that it was induced by legal malice, or wickedness of motive, the limit of lawful authority may be adjudged to be passed. In determining this question, the nature of the instrument of correction used may have a strong bearing on the inquiry as to motive or intention. The latter view is indorsed by Mr. Freeman in his note to the case of *State v. Pendergrass*, 31 Amer. Dec. 419, as the more correct. "The qualification," he observes, "that the school-master shall not act from malice, will protect his pupils from outbursts of brutality, whilst, upon the other hand, he is protected from liability for mere errors of judgment." *Lander v. Seaver*, 32 Vt. 114, 76 Amer. Dec. 156, and note on pp. 164-167; *State v. Alford*, 68 N. C. 322; *State v. Harris*, 63 N. C. 1.

Judge Reeve, in his work on Domestic Relations, indorses the same view, asserting that the parent and school-master, in imposing chastisement for cause, must be considered as acting in a judicial capacity, and are not to be held legally responsible for errors of judgment, although the pun-

ishment may appear to the trial court or jury to be unreasonably severe, and not proportioned to the offense, provided they act "conscientiously, and from motives of duty." "But," he says further, "when the punishment is, in their opinion, thus unreasonable, and it appears that the parent acted *malò animo*,—from wicked motives,—under the influence of an unsocial heart, he ought to be liable to damages. Foreror of opinion he ought to be excused, but for malice of heart he must not be shielded from the just claims of the child. Whether there was malice may be collected from the circumstances attending the punishment." Reeve, Dom. Rel. (4th Ed.) § 357, 358.

Dr. Wharton, in his work on Criminal Law, thus states the principle: "The law confides to school-masters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible unless the punishment be such as naturally to occasion permanent injury to the child, or be inflicted merely to gratify their own evil passions. The teacher must be governed, when chastisement is proper, as to the mode and severity of the punishment, by the nature of the offense, the age, size, and apparent powers of endurance of the pupil. It is for the jury to decide whether the punishment is excessive." 1 Whart. Crim. Law, (9th Ed.) § 632.

Mr. Bishop adds, pertinent to the same subject: "The law has provided no means whereby a parent, meditating chastisement, can first obtain a judicial opinion as to its necessity, the proper instruments, and its due extent. In reason, therefore, if he acts in good faith, prompted by true parental love, without passion, and inflicts no permanent injury on the child, he should not be punished merely because a jury, reviewing the case, do not deem that it was wise to proceed so far." 1 Bish. Crim. Law, (7th Ed.) § 882. See, also, Schouler, Dom. Rel. (4th Ed.) § 244; 1 Bl. Comm. § 556; 2 Greenl. Ev. § 97; 2 Add. Torts, (Wood's Ed.) § 840; Danenhoffer v. State, 69 Ind. 235; Com. v. Randall, 4 Gray, 36; State v. Burton, 45 Wis. 150.

To the foregoing authorities I may add, as a matter of literary curiosity rather than legal authority, the following views expressed on this subject by Dr. Samuel Johnson to his biographer, Boswell, as far back as 1772. Boswell was of counsel for a school-master in Scotland who had been somewhat severe in his chastisement of one of his pupils, and the case was pending on appeal from the court of session before the English House of Lords, in a proceeding to remove him from his office. The opinion of this most learned of literary philosophers having been solicited, he discoursed as follows: "The government of the school-master is somewhat of the nature of a military government,—that is to say, it must be arbitrary; it must be exercised by the will of one man according to particular circumstances. A school-master has a prescriptive right to beat; and an action of assault and battery cannot be admitted against him unless there be some great excess, some barbarity. In our schools in England many boys have

been maimed, yet I never heard of an action against a school-master on that account. Puffendorf, I think, maintains the right of a school-master to beat his scholars." Boswell's Life of Johnson, vol. 2, pp. 89-96.

While, on the one hand, we should recognize that every child has rights which ought to be protected against the brutality of a cruel teacher or barbarous parent, on the other, it is equally important not to paralyze that power of correction and discipline by the rod given, as Blackstone asserts, "for the benefit of education," which has for ages been deemed necessary alike, on the part of parents, to prevent their children from becoming "the victims of bad habits, and thereby proving a nuisance to the community," and on the part of teachers, to preserve that discipline of the schools without which all efforts to promote the education of the present and future generations will prove a lamentable failure. Reeve, Dom. Rel. 357. No regulation of the school-room, any more than a law of the state, can be successfully enforced without the aid of coercive penalties. A law without a penalty is in practice a dead letter. Moderate chastisement is established by immemorial usage as the only available terror to vicious and incorrigible evil-doers, both in the homestead and the school-room, at least in cases where the more humane law of kindness and moral suasion has proved ineffectual. "Foolishness," said Solomon, "is bound up in the heart of a child, but the rod of correction shall drive it far from him." "The rod and reproof give wisdom, but a child left to himself causeth shame to his mother." And again: "Train up a child in the way in which he should go, and even when he is old he will not depart from it." These words are as true now as they were a hundred generations ago, when they were uttered by the wise man. This right of discipline with the rod, administered without malice or immoderation, has been well characterized as a part of the common law of the school-room. The more thoroughly the right is established, as experience in all discipline shows, the less frequent will be the necessity of resorting to its exercise to enforce obedience to the lawful mandates of the parent or the school-master.

We have said this much in order that we may not be misunderstood in the conclusion reached by us, not to disturb the judgment of conviction in this case. We cannot say, under the principles above stated, that the judge of the criminal court reached an erroneous conclusion in adjudging that the defendant exceeded his lawful authority, so as to render himself liable for an assault and battery.

The statute organizing the criminal court of Pike county confers upon convicted parties the right of appeal to this court. But where a jury is waived, and the judge tries the facts, the decision of the court upon the facts is, in legal effect, equivalent to the verdict of a jury, and, in the absence of statutory power, will not be reviewed by this court on appeal. Bell v. State, 75 Ala. 25; Calloway v. State, Id.

37; Knowles v. State, 80 Ala. 9; Wynn v. State, 87 Ala. 137, 6 South. Rep. 391. The statute under consideration confers no such jurisdiction on this court. Acts 1888-89, pp. 631, 634, § 15.

It is only where, upon the undisputed facts of the case, with all proper inferences deducible from such facts, a jury would not have been lawfully authorized to find the defendant guilty of the crime charged, that we will review and reverse the judgment of the lower court. In other words, where the whole question raised is reduced to one of law, and the verdict cannot, as matter of law, be supported by any reasonable inferences from the evidence. This was the case of Skinner v. State, 87 Ala. 105, 6 South. Rep. 399.

There was evidence in this case from which the inference of malice could have been deduced as influencing the conduct of the defendant in his chastisement of young Crowder, both as to his outbursts of temper, and in the use of improper instruments of correction. Taking, as we must, every reasonable inference which the judge, acting as a jury, could have drawn from the evidence, we take as true, among others, the following facts: That after the severe chastisement administered in the school-room the defendant followed Crowder into the school-yard, and struck him with "a limb or stick," and then "put his hands in his pocket, as if to draw a knife;" that, although Crowder did not strike back, but only protested against, and resisted, castigation, and after apologizing for the objectionable language imputed to him asked permission to withdraw from the school, the defendant after promising not to strike him, "afterwards struck him, in the face, three licks with his fist, and hit him several licks over the head with the butt end of the switch." From these blows the eye of the young man was "considerably swollen," and was "closed for several days." The attending physician testified that there were "marks on his head, made by a stick, in his opinion." One witness asserts that the defendant declared he "would conquer him [Crowder] or kill him." All the witnesses for the state say that the defendant was apparently very angry all the time, and was very much excited; and, after he got through whipping Crowder, he remarked, in an excited, angry voice, in the presence of the school, and others, that he "could whip any man in China Grove beat!" From this unseemly conduct on the part of one whose duty it was to set a good example of self-restraint and gentlemanly deportment to his pupils, there was ample room for the inference of legal malice, in connection with unreasonable and immoderate correction. Nor was the limb of a tree of the size indicated by the evidence, nor a clinched fist, applied in bruising the pupil's eye, after the manner of a prize fighter, a proper instrument of correction to be used on such an occasion.

The conviction must accordingly be sustained, without assuming any jurisdiction to review the correctness of the judge's finding on the facts.

Affirmed.

GILES v. STATE.

(Supreme Court of Alabama. Jan. 29, 1890.)

FAILURE TO PERFORM LABOR FOR SURETY IN A JUDGMENT FOR FINE AND COSTS—INDICTMENT.

1. On the trial of an indictment for failure to perform services for a surety in a confessed judgment for fine and costs,—an indictment which must be brought within one year from the commission of the offense,—the evidence showed only the filing of a complaint before the judge of the county court, charging the defendant with the crime for which he was indicted beyond the year, the issuance by that officer of a warrant for the arrest of the defendant on that charge, and the return of the warrant "for an *alias*." There was nothing tending to show that an *alias* was ever issued; that the defendant was ever arrested on, or appeared to answer, that charge; or that the defendant was bound over to or appeared in the circuit court, whence the indictment was certified, to answer that prosecution. *Held*, that the indictment was not a continuation of the former proceedings in such manner as to bring the prosecution within the exception to the statute of limitations applicable to the offense.

2. Code Ala. § 3832, under which defendant was indicted, provides that the failure or refusal of a party who enters into a contract of service on confession of judgment, etc., "without a good and sufficient excuse," to discharge and perform that contract, renders him guilty of a misdemeanor. *Held*, that an indictment charging such failure or refusal, "without just cause or excuse," is sufficient, under Id. § 4370, which provides that "words used in a statute to define an offense need not be strictly pursued in the indictment; it is sufficient to use other words, conveying the same meaning."

Appeal from criminal court, Pike county; PARKS, Judge.

Indictment for failure to perform service for surety in a confessed judgment for fine and costs. The indictment in this case, which was returned into the court on the 31st October, 1889, charged that the defendant, Frazier Giles, "having been convicted in the county court of Pike county on a charge of misdemeanor, and in consideration of M. D. Miers' having confessed judgment and being security for said fine and costs, entered into a contract in writing with said M. D. Miers to perform service, (said contract approved in open court by the presiding judge,) and has abandoned said contract without just cause and excuse, and has failed or refused to perform said service, (said contract having been recorded in the probate office of Pike county within the time prescribed by law,) against the peace," etc. The defendant demurred to the indictment, but his demurrer was overruled; and he then pleaded guilty.

On the trial before the court, as the bill of exceptions shows, a jury not having been demanded, the prosecution offered in evidence the written contract referred to in the indictment, which was dated September 27, 1888, and contained recitals and indorsement showing its due approval and registration, and introduced said M. D. Miers as a witness, who testified, substantially, that on the day of the execution of said instrument, in Troy, Ala., the defendant refused to go and work with him, and has never been about him to perform said contract, up to the finding of the indictment in this case. The prosecution here closed, and the defendant then moved to dismiss the case, "on the ground that the

prosecution was not commenced within twelve months after the commission of the offense." In opposition to this motion, the court allowed the prosecution, against the objection and exception of the defendant, to introduce in evidence a warrant for the defendant's arrest issued by the judge of the county court on the 25th October, 1888, charging him with a failure to perform service for said Miers under said written contract, and allowed the judge of said county court to testify that the warrant was issued on an affidavit which charged the offense in substantially the same words, and that he had not been able to find said affidavit after diligent search. The defendant objected and excepted to the admission of each part of this evidence. The warrant was offered and read in evidence; was indorsed, "Returned for an *alias*, February 16th, 1889;" and there was no proof that any other proceedings were ever had under it. The above being substantially all the evidence, the court found the defendant guilty, and imposed a sentence as prescribed by law; to which judgment and ruling the defendant duly excepted.

W. L. Parks, for appellant. *Atty. Gen. Martin*, for the State.

MCCLELLAN, J. The act of February 25, 1889, establishing the criminal court of Pike county, and providing for appeals from that court to this, does not authorize us to review the conclusions of the judge of that court on the evidence adduced before him; jury being waived. *Acts 1888-89*, pp. 631-636; *Wynn v. State*, 87 Ala. 137, 6 South. Rep. 391.

If, however, the facts put in evidence in a given case, or in respect to a particular matter, before the judge of that court, are free from conflict, and do not admit of adverse inferences or deductions, the action of the court in applying the law to those facts will be reviewed. In such case, the matter revised is a conclusion of law from undisputed facts, and not the finding of fact from the evidence adduced on the trial. *Skinner v. State*, 87 Ala. 105, 6 South. Rep. 399; *Hardy v. Ingram*, 84 Ala. 544, 4 South. Rep. 372; *Boyd v. State*, ante, 268, (present term.) The present case illustrates the foregoing proposition. The offense charged was barred by the statute of limitations of one year, unless, as was claimed, the prosecution had been commenced within the year by the issuance of a warrant as provided by section 3714 of the Code. There was no dispute as to whether a warrant for the arrest of the defendant for the offense charged against him by the indictment under which this conviction was had, was issued within a year from the commission of the offense, but the contention was that the issuance of that warrant did not have the effect of saving the prosecution from the bar of the statute; and this contention, manifestly, raised a question of law, which the lower court decided adversely to the defendant. We entertain no doubt of our right and duty to review this action, under the principles adverted to above. The evidence showed only the filing of a complaint be-

fore the judge of the county court, charging defendant with the crime for which he was indicted beyond the year, the issuance by that officer of a warrant for the arrest of the defendant on that charge, and the return of the warrant "for an *alias*." There was nothing tending to show that an *alias* was ever issued; that the defendant was ever arrested on, or appeared to answer, that charge; that any other or further step or proceeding was taken in that behalf; or that the defendant was bound over to or appeared in the circuit court, whence this indictment was certified, to answer that prosecution. On these uncontroverted facts, there was no connection between the prosecution instituted within the year, by complaint and warrant in the county court, and the prosecution instituted beyond the year, by indictment in the circuit court; and the judge of the criminal court committed an error of law, not of fact, in holding the latter proceeding was a continuation of the former, in such manner as to bring the prosecution within the exception to the statute of limitations applicable to offenses of this grade. *Martin v. State*, 79 Ala. 267.

Section 3832 of the Code, under which appellant was convicted, provides that the failure or refusal of a party who enters into a contract of service on confession of judgment, etc., "without a good and sufficient excuse," to discharge and perform that contract, renders him guilty of a misdemeanor. The present indictment charges such failure or refusal "without just cause or excuse;" and it is insisted that the demurrer, which proceeded on the ground that the indictment did not follow the statute in describing this purely statutory defense, should have been sustained. Section 4370 of the Code provides that "words used in a statute to define an offense need not be strictly pursued in the indictment. It is sufficient to use other words, conveying the same meaning." To our minds, the words employed in the indictment convey substantially the same meaning as those used to describe the offense in the statute, and we hold there was no error in overruling the demurrer.

For the error pointed out in reference to the statute of limitations, the judgment of the criminal court is reversed, and the cause remanded.

WELLS V. STATE.

(*Supreme Court of Alabama. Jan. 30, 1890.*)

INDICTMENT—MISNOMER.

A plea of not guilty to an indictment is an admission that the name by which the defendant is indicted is his true name, and a waiver of the misnomer, if in fact the indictment was originally open to that objection.

Appeal from circuit court, Marshall county; *JOHN B. TALLY*, Judge.

Indictment for carrying concealed weapons. The indictment in this case charged that "Babe Wells, whose true Christian name is to the grand jury unknown, otherwise than as stated, carried a pistol concealed about his person." There was no demurrer to the indictment, and no plea

in abatement, and issue was joined on the plea of not guilty. On the trial the prosecution introduced a single witness, who testified that the defendant, on proposing a visit to "the mountain," which the witness declined, lest they might get into some trouble, pulled a pistol out of his pocket, showed it to witness, and then replaced it in his pocket; and he further testified, on cross-examination, "that he was before the grand jury, and they did not ask him if the defendant had any other name, but did not recollect if they asked him the name of the defendant." The defendant then introduced one William Wells as a witness, who testified "that he was before the grand jury by which the indictment was found, and they did not ask him anything about the defendant's name; that he was well acquainted with the defendant at the time, and knew that his name was Pinckney Wells." On this evidence the defendant asked the following charge in writing, and excepted to its refusal: "If the jury believe from the evidence that the defendant's true Christian name at the finding of the indictment was Pinckney Wells, and that the grand jury knew his name was Pinckney, or by the exercise of due diligence could have found out the fact, and failed to do so, then they must acquit the defendant." After conviction the defendant moved in arrest of judgment, on the ground that the averments of the indictment as to his name "are inconsistent and self-repugnant," which motion the court overruled.

Atty. Gen. Martin, for the State.

MCLELLAN, J. The plea of not guilty was an admission that the name by which the defendant was indicted was his true name, and a waiver of the misnomer, if in fact the indictment was originally open to that objection, whether advantage is sought to be taken of it on the trial, as by a request for an instruction on the point, or after verdict by a motion in arrest of judgment. *Miller v. State*, 54 Ala. 155. There was no self-repugnance or inconsistency in the allegations of the indictment as to the Christian name of the defendant. The most that can be affirmed of the language employed in this connection, to-wit, "Babe Wells, (whose true Christian name is to the grand jury unknown, otherwise than as stated,)" is that the grand jury were in doubt whether the name "Babe" was the baptismal or pseudonym of the defendant, but that, if his name was other than as stated, the fact was unknown to them; or, in other words, that they knew this was a name by which defendant was known, and if he had another they neither knew that other, or the fact that he had any other. Moreover, the matter embraced in the parentheses, as shown above, was mere surplusage, not essential to a full averment of the offense and identification of the offender, and may be entirely disregarded. 1 Bish. Crim. Proc. § 487; *Heard*, Crim. Pl. §§ 135, 136. If, on the other hand, the language quoted be held the equivalent of an averment that the first name of the defendant was unknown to the grand jury, the result to the appellant is the same. He might have im-

peached the finding by disproof of the fact thus alleged; that is, it was open to him to show that his true name was known, and, showing which, the indictment would not have supported a conviction. But he did not do this. What he did was to show, not that the jury knew, but that with reasonable inquiry they might have known, his true name. This was insufficient; and the charge requested, which predicated his right to an acquittal on the failure of the jury to make diligent inquiry in this behalf, was properly refused. *Duvall v. State*, 63 Ala. 12.

The judgment of the circuit court is affirmed.

STANLEY V. STATE.

(*Supreme Court of Alabama*. Jan. 30, 1890.)

INDICTMENTS—INDORSEMENT—CLERK OF COURT—EMBEZZLEMENT—EVIDENCE.

1. Code Ala. § 4386, requiring an indictment to be indorsed, dated, and signed by the clerk, is directory merely.

2. Defendant was indicted for converting to his own use moneys paid into his office, or received by him in his official capacity as clerk of the circuit court. The solicitor elected to charge defendant with having embezzled the solicitor's fees in five specified cases, in which the defendants were convicted at the fall term, 1887, of the court. No final record having been made up since 1883, and the original indictments in the cases of the persons convicted having been mislaid or lost, the solicitor introduced in evidence the trial docket, and the minutes of the court, to show the conviction of the defendants in the cases elected, and confessions of judgment for the fines and costs; also, the issue of executions, the collection of the solicitor's fees by the sheriff, and the receipts of defendant for the same. *Held*, that this evidence was admissible to show that defendant had received the fees in his official capacity.

3. Transcripts of the reports made to the auditor by defendant, as clerk, of the amount of solicitor's fees, in cases of conviction, with which he was charged, having been properly certified, were receivable in evidence.

4. Proof offered of other acts of embezzlement, of similar character, committed by the defendant, was admissible, being material to show the knowledge and intent with which the particular acts charged were committed, and tending to rebut any inference of accident or mistake.

Appeal from circuit court, Covington county: JOHN P. HUBBARD, Judge.

Indictment for embezzlement. The indictment in this case charged that John E. Stanley, "being clerk of the circuit court of said county, knowingly converted to his own use, or permitted another to use, money to about the amount of fifty dollars, which was paid into his office, or received by him in his official capacity, and which said money belonged to the state of Alabama." Issue being joined on the plea of not guilty, the jury returned a verdict in these words: "We, the jury, find the defendant guilty of converting to his own use more than twenty-five dollars;" and the court thereupon sentenced him to the penitentiary for the term of three years. When the case was called for trial, before pleading to the indictment, the defendant moved to strike it from the files because it was not indorsed by the clerk as required by law, showing the fact and date of filing, with his signature attached. On the hearing of this motion, it was

shown to the court, as the bill of exceptions shows, that the indictment was returned into open court by the foreman of the grand jury, in the presence of 12 or more of the grand jurors; that, the indictment being against the clerk, the court appointed E. Dixon as special clerk, in the presence of the grand jury, and delivered the indictment to him; that it was retained by said Dixon until the present incumbent, W. J. Mosely, was qualified, and entered on the discharge of the duties of the clerk's office, when it was delivered to him by said Dixon, and it was produced by him on the trial. On this evidence the court overruled the motion to strike the indictment from the files, and the defendant duly excepted.

J. D. Gordon, W. D. Roberts, and John Gamble, for appellant. *Atty. Gen. Martin*, for the State.

CLOPTON, J. Defendant moved to strike the indictment from the files on the ground that it was not indorsed, dated, and signed by the clerk, as required by the statute. The motion is based on section 4386 of the Code, which requires: "All indictments must be presented to the court by the foreman of the grand jury, in the presence of at least eleven others jurors, must be indorsed 'Filed,' and the indorsement dated and signed by the clerk." No citizen should be tried for a criminal offense until he has been regularly and legally charged; and it becomes the duty of the court to strike an indictment from the files, on objection being made in due time, when it appears to have been introduced into them without warrant of law. But the only evidence which the statute requires that an indictment has been regularly and legally returned into court is that it shall be indorsed "A true bill," which shall be signed by the foreman of the grand jury. Code, § 4358; *Wesley v. State*, 52 Ala. 182.

In determining whether section 4386 is mandatory or directory, the provision should be taken notice of which requires, after providing for the filing and indorsement by the clerk: "But no entry of an indictment found must be made on the minutes, nor must any indictment be inspected by any other person than the solicitor, the presiding judge, and the clerk of the court, until the defendant has been arrested, or has given bail for his appearance." The purpose of the section is to prevent an inspection of the indictment by any person other than the officers named, and to constitute the indorsement by the clerk evidence that it had been properly returned into court. The statute imposes upon the clerk a public duty,—a ministerial duty,—and prescribes the mode of performance, intended to secure the orderly and proper conduct of the business of the court. It requires the duty to be performed at a certain time, and in a certain manner, and contains no nugatory words. Time is not of the essence of the duty to be performed. On this principle, it has been decided that the indorsement required to be made by the clerk may be made at any time while the cause is *in fieri*. *Hubbard v. State*, 72 Ala. 164; *Wesley v. State*, supra. To make the performance of such a duty essential to the

validity of an indictment which has been returned into court indorsed and signed by the foreman of the grand jury, as required by the statute, would oftentimes work great inconvenience and prejudice, and defeat the ends of the administration of the criminal law. We hold the statute to be merely directory. *Walker v. Chapman*, 22 Ala. 116.

Defendant was indicted for knowingly converting to his own use, or permitting another to use, moneys which were paid into his office, or received by him in his official capacity as clerk of the circuit court. The solicitor elected to charge the defendant with having embezzled the solicitor's fees in five specified cases, in which the defendants were convicted at the fall term, 1887, of the court. No final record having been made up since 1882, and the original indictments in the cases of the persons convicted having been mislaid or lost, the solicitor introduced in evidence the trial docket, and the minutes of the court, to show the conviction of the defendants in the cases elected, and confessions of judgment for the fines and costs; also, the issue of executions, the collection of the solicitor's fees by sheriff, and the receipts of defendant for the same. There can be no just objection to this evidence, or any part thereof. It was relevant and admissible to show that defendant had received the fees in his official capacity.

The statute requires that all fees taxed against defendants, on convictions, as solicitor's fees, shall, when collected by any officer authorized by law to collect such fees, be forthwith paid to the state treasurer, and that the clerks of the circuit court shall make quarterly reports to the auditor of the solicitors' fees collected in their respective counties. Acts 1886-87, p. 161. By subdivision 6 of section 96 of the Code, the auditor is required "to audit and adjust the accounts of all public officers, keeping a regular account with every person in each county in the state who is by law authorized to collect and receive any part of the state revenue, in suitable books, in which he must charge such persons with all sums of money due from them severally, and credit each with all moneys paid by him to the treasurer, having first certified to that office the amount or balance due." And section 2785 requires that "all transcripts of books or papers required by law to be kept in the office of the secretary of state, or the office of the auditor, when certified by the proper custodian thereof, must be received in evidence in all courts." Under these statutes, the transcripts of the reports made to the auditor by defendant, as clerk, of the amount of solicitor's fees, in cases of conviction, with which he was charged, having been properly certified, were receivable in evidence. They are papers which he is required to keep under the sanction of his official oath, and in performance of his official duty. They are *prima facie* evidence of the facts stated in them. *Dudley v. Chilton Co.*, 66 Ala. 593.

Defendant further objects that the state was allowed to prove offenses other than those charged, though of a similar character. It is true that in all criminal trials

the evidence should be relevant, and confined to the proof or disproof of the point in issue; and generally it is not allowable to prove the commission of other offenses by the accused for the purpose of convicting him of the offense charged. But there are well-recognized exceptions to this rule; and such evidence is receivable when necessary to prove *scienter*, to establish identity, or to complete a chain of circumstantial evidence of guilt in respect to the act charged. *Ingram v. State*, 39 Ala. 247; *Mason v. State*, 42 Ala. 532. The evidence introduced by the state related to solicitor's fees on convictions of persons other than those with which the solicitor elected to charge the defendant, and consisted of proof of the convictions of such persons, the collection of solicitor's fees by the sheriff, and the receipts of defendant for same; also, of the transcript from the auditor's office of the reports of defendant, of the amount of solicitor's fees paid in the cases of conviction, and that no part thereof had been paid by defendant. The solicitor's fees thus reported accrued at the fall term, 1887, and the spring and fall terms, 1888, of the circuit court. These facts show that the proofs offered of other acts of embezzlement were ultimately and directly connected with the particular accusation against defendant, and the evidence adduced to establish it. They form, to some extent, parts of one transaction, and are material to show the knowledge and intent with which the particular acts charged were committed, and tend to rebut any inference of accident or mistake. *People v. Gray*, 66 Cal. 271, 5 Pac. Rep. 240.

The court instructed the jury that the only purpose for which they could consider the evidence relating to the other acts of embezzlement was to determine defendant's guilty knowledge in converting the moneys with which he was charged, and that they could not convict unless satisfied that he did convert to his own use, knowingly, the moneys with which he is charged in the indictment. The court confined the evidence within proper limits, and restricted it to proper purposes, though it might also well have instructed the jury that they could consider the evidence in determining the intent with which defendant used the moneys; but of this omission the defendant cannot complain.

We discover no error in the record.

Affirmed.

SULLIVAN v. STATE.

(*Supreme Court of Mississippi*. March 17, 1890.)

PRIZE-FIGHTING—INDICTMENT.

1. As it is doubtful whether, to constitute a "prize-fight," there must be a fighting in public, and as Act Miss. March 7, 1882, making it "unlawful for any persons to engage in prize-fighting in this state," was intended to prohibit prize-fighting which is public in character, and tends to disturb the peace, it is not sufficient to indict under this statute by the use of the statutory words only; but the facts which, if proved, would show the defendant to be guilty of the statutory offense must be charged.

2. The indictment must charge that the persons fought together, and against each other, in order to constitute the offense of "engaging" in the fight, and an indictment which charges that

S. did unlawfully engage in a prize-fight with K., "to-wit, did then and there enter a ring, commonly called a 'prize-ring,' and did then and there, in said ring beat, strike, and bruise said" K., is defective as the *videlicet* excludes the conclusion that K. fought.

Appeal from circuit court, Marion county; S. H. TERRAL, Judge.

Calhoun & Green, for appellant. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. The appellant has been convicted of the offense of prize-fighting, in violation of an act entitled "An act to prevent prize-fighting in this state, and for other purposes," approved March 7, 1882. The first section of the act declares that "it shall be unlawful for any persons to engage in prize-fighting in this state, and any persons engaging in such prize-fighting shall be deemed guilty of a misdemeanor," etc. The indictment contains two counts, —the first for a violation of the above statute, and the second for an assault and battery. Appellant was acquitted under the second count, and convicted under the first. The defendant pleaded in abatement to the indictment, to which demurrers were interposed, and were sustained; and, after conviction he moved in arrest of judgment, and for a new trial; and, both motions being denied, he prosecutes this appeal.

So much of the indictment as is brought into review is as follows:

"The state of Mississippi, County of Marion. In the circuit court for the second judicial district of Marion county, at the special August term, 1889. The grand jurors of the state of Mississippi upon their oaths present that John L. Sullivan, in the second judicial district of Marion county, Mississippi, on the 8th day of July, A. D. 1889, by and in pursuance of a previous appointment and arrangement made to meet and engage in a prize-fight with another person, to-wit, with Jake Kilrain, did then and there, for a large sum of money, the exact amount of which is to the grand jurors aforesaid unknown, did then and there, to-wit, on the 8th day of July, 1889, in the second judicial district of Marion county, Mississippi, unlawfully engage in a prize-fight with the said Jake Kilrain, to-wit, did then and there enter a ring, commonly called a 'prize-ring,' and did then and there, in the said ring, beat, strike, and bruise the said Jake Kilrain, against the peace and dignity of the state of Mississippi. JAS. H. NEVILLE, Dist. Atty."

This count is fatally defective as one charging the appellant with the offense of prize-fighting. The statute neither defines the offense of prize-fighting, nor declares what act done shall be a violation of its provisions. The specific offense was unknown to the common law; the participants being only punishable for an affray, riot, or assault and battery, according to the circumstances. In indictments for purely statutory offenses, it is sometimes sufficient to charge the offense by using only the words of the statute. This may be done where the language of the statute is so specific as to give notice of the act made unlawful, and so exclusive as to prevent

its application to any other acts than those made unlawful. Our statute against retailing (Code, § 1097) is an apt illustration of this character. It declares that "it shall not be lawful for any person to sell any vinous or spirituous liquor in a less quantity than one pint, without having first obtained a license in the manner directed by this act." Here the nature and character of the prohibited act is clearly set out, and there is an exclusion of its application as to the only class of persons—licensed dealers—who may sell in the quantity named without guilt. But where the act prohibited does not clearly appear from the language employed, or where, under certain circumstances, one may lawfully do the thing forbidden by the literal meaning of the words of the statute, it is not sufficient to indict by the use only of the statutory words. Under such circumstances, the indictment must charge, in apt language, the unlawful act, that the defendant may be advised of the nature and character of the offense with which he is charged, and that he may, by demurrer, take the opinion of the court whether the facts charged constitute an offense.

In *Jesse v. State*, 28 Miss. 100, the defendant had been indicted under a statute which provided that "if any slave be guilty of burning any dwelling-house, store, cotton-house, gin, or outhouse, barn, or stable," etc. The indictment was in the words of the statute, and it was held insufficient for the reason that the statute was intended to punish a malicious burning only.

A statute declared that, "if any clerk of any court, or public officer, or any other person, shall wittingly make any false entry, or erase any word or letter, or change any record belonging to any court or public office, whether in his keeping or not, he shall on conviction," etc. Code 1880, § 2703. It was held that the purpose of the act was to prevent such change, erasure, or false entry, to the end that some one might be thereby benefited or injured, and that an indictment which failed to aver such fact was fatally defective. *Harrington v. State*, 54 Miss. 490. The facts developed on the trial of that case disclosed that the defendant, a clerk of the treasurer, erased the number of a warrant that had been erroneously entered on the treasurer's books, and substituted the true number. These cases were decided on the ground that a person might, under circumstances, lawfully do the things forbidden in the most comprehensive manner by the mere letter of the statute. "A verdict [of a jury] does nothing more than verify the facts charged; and, if these do not show the party guilty, he cannot be considered as having violated the statute." *Shaw, C. J.*, in *Com. v. Odlin*, 23 Pick. 275.

Where, therefore, the language of the statute is broader than its purpose, and the indictment is in the words of the statute, it cannot be told whether the jury intend to find the defendant guilty of the act forbidden by the statute, or of those only within its literal, but not its true, construction. It is therefore necessary for the pleader to depart from the statute, and in-

dict in words aptly charging an offense, in all cases in which the words of the statute do not in legal intendment import a particular offense certainly committed by any one who has violated its literal language.

The statute under consideration declares, in general terms, that it shall be "unlawful for any persons to engage in prize-fighting in this state." What is a "prize-fight" is not declared, but must be discovered by the courts from the known meaning of the terms used, and the evil intended to be provided against. The meaning of "to fight," according to Webster is "to strike or contend for victory, in battle or in single combat; to attempt to defeat, subdue, or destroy an enemy, either by blows or weapons." Worcester gives practically the same definition. Prize is defined by Worcester to be "a reward gained by contest or competition," and by Webster as "that which is obtained against the competition of others; anything carried off as the result or award of a contest." Worcester defines "prize-fighter" as "one who fights or boxes publicly for a reward," and "prize-fighting" as "the act or the practice of fighting for a prize." Webster defines "prize-fighter" as "one who fights publicly for a reward," and "prize-fighting" as "fighting, especially boxing, in public, for a reward or wager." He defines "prize-fight" to be "a contest in which the combatants fight for a reward or wager." Worcester gives no definition of this word. It thus appears that, while these two lexicographers define a "prize-fighter" to be one who fights publicly, for a reward, Worcester defines "prize-fighting" as the act of fighting for a prize, while Webster defines it as a fighting in public for a reward or wager, and prize-fight to be a contest in which the combatants fight for a reward or wager. According to the lexicographers, it would seem to be left doubtful whether, to constitute a prize-fight, there must be a fighting in public. We think, however, that the evil sought to be protected against by the statute is the debasing and brutalizing practice of fighting in public places, or places to which the public, or some part of it, is admitted as spectators. The act was not passed in tenderness to those who participate in such contests, nor to afford them protection by discouraging the practice. We must either construe the act as prohibiting all contests, whether public or private, where a prize or wager is determined by blows, or as intended to apply only where others than the contestants are admitted spectators.

The second section of the act declares that if death result from the fight the party causing it shall be guilty of murder, or if mayhem results the punishment for that crime shall be inflicted. By the third section the aiders and abettors of such "prize-fighting" are declared guilty of a misdemeanor. These sections add strength to the conclusion, which would properly be drawn from the first only, that the prize-fighting intended to be prohibited is that which is public in character and tends to disturb the peace and quiet of the community in which it occurs, and to debase not

only the participants, but others, who are admitted as spectators. A private contest between individuals, whether amateurs, or professional fighters or boxers, though it be for a prize or wager, would not be in violation of the particular statute under consideration, though the participants might be guilty of assault and battery, or of gaming. A fight or contest, under such circumstances, would be a fight because a contest determined by blows, and a prize-fight because a prize or wager would be awarded to the victor; but it would not be a prize-fight within the meaning of the statute, which prohibits such fights only as are offenses against public peace and order. Since, therefore, the appellant might fight for a prize under such circumstances as would not be violative of the statute, it is not sufficient to indict by the use of the statutory words only, but the facts which, if proved, show him to be guilty of the statutory offense must be charged.

The indictment is defective for another reason. The offense can only exist where two persons engage in the unlawful act. The parties are severally guilty, but the guilt of each springs from the joint unlawful act. One man cannot commit the offense. The indictment in this case does not follow the usual form, by charging that Sullivan and Kilrain fought together, and against each other. It avers that Sullivan, "in pursuance of a previous appointment and arrangement made to meet and engage in a prize-fight with Jake Kilrain, for a large sum of money, did unlawfully engage in a prize-fight with the said Jake Kilrain, to-wit, did then and there enter a ring, commonly called a 'prize-ring,' and did then and there, in said ring, beat, strike, and bruise the said Kilrain, against the peace and dignity of the state of Mississippi." The clause preceding the *videlicet*, that Sullivan "unlawfully did engage in a prize-fight with the said Jake Kilrain," is the only portion of the indictment by which even an indirect charge is made that Kilrain did anything in the fight; and the pleader excludes the conclusion that he did fight by setting out, under the *videlicet*, how Sullivan so engaged in a prize-fight, viz., by going into a prize-ring, and then and there beating Jake Kilrain. The common office of a *videlicet* is to state time, place, or manner which are not of the essence of the matter in issue, and thereby to relieve the party of the duty of proving the allegation strictly as made; but it may be, and is frequently, used as particularizing the more general antecedent matter. "A *videlicet*," says Lord HOBART, "is a kind of interpreter. Her natural and proper use is to particularize that that is before general." It may work a restriction when the former words are not express and special, but so indifferent as they may receive such restriction without apparent injury, though these former words, by construction of law would have had a larger sense if the *videlicet* had not been. *Stukeley v. Butler*, Hob. 172; *Dakin's Case*, 2 Saund. 291, note a. "If a party, in pleading, use a generic term, comprising, therefore, many species or particulars, and afterwards use an averment de-

fining which particular or species of the number he insists on, he is tied up to that particular one. [The reason may be, because he leads his adversary to suppose he only means to rely on that, who therefore confines his proof accordingly.] *Harris v. Mantle*, 3 Term R. 307; *King v. Perrott*, 2 Maule & S. 379. Com. Dig. "Pleader," C 22. "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. If expressions are used which leave it in doubt whether all of several facts, or some only, are charged against him, subsequent averments must be used defining and tying up this generality." Com. Dig. "Pleader," C 22.

In *Mallett v. Stevenson*, 26 Conn. 428, a warrant had issued commanding the officer to seize "certain intoxicating liquors, to-wit, several casks of French brandy, containing twenty-five gallons, more or less, several casks of gin, containing twenty-five gallons, more or less, and several casks of intoxicating wines, containing twenty-five gallons, more or less." The officer seized some French brandy, and also a quantity of rum, cider, brandy, and pale brandy. It was held that the warrant did not justify the seizure of the latter articles. The court said: "Intoxicating liquors' is the name of a genus, of which brandy, gin, etc., are species; and, although we agree with the judge who tried the cause that the particular species of liquor, when the species is unknown, need not be stated in the complaint or warrant, yet the objection in this case is, not that all the liquors seized were not designated by their specific names, but that the generic name, 'intoxicating liquors,' was by the *videlicet* restricted to the species particularly described under it, so that no intoxicating liquors besides those designated by their specific names were complained of or proceeded against under any name, general or specific."

In *Harris v. Mantle*, 3 Term R. 307, breach of covenant was assigned "that the defendant has not used a farm in an husband-like manner, but, on the contrary, has committed waste." Held, that plaintiff could not give in evidence defendant's unhusband-like use, if it did not amount to waste.

Where the matter stated under the *videlicet* is immaterial, it may be rejected as surplusage. But, where the precise time is the very point and gist of the cause, there the time alleged by the *scilicet* is conclusive and traversable, and it shall be intended to be the true time, and no other, and, if impossible or repugnant to the premises, will vitiate the plea; if true, will support the defense. *Blackstone*, in argument in *Bishop of Lincoln v. Wolferstan*, 1 W. Bl. 495. "And the distinction seems equally to apply to every other matter which comes under the *videlicet*." Note to *Dakin's Case*, 2 Saund. 290b; 1 Bish. Crim. Proc. § 406.

If the averment of the indictment had been that Sullivan and Kilrain "fought together and against each other," the allegation under the *videlicet* might be referred to Sullivan's action in such fight. But, as we have said, the antecedent clause

only states that Sullivan fought with Kilrain, and the *videlicet* explains and particularizes the whole of the previous averment, by showing how he "fought with him." So read, the indictment is as though the pleader had said that Sullivan engaged in a prize-fight with Kilrain by going into a prize-ring, and there beating and bruising him. This avers the several act of Sullivan to constitute a prize-fight; and, in the nature of things, that cannot be. As we have said, the parties in a prize-fight are severally guilty, but the guilt of each must arise from the joint act of two.

The present indictment illustrates the wisdom of the advice given by Mr. Bishop, "to have nothing to do with the *videlicet*, unless in exceptional circumstances."

The demurrer to the pleas in abatement should have been extended to the indictment, and the first count of the indictment quashed.

The judgment is reversed, the first count of the indictment quashed, and the appellant held to answer at the next term of the circuit court of Marion county, such indictment as may be preferred against him.

KANSAS CITY, M. & B. R. CO. v. DOGGETT.
(Supreme Court of Mississippi. Jan. 27, 1890.)
RAILROAD COMPANIES—STOCK-KILLING CASES—EVIDENCE.

In an action against a railroad company for the negligent killing of plaintiff's stock, the conductor and engineer testified that they first saw the stock 85 or 40 feet ahead of the train, between the track and a fence running parallel to it; that they ran along the fence 200 feet, to where it stopped against a trestle, and there jumped on the track in front of the train; that the train of 16 cars loaded with iron, and carrying 160 pounds of steam, could not have been stopped under 500 feet; that as soon as the stock were seen brakes were applied, and every effort made to stop. Plaintiff showed that the distance from where the stock were seen to the trestle was 336 feet; that to that point, from half a mile below, the grade was so heavy that it was difficult for trains to get over it; and that there were fresh tracks running from where the stock were seen, directly down the track, to where they were killed. *Held*, that the question of defendant's negligence was for the jury.

Appeal from circuit court, De Soto county; W. M. ROGERS, Judge.

This is an action by appellee, Doggett, against the appellant, for killing some of his stock by the running of appellant's trains. The facts are sufficiently stated in the opinion. The fourth instruction given for plaintiff is as follows: "If the jury believe from the evidence that the plaintiff's stock was killed and injured by the running of defendant's cars upon and over the said stock, then the law presumes that it was negligently done, and that such injury could have been prevented by the exercise of reasonable care and diligence upon the part of defendant's employees, and the burden of proof is upon the defendant to satisfy the jury, from the evidence, that such injury could not have been prevented by the exercise of reasonable care and diligence on the part of their employees. If upon this point, as to exercise of reasonable care and diligence by defendant, the weight of evidence and credibility of

witnesses is equally balanced, then the law is for the plaintiff, and the jury must so find." There was verdict and judgment for plaintiff, from which the railroad company appealed.

J. W. Buchanan, for appellant. Buchanan & McKay, for appellee.

WOODS, C. J. The killing of the stock, as alleged in the declaration, was proven and was admitted by appellant on the trial below. The value of the stock was also proven. The *prima facie* case for the plaintiff, under our statute, was thus made out; and it then became incumbent on the railroad company to relieve itself from liability, by showing circumstances of excuse or justification for such killing. Responding to this requirement, the railroad produced as witnesses the conductor and engineer of the train which caused the injuries complained of, and by them showed that they first saw the stock when they were running by Miller's station; that the stock were 35 or 40 feet distant, and between the road-bed and a fence which ran parallel with the track of the railroad from that point until it reached a point opposite the trestle where the stock was injured and killed, where the fence made a right angle, ran to and was joined upon a post in the trestle; that the stock first ran towards the train, but turned and ran diagonally across towards the fence, and then turned up the fence, and followed it around to the track, when they jumped on it, immediately in front of the train, and so received their injuries; that, as soon as the stock was seen, brakes were applied, signals sounded, and every effort used to prevent an accident; that the train was composed of 16 cars loaded with pig-iron, and was carrying 160 pounds of steam; that it could not have been stopped under 500 feet; and that the distance from the station, when the stock was first seen, to the trestle, where the accident occurred, was only about 200 feet. If the evidence had ended here, the railroad company would have relieved itself of liability, clearly; but the plaintiff further showed that the distance from the station to the trestle was about 336 feet; that from Coldwater river, a half mile below the station, to the trestle and much beyond, the grade is so heavy that trains often have difficulty in going over it, and that, now and then, trains are compelled to drop some of their cars at Miller's, and make two trips before getting over the grade; that the tracks of the animals, fresh and running directly upon the track from Miller's to the trestle, were seen very quickly after the accident. This testimony, thus affecting the evidence of the conductor and engineer, was held by the court below sufficient to warrant it in refusing a peremptory instruction to the jury to find for the defendant. The conflict in the evidence was thought to be referable properly to a jury, for its determination upon the facts. In this view we concur.

The fourth instruction for plaintiff was not improperly given. The evidence of the witness Box shows that the tracks of these animals were seen, directly after the injuries, running down the track, for about 300

feet, to the trestle, where they were caught. The counsel for appellant insists that the witness did not mean this. We can only reply that, as it is so written in the record, we feel bound to adhere to it, and to give it its natural meaning. In view of this testimony, the instruction rightfully submitted the settlement of the discrepancy to the jury.

It is urged upon us that the verdict, in the amount of damages awarded, is unsupported by the evidence. This is true, if a verdict for \$150 only is unwarranted when the evidence shows the damages to have been \$275; and it may be matter of regret that the jury did not do its full duty, as they adjudged the facts, and give the plaintiff more than the sum named in their verdict. But as the plaintiff, against whose interests the error was committed, makes no complaint, we do not see how we can reverse the case on this ground, at the suggestion of the party who is shown not to be injured or wronged thereby.

This is one of the many unsatisfactory causes which, on their facts, peculiarly belong to the province of the jury, and is one we would be slow to disturb because of any supposed errors in the findings as to facts. We cannot say there is no evidence to support the verdict. We could not have said the verdict was unsupported by evidence, if the jury had found for the defendant.

Affirmed.

MOBILE & O. R. CO. v. TUPELO FURNITURE MANUF'G CO.

(*Supreme Court of Mississippi. Jan. 27, 1890.*)

CARRIERS OF GOODS—CONNECTING LINES—BURDEN OF PROOF.

The burden is on a carrier which delivers goods in a damaged condition, and which are shown to have started on their journey over connecting lines in good condition, to show that the injury did not occur by its default.

Appeal from circuit court, Lee county; L. E. Houston, Judge.

The appellee manufacturing company bought, somewhere in the north-west, certain articles of machinery, which were carefully packed into a car, and reached Chicago in good condition. At Chicago the car was opened, and other goods for the appellee were placed therein. The car left Chicago in good condition as to its contents, and, going over connecting lines, reached the line of the Mobile & Ohio Railroad, and was transported by it to Tupelo, and there the machinery was delivered by the appellant in a damaged condition. The appellee sued the appellant, and obtained judgment for the damage, from which the railroad company appealed.

E. L. Russell and J. A. Blair, for appellant. *Allen, Robins & Stribling*, for appellee.

CAMPBELL, J. The first and second instructions given for the plaintiff are objectionable, but immaterial, because not influential in determining the case, which is properly resolvable, in view of the facts, by a resolution of the question whether it devolved on the plaintiff to show that the damage to the property was done on the

road of the defendant, or on the defendant to show that it occurred before it received the goods for transportation. That is the only material question in the case. We think the better reason and policy, and the greater number of cases adjudged, favor the rule to require the carrier which delivers goods damaged, and which are shown to have started on their journey over connecting lines of transportation in good condition, to exculpate itself from liability by showing that the injury did not occur by its default.

Affirmed.

YAZOO & M. V. R. CO. v. WILLIAMS.

(*Supreme Court of Mississippi. Feb. 3, 1890.*)

INSTRUCTIONS—APPEAL.

Where a party destroys an instruction given in lieu of one which he asked, the case will be considered on appeal as if the instruction not given was not in the record.

Appeal from circuit court, Leflore county; J. B. CHRISMAN, Judge.

Appellee, Williams, sued the appellant railroad company for killing some stock. There was conflict in the testimony; witnesses for the appellee testifying that the stock was on the track some 50 or 100 yards in front of the train, on a straight track, and that the alarm was not sounded till the train was almost on the stock, and witnesses for appellant testifying that they sounded the alarm as soon as they saw the stock, which sprang on the track just in front of the engine, and that all was done that could be done to prevent the collision. On the trial below, the defendant asked an instruction (No. 7) to the effect that the train was not bound to stop or slacken speed when the engineer saw stock near the track, which was refused, as the judge says, on a motion to supply the record with such instruction, and the one (No. 1) given in lieu thereof; that said instruction No. 7 was refused because he had marred it by interlineations, and that he gave another instruction in lieu thereof, which instruction counsel for the defendant (appellant) then and there tore up. There was verdict and judgment against the railroad company, from which it appealed.

W. P. & J. B. Harris and L. P. Yerger, for appellant. *Calhoon & Green*, for appellee.

CAMPBELL, J. In view of the fact that the circuit court refused the instruction No. 7 in the record, and gave one in lieu of it, which was destroyed by the counsel who asked it, our conclusion is to consider the case as if instruction No. 7 was not in it. This is the just course, since counsel, by destroying the substituted instruction, precluded the possibility of determining by inspection what was the action of the court.

In examining the other instructions in the case, the only error discovered is as to some given at the request of the defendant, notwithstanding which a verdict was rendered for the plaintiff; and, while we doubt its correctness, it is not without evidence to support it, and we are unwilling to disturb it. Affirmed.

RAGAN et al. v. STATE.*(Supreme Court of Mississippi. Feb. 8, 1890.)***INTOXICATING LIQUORS—INDICTMENT—PLACE.**

Under Act Miss. approved February 1, 1889, prohibiting the sale of malt liquors "at or within three miles of Providence College, situated in the county of Lee and in the state of Mississippi," an indictment charging that defendants sold such liquors "at Nettleton, in violation of an act of the legislature approved February 1, 1889, entitled 'An act to incorporate Providence College,' etc., and not alleging that the sale was made within three miles of Providence College, is fatally defective.

Appeal from circuit court, Monroe county; L. E. HOUSTON, Judge.

Ragan and Campbell were indicted for selling malt liquors. They moved to quash the indictment, because it did not allege that such liquors were sold within three miles of Providence College; which motion was overruled, and there was judgment against appellants, from which they appealed.

J. L. Finlay, for appellants. T. M. Miller, Atty. Gen., for the State.

COOPER, J. The indictment is fatally defective, and should have been quashed upon the motion of the defendants. It charges no offense. Its averments are that the defendants, on the 22d day of April, 1889, did "unlawfully sell malt liquors at Nettleton, in violation of an act of the legislature approved February 1, 1889, entitled 'An act to incorporate Providence College, in Lee county, and for other purposes.'" Looking to the act referred to, it appears that it is not thereby made unlawful to sell such liquors at Nettleton. The prohibition is against the sale of such liquors "at or within three miles of Providence College, situated in the county of Lee and in the state of Mississippi." Place is made of the essence of the offense, and, being so, it is necessary to be alleged. 1 Bish. Crim. Proc. § 372, and authorities in note.

Judgment reversed, and indictment quashed.

HAZARD et al. v. ILLINOIS CENT. R. Co.*(Supreme Court of Mississippi. Feb. 8, 1890.)***CARRIERS—BILLS OF LADING—RETROACTIVE LAWS.**

1. In an action by the assignee of a bill of lading against a railroad company for failure to deliver part of the items mentioned therein, it is a good defense for the railroad company to show that it gave the bill of lading on delivery to it of a warehouse receipt authorizing the delivery to it of the items mentioned therein, and that only those items were delivered to it which it afterwards delivered to plaintiff.

2. Act Miss. 1886, making a bill of lading in the hands of an innocent purchaser conclusive evidence of the receipt by the railroad company of the items mentioned therein, is not retroactive, as it is not a mere rule of evidence, but changes the character and legal effect of the contract evidenced by the bill of lading.

Appeal from circuit court, Clay county; L. E. HOUSTON, Judge.

Abert & Perkins, cotton buyers at West Point, had cotton at the compress warehouse. They desired to ship 25 bales of cotton to the appellants, in Boston; and, instead of delivering the 25 bales to the appellee railroad company, following the us-

ual custom, took to the agent of the railroad company a warehouse receipt showing that they, the cotton buyers, had the cotton at the warehouse, and said agent delivered to said Abert & Perkins a bill of lading for 25 bales of cotton to be shipped to appellants, Hazard & Chapin, in Boston. Abert & Perkins transferred the bill of lading to Hazard & Chapin, who only received 21 bales of cotton, and sued the railroad company for the 4 bales not delivered, in accordance with the bill of lading transferred to them. The company pleaded that it only received 21 bales from the warehouse. Appellants replied, setting up the custom as above stated, to which replication the railroad company demurred, the demurrer was sustained, and, plaintiffs declining to plead further, judgment was entered for defendant railroad company, from which Hazard & Chapin appealed. The act (of 1886) referred to in the opinion of the court makes a bill of lading in the hands of an innocent purchaser conclusive evidence of the receipt of cotton by the railroad company.

Beall & Pope, for appellants. W. P. & J. H. Harris, for appellee.

CAMPBELL, J. The transfer of the bill of lading vested in Hazard & Chapin the right of Abert & Perkins, and this action is determinable just as if the last-named parties were plaintiffs. A bill of lading, while a muniment of title, is not like a promissory note or bill of exchange under the law-merchant, and its transfer for value to an innocent holder does not preclude defense. Any defense available against an action by Abert & Perkins was available against their assignee. The bill of lading did not preclude the defendant from denying the receipt of the 25 bales of cotton. It was issued on delivery to the company of a receipt by the compress company for that cotton. That receipt authorized delivery of the cotton to the railroad company, for transportation, and that was its entire effect. For convenience, instead of requiring Abert & Perkins to haul and deliver the cotton, the receipt of the compress company was accepted, in the faith that the cotton would be delivered. It was not delivered, and it would be most unjust to hold the railroad company liable as if it had been.

The act of the legislature referred to by counsel was passed after the bill of lading was given, and cannot be applied to it; for it is not a mere rule of evidence, but has the design to change the character and legal effect of the contract evidenced by a bill of lading.

Affirmed.

ALEXANDER et al. v. WESTERN UNION TEL. Co.*(Supreme Court of Mississippi. Feb. 17, 1890.)***TELEGRAPH COMPANIES—DELAY IN DELIVERY.**

1. In an action for damages against a telegraph company for delay in delivering a telegram instructing C. to buy certain land for plaintiff, it appeared that, if the message had been transmitted in due course of business, it would have enabled plaintiff to purchase for \$3,000 property worth \$5,000. Held that, if the delay was caused

by the company's negligence, it was liable for the loss.

2. Another person had also sent a message instructing C. to buy the property for him. If both messages had been transmitted without delay, the latter would have reached C. first, and plaintiff would have lost his opportunity to purchase the property. Held, that this was no defense to plaintiff's action.

Appeal from circuit court, Oktibbeha county; L. E. Houston, Judge.

For opinion on appeal from an order sustaining a demurrer, see 5 South. Rep. 397.

Alexander, for himself and another, gave to the operator of the telegraph company at Starkville a telegram about the purchase of some property in Chattanooga, which telegram was in reply to the following letter:

Chattanooga, Tenn., Dec., 1886. C. H. Alexander, Jackson, Miss. — Dear Alex.: Following up the inquiry contained in your letter of a few days ago, I have this morning hit upon a piece of property which covers your case exactly. It is a lot on Market St., (the principal st. in the city,) 48 feet front, running back to Broad (a parallel st.) 236 feet. It has a frame house on it, which pays a rent now, I am told by the agent in charge, of \$30.00 a month. Of course, it is not considered valuable for the improvements, which are regarded as of temporary character. This property can be bought at \$3,000.00,—\$700.00 cash, \$500 in 6 months, 500\$ in 12 months, 500\$ in 18 months, and balance, 800\$, in 24 months, with 6 per cent. int. on deferred payments. You perceive that 3,000\$ for 48 feet is \$62.50 a front foot. Say the property will pay 300\$ a year. That is a good interest on the investment, if it were all cash; and the outcome of the property, in my judgment, is very great. Five times the amount could not buy the same amount of ground 4 blocks away on the same street, where it is, of course, better improved. A party will be here Monday to whom I will be under obligations to refer this property. So, if you want to secure a bargain, and are willing to make a venture on my say so, you had better telegraph. There is nothing on the market now that will compare with it as an investment. Your friend, NEIL W. CAROTHERS."

The telegraph company failed to deliver the telegram of Alexander sent in reply to above letter until the next day after its delivery to the company. In the mean time another party, one Sims, to whom the same letter was written, telegraphed Carothers that he would take the property mentioned, and so secured it. There was, under the instructions of the court below, a judgment in favor of Alexander et al. for the amount paid for sending the telegram mentioned, and they were taxed with the costs, from which they appealed.

Muldrow & Nash and Brome & Alexander, for appellants. W. P. & J. B. Harris, E. H. Bristow, and Sykes & Richardson, for appellee.

COOPER, J. The letter from Carothers to Alexander of date December 3, 1887, was not an offer to sell the land therein referred to. It was only a letter of advice; and, if Alexander's telegram had been promptly delivered, he would not thereby have be-

come entitled to a conveyance of the land upon payment of the price at which he had been informed it could be bought. Both an offer to sell, and an acceptance of the offer, are essential to constitute a contract of sale; and, if it be true that Alexander construed the letter as an offer, and accepted it as such, his action could not make it what it was not. So much of the declaration as seeks recovery on the ground that an offer of sale had been made and accepted by the plaintiff, but which failed of consummation by reason of the negligent failure of the company to transmit the acceptance, may be disregarded, because there is a total failure to show any offer for acceptance.

The true ground of complaint, as developed by the evidence, is that the plaintiff delivered to the company a message directing and instructing Carothers to buy the lot, which message, if it had been transmitted in due course of business, would have enabled the plaintiff to purchase at the price of \$3,000 property worth \$5,000, but which, by the negligence of the defendant, was not delivered until the opportunity of making the purchase had been lost. Instead of stating his case according to facts, and standing on it, the plaintiff has devoted the principal portion of his declaration to counts for breach of contract in failing to deliver an acceptance of an offer of sale. The defendant, seizing upon this aspect of the case, sets up in defense that at the same time that Carothers made the offer to plaintiff to sell the lot he also made a similar offer to one Sims, who accepted it by delivering a message, addressed to Carothers, to the telegraph company, for transmission, one hour before the plaintiff delivered his message, whereby he became entitled to the land before plaintiff had accepted the offer made to him. But the admitted facts show that the letter to Sims was a counterpart of the one written to plaintiff; and, as it contained no proposal to sell the land, Sims' acceptance of it as an offer, by delivering his message to the company, did not complete a contract of purchase by him. The evidence tends to show that plaintiff's message should have been delivered to Carothers at from 2 to 3 o'clock P. M. of December 6th; that at that time the message sent by Sims had not been received by Carothers, and, if plaintiff's message had been then delivered, Carothers could and would have secured the lot for the plaintiff. If this be true, (and it is a question of fact to be determined by the jury,) and if it be also true that the delay was caused by the negligence of the defendant, and that plaintiff has sustained a loss by failing to secure a bargain, the defendant is liable. The condition of things as they really existed at Chattanooga when plaintiff's message should have been delivered, and not what they would have been if Sims' message had been seasonably delivered, is to be looked to. The defendant cannot exonerate itself, if otherwise liable, by showing that if something else had occurred, which did not, the plaintiff could not have secured the property.

The development of the case has demonstrated that so much of the plaintiff's dec-

laration as counts upon his message as an acceptance of an offer to sell should be abandoned. It serves only to incumber and confuse the real controversy, which is a narrow one, and hinges solely upon the count charging a failure of the defendant to transmit the message as one instructing Carothers to buy the land.

The judgment is reversed, and cause remanded.

STATE V. RICKETTS *et al.*

(*Supreme Court of Mississippi*. Feb. 17, 1890.)

BAIL-BOND—JUDGMENT *NISI*—*SCIRE FACIAS*.

1. A judgment *nisi* against a principal and his sureties on a bail-bond recited that they had bound themselves by a recognizance instead of a bail-bond. At the next term this recital was amended to show that it was taken on a bond, and judgment final was entered. *Held*, that the mistake in the recital was, at most, an irregularity, assignable for error on appeal, and did not affect the validity of the judgment in a collateral attack.

2. A *scire facias* which cites defendants to appear at the next term of the circuit court to be held in G. is not void for omission of the day of the month, as the law fixes the date for the beginning of the term.

Appeal from chancery court, Carroll county; T. B. GRAHAM, Chancellor.

Ricketts & Askew, the appellees, became sureties for the appearance of one D. P. Ricketts, Jr., for his appearance before the circuit court of Grenada county to answer a charge of grand larceny. This bond was approved by the chancellor, August 16, 1887. At the next term of the circuit court, Ricketts, Jr., failing to appear, a judgment *nisi* was entered for the penalty of the bond; describing the bond, however, as a recognizance. At the next term on the circuit court the judgment *nisi* was amended, and made to recite that it was taken on a bond instead of a recognizance, and judgment final was entered against the sureties, the appellees, for the penalty of the bond. A *scire facias* was issued, commanding the sheriff to summon the principal and said sureties to appear before said circuit court at Granada on the ——— Monday of January, 1888. This *scire facias* was issued on September 7, 1887, and was executed in person on the sureties (the principal not being found) on September 25, 1887. Execution was issued on the judgment final, and the sheriff was about to execute the same by levying on property of the sureties in Carroll county, when this bill was filed to enjoin said sheriff from such levy. The state made a motion to dissolve the injunction, which was overruled, and the state appealed.

T. M. Miller, Atty. Gen., for the State. Sullivan & Whitfield, for appellees.

COOPER, J. The injunction should have been dissolved. The recital in the judgment *nisi* that Ricketts and his sureties had bound themselves by a recognizance, instead of a bail-bond, was, at most, an irregularity assignable for error on appeal, and not affecting the validity of the judgment in a collateral attack. The *scire facias* was not void because of the fact that the parties were cited to appear at the next term of the circuit court to be held in Grenada, in the county of Grenada, on

the ——— Monday of January, 1888. The law fixed the date for the beginning of said term, and the appellees were sufficiently notified when to appear. Wharton v. Conger, 9 Smedes & M. 510; Lore v. McRae, 12 Ala. 444; Yonge v. Broxson, 23 Ala. 684. But, if the judgment was void, the appellees have a plain, adequate, and complete remedy at law, and no exceptional circumstances are shown warranting the interposition of a court of chancery. Jones v. Coker, 53 Miss. 195; Beatty v. Smith, 2 Smedes & M. 567; Boone v. Poindexter, 12 Smedes & M. 640. The decree is reversed, and injunction dissolved.

HAMILTON *et al.* v. STATE.

STATE V. ALLEN *et al.*

(*Supreme Court of Mississippi*. Feb. 17, 1890.)

APPEAL—EFFECT OF OPINION ON SUBSEQUENT TRIAL.

1. In an action by the state against the principals and sureties on a bond given by them as lessees of the penitentiary, defendants pleaded that they had been discharged from liability by a transfer of the lease to a third party under an act of the legislature, and, while the case was pending, the attorney general and counsel for the defense submitted to the supreme court for their decision the question whether the transfer had such effect. *Held*, that the decision was only intended to settle the law on the facts as stated in the plea, and, though for defendants, did not preclude the state from traversing the plea, and having a trial of the issue thereby raised.

2. The court below having on motion entered final judgment on such opinion, discharging the sureties, notwithstanding the traverse of the plea, and having afterwards allowed the declaration to be amended and given judgment thereon against the principals, the reversal of the former judgment will necessitate reversal of the latter, so as to put the parties *in statu quo*.

Appeal from circuit court, Hinds county.

This was an action against Jones S. Hamilton *et al.*, principals, and their sureties, John M. Allen *et al.*, for an alleged indebtedness due by the principals to the state, which it was alleged was covered by a bond executed by said Hamilton *et al.* There was judgment, after the decision of the judges of the supreme court as to the plea mentioned in this opinion, discharging the sureties, from which the state appealed, and a judgment rendered against the principals, Hamilton *et al.*, for the amount claimed, from which they appealed. The points of decision are sufficiently stated in the opinion. J. B. CHRISMAN, J., presided when the judgment discharging the sureties was rendered, and C. H. CAMPBELL, J., presided when the judgment against the principals was rendered.

Nugent & McWillie, for principals and sureties. T. M. Miller, Atty. Gen., for the State.

CAMPBELL, J. The state sued on the bond of Hamilton and others, as lessees of the penitentiary, to recover the money claimed to be due for rent stipulated to be paid. A number of pleas were pleaded, and among them one numbered 5, in which it was averred that the defendants had been discharged from all liability on the bond sued on by an executed transfer of the penitentiary to the Gulf & Ship Island Rail-

road Company, in pursuance of an act of the legislature entitled "An act to facilitate the construction of the Gulf & Ship Island Railroad Company, and for other purposes," approved March 13, 1884. While the case was pending in the circuit court, the attorney general and counsel for the defense applied to the judges of the supreme court for their consent to decide the questions of law relating to the liability of the sureties on the bond, in advance of the trial of the case in the circuit court, inasmuch as the case might be expected to come before the supreme court ultimately, however decided by the circuit court, and it was desirable to obtain an expression of the view of the judges of said court as soon as possible, for the guidance of all concerned in the further progress of the case in the circuit court. The judges of the supreme court consented to hear the case, and give their view of the law applicable, as requested by the counsel for the state and the defendants. In pursuance of what had occurred, an agreement, signed by counsel, was presented to the judges, in which, after stating, "It is hereby agreed to submit the questions of law relating to the liability of the sureties on the bond," etc., it proceeded in the following language: "The questions the said judges are asked to decide are: * * * (2) As to whether or not a compliance with the act of 1884, authorizing a transfer of the convicts to the Gulf & Ship Island Railroad Company, in everything save the giving of the bond required by said act, released the sureties on the bond of the lessees." A stipulation of the agreement of counsel was that the decision of the judges of the supreme court should "be accepted by both the state and the said sureties as the law of the case, and the case is to be disposed of in the circuit court of Hinds county in accordance with such decision," etc.

The attorney general and counsel for the defendants appeared before the judges of the supreme court, and argued fully the several questions involved in it. After the argument, the judges took charge of the case, for the purpose of giving their view of the law upon the questions submitted to them. In the argument it was conceded by the attorney general that if, under the act of 1884, a valid transfer could be made to and accepted by the Gulf & Ship Island Railroad Company, without its bond being first given, the sureties would be discharged. On considering the case as submitted to them, the judges were impressed with the belief that the plain interpretation of the act of 1884 led to the conclusion that the giving a bond by the railroad company was not a condition precedent to a valid transfer of the penitentiary, but that the transfer was to precede the execution of the prescribed bond, which was a matter between the state and the railroad company.

The following opinion was written and subscribed by the judges of the supreme court at the time, as expressive of their views of the law. It is confined to a single question, because one good plea in bar is as good as a hundred, and it was deemed unnecessary to decide any other question, as this was supposed to be decisive of the

case, so far as related to the liability of the sureties:

"The fifth plea presents a good defense to the action. It avers that a transfer was made by Hamilton, Allen & Co. to the Gulf & Ship Island Railroad Company, and accepted by it, and a copy of the transfer filed in the office of the secretary of state, as provided by 'An act to facilitate the construction of the Gulf & Ship Island Railroad, and for other purposes,' approved March 13, 1884, and found in Acts 1884, p. 971. The express declaration of that act is that, 'upon the execution of such transfer and assignment in writing, and a copy thereof, filed,' etc., 'the said Hamilton, Allen & Company, lessees, or their assigns, shall be released from all liabilities thereafter to the state of Mississippi.' The act requires said company to execute a bond, but does not make the giving of such bond a condition of the validity of the transfer authorized. The giving bond was a matter between the state and the railroad company, with which Hamilton, Allen & Co. had nothing to do; and the transfer by them, and its legal effects, were not by the act made dependent on the giving the bond required, which was to succeed the transfer. It is plain from the act that the purpose was to get a transfer of the lease from Hamilton, Allen & Co. to the G. & S. I. R. R. Co., and this was first authorized. Negotiations between these parties as to terms, and a transfer from one to the other as a complete act, evidence of which was to be filed in the office of the secretary of state, were provided for to precede, and therefore to be independent of, the requirement that the railroad company should give the bond. That was the condition on which the railroad company was to continue in the enjoyment of the lease, which it was empowered to obtain by assignment. The natural order contemplated was the transfer in writing, executed, and then giving bond, the necessity for which could not arise until the completion of the transfer. It was the transfer executed, and a copy filed, which was to release Hamilton, Allen & Co. The validity of the transfer did not depend on what might subsequently occur as to the bond. They were to be released by their own act, and not by what might or might not be done by the railroad company, which had first to deal with them, and with the state, as to the bond. The rules of law applicable to the contracts of individuals must apply here. The settled doctrine is that whether or not a condition exists, or whether it is precedent or subsequent, or whether there is dependence or independence of stipulations or requirements, is to be collected from the evident sense and meaning of the parties as they have expressed themselves. The question of precedence depends 'on the order of time in which the intent of the transaction requires their performance.' If a matter is to occur before another matter, or may so occur, it cannot be said to depend on the other. It must be independent, in the nature of things, and so the law is declared by all the authorities. It will not do to say that the requirement of a bond must be held a condition of the validity of the

transfer to the railroad company as a means of protection to the state. If the state was injured or liable to injury for want of such a condition, it was its own doing, and it cannot complain. The truth is, the legislature assumed that a bond would be given by the railroad company, and without stipulating that it should be given, as a condition of the transfer, authorized the transfer to be made; and, as it was made, it must be held to have had the effect declared by the act. The transfer, in compliance with the law, divested Hamilton, Allen & Co. of all right to the lease; and the giving a bond, as required of the railroad company, was the condition on which it was to hold what was transferred. Failure to give the bond gave the state the right to assume control of the penitentiary. That was a sufficient protection to the state; but, whether it was or not, it is all the legislature provided. We concur in holding the fifth plea good, and for the reasons above stated.

"J. A. P. CAMPBELL.

"TIM E. COOPER.

"JAMES M. ARNOLD."

At the time of delivering that opinion, we did not have a doubt of its correctness, as an exposition of the law on the facts assumed to exist, and we do not entertain a doubt now of its accuracy, as an expression of the true interpretation of the act of 1884. We adhere to the view expressed, and it must prevail as the law of the case, whatever be the consequence to any party to it.

Afterwards, in the circuit court, the attorney general, who, since the submission of the question of law to the judges of the supreme court, had been led to believe that the fifth plea, which he had before regarded as true, was not in fact true, obtained leave of court, and replied traversing the plea as to the transfer to the Gulf & Ship Island Railroad Company. After this, on motion of the defendants for judgment final, "upon the award and judgment of the judges of the supreme court," the sureties on said bond were by the judgment of the circuit court discharged from all liability. To this the state excepted, and has appealed to this court. Upon the rendition of the judgment discharging the sureties, the attorney general obtained leave of the court, and presented a declaration on the contract of lease of the penitentiary, and to recover of the lessees, who were principals on the bond sued on in the action, the money claimed to be due from them for the period of time for which the action on the bond was brought, viz., the year 1885. This declaration was demurred to by the defendants, and when the demurrer was overruled divers pleas were filed, to all of which demurrers were sustained, except the general issue, on which a trial was had resulting in a judgment in favor of the state, from which the defendants have appealed.

It was error for the circuit court to discharge the sureties, on motion, in view of the traverse of the fifth plea. All that the opinion of the judges of the supreme court settled, or was intended to settle, was the law upon a given state of facts, viz., the facts stated in the fifth plea, which were assumed to be true, without inquiry, by

the judges, who undertook to declare the law on the question submitted to them by the attorney general and counsel for the defendants. It did not occur to the judges that the state would be precluded from controverting the facts set up in any of the pleas, and we fail to perceive now any plausible ground for such a ruling. The judges, in considering the case, looked only to the questions presented by counsel, and did not at the time consider the application of the view expressed to the pleadings. It is true that it was supposed that the effect of the opinion of the judges would be to discharge the sureties, but that was upon the assumption of the truth of the fifth plea. When it was proposed by the attorney general to controvert the plea, the issue should have been tried.

There was no arbitration of the case by the judges of the supreme court, and no award by them, except as stated above. It was justly assumed that they would, when urged by counsel on both sides, give their view of the law under a sense of their responsibility as judges, as if in court, and it was accordingly done, so that it might be known in advance what that view was.

It follows the view presented that the judgment in favor of the sureties against the state must be reversed, and from this it results, necessarily, that the judgment in favor of the state against the principals in the bond, on the amended declaration, must be vacated. Otherwise a curious condition of things would be presented. It may be that amending the declaration and proceeding to judgment against the principals in the bond would have amounted to an election to abandon the pursuit of the sureties, and pursue the principals instead, if the principals had acquiesced in the judgment against them, and the sureties had pleaded that in bar of the further pursuit of them. But, as the whole matter is before us on appeal and cross-appeal, we are satisfied that our proper course is to reverse the judgment discharging the sureties, and as a consequence of that, and without inquiry into the rulings on the action as amended, to vacate the judgment in favor of the state, and restore the *status quo* of the case before the error discharging the sureties, on which error the subsequent proceeding was based.

Judgment will be entered accordingly.

MARSHALL, Sheriff, to use of CLIFTON *et al.*,
v. STEWART *et al.*

(Supreme Court of Mississippi. Feb. 17, 1890.

INDEMNITY BONDS—ACTION ON—PARTIES.

Under Code Miss. §§ 1754, 1755, providing for giving an indemnity bond to a sheriff levying on property, conditioned to pay to any person "claiming title to the property seized" all damages sustained by such person in consequence thereof, and declaring that "any person claiming the property levied on may prosecute a suit" on the bond, persons who claim a right in property levied on by virtue of a deed of trust given to secure a debt due them cannot sue on such a bond, as uses, in the name of the sheriff.

Appeal from circuit court, Monroe county; L. E. Houston, Judge.

Action by J. H. Marshall, to the use of

Clifton & Eckford, against T. W. Stewart and others, on an indemnifying bond given to the sheriff by defendants. The sheriff had levied on certain goods, and afterwards sold them. The court instructed the jury to find for defendants; and a verdict was so rendered, and judgment entered thereon, from which plaintiffs appeal.

Clifton & Eckford, for appellants. *Bristow & Walker*, for appellees.

COOPER, J. The bond of indemnity provided for by section 1754 of the Code is in substitution of the common-law liability of the sheriff for the trespass committed by him in levying upon property of one other than the defendant in execution. *Swain v. Alcorn*, 50 Miss. 320; *Shattuck v. Miller*, Id. 386. But the statute does not confer a right of action on the bond upon persons who might not have sued the officer for the trespass. The bond is conditioned to pay and satisfy to any person "claiming title to the property seized all such damages which such person may sustain in consequence of such seizure and sale."

Section 1755, which provides for the remedy on the bond, declares that "any person claiming the property levied on may prosecute a suit," etc. The uses in this action, *Clifton & Eckford*, aver themselves to be the owners of the property seized. The evidence shows a deed from the former owner to one Vasser, trustee, to secure payment of a debt due to *Clifton & Eckford*. This does not show that they had either title or claim to the property. It shows merely a right to have a sale of the property by the trustee for their benefit. They could not have sued the sheriff in their own names; and, since this could not have been done, they were not entitled to sue as uses in this action.

In *Brown v. Lester*, 13 Smedes & M. 392, where suit had been brought in the name of one for the use of another, and the clerk failed in discharging his duty of putting the suit on the issue docket, suit was brought on the bond of the clerk in the name of the governor, to whom it was payable, for the use of the uses in the first suit. It was held that the uses might sue, because the condition of the bond was to pay to the "party injured" by the neglect of duty, and the injury was to the uses, and not to the nominal plaintiff.

Matthews v. Bailey, 25 Miss. 33, was an action on the bond of a sheriff by the assignee of a judgment under which the sheriff had collected the money demanded. The court upheld the right of the assignee to put the bond in suit in the name of the governor, for his use, on the ground that the bond was conditioned to pay the money collected to "the person or persons to whom the same is due, his or their lawful attorneys, executors, administrators, or assigns," and the statute authorized suit to be brought by the "party injured." But for this the right would have been denied.

The bond on which this suit is brought is not conditioned to pay damages save only to the persons "claiming title" to the property levied on and sold, and the statute authorizes such persons alone to sue.

The plaintiffs do not fall within the terms of the bond, or of the statute conferring the right of suit; and the court properly instructed the jury to find for defendant. Judgment affirmed.

GATTMAN et al. v. GUNN.

(*Supreme Court of Mississippi*. Feb. 17, 1890.)

CREDITORS' BILL—CONSENT DECREE.

A consent decree entered on bill by several attaching creditors of defendant settling the respective priorities of such creditors, precludes defendant from contesting the further prosecution of one of the attachment suits in another county against certain property by one of such creditors, to whom the decree gave that property, in order to perfect his lien as against defendant's creditors, who were not parties to the decree.

Appeal from circuit court, Chickasaw county; R. C. BECKETT, Special Judge.

Many creditors of Gattman & Co. sued out attachments on their property wherever found. W. R. Gunn sued out an attachment on property in Chickasaw county, and also on property in Monroe county. Other creditors sued out attachments on the same property. The attaching creditors then filed a bill in the chancery court of Monroe county, setting out the fact that all were attaching on the same ground, and asking a settlement of the claims of such creditors, and of their priorities, etc. A consent decree was rendered in accordance with the agreement of the parties and the prayer of the bill. Gunn obtained a decree against the property he had attached in Chickasaw county; but, as all creditors had not joined in the chancery proceeding, Gunn proceeded with his attachment suit in the circuit court of Chickasaw county, which Gattman & Co. contested. Gunn obtained judgment, and Gattman & Co. appeal.

Sykes & Richardson, for appellants. *W. T. Houston* and *Miller & Baskin*, for appellee.

COOPER, J. The consent decree entered in the chancery court of Monroe county precluded Gattman & Co. from interposing the decree as an obstacle to the further prosecution of this suit to fix the plaintiffs' debt upon the property attached. That decree was in the nature of a compromise entered into between Gattman & Co. and the creditors who were parties thereto, and its manifest purpose was to secure to them all the property which had been seized by writs of attachment theretofore issued. To this end Gattman & Co. agreed to lend their aid, as far as they lawfully might, to those creditors who, notwithstanding the decree, should find it necessary to take steps in the courts having jurisdiction of the suits at law. The decree expressly provided that the property here in controversy, and which had been attached by several creditors, should be appropriated to someone of them. The only question left open was as to the order of appropriation. But, since all the creditors of Gattman & Co. were not parties to the chancery decree, it was thought necessary by the plaintiffs to perfect the lien of his attachment by securing a judg-

ment in his suit at law. Under the facts disclosed, there appears no just reason for Gattman & Co. to object to that course.

The judgment is affirmed.

CARTER *et al.* v. HARVEY *et al.*

(Supreme Court of Mississippi. Feb. 17, 1890.)

EQUITY—ISSUES—CROSS-BILL.

On bill to enjoin the sale of land under execution, a cross-bill praying an issue *deviseavit vel non*, to determine the validity of a will under which plaintiffs claim the land, is demurrable, as it seeks no affirmative relief, and serves but to accumulate costs, since the court could as well direct the issue on motion or *sua sponte*.

Appeal from chancery court, Oktibbeha county; T. B. GRAHAM, Chancellor.

Mrs. W. H. Harvey died, leaving a will by which she bequeathed all her property to her children. Her husband was named as executor, and as guardian of her children, without bond. In the event all her children died before attaining majority, the husband was to have the property. Her husband was to manage and control the property for the benefit of the children. The will was duly probated. Carter Bros. & Co., judgment creditors of W. H. Harvey, caused an execution to be issued and levied on his interest in the land devised by Mrs. Harvey. Said land was advertised to be sold, when W. H. Harvey and the minor children of Mrs. Harvey exhibited a bill to enjoin the sale. An injunction was granted, and defendants' motion to dissolve the same was overruled; whereupon they filed an answer raising the issue that there was no valid will of Mrs. Harvey, and subsequently filed a cross-bill, praying that an issue *deviseavit vel non* be made up to determine the validity of the will. A demurrer to this cross-bill was sustained, and the cross-bill dismissed, and Carter Bros. & Co. appeal.

O'Neill & Fant, for appellants. Nash & Alexander, for appellees.

COOPER, J. The court rightly sustained the demurrer to the cross-bill of appellants. The cross-complainants sought no affirmative relief. Their sole purpose was to secure an order for an issue *deviseavit vel non*, which the chancellor could as well direct on motion or *sua sponte* as upon the prayer of the cross-bill. The practice resorted to served but to accumulate costs, and was properly terminated at an early stage of the proceedings.

The decree is affirmed.

BORDEAUX, Tax Collector, v. MERIDIAN LAND & INDUSTRIAL Co. *et al.*

(Supreme Court of Mississippi. Feb. 24, 1890.)

SCHOOLS AND SCHOOL-DISTRICTS—TAXATION.

1. By Code Miss. 1880, towns having 1,000 inhabitants could elect to be separate school-districts, and by section 781 the board of mayor and aldermen are authorized to levy a tax sufficient to maintain the free public schools in such town. By the preceding section, boards of supervisors are authorized to levy a tax upon the taxable property of the county for the maintenance of schools in the county. Held, that the act of March 18, 1888, requiring the board of supervisors of each county, annually, to levy upon the taxable

property of such county a tax of three mills or more on the dollar, does not include a levy upon the taxable property within the limits of a town which is a separate school-district, as the term "county" was manifestly used in the sense of a school-district outside of a town which is one.

2. The creation of several school-districts in a county is free from any constitutional objection, nor is the act unconstitutional because the schools in the town may get the benefit of a tax on a larger amount of property, in proportion to the number of children of the school age, than the county.

Appeal from chancery court, Lauderdale county; S. EVANS, Chancellor.

Meridian, situated in Lauderdale county, is under the school law a "separate school-district," the municipal authorities of which, under said law, levy a school tax on the property of said city. The board of supervisors of Lauderdale levied the three-mill tax authorized by law for school purposes each year on all the property of the county, including the property in the separate school-district, the city of Meridian; and the sheriff was proceeding to collect said tax, when the appellees, property owners of the city of Meridian, filed this bill to enjoin such collection. A motion was made to dissolve the injunction, which was overruled, and the injunction perpetuated, from which this appeal is prosecuted.

Walker & Hall, for appellant. Fewell & Brahan and J. S. Hamm, for appellees.

CAMPBELL, J. We proceed to consider the main question in this case without notice of others, viz., does section 75 of "An act in relation to free public schools," approved March 18, 1886, which requires the board of supervisors of each county, annually, to levy upon the taxable property of such county a tax of three mills or more on the dollar, contemplate the inclusion in such levy of such taxable property as is within the limits of any incorporated town in such county which is a separate school-district?

The question is a very plain one, and we answer it, without hesitation or doubt, in the negative. From the beginning, under the present constitution, the system has been for each county to constitute a school-district, and for incorporated towns having a prescribed population to constitute separate school-districts, either by force of the school law making them such, as by section 1994 of the Code of 1871, which in this followed the school law of July 4, 1870, except as to the number of inhabitants, and the school law of April 17, 1873, or by the determination of the municipal authorities of towns having a certain number of inhabitants, which varied until, by the act of 1886, an incorporated town having a population of 750 was empowered to be a separate school-district. By the act of July 4, 1870, there was a separation of towns having a population over 5,000 from the counties they were in as school-districts, and no provision was made for raising money for the support of schools by municipal taxation. Taxes were to be levied by the board of supervisors only; but the county treasurer was required to "keep a separate account with each district in the county, and credit each district with the amount

thus collected." The levy, although made by the board of supervisors, was upon the taxable property in each district, and a separate account was to be kept of the money raised in each district. Section 32, Acts 1870, p. 11. Each district, the county and town separately, had its own board of school directors, and separate administration, except that it was subject, as provided, to the county superintendent of education, and was dependent on the board of supervisors for the levy of taxes. By "An act in relation to public education," chapter 39 of the Code of 1871, every county, and every incorporated town containing more than 3,000 inhabitants, was made a school-district, separately, with provision for separate administration of schools, and it was made the duty of the board of supervisors to levy a prescribed tax upon the taxable property of the county, and the "city council of any incorporated city," etc., to levy a tax upon the taxable property of the city, to defray the estimated costs and expenses of school-houses and teachers. Section 2063, Code 1871. The money thus obtained was to go into the county and city treasury, respectively, for the support of schools in the respective districts. By the act approved April 17, 1873, which was a revision of the school law of the state, not only was each incorporated town of more than 2,000 inhabitants made a separate school-district, but each of such towns was to contribute to pay the salary of the county superintendent on the ratio of its taxable property to the entire taxable property of the county, and the board of supervisors was required to levy a tax annually upon the taxable property of the county, and the mayor and aldermen of the city or town were to levy such tax on the taxable property of the city or town for school-house and teachers fund, etc.

By the school law approved March 5, 1878, which was a general revision of the law on that subject, and more extended and elaborate than any preceding it, any town of 1,000 or more inhabitants was empowered to be "a separate school-district, if the mayor and aldermen so elect," and the line of separation between the districts, and controlling authority of the board of supervisors and town authorities, was clearly drawn; and it was provided that "the board of mayor and aldermen shall exercise, in such town or city, all the duties and functions prescribed in this act for boards of supervisors in the county," and among these was to levy a tax, not to exceed three mills on the dollar, for school purposes. The school law of the Code of 1880 is the act of 1878 slightly changed. By it towns having 1,000 inhabitants could elect to be separate school-districts, and by section 731 the board of mayor and aldermen of any such town as constituted a separate district was authorized to levy a tax sufficient to maintain the free public schools in such city or town, as contemplated by the law. The section immediately preceding empowered boards of supervisors to levy a tax upon the taxable property of the county for the maintenance of schools in the county. The chapter in the Code of 1880 was but little changed un-

til the act of March 18, 1886, and section 76 of the act of 1886 is section 731 of the Code of 1880, except the word "school" for "schools," which is a distinction without a difference.

It is manifest from a review of legislation that a city or town which by law is a separate school-district is excepted from the county in the matter of the levy provided for by the board of supervisors. The board of supervisors is to levy taxes on the taxable property of the county, outside of and distinct from the town made a separate school-district. That is the province of the board of supervisors. The town is in the county, but not of it, for this purpose of taxation, because the legislature has separated county and town for school purposes, and given the control of the county outside of town to the board of supervisors,—the county authorities,—and the town to its authorities. The language making it the duty of the board of supervisors of each county to levy a tax upon the taxable property of the county is general, because each county is a school-district, and may not have in it a town which is such; but the manifest purpose of the legislature is to employ the word "county" in the sense of a school-district outside of a town which is one. In this restricted sense, the word "county" is to be understood in the matter of taxation, in order to carry out the legislative scheme of separate school-districts between counties, and the towns they may contain. Nor is it necessary or allowable to give this restricted meaning to the word "county" in other parts of the law, because there is nothing to suggest such restriction as in reference to separate districts, and taxation in them. Generally, the word "county" embraces the whole county, including towns in it; but where it is used in a limited or restricted sense it must be so interpreted, in conformity with familiar rules of interpretation.

There is nothing in the constitution to support the position that each county is a school-district, and that a district may not be made within a county. The creation of several school-districts in a county is free from any constitutional objection; and the separation of towns from the county, in the creation of school-districts, is not violative of the uniformity in the system of free public schools required by the constitution. The argument that, because Meridian may have a taxable wealth of \$4,000,000, and 3,000 children of educable age, and the county of Lauderdale, excluding Meridian, may have \$2,000,000 of taxable property, and 4,000 educable children, and therefore that 3,000 children in Meridian would get the benefit of a 3-mill tax on \$4,000,000, while the 4,000 in the county would have the benefit of such tax on only \$2,000,000, has no merit as an attack on uniformity of the system or justice in appropriating money raised by taxation in the separate school-districts. Each gets its own, and none should complain. The countryman does not pay any of the town tax, and has no just claim to share its benefits. He gets a share of the larger wealth of the town, in the general tax for school purposes, so far

as it raised by general taxation, and is distributed as school fund by the state.

We deal not with the policy of the scheme as established, which is for the legislature to determine, and notice the argument as to alleged inequality only to show that it is unfounded as to the purpose for which it is used. It is probably true that by far the larger part of the taxes for all objects is paid by the cities, towns, and villages; but it is also probably true that the explanation of this is found in the fact that town property is taxed much nearer its value than property in the country, and business pursuits which are taxed are chiefly found in towns, and by far the larger part of values exempted from taxation is in the country. Whatever may be true as to the facts or the explanation, there is no violation of the constitution in permitting taxation in each district for its own schools.

As the question discussed dominates all other questions in the case, their consideration is rendered unnecessary by the view taken, which disposes of the case on its merits.

Affirmed.

KOHLBRUNNER V. STATE.

(*Supreme Court of Mississippi*. March 8, 1890.)

LOCAL OPTION—CONSTRUCTION OF STATUTES.

Act Miss. March 16, 1886, amending Code Miss. 1880, § 1112, which prohibits sale of vinous and other liquors, in quantities of less than a gallon, without a license, provides that any person may sell wine made of grapes, or other fruits grown by himself, in any quantity not less than one pint, without paying a tax or obtaining a license, provided that nothing therein shall be construed to interfere with any local law prohibiting the sale of native wines, etc., and repeals all conflicting acts. *Held*, that it repeals, so far as it is in conflict with it, Act Miss. March 11, 1886, which provides that, upon the submission to and adoption by the qualified electors of any county of local option, it shall not be lawful for any person within such county to sell any alcoholic, spirituous, vinous, malt, or intoxicating liquors.

Appeal from circuit court, Pike county; J. B. CHRISMAN, Judge.

Brame & Alexander, for appellant. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. The appellant has been indicted and convicted for the violation of the provisions of an act entitled "An act for preventing the evils of intemperance by local option in any county in this state, by submitting the question of prohibiting the sale of intoxicating liquors to the qualified voters of each county, to provide penalties for its violation, and for other purposes," approved March 11, 1886, and operative from and after its passage. The case was tried on an agreed statement of facts, by which it appears that the act of above date had been put in operation in the county of Pike, and was in operation at the time of the sale of the wine by the appellant. It further appears that the sale for which the indictment was found was that appellant had, at his vineyard in the county of Pike, sold wine made of grapes grown by him in his said vineyard, in quantities not less than one pint. The defendant asked the court to instruct the

jury that under the above facts he should be acquitted, which instruction the court refused; and, the jury having returned a verdict of guilty, sentence of fine and imprisonment was imposed, from which the defendant appeals.

The appellant invokes in his defense the provisions of an act entitled "An act to amend section 1112 of the Code of 1880, in relation to the sale of vinous and spirituous liquors," approved March 16, 1886, and operative from and after its passage. That act is as follows: "Section 1. Be it enacted by the legislature of the state of Mississippi that section eleven hundred and twelve of the Code of 1880 be, and the same is hereby, amended by adding after the word 'court,' in the last line of said section, the following: 'Provided, that any person may sell wine made of grapes and other fruits grown by himself, in this state, in any quantity not less than one pint, without paying any tax, or obtaining any license, provided that nothing herein contained shall be construed so as to interfere with any local law prohibiting the sale of native wines; provided, further, that the party so selling domestic wine shall sell the same at his place of residence or vineyard; but this act shall not be construed to prevent the delivery of the wine in towns, or to railroads or other common carriers, by the producer.' Sec. 2. Be it further enacted, that all acts and parts of acts in conflict with this act be, and the same are hereby, repealed." Section 1112 of the Code, of which this act is amendatory, is a part of the chapter in relation to retailing liquors. By previous sections, it was provided how licenses to sell in quantities less than one gallon might be secured, and also under what circumstances it should not be lawful for the constituted authorities to grant any license to retail within particular localities. So much of section 1112 as is necessary to be set out for the consideration of this case is as follows: "If any person shall sell any vinous or spirituous liquor, in any quantity less than one pint, without having a license therefor, in pursuance of this act, * * * or if any person, without having first paid the privilege tax, and having obtained license accordingly, shall sell any vinous or spirituous liquor in the quantity of one pint, or in a greater quantity, * * * the person so offending shall be liable to indictment, and on conviction shall be fined not less than twenty-five dollars, nor more than five hundred dollars, or be imprisoned not less than one week, nor more than three months, or both, at the discretion of the court."

The act of March 11, 1886, for breach of which the indictment was found, provided that upon petition of a certain number of qualified electors the boards of supervisors of each county in the state should submit to the electors of said county, to be decided by them, whether said act should be put in operation in such county, and, upon the fact being thus ascertained that a majority of the voters had adopted the law as operative, then it is provided by section 6 of said act that "it shall not be lawful for any person, within the limits of

such county, to sell, or barter for valuable consideration, either directly or indirectly, or give away, to induce trade at any place of business, or furnish at other public places, any alcoholic, spirituous, vinous, malt, or intoxicating liquors," etc.

The attorney general contends that the act of March 16th is only an amendment of section 1112 of the Code, and consequently has no application except in those cases in which, but for the amendment, the Code provision would prohibit the sale of domestic wines; that, where the Code provision is suspended or superseded by the acceptance of the act of March 11th, the privilege of selling domestic wines secured by the act of March 11th is also superseded and suspended. The appellant insists that the act of March 16th, being of later date than that of March 11th, and containing a clause by which conflicting acts are repealed, operates to secure to manufacturers of domestic wines, from grapes or fruits grown by themselves, the right to sell in the quantities named, except only in those localities where by local law such sales are prohibited.

While the question is not free from difficulty, we are of opinion that the view contended for by appellant is supported by a proper construction of the act. It is true that the title of the act is that of a mere amendment to the section of the Code, and, further, that it is in the form of a proviso thereto. Ordinarily, it would be but a part of the amended section, and, being a proviso, would be but a reservation or exception to the body of the law. Read as such, it would simply declare that nothing in section 1112, or of the chapter of which it is a part, should be held to prohibit the sale of domestic wine made of grapes or fruit grown by the maker. But the intent that the right to sell should exist under other circumstances is evident from the fact that the act contains a repealing clause, by which all acts in conflict with its provisions, save only local laws by which the sale of domestic wine is prohibited, are expressly repealed. Construed as a mere proviso to the Code, the repealing section of the act is destroyed, and so much of the body of the act as declares that it shall not have effect in those localities in which, by local laws, domestic wines are prohibited from being sold, becomes a mere redundancy. The question is whether, to preserve the form, we shall adopt a construction by which one section of the act, (the repealing clause,) and another portion of the body of the act, shall be rendered surplusage, or shall we uphold the substance by disregarding the form?

The law under which appellant has been convicted was in existence at the time of the passage of the act of March 16th. It was a general law, and is in conflict with the provisions of that act, and, in so far as it is, is by its express provisions repealed. The matter was before the legislative mind, and was directly dealt with. It knew that in some sections of the state local laws were in operation, under which no license could be obtained to retail vinous or spirituous liquors; and it knew, also, that under the general laws then re-

cently passed a broader prohibition might be secured by the adoption of its provisions by the qualified voters of any county in the state. Knowing this, it declared that the act then being considered should not have effect where, by reason of local laws, the sale of domestic wine was prohibited, but also declared that all general laws in conflict with its provisions should be, and were, repealed.

The construction adopted by us is, furthermore, that by which the object of the statute is preserved. The right intended to be secured was evidently for the purpose of encouraging a domestic industry, by permitting the producer to dispose of the product of his labor without liability to criminal prosecution for so doing. While the legislature thought it inexpedient to secure that right in those localities where, by fixed laws, such sales were prohibited, it properly assumed that no stimulus would be given to the industry protected if it was subjected to the varying application of the provisions of the act of March 11th, under which that law might be in force for two years in any locality, and suspended for a like time, and again in operation, and again suspended, and so in continuous alternation for all time.

The judgment is reversed, and cause remanded.

ATKINSON v. SINNOTT.

(*Supreme Court of Mississippi*. March 10, 1890.)

DEEDS—CANCELLATION—CONSTRUCTION AND EFFECT—SPECIFIC PERFORMANCE.

1. An instrument will not be canceled for fraud of defendant in putting it in the form of an absolute deed, when complainants intended it as a contract to convey, where it appears that complainants agreed to convey the land to defendant, that he has performed his part of the agreement, and that specific performance thereof would give him a deed exactly like that sought to be canceled.

2. A deed recited that grantors, in consideration of \$1,000 to be paid within 10 days, as agreed, "hereby sell, convey, and warrant to the said * * * all that portion of land, * * * excepting only that portion * * * upon which our residence is built. * * * And we hereby sell, convey, and warrant to the said * * * the above-described reservation of home and lot of ground upon the payment to us, or our administrators, of the sum of \$500." The grantee was put in possession of the first-mentioned tract, but not of the home lot. Held, that there was a sale only of the land, exclusive of the residence lot, and it was optional with the grantee whether he would take the latter at the price named.

Cross-appeal from chancery court, Pike county; L. MCLAURIN, Chancellor.

R. H. Thompson, for complainant. S. E. Packwood and W. P. Cassidy, for defendant.

COOPER, J. Mrs. Sinnott exhibited the bill in this cause against Atkinson to cancel a deed she had made to him as obtained by fraud; or if, upon hearing, this relief should be denied, she prayed specific performance of its terms against him. The instrument giving rise to the controversy is here set out, and is followed by the only paper signed by Atkinson. The deed is as follows:

"N. Sinnott & Wife to (Deed) Wm. Atkinson. State of Louisiana, parish of Orleans. For and in consideration of the sum of one thousand dollars to be paid to us within ten days from the date hereof, as per agreement entered into with William Atkinson, of Magnolia, Miss., we hereby sell, convey, and warrant to the said William Atkinson, his heirs, assigns, all that portion of land lying in the town of Magnolia, county of Pike, state of Mississippi, known as the 'Sinnott Place,' the same being the only and all the land owned by us in said county and state; excepting only that portion of land lying near the track of the Illinois Railroad and the creek known as the 'Minnehaha Creek,' upon which our residence is built, (the boundaries are to be indicated by iron posts set up at the corners thereof) and now inclosed by a wooden fence. And we hereby sell, convey, and warrant to the said William Atkinson, his heirs or assigns, the above-described reservation of home and lot of ground upon the payment by him to us, or our administrators, of the sum of five hundred dollars. Witness our hands this, the 19th day of August, A. D. 1887. N. SINNOTT. ARABELLA D. SINNOTT."

This instrument was properly acknowledged as a deed by the grantors before a notary public in the city of New Orleans on the day of its date. On the same day, Atkinson, by his agent, delivered to Mrs. Sinnott a written promise to pay money, in the following form, as claimed by Mrs. Sinnott; but Atkinson asserts that the words "to be," which are italicized, were inserted therein by complainant after its delivery by him.

"New Orleans, August 19th, 1887. I hereby agree to pay to Nicholas Sinnott and A. D. Sinnott the sum of one thousand dollars (\$1,000) within ten days from date, or upon approval by my attorney of a certain deed *to be* made to me by said parties to a certain tract of land in Pike county, Mississippi, known as the 'Sinnott Place.' Attest: J. H. LEVY. WM. ATKINSON. Per R. M. McDONALD."

Complainant seeks to avoid the conveyance made by herself and husband on the ground that it was obtained by fraud; but the only fraud averred, or sought to be proved, is that, while she and her husband intended only to make a written contract to convey, the defendant put the contract in the form of a deed, and, knowing that the grantors therein did not then intend to execute a deed, fraudulently secured the instrument to be executed, representing it to be only a contract to make a future conveyance. There is no pretense that the instrument does not set out, according to the understanding of all the parties, the land to be conveyed, the price at which it was to be sold, and the time at which the purchase money was to be paid. The sole complaint is that by the fraud of the defendant a contract to make a conveyance in the future was made to take the form of a present conveyance. It would be a sufficient reply to this to say that, if the court should afford to complainant all the relief it can give in conformity with its inherent principles, she would be left precisely in the attitude in

which she now stands. Certainly, she must do equity as a condition of receiving relief; and, according to her own showing, she can only vacate the deed she assails upon condition of executing another of precisely the same tenor. It is incontrovertibly shown that, within the time named in the writing given by him, Atkinson tendered the purchase price, and has continuously kept his tender good, and has paid the money into court with his answer, where it now is, subject to complainants' acceptance. Under these circumstances, there would be no shadow of right to relief on the ground now under consideration. But, in addition to this, it is shown that, soon after the execution of the deed, Atkinson went upon the premises for the purposes of making a survey of the land bought, and complainant then pointed out the lines, and, after the survey, permitted him to enter upon the land, which he has since improved, according to his testimony, by putting up a house at a cost of \$12,000. We approve the action of the court below in refusing relief upon the allegations of fraud in procuring the conveyance.

The alternative prayer for relief was that the court should direct and compel the defendant to pay to complainant the sum of \$1,500, and that the whole land composing the Sinnott place, including both that part sold to Atkinson at \$1,000, and the homestead reservation, valued at \$500, should be decreed subject to sale for the whole sum. From a final decree in accordance with this prayer the defendant, Atkinson, appeals.

The question is whether there was a sale of the whole premises, at the sum of \$1,500, as the chancellor has found, or a sale only of the land, exclusive of the residence lot, at the sum of \$1,000, with the privilege or option secured to Atkinson to become the owner of the residence lot upon payment of the further sum of \$500. This question is determinable from the contract of the parties as found in the writings signed by them. While the conveyance uses words, in reference to the residence lot, of settled technical significance, and which imply a present grant, the context shows that a different construction shall be put upon them to meet the meaning in which they were employed. In the prior portion of the conveyance, the residence lot was expressly reserved, while a fixed price, to be paid at a fixed time, and evidenced by a written obligation of the grantees, was stipulated to be paid for the other land. The concluding clause of the deed, while using words of present conveyance of the home lot, indicates that the conveyance thereof was to be effectual only "upon" the payment of the price named, \$500; and neither by the deed, nor by any writing signed by Atkinson, is there imposed on him the correlative obligation of paying the price, or accepting the deed as conveying this land. In fact, he did not enter upon the possession of this part of the property; nor is it claimed, either in the pleading or evidence, that he agreed to be the purchaser thereof. It is a well-settled rule of construction that, where the whole of a written instrument shows that the

parties thereto employed technical language in a sense different from its ordinary meaning, the primary meaning of the words is what the parties meant, and not what the technical words usually import. Elph. Interp. Deeds, Rule 16, p. 76. "It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*. Every part of it may be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done." Lord ELLENBOROUGH in *Barton v. Fitzgerald*, 15 East, 540.

Looking to the whole deed, it is evident that the reserved lot was intended to be dealt with in some manner other and different from that in which the balance of the land was dealt with. Manifestly, it was not intended to sell the whole at a lump sum; for such construction would render inoperative that clause of the conveyance by which the reservation was made of the residence lot, and would have entitled the grantees to the immediate possession of the whole, and this in direct conflict with the contract of the parties that the residence lot should only pass "upon" the payment of the price for which it was agreed to be sold.

Looking only at the clause having reference to the residence part of the lot, we find the present effect of the granting words limited and restrained by the words which succeed it, by which it appears that the conveyance was to be operative as to this lot only upon the payment of the purchase price. The taking effect of the grant evidently depended on something to be thereafter done, and which must be done as a condition precedent to the operation of the grant. But there is nothing in the deed, or in the conduct of the parties, from which arises an obligation on the part of Atkinson to perform the condition. If he had been admitted to the possession of the property, and had accepted the possession, claiming under the deed, a different question might be presented. It may be that even then he would have been compelled either to pay the money, or surrender the possession. But, confessedly, there has been neither a recognition of his right to possession by complainant, nor a claim by him of such right. It was never the intention of the grantors to make an immediate sale of the residence lot, nor of Atkinson to make an immediate purchase. Looking to the deed alone, we find nothing which binds him to buy. If we look to the circumstances of the parties, to discover therefrom what meaning they intended to convey by the use of the words "upon the payment of the sum of five hundred dollars," it is clear, beyond all doubt, that no present sale was intended.

The complainant testified that she was unwilling to make a present sale of the residence, which she desired to retain as a place of recreation for an invalid husband during his life, and that the purpose of the clause of the deed referring to the sale of this lot was to give Atkinson the right to buy it at the price named after the death of herself and husband. We are not to be

understood as deciding that it is permissible to seek to find the unexpressed intention of the parties to the deed. What they intended must be found from the language of the deed; but it is competent to look to the surroundings of the parties, not to contradict, but to interpret, the meaning of the words they have employed. We find nothing in the deed from which a present conveyance of the residence lot, or an obligation on the part of Atkinson to buy it, can be inferred; and, since he tendered with his answer the money due for land he did buy, the money should have been directed to be paid to her, and she should have been denied interest on said sum, and costs of court.

The decree is reversed on the appeal of the defendant, Atkinson, and cause remanded.

WEIR *et al.* v. MONAHAN *et al.*

(*Supreme Court of Mississippi*. March 8, 1890.)

DECEASED ADMINISTRATORS — ACTIONS ON BONDS — LIMITATIONS.

1. An order of court appointing the county administrator, administrator of a deceased administrator's estate, cannot be collaterally attacked, on the ground that the decedent left no property subject to administration.

2. It is not necessary that formal letters should issue in case of grants of administration to the county administrator.

3. Where M., the county administrator, is appointed administrator of the estate of D., who was the deceased administrator of the estate of P., and also administrator *de bonis non* of the estate of P., an account, filed by him as the final account of D., deceased, as administrator of the estate of P., is proper, and it is immaterial that the account is referred to, throughout the whole proceeding of accounting, as exhibited by M., administrator *de bonis non* of P., where it appears that the account was acted on and passed as the account of the deceased administrator.

4. By Code Miss. 1880, § 1998, an administrator *de bonis non* was authorized to sue on the bond of any former administrator of the estate "where it is insolvent, or where such suit and recovery may be necessary for the payment of the debts of such estate." By section 2684, when the legal title to property, or a right of action, is in an administrator or guardian, the time during which any statute of limitations runs against him shall be computed against the persons beneficially interested, though they may be under disability. *Held*, that where, before the right of the administrator *de bonis non* to sue on the bond of the deceased administrator has been barred by limitation, it becomes no longer necessary to recover the assets to pay debts, the right of the distributees to sue immediately arises, and the statute then ceases to run as against the administrator, or as against them by virtue of his right to sue.

5. This statute is not one which, having commenced to run, runs uninterruptedly, notwithstanding the absence of a person competent to sue; and when, upon the destruction of the administrator *de bonis non*'s right to sue, the infants are under a guardianship, without any right in the guardian himself to sue, the statute is stayed until the disability is removed.

6. Code 1880, § 2683, provides that if any person, entitled to bring any of the personal actions mentioned in the previous sections, limiting the time in which they may be brought, "or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after

the death of such person." *Held*, that this section applies where the deceased person has died before the adoption of the Code, and within the last year for the bringing of the suit.

Appeal from chancery court, Adams county; W. R. TRIGG, Chancellor.

T. Otis Baker, Martin & Lanneau, Thos. J. Carson, and Reed & Reed, for appellants. R. E. Conner and Claude Pintard, for appellees.

COOPER, J. The complainants, distributees of the estate of P. L. Monahan, exhibit this bill in the chancery court of Adams county against the representatives of the sureties upon the administration bond of one H. C. Doherty, who was administrator of their deceased father, P. L. Monahan.

The bill avers that all the complainants are infants, and sue by their guardian and next friend, except W. J. Monahan, who arrived at majority less than one year before the commencement of this suit. That their father died in October, 1871, in the county of Adams, possessed of a small personal estate; and on December 4, 1871, administration thereof was by the chancery court of Adams county committed to H. C. Doherty, who qualified and entered into bond conditioned according to law, with Levi Fields (the testator of the defendant Wier) and William Zock (the intestate of the defendant Doretha Zock) as sureties. That Doherty wasted the estate of his intestate, and, without having made any final settlement thereof with said court, died in September, A. D. 1874, intestate and insolvent. That on September 30, 1876, Oren Metcalfe, county administrator of Adams county, was by the proper court appointed administrator of the said H. C. Doherty, and administrator *de bonis non* of the estate of said P. L. Monahan. That on March 27, 1877, said Metcalfe filed the final account of H. C. Doherty, deceased, as administrator of the estate of Monahan; "which said account, though made out as the account of said Metcalfe as administrator *de bonis non* of the estate of said Monahan, was, as shown by the orders and decrees of the court to be, the final account of said H. C. Doherty with said estate," and that said account, having been excepted to, was restated by a commissioner of the court, and as restated showed a balance due said estate by said Doherty of \$3,427.29. That said restated account was by proper decree, of date May 10, 1879, allowed, confirmed, and ordered to be recorded. That no part of the sum so found due has ever been paid by the representative of said Doherty, and that all debts and demands against the estate of P. L. Monahan have been paid, or are barred by the statute of limitations. That Levi Fields, one of the sureties upon the administration bond of said Doherty, died on the 11th of December, A. D. 1884, testate, and his will was duly admitted to probate in the proper court on the 15th day of said month, and letters testamentary granted to the defendant Washington Weir, and that administration of said estate is yet pending. That William Zock, the other surety upon said administration

bond of said Doherty, died intestate in July, 1876, and administration of his estate was on August 7, 1876, committed to the defendant Doretha Zock, and that said administration is still open and pending. The prayer of the bill is for a personal decree against said Wier, executor, and said Zock, administratrix, for the sum found to be due by the deceased administrator, Doherty, upon his final account.

The defendants answered, admitting the death of Monahan; the appointment of Doherty as his administrator; the right of the complainants, as distributees; the death of Doherty; and that complainants are minors, except W. J. Monahan, whose age is admitted to be less than 22 years. They deny that the debts against the estate are all paid or barred by limitations. Touching the debts, they say that the following judgments were recovered by creditors against said Doherty, administrator, — one in favor of Henry Kern, of date January 14, 1874; one in favor of Jane G. Kenny, January 15, 1874; and one in favor of Dodge, Canmeyer & Co., April 23, 1875, — none of which have been paid. They aver that Mrs. Kenny died May 4, 1880, intestate, and that no letters of administration have been granted of her estate. They deny that Metcalfe was ever appointed administrator of the estate of Doherty, the deceased administrator, or that he ever filed the final account of Doherty as administrator of Monahan. If, however, he was ever so appointed and filed said account, and if a decree was rendered thereon, then they aver that said Metcalfe was also at the same time appointed administrator *de bonis non* of the estate of Monahan, and as such administrator *de bonis non* had, and still has, the exclusive right to sue upon the administration bond of said Doherty. But, if it shall appear that the right of the administrator *de bonis non* has become barred by limitation, then they insist that the complainants are also barred. The defendants also contend that Hanley, the guardian of the complainants, other than William J., was also the guardian of all of them until the said William reached majority, that said guardian might have sued upon the administration bond; and that he is barred by limitation, wherefore, also, the complainants are barred.

The foregoing defenses are common to the two defendants. In addition to these, the defendant Doretha Zock pleads that administration upon the estate of her intestate was granted on the 7th day of August, 1876, and that suit was not brought against her within four years of the rendition of the final account of Doherty, administrator of Monahan, nor within four years from the adoption of the Code of 1880, and she pleads the bar of the four-years statute of limitations.

An agreed statement of facts appears in the record, from which it is shown: (1) That all claims against the estate of Monahan were registered according to law. (2) That the judgments described in the answer were rendered, and Mrs. Kenny, one of the judgment creditors, died May 4, 1880, and no administration has been

granted on her estate, and that none of said judgments have been paid. (3) That Metcalfe never qualified as administrator of Doherty, nor were letters of administration issued to him, and that he never performed any acts as such administrator, unless a certain account filed by him of date March 27, 1877, (to be hereinafter more fully described,) was the final account of said Doherty as administrator of Monahan, filed by said Metcalfe as Doherty's administrator. (4) That said Metcalfe is yet alive, and has never resigned his office of administrator *de bonis non* of the estate of P. L. Monahan. (5) That said Metcalfe has never proceeded to final settlement of the estate of Monahan, nor has he ever paid any of the creditors of said estate any part of their claims. (6) That the estate of Monahan was never declared insolvent, but that it was at the time of the appointment of the administrator *de bonis non*, actually insolvent, and ever since has been and is now insolvent. (7) That some of the credits asked by Metcalfe in the account filed by him were disallowed on technical grounds, having been originally just and true claims against the estate. (8) That Doherty, at his death, was insolvent, and had no property liable to execution. (9) That Metcalfe never received any assets of the estate of Monahan or of Doherty. (10) That Doherty, upon his appointment, gave notice to creditors to present their claims. (11) That the distributees have never received any part of the estate of Monahan.

Complainants offered in evidence, in addition to the agreed statement of facts, the following records from the chancery court of Adams county: (1) The petition, bond, and qualification of Doherty, administrator of Monahan. (2) An annual account of said administrator, to which exceptions were interposed by the guardian of the complainants, and which, though restated, was never passed by the court. (3) A suggestion made to the chancery court in the administration of the estate of Monahan, by an attorney of the court, who represented himself to be attorney for "a creditor," of the death of Doherty, the administrator, and an application to the court to direct Metcalfe, county administrator, "to take out letters of administration *de bonis non* of the estate of Monahan, and render the final account which Doherty failed to render, and also letters of administration on the estate of said H. C. Doherty." (4) A decree of the court made on this petition, by which the court decreed that "Oren Metcalfe, county administrator of the county of Adams, be, and he is hereby, directed to take out letters of administration on the estate of Henry C. Doherty, late of said county of Adams, and late administrator on the estate of P. L. Monahan, deceased; and that said county administrator do also take out letters of administration *de bonis non* on said estate of P. L. Monahan, deceased, it appearing to the court that more than six months have elapsed since the death of said Doherty, intestate, without letters of administration having been taken out upon the estate of said Doherty, although said Doherty died possessed of property in this county." (5) A final account of the estate of Monahan

filed by Metcalfe on the 27th day of March, 1877, and consisting of the debits and credits charged and asked by Doherty on the restated annual account filed by him. This account filed by Metcalfe purported to be his final account as administrator *de bonis non* of the estate of Doherty. (6) Exceptions of certain creditors filed to the above account, in which it is referred to as the "final account of Henry C. Doherty, administrator of said estate, as stated by Oren Metcalfe, administrator *de bonis non* of said estate of P. L. Monahan." (7) Motion to refer said account and exceptions to a commissioner, order of reference to commissioner, report of commissioner, and motion to confirm the same, in all of which the account is spoken of as the final account of the administrator *de bonis non*. (8) The final decree on said account, in which the same is referred to as the "final account of Oren Metcalfe, county administrator and administrator *de bonis non* of said estate of said Monahan, deceased, by H. C. Doherty, deceased, late administrator," etc. After referring to the exceptions that had been taken to the account as filed, and the report of the commissioner thereon, the decree proceeds to state that the account showed a balance of \$3,427.29 due by Henry C. Doherty, the former administrator, and that the distributees of the estate had been cited to appear and contest said account, and had filed no exceptions thereto, etc.; wherefore it was "considered by the court, and so ordered and decreed, that said report of the said master be, and the same is hereby, ratified and confirmed, and that said restated final account of the said administrator of said estate by said administrator, Henry C. Doherty, (now deceased,) as returned into court by said master, showing said balance of \$3,427.29 due by said Doherty as such administrator to said estate, be, and the same is hereby, allowed, confirmed, and ordered to be recorded." The date of this decree is May 10, 1879. (9) An order of court of the same date as above decree, directing Oren Metcalfe, administrator *de bonis non* of the estate of Monahan, to put in suit the bond of Doherty, former administrator, to recover the balance shown to be due by him as per said decree.

The defenses interposed by the two defendants (those which are common to both) are: (1) That there has been no final decree against the administrator, Doherty, or his administrator, wherefore the complainants, who are distributees, may not sue on the bond. (2) That, if there is a final decree, the right of action on the bond is in Metcalfe, administrator *de bonis non*. (3) That if there is a final decree, and a right of action existed thereon, it was in Metcalfe, administrator *de bonis non*, but has become barred by limitation, and that, Metcalfe being barred, the complainants, who were beneficially interested therein, are also barred. (4) That the right of action on the bond was in the guardian of complainants, and that he is barred, and, because he is, so, also, are the complainants. Mrs. Zock, administratrix of one of the sureties, sets up the bar of the four-years statute of limitations, which forbids any suit against an executor or adminis-

trator after four years from the grant of letters testamentary or of administration.

We will consider these defenses in the order in which they are stated. The objection that there has been no final decree against the administrator, Doherty, or his administrator, rests upon the assumption that no valid appointment was made of Metcalfe as administrator of Doherty, or, if there was such appointment, that the account rendered by him was the account of himself as administrator *de bonis non*, and not the final account of Doherty, administrator.

The first objection taken is that the court was without power to appoint an administrator of Doherty, because it is now admitted that Doherty left no estate for administration. It is sufficient to say, in answer to this, that it is not competent to aver or prove this fact in this collateral proceeding. The chancery court of Adams county with full jurisdiction over the subject, upon the hearing of the petition for administration, found as a fact that the decedent did have property subject to administration. We are not to be understood as deciding that the non-existence of property subject to administration would preclude the grant of administration for the sole purpose of securing a final settlement of the previous administration of Monahan's estate. We only decide that, if it was essential to the exercise of its jurisdiction that the decedent should have died the owner of property subject to administration, the decree, having found that fact, is not subject to collateral attack.

The evident purpose of the petition, and the decree thereon, was to constitute Metcalfe administrator of the estate of Doherty. It is true the decree directs him to take out administration, instead of formally and by apt words committing the administration to his hands. But it sufficiently shows the exercise of judicial power, and an award of administrative authority, which authority was exercised by the appointee, and recognized by the court in its subsequent orders. The objection that no formal letters were issued is without merit. The appointee was the county administrator, and his official bond and oath, of office as such protected and applied to each administration committed to him. In cases of grants of administration to private individuals, they are required by law to execute bonds and take the oaths of office before entering upon the discharge of their duties, and letters are granted both to authenticate the grant, and to show that the person appointed has qualified according to law. In these instances the grant is conditional that the person appointed shall qualify according to law, as a condition precedent to executing the powers of the office. But, where the qualification precedes the order of the court, the letters would be but certification of the authority given by the order.

In *Elden v. Keddell*, 8 East, 187, the fiat of the surrogate was as follows: "Elden, Edw.—On the 18th day of April, 1791, power was granted to Elizabeth Elden, the lawful widow and relict of Edward Elden,

late of the Parish of Chalk, in the county of Kent, victualler, deceased, to administer the goods, chattels, and credits of the said deceased, she having been first sworn duly to administer. Till the last day of July to exhibit an inventory. Same day bond from Elizabeth Elden, widow, Matthew Dawson, and John Clay, under 100 £." In a suit, no letters having been produced or proved, a verdict was directed against the party relying upon the grant of administration. On appeal, Lord ELLENBOROUGH said that "it could not be questioned but that the original book of acts of the court, which was the authority for the proper officer afterwards to make out the letters of administration, was proper evidence of the title of the widow; for the letters of administration were only the copy of the original minutes of the court, drawn up in a more formal manner."

In *Davis v. Williams*, 13 East, 232, the following order from the minutes of the registry of the prerogative court was held to show a grant of administration: "Administration of the goods, chattels, and credits of Sir Edward Williams, Bart., late of Langford Castle, in the county of Brecon, and of Clifton, in the county of Gloucester, deceased, was granted to Dame Elizabeth Williams, widow, the relict of the said deceased, having been first sworn by commission duly to administer." To the same effect are *Hosey v. Brasher*, 8 Port. (Ala.) 561; *Thompson v. Bondurant*, 15 Ala. 346; *Beckett v. Selover*, 7 Cal. 228.

The account filed by Metcalfe was the account proper to be filed by him as administrator of Doherty, and not as administrator *de bonis non* of Monahan. Metcalfe, by the same decree, was appointed administrator of both estates. It is manifest from the record that neither he, nor the counsel at whose instance he was appointed, had any clear views in reference to the final account of the deceased administrator. Throughout the whole proceeding the final account is referred to as the final account of Doherty, the deceased administrator, exhibited by Metcalfe, administrator *de bonis non* of Monahan. But since Metcalfe was the incumbent of both offices, and the account was in its very nature the final account of the deceased administrator, and was acted on and passed as such, the addition of the words "*de bonis non*" should be disregarded as surplusage.

We are therefore of opinion that there was a valid final decree fixing the liability of the deceased administrator, Doherty, upon which suit might have been instituted against the sureties on his official bond.

The next inquiry is, when and for how long this right of action was vested in Metcalfe, as administrator *de bonis non* of Monahan, and whether the particular right of action held by him has become barred by limitation.

The final decree was rendered May 10, 1879. Prior to the act of 1873 (Acts 1873, p. 70) it was settled in this state that there was no right in the administrator *de bonis non* to recover from a former administrator an indebtedness shown by his final account to be due to the estate, the right

of the administrator *de bonis non* extending only to the unadministered assets. *Kelsey v. Smith*, 1 How. (Miss.) 68; *Stubblefield v. McRaven*, 5 Smedes & M. 130; *Byrd v. Holloway*, 6 Smedes & M. 323; *Dement v. Heth*, 45 Miss. 388.

By the act of 1873, a right of action was given to the administrator *de bonis non* to institute suit upon the bond of the former administrator, "in all cases where the estate may have been declared insolvent." Under this act there was no right of action in the administrator *de bonis non* to sue upon the bond of Doherty, the former administrator, for the estate of Monahan was never declared insolvent. By the Code of 1880, the right of the administrator *de bonis non* to sue on the bond of the former administrator was somewhat extended. By section 1998 of the Code, it is declared that "he may sue on the bond of any former administrator or executor of the estate, where it is insolvent, or where such suit and recovery may be necessary for the payment of the debts of such estate."

The agreed facts show that, while the estate of Monahan was never declared insolvent, it was yet necessary that suit should be brought upon the bond of the former administrator, in order that the debts due by the estate might be paid. By reason of this necessity, there was on the 1st day of November, 1880, (the day when the Code went into operation,) a right of action against the bond of the former administrator vested in the administrator *de bonis non*; but this right was limited by the necessity from which it sprung,—the need of the funds for the payment of debts. Since there could be but one recovery on the bond, the administrator *de bonis non* entitled to sue would, of course, recover the full sum due by the former administrator, and so much of it as might remain after the payment of debts would remain in his hands for distribution. But he was not authorized to sue where there was no necessity to use the recovery for the payment of debts. He might not recover for distribution only. In such cases the right of action was not given to him, and, as before, remained in the distributees.

Another change was wrought by the Code of 1880, which it is important here to note. Prior to the Code of 1880, where the distributees were under the disability of infancy, no statute of limitations ran against them, even though the administrator in whom the right of action was vested might be barred. But by section 2694 of the Code it was declared that "when the legal title to property, or a right in action, is in an executor, administrator, guardian, or other trustee, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested in such property or right in action, although such person may be under disability, and within the saving of any statute of limitations, and may be availed of in any suit or action by such person."

Upon the accrual of the right to sue on the bond to Metcalfe, administrator *de bonis non*, the statute of limitations began to

run against him; and, under the provisions of section 2694, the time which ran against him may be computed against the complainants in this action, and, if he was barred by limitation, so are they.

To bar the plaintiffs, however, under this statute, Metcalfe must either be barred by limitation, or the time which ran against him computed against them, and added to the time which has run against them, or against their guardian, having "a legal title or right of action in himself," must be sufficient to bar their right.

Was Metcalfe barred by limitation?

His right to sue accrued on the 1st day of November, 1880, and on that day the statute began to run. But the right of Metcalfe to sue sprung, under the law, from the necessity to recover the debt due by the former administrator for the payment of debts due by the estate of Monahan. If, before this right to sue was barred by limitation, it was lost by the changed condition of the estate of Monahan, so that the recovery was no longer needed for the payment of debts, the right of the distributees instantly arose. The termination of Metcalfe's right to sue by this changed condition would give birth to complainants' right to sue, instead of destroying it; whereas, if Metcalfe's right to sue was lost by the bar of the statute of limitations, their right would die with his. But Metcalfe's right of action had not been lost by limitation when this suit was brought. The statute began to run against him November 1, 1880, and this bill was exhibited October 20, 1886. If, therefore, Metcalfe's right of action was not lost by reason of the changed condition of the estate of Monahan, the complainants must fail, not because they are barred by the running of the statute of limitations against Metcalfe, but because the right to sue was in him, and not in them, when the bill was filed. Since Metcalfe's right to sue depended upon the necessity to recover the balance due by the former administrator for the payment of debts due by the estate of Monahan, it ended when the debts due by the estate were paid or barred by limitation.

Of the claims against the estate of Monahan, no plausible argument can be made, or has been attempted, to show them not to be barred by limitation, save only the debt to Jane G. Kenny, deceased. The judgment of Dodge, Canmeyer & Co. was certainly barred on April 23, 1882, seven years after its rendition. They were creditors, and under no obligation to await the final account of the delinquent administrator. We will therefore examine only the claim of Mrs. Kenny. Her judgment was rendered January 15, 1874, and she died May 20, 1880, and therefore within the last year of the time limited by law for suit upon the judgment. Under the Code of 1871, which was in operation at her death, her right of action would have been preserved until one year after the grant of letters of administration on her estate. Code 1871, § 2162. And, no administration having yet been granted, her right is barred, if at all, by the Code of 1880. By that Code, § 2633, it is declared that "if any person, entitled to bring any of the personal actions hereinbefore mentioned, or liable to any

such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person." The question is whether this section applies where the deceased person has died before the adoption of the Code, and within the last year limited for the bringing of the suit.

In *Hambrick v. Jones*, 64 Miss. 240, we held that section 2683 of the Code of 1880 applied only to cases in which the death of the person occurs within the last year of the time limited, and because in that case the death had not occurred within the last year that the right of action was not barred by that section. We left it there an open question whether it would apply to a case where, as here, the death did occur in the last year of the time limited. The question is now presented, and we hold that this section of the Code does apply in such cases. Sections 2162 of the Code of 1871, and 2683 of the Code of 1880, both add to the time in which an action may be brought an additional year in which the representative may sue, if the person entitled dies before the bar of the statute attaches. Under the Code of 1871, this time was indefinite, in that it was fixed by the uncertain act of taking out letters testamentary or of administration, while by the Code of 1880 the extension runs from a time fixed by a certain event,—the death of the person. We accept the Code of 1880 as expressive of the legislative will that the indefinite and uncertain extension should no longer prevail, but that the personal representative of the deceased person should sue or be sued within one year of the death of the decedent, provided such time elapses after the adoption of the Code. The statute ought not, we think, to be applied so as to run retroactively; but we fail to perceive why it may not, by reason of a past event, (the death of the party,) have prospective operation. Mrs. Kenny's right of action against the estate of Monahan was barred on November, 1, 1881, *Dodge, Canmeyer & Co.* were barred April 23, 1882, and thereafter there was no right in the administrator *de bonis non* to sue upon the bond of the former administrator, for there was after that time no debts of the estate to be paid, and consequently no necessity to recover on the bond for the payment of debts.

This disposes of the questions presented by the record by the appellants' jointly, (save one as to the failure of the court to refer the cause to a commissioner to hear evidence and restate the account, to which we will hereafter revert,) and leaves for consideration the defense interposed by Mrs. Zock, administratrix of one of the sureties. Her contention is that the complainants cannot recover against the estate of her intestate, because suit was not brought within four years from the grant of administration to her.

The complainants, being infants, are not barred, unless it be by reason of the neglect of the administrator *de bonis non*, or of their guardian, Hanley, to sue. We have seen the right of the administrator *de*

bonis non arose on November 1, 1880, and expired April 23, 1882. There was therefore 1 year, 5 months, and 23 days which ran against him, and which, under section 2694 of the Code, is to be computed against complainants. This is not a case in which the statute, once having commenced to run, runs uninterruptedly, notwithstanding the absence of a person competent to sue.

The right of the administrator *de bonis non* sprang from the statute, and was limited by it. It expired because of the changed condition of the estate, and no longer exists. It was not the same right which complainants have as distributees, but was conferred upon the administrator for the benefit of another class, creditors of the estate. But, because there can be but one recovery on the bond, it must be held under the law that the time which ran against the administrator *de bonis non* is to be computed against the right of complainants. The time which ran against the administrator is not sufficient to bar complainants, unless it be true that, by reason of the guardianship of Hanley, he succeeded to the right of action, within the meaning of section 2694 of the Code.

We are of opinion that this section is only applicable where the legal title to property or the right of action, at law or in equity, is in the guardian, and not in the infants. In this case the guardian had no right to sue in himself. The right was that of the infants, to be asserted by him in their name. "The distinction is this: When the legal title to the property is vested in a trustee who can sue for it, and fails to do so within the time prescribed by law and his right of action is barred, the infant *cestuis que trustent*, who have only an equitable interest in the property, will be also barred; but when the legal title to the property is vested in the infants or cast upon them by operation of law, then the statute does not run against them during their infancy." *WARNER, C. J., in Wingfield v. Virgin*, 51 Ga. 139; *Grimsby v. Hudnell*, 76 Ga. 378; *Bull v. Dagenhard*, 55 Miss. 602.

The final account of the administrator was *prima facie* evidence against his sureties, and, in the absence of any evidence by them, entitled complainants to a decree. No suggestion was made by the defendants that they could show anything tending to reduce the amount of the decree. The final report of the commissioners shows that there is due complainants something over \$5,000, but, since the penalty of the bond was only \$4,000, they secured a decree for only that sum. Nothing is shown from which we can infer that an accounting would reduce their claim below this sum.

The decree is affirmed.

SUBLETT V. HODGES *et al.*

(Supreme Court of Alabama. Jan. 28, 1890.)

WITNESS—TRANSACTIONS WITH DECEDENTS—CONTRACTS—ACTIONS—PLEADING.

1. One to whom plaintiff had given an interest in a contract, but who within a few days thereafter sold it back to plaintiff, is not a competent witness for plaintiff as to conversations between plaintiff and one of the other parties to the contract, who has since died, and whose administrator is a party to the suit, under Code Ala. 1886,

§ 2765, which provides that neither party shall be allowed to testify against the other as to any transactions with, or statements by, any deceased person whose estate is interested in the result, unless called to testify thereto by the opposite party.

2. In a suit against one D. and the administrator of a decedent on a joint demand, D. is not a competent witness for the administrator as to conversations between decedent, the plaintiff, and himself.

3. Plaintiff's evidence to show that the defendants employed him to do the work in question, and agreed to pay him a specified price for it, being contradicted by that of defendants, which tended to show that they had made the contract with another person, it is error to instruct the jury to find for the defendants if they believe their evidence.

4. Plaintiff, suing for the price of work done under a contract alleged have been made with him, is entitled to recover even if it be shown that the contract was made with him and another, whose interest plaintiff had acquired when the action was commenced.

5. In an action on a contract alleged to have been made with plaintiff, an amended complaint showing that the contract was made with plaintiff and another jointly, and that plaintiff had acquired the interest of the latter, introduces no new cause of action, so as to be barred by the statute of limitations.

Appeal from circuit court, Marshall county; JOHN B. TAILY, Judge.

Assumpsit by W. M. Sublett against J. W. Hodges and James S. Bain. Bain having died pending the suit, it was revived in the name of his administrator. The evidence for the plaintiff was that defendants contracted with plaintiff for the building of a hall; that, after this contract was made, plaintiff gave one Coleman a half interest, but afterwards prosecuted the work alone. Coleman testified that, in the making of the contract with plaintiff, Bain was equally interested with the defendant Hodges. The court excluded all the testimony in reference to conversations with said Bain, deceased, on the ground that the said witness had been interested in the subject-matter of this suit. Defendant's testimony was that the contract was made with Coleman. Hodges testified: "I never had anything to do with Sublett in it, nor spoke to him in relation to it." Plaintiff objected to the testimony of said witness as to conversations with Bain, deceased, but the court overruled this objection. Judgment for defendants, and plaintiff appeals.

Hunt & Clopton and O. D. Street, for appellant.

SOMERVILLE, J. 1. It is settled by our decisions that the transferrer of a chose in action is not a competent witness for his transferee, under the statute, in a suit by the latter against the personal representative of a decedent, as to any statement or transaction occurring between himself, or between other persons, and such decedent. *Drew v. Simmons*, 58 Ala. 463; *Louis v. Easton*, 50 Ala. 470; *Godlett v. Kelly*, 74 Ala. 213; Code 1886, § 2765. Under this principle, the circuit court properly excluded so much of the testimony of the witness W. M. Coleman as related to conversations and transactions with the decedent, Bain, touching the claim in suit. The witness is shown to have had a half interest in this demand, which he held for

a time and then transferred to the plaintiff, Sublett. He was therefore a transferrer, within the meaning of the rule.

2. The court erred, however, in allowing the defendant Hodges to testify, against the plaintiff's objection, as to conversations or transactions occurring between the witness, the decedent, Bain, and Coleman, who was transferrer of the plaintiff. The case must be treated as if the transaction testified to had been one between the witness, the decedent, and the plaintiff himself, inasmuch as the latter claims as Coleman's transferee. We have the case, then, of a suit by the plaintiff against Hodges and Bain's personal representative on a joint and several demand. Can the personal representative introduce his co-defendant, Hodges, to testify against the plaintiff, the latter objecting to the testimony on the ground that it related to a transaction with the deceased, whose estate was interested in the result of the suit? At common law, the rule was that a person named on the record as a party was incompetent to testify without the consent of all other parties to the record. The right of objecting was a mutual and several privilege, and not merely a joint one. 1 Greenl. Ev. § 354. The statute now renders parties competent, with two exceptions,—one of which is that neither party is to testify against the other as to "any transaction with or statement by any deceased person whose estate is interested in the result of the suit, unless called to testify thereto by the opposite party." Code 1886, § 2765. The witness Hodges falls clearly within the letter of the prohibitory exception. (1) He is a party to the record; (2) his testimony relates directly to a transaction between himself, the decedent, whose representative is also a party defendant, and the plaintiff's assignor; (3) his testimony is adverse to the plaintiff. It is true that the administrator of Bain waives all objection to Hodges, and calls him as a witness. But there is no waiver on the part of the plaintiff, who is also a party, and whose rights may be injuriously affected by the testimony. He is an "opposite party," within the meaning of the statute, and his consent was requisite in order to authorize the witness to be called. *Bank v. McDonnell*, 87 Ala. 736, 6 South. Rep. 703. This result comports also with the equity of the statute, which has in view the idea of preserving perfect equality and justice between the parties litigant, so far as practicable. If the lips of the plaintiff are sealed by the law because he is a party, and he is, for this reason, forbidden to testify against either Hodges or Bain's estate, it would seem to be unjust that the administrator, within his mere discretion, should be empowered to let Hodges testify against the plaintiff, and by his *ipse dixit*, at the same time, prevent the plaintiff from making any counter-explanation as against Hodges himself, a living party defendant. It is further manifest that the plaintiff, by waiving objection, could not have introduced Hodges as a witness against Bain's estate. No more ought the representative of the estate to be permitted to introduce him against the plaintiff.

3. The court erred in giving the general

affirmative charge requested by the defendants, in view of the conflict in the evidence bearing on the main issue of indebtedness *vel non* to the plaintiff, in reference to which opposite inferences might reasonably have been drawn by the jury.

4. If Hodges and the decedent, Bain, jointly agreed unconditionally to pay for the work of constructing the building, or any part of it, and the work was skillfully executed, in proper time, the plaintiff would, *prima facie*, be authorized to recover the reasonable value of the work, if there was no price fixed, or the stipulated price, if any, was agreed on between the contracting parties. And this would be true whether the contract was made with the plaintiff alone, or, as averred in the amended complaint, with plaintiff and Coleman jointly, provided the claim was the property of the plaintiff at the time the action was commenced.

5. The amended complaint introduced no new cause of action, so as to be barred by the statute of limitations of three years, which was pleaded. It only corrected a supposed misdescription in the account or demand already in suit. The case of Long v. Patterson, 51 Ala. 414, in principle, is conclusive of this point.

For the error of giving the charge to which exception was taken, the judgment is reversed, and the cause remanded.

WARD V. STATE.

(Supreme Court of Alabama. Feb. 1, 1890.)

FAILURE TO WORK THE ROAD.

Code Ala. 1886, § 4126, provides that "any person liable to road duty, who willfully fails or refuses, after legal notice, to work the public roads, either in person or by substitute, without a sufficient excuse therefor, must, on conviction, be punished as prescribed by the statute. *Held*, that this statute does not apply to one who, at the time of notice to work on the public roads, is under contract to perform service for his surety on a confession of judgment for the fine and costs imposed on his conviction for a misdemeanor in the circuit court.

Appeal from circuit court, Bibb county; J. R. DOWDELL, Judge.

Prosecution for failure to work on the public roads, without legal excuse, after having been duly notified, commenced in the county court, and removed by appeal into the circuit court.

Logan, Hargrove & Vandegriff, for appellant. *Atty. Gen. W. L. Martin*, for the State.

CLOPTON, J. At the time defendant was notified to work on the public road he was under contract to perform service for one Hall, who had become his surety on a confession of judgment for the fine and costs imposed on his conviction, for a misdemeanor in the circuit court. The contract was approved in writing by the judge of the court in which the conviction was had, and was recorded in the office of the judge of probate, and defendant was performing the service which he had agreed to do under the contract. Section 3832, Code 1886, declares: "Any defendant on whom a fine is imposed on conviction for a misdemeanor, who in open court

signs a written contract, approved in writing by the judge of the court in which the conviction is had, whereby, in consideration of another becoming his surety on a confession of judgment for the fine and costs, agreed to do any act or perform any service for such person, and who, after being released on such confession of judgment, fails or refuses, without a good and sufficient excuse, to be determined by the jury, to do the act or perform the service which in such contract he promised or agreed to do or perform, must, on conviction, be fined not less than the amount of the damages which the party contracting with him has suffered by such failure or refusal, and not more than five hundred dollars." In *Lee v. State*, 75 Ala. 29, this statute was construed as providing a mode for the imposition of labor or service as a punishment. While it was observed that the statute offers to offenders, convicted of a misdemeanor and fined only, the opportunity of selecting the person for whom they will perform labor, the kind of service they will render, and of having a voice in the measure of compensation, it was also said: "The confessed judgment, and the contract approved by the court, do not satisfy the offended law, nor pay the penalty imposed. They are but the condition on which the offender is permitted to select how and whom he will serve, in satisfying the broken law." The manifest purpose of the statute, as is apparent from its title, was "to better secure the payment of fines and costs in criminal cases in the courts of this state," and the effect of its provisions is to provide a mode for the imposition of labor or service as a punishment, where the defendant is convicted of a misdemeanor, and only fined.

Notwithstanding the privileges and benefits secured to the defendant by the humane provisions of the statute, he is, to legal intents and purposes, performing labor or service as a punishment,—as if he had been sentenced to hard labor for the county. Having signed the contract, and the same having been approved by the judge of the court, and recorded, as required by the statute, defendant was placed, by authority of law, under the control and in the custody of his surety and employer, and restrained of his liberty. Could defendant be compelled to work on the public roads, while performing the service which he had contracted to perform, he would be placed in a situation where he must necessarily violate one or the other statute, and incur the prescribed penalties. No one would question that if defendant had been sentenced to hard labor for the county, and let to hire by the court of county commissioners, he could not be legally taken from the hirer, and compelled to work on the public roads. The legislature having authorized such contract, and prescribed penalties for its enforcement, the state must be regarded as having impliedly exempted defendant from liability to work on the public roads during the continuance of the contract.

Section 4126, under which defendant was convicted, provides: "Any person, liable to road duty, who willfully fails or refuses, after legal notice, to work the public roads,

either in person or by substitute, without a sufficient excuse therefor, must, on conviction," be punished as prescribed by the statute. The controlling words used in defining the offense are "willfully" and "without sufficient excuse." It is shown that defendant, after being notified, applied to Hall for permission to work on the road, who forbade him to go, on the ground that he was under contract to work for him. Hall having the right under the statute to restrain him, defendant cannot be said to have willfully failed or refused. His excuse must be regarded as sufficient.

Judgment reversed, and defendant discharged.

LEHMAN, DURR & Co. *et al.* v. GREENHUT *et al.*

(Supreme Court of Alabama. Nov. 27, 1889.)¹

PARTIES—MISJOINDER—FRAUDULENT CONVEYANCES—EVIDENCE.

1. A misjoinder of complainants, apparent on the face of a bill, must be taken advantage of by demurrer; and an objection on that ground, made for the first time on the hearing, is too late, and cannot be considered on appeal.

2. In a suit to set aside a transfer of property to a creditor of the grantor, as in fraud of other creditors, where complainant's claims were contracted before the transfer, the *onus* is on the purchasing creditor to show by clear and satisfactory evidence, not only a *bona fide* debt, but also that the amount thereof was not materially less than the fair and reasonable value of the property.

3. Where the parties to the transfer are near relations, clearer and more convincing proof is required of the *bona fides* of the transaction than when they are strangers.

Appeal from chancery court, Butler county; JOHN A. FOSTER, Chancellor.

Bill to set aside a transfer of property as in fraud of creditors, by Lehman, Durr & Co. and others against F. Greenhut and others. Decree for defendants, and complainants appeal.

Tompkins & Tray, for appellants. *Watts & Son* and *John Gamble*, for appellees.

CLOPTON, J. The appellees insist that the decree should be affirmed though the chancellor may have erred in his conclusions of fact, on the alleged ground that the bill shows on its face a misjoinder of complainants. This objection, when apparent from the bill, must be taken advantage of by demurrer. It comes too late when taken for the first time at the hearing, and will be disregarded on appeal, if it does not materially affect the propriety of the decree. *Erwin v. Ferguson*, 5 Ala. 158; *Newhouse v. Miles*, 9 Ala. 460. The objection having been taken for the first time at the hearing, without the interposition of a demurrer, we shall disregard it on this appeal.

The bill, which is filed by appellants as creditors of Long & Greenhut, a late mercantile partnership, seeks to assail, for fraud, a conveyance of lands and a transfer of a stock of goods and notes and mortgages made by the firm to F. Greenhut,

December 6, 1886. The conveyance of the lands recites as its consideration the sum of \$2,170 paid by the grantee to the grantors, and the consideration expressed in the transfer is the satisfaction and release of an indebtedness due by the grantors to the grantee in the sum of \$6,071.58. The answers, however, allege that the consideration of both conveyances is the payment and discharge of an indebtedness amounting to the aggregate of the sums recited in both instruments. The answers made the case of a sale by an insolvent debtor to a preferred creditor in payment of his demand. We have often ruled that in such case the inquiries relate to the *bona fides* and amount of the debt, the value of the property, and the reservation of an interest or benefit to the debtor. The grantee claims that the indebtedness, which constitutes the consideration of the conveyances, consists of money loaned by him to Long and Greenhut, and collections made by them for him. The claim is that F. Greenhut loaned money to the firm in various sums, from time to time, commencing with January, 1877, and extending to 1884, a period of seven years; and that a settlement was made between them April 21, 1884, whereby the balance found due was \$6,204.60, for which they gave two notes, —one for \$3,000, and the other for \$3,204.60. These notes, with interest and moneys subsequently collected by the firm, it is alleged are the constituent elements of the indebtedness. The principles of law governing the case are well settled, and its correct determination mainly depends upon the sufficiency of the proof. In the discussion of the evidence, the following rules must be observed and applied: As the demands of complainants were contracted prior to, and were existing at the time of, the sale, the *onus* is on the purchasing creditor to establish, not only a *bona fide* debt, but also that the amount was not materially less than the fair and reasonable value of the property; in other words, that an adequate and valuable consideration was paid. The proof produced to establish these essential facts must be clear and satisfactory, in order to defeat the right of another creditor to have the debtor's property appropriated to the payment of his claim; and when near relationship exists, as in this case, the grantee being the brother of one and the cousin of the other grantor, more vigilant and jealous scrutiny will be excited, and clearer and more convincing proof required, than when the transaction is between strangers.

F. Greenhut testifies that he loaned the firm money from January, 1877, to April, 1884, to the amount represented by the notes of that date, and at the time of the sale they were indebted to him in the exact aggregate of the sums expressed in the conveyances. But his testimony is, in this respect, unreliable and unsatisfactory. He kept no memorandum or account of the moneys loaned, but trusted to his brother, and did not examine the books of the firm. The items are numerous, and range from five dollars upwards, and were advanced at divers times, through a series of seven years. To recall them is beyond the power of memory, unaided and unrefreshed by

¹ Publication delayed pending application for rehearing.

note or memorandum. A recollection of the several component amounts is requisite to a reliable and correct statement of the aggregate, if there be no other data from which it is ascertainable. The same observations apply with equal force to the testimony of Long, one of the partners. He testifies that the firm obtained money from F. Greenhut at first in small sums, and afterwards in larger; but he derives his knowledge of the amounts solely from the books, the accuracy of which he does not know, but only presumes. He remembers nothing material, and says the transactions were had with A. Greenhut. His evidence is loose, vague, and indefinite. The uncertain and unsatisfactory character of the evidence of these witnesses leaves the ascertainment of the amount of indebtedness dependent, apart from the books, upon the testimony of A. Greenhut. He testifies, substantially, that Long & Greenhut obtained from F. Greenhut, at divers times, considerable sums of money, the account of which was not closed until April 21, 1884, on which day they had a settlement, and gave the notes of that date for the balance found due. To his depositions is appended an account, which he states is a correct copy as taken from the books of the firm, and that each and every item is just, true, and correct. The account begins in January, 1877, and closes in April, 1884. If it be a correct copy of the entries as they appear in the books, the account and the books will harmonize as to dates and amounts. No books covering the years 1877 and 1878 are produced, but there is a cash-book commencing in January, 1879, and ending in December, 1883. We have carefully examined the items of cash entered in this book, which purports to show the cash received by the firm during that period on any account, and from all sources whatever. The first entry of cash received from F. Greenhut is \$51.75, January 15, 1880, and the next is \$125, July 30, 1881. With these exceptions, there are no entries of cash received from him prior to the latter date, though there are several entries of cash advanced to him in small sums. It would be a circumstance which calls for explanation to debit him with cash advanced, and omit to credit him with cash received from him. Further, the books show that the account of F. Greenhut, which A. Greenhut testifies was not closed until April 21, 1884, was closed by notes, January 31, 1883. He enters in the account, made and verified by him, the precise amount of interest which the ledger shows was allowed F. Greenhut on the settlement. This he must have taken from the book entry of the settlement. This discrepancy is scarcely susceptible of explanation. A comparison of his evidence with the books, to which he appeals for verification of the correctness of the account, renders manifest that, instead of corroborating they disprove his statements. The mind of the court cannot rest on his testimony with any degree of satisfaction. It is not the clear and convincing proof which equity exacts in cases like this.

Certain books of the partnership were produced, on notice of complainants, and have been sent, by order of the chancellor,

for our inspection. The portions used in evidence by the parties are copied and incorporated in the record. It remains, therefore, to consider the sufficiency of the proof furnished by the books as to the amount of the indebtedness. Though produced under notice, and introduced by both parties, they are not to be regarded as conclusive in favor of either, but only entitled to such weight as may be proper, in view of all the circumstances. Exclusive of the cash-book, to which we have alluded, the first entry of a transaction with F. Greenhut is the entry of a note for \$1,173.20, and appears in the ledger of 1882-83, under the head of "Notes Payable," and under date of February 28, 1882. There is no entry in any book showing the consideration of this note, though in respect to another note appearing in the same ledger, under the same head, and under date of March 27, 1882, the cash-book shows an entry on that day of \$600 cash received from F. Greenhut, and the journal shows that the latter note was given for that money, with interest. If full effect be accorded to the ledger as evidence, it only proves the existence of the note. In the absence of explanation, the presumption arises, from the execution of a note, that all previous matters of account were settled and closed thereby. This presumption is strengthened by the testimony of F. Greenhut. Though retaining no recollection of these notes, he supposes them to be correct, because they are entered in the books, and states that, if he had such notes, they were given for money previously loaned. As to the note of March 27, 1882, he is evidently mistaken, or the books are incorrect. The most favorable view for defendants is that, when the note of February 28, 1882, was given, all previous matters of indebtedness, if any existed, were taken into the account, and that this note should be taken as the initial item of calculation in ascertaining the amount of indebtedness. A calculation on this basis, and assuming the correctness of every item of cash subsequently received, and every note as entered in the books, except the note for \$4,850, with legal interest to May 1, 1884, the time to which A. Greenhut testifies interest was calculated, will show that the amount of indebtedness on that day was about \$300 less than the aggregate sum represented by the note of April 21, 1884.

In this mode of calculation we have excluded the note for \$4,850 for several reasons. It purports to have been given for the balance found to be due by the settlement of January 31, 1883, all prior notes and cash having been taken into the settlement. It is true neither of the partners were examined or testified in respect to it; but A. Greenhut, in stating that the account was not closed until April 21, 1884, affirms, in effect, that no such settlement was made. The books furnish the only evidence that such note was ever given. Referring to the journal, we find that the entry of this note in the ledger consists of two notes, each for one-half of the amount, and payable on the 15th days of September and October, respectively, but in what year does not appear,—presumably 1883,

the year of their dates. In respect to this entry, unexplained erasures and alterations appear on the journal, which cast suspicion on the transaction. Also the footing at the bottom of the column, and the difference in ink, indicate that the entry was made in the journal, not at the time it purports, but at some subsequent period. There is not proof as to when, or by whom, it was made, except that A. Greenhut was the book-keeper.

Furthermore, the account of "notes payable," as it appears in the ledger, is credited with the note for \$4,850, under the date of January 24, 1884. This credit, *prima facie*, imports that the note was paid or taken up in some way on that day; and, in the absence of explanatory proof, justifies such inference. As this account is kept in the ledger, it is debited with the notes when issued, and credited with them when taken up, contrary to the proper mode of book-keeping. The result, however, is the same. The consequence would be to exclude from the calculation all prior notes and charges of cash, thus reducing the indebtedness to a relatively small sum. But if the entry in regard to these notes were satisfactorily explained, and their existence proved, a settlement and closing up of all precedent matters would appear. If these notes be taken as the basis of calculation, the amount of the debt will be less than the sum of the notes of April 21, 1884, by more than \$200. The difference consists in usurious interest being charged. Ordinarily the validity of a conveyance by a debtor in payment of a debt cannot be assailed by a creditor on the ground of usury. There was no special agreement as to the rate of interest to be paid on the general indebtedness, so far as disclosed by the evidence. Independent of agreement, the law presumes only legal interest. When no previous agreement exists, and the creditor receives, and the debtor allows, usurious interest on a settlement and sale of property in payment of a debt, this is a circumstance dependent for its weight upon the other circumstances with which it is associated; and, if it appears that this is done for the purpose of swelling the debt to an amount not materially less than the value of the property, the transaction is fraudulent.

It is claimed, as we have stated, that the indebtedness also consisted of collections made by Long & Greenhut after the notes were given. Among these collections is a note of Flexner & Lichten for borrowed money. A. Greenhut testifies that this money was not included in the notes of April, 1884, and F. Greenhut states that he gave the money to Long & Greenhut, and told them to let Flexner & Lichten have it and that it was loaned after he left for Europe. These statements are contradicted by Lichten, and by the books of both firms. He testifies that his firm borrowed \$500 from Long & Greenhut, March 1, 1883, for which they gave a note, April 21, 1884, maturing in the following October, and at its maturity paid them \$595, the principal and interest. The amount thus collected entered into the indebtedness to F. Greenhut as fixed at the time of the sale. In the cash-book of Long &

Greenhut there is an entry, made in April, 1883, of \$500 cash, to Flexner & Lichten, which is entered as a charge against them on the journal and ledger, without being closed by note. It does not appear that F. Greenhut let Long & Greenhut have any money at or near the time of the loan. If obtained from him at different times previously, they never received credit for it, either prior to or on the settlement of April, 1884. From the evidence of Lichten, supported by the books of both firms, the conclusion is irresistible that the money was loaned Flexner & Lichten in 1883, and entered into the balance found due on the settlement of April, 1884. It also constituted an additional and independent element of the debt, as fixed at the time of the sale.

We need not discuss at length the evidence as to the value of the property. We accord little, if any, weight to the testimony of Long as to this matter. Other witnesses place a less proportionate value per acre on detached parts of the lands than the value of the whole, as estimated by the parties. At the time of the sale they were valued in mass, and separately conveyed. Detached portions may not be worth as much per acre as their proportionate rate of the valuation of the entire lands when taken together. The testimony of A. Greenhut sustained the estimated value in making the sale. The goods were inventoried and valued at original cost, less 10 per cent. The stock was comparatively new, having been purchased between August, 1884, and November, 1886, and consisted largely of staple goods. The estimates of witnesses, not having knowledge of the character and quantity of the stock, based on casual and general inspection, is not satisfactory, nor is the price at which the goods were subsequently sold by the receiver convincing. The notes and mortgages were evidently undervalued, for the receiver has collected several hundred dollars more than their estimated valuation. The value of the entire property, as estimated by the parties for the purposes of the sale, exceeds \$7,800. If to this be added the difference between the estimated value of the notes and mortgages and the amount collected by the receiver, it amounts to \$8,200. And the aggregate of the price paid for the lands as expressed in the conveyance, and the sums actually realized by the receiver from the sale of the goods and from the notes and mortgages, leaving out of the account those uncollected, exceeds \$7,400. Under these circumstances, defendants cannot complain, if their estimate for the purposes of the sale is taken as the fair and reasonable value of the property. It is not presumable that they overrated it.

Counsel argue that it is not supposable that in making the settlement and giving the notes of April 21, 1884, when the admission of so large indebtedness was against their interest, Long & Greenhut concocted a fraud, and F. Greenhut conspired with them, to defeat their creditors, more than two years preceding their failure, and before the debts to complainants were contracted. In this connection we need only refer to the testimony of A. Greenhut that Long & Greenhut, on the

1st of April, 1884, owed fully or nearly as much as they were worth, and that they made no money during the succeeding years; nor to their former failure in October, 1881; nor to the fact that at that time they transferred mortgages to F. Greenhut to secure a debt said to be due him, which he neither took possession of nor looked after; nor that the books do not show any settlement, or that such notes were given on that day, except a pencil memorandum, when and by whom made not appearing; nor to the absence of proof as to where and by whom the notes were kept during F. Greenhut's two years' absence in Europe. It is unnecessary to determine whether such settlement was actually made, and such notes then given for the difference between the amount of the debt, as ascertained by either of the modes of calculation we have suggested as the most favorable for defendants, and the amount of the notes would not be material enough of itself to invalidate the sale. We have discussed the evidence as to the amount due April 21, 1884, because it is an element of the indebtedness in payment of which the property was sold, and has a material bearing upon the *bona fides* of the transaction, in that it was enlarged at the time of the sale by the amount collected from Flexner & Lichten, which we have shown entered into the settlement of 1884. Leaving out of consideration some discrepancies in the testimony of F. Greenhut; his loans of money to other persons in the mean time; his indefinite and general account of the sources from which he obtained the money, except his salary as clerk; and his obtaining money from Long & Greenhut at divers times, in small sums, and also money with which to purchase cotton,—we are still forced to declare that the evidence, whether considered in parts or in entirety, fails to clearly and satisfactorily establish that the amount of the *bona fide* debt was not materially less than a fair and reasonable value of the property.

The sale was attended by unusual circumstances, which render the transaction suspicious. It was made in haste and secrecy, and in the absence of F. Greenhut, without consultation with him as to the price of the property; the conveyances were prepared at night, and executed next morning before his arrival; the amount of the debt and the value of the property were fixed by A. Greenhut; and the sale was made within three weeks after F. Greenhut's return from Europe. These facts, and others disclosed by the evidence, reasonably justify the inference that a benefit was reserved to the debtor. We have no doubt that F. Greenhut loaned the firm some money, and that they were indebted to him, but in what amount we are unable to satisfactorily ascertain. If he trusted to his brother to fix the amount of the debt, and he wrongfully and fraudulently swelled it by the inclusion of improper items for the purpose of covering the fair and reasonable value of the property, and if he trusted to him to fix its value, he must bear the consequence of his own folly, and of a fraud the fruits of which he accepted. Reversed and remanded.

HAWES V. STATE.

(Supreme Court of Alabama. Jan. 18, 1890.)

CHANGE OF VENUE—JURY—HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. Under Code Ala. § 4435, providing that an application for change of venue "must be made as early as practicable before the trial, * * * and the refusal of such application may, after final judgment, be reviewed and revised on appeal," where several successive applications for change of venue are refused, the last refusal only can be reviewed on appeal.

2. An application for change of venue was supported by defendant's affidavits showing such excitement and prejudice against him, several months before the trial, as would have entitled him to a change. The affidavits of seven reputable witnesses testified that this excitement and prejudice continued to the time of the trial, and infected the proceedings, but this was rebutted by the affidavits of 65 reputable witnesses, who had apparently better opportunities for knowing, which affirmed that the prejudice did not then exist, and that defendant could have a fair trial. Held, that it was not error to overrule the application, without examining witnesses *ore tenus* on the issue presented.

3. Sickness of a juror's wife, of such a nature that, in the opinion of her physician, her life depends on her husband's presence, and the knowledge of which incapacitates the juror from performing his duties as such, warrants his discharge, even after defendant's arraignment; especially as Code Ala. § 4453, authorizes the court to discharge a juror on account of his illness; or for any other cause which in the opinion of the court renders it necessary, and such discharge does not operate as an acquittal of defendant.

4. The words, "to serve as grand jurors for the week," in a *venire* for grand jurors, are inconsistent with the writ required to be issued; and, where it appears that the grand jurors were drawn and summoned for the term, such words are properly treated as surplusage, and do not vitiate an indictment found by such grand jury after the expiration of the week.

5. The facts that jurors are drawn and summoned in compliance with a statute passed after the commission of the offense, and that the clerk had not written up the minutes, and hence there was no record of the order for the *venire*, are no ground for quashing the *venire*.

6. It is proper to refuse to ask a juror on his *voir dire* whether or not he has previously had a fixed opinion as to defendant's guilt or innocence.

7. On a trial for murder of one of defendant's daughters, where there is evidence to support the theory of the prosecution that her killing, and the killing of defendant's wife and another daughter, were each a part of a scheme to accomplish a certain purpose, all evidence tending to connect defendant with the murder of his wife and other daughter is admissible.

8. Evidence of a witness on cross-examination, as to defendant's character, that he "had heard for the last few years that defendant had frequent difficulties with and struck his wife," is admissible.

9. A witness may be permitted to refresh his memory by referring to a published article written by him from notes of a conversation held by him with defendant, and which he testifies contains the substance of what defendant said, the notes having been destroyed.

10. Communications to a confidential clerk of a firm of attorneys, made by one who knows that such clerk is not an attorney, and who does not know his relations to the firm, and without showing any desire to have the clerk carry the communications to the attorneys, are not privileged.

11. Code Ala. § 2780, which provides that "registers of marriages * * * kept in pursuance of law * * * may be certified by the custodian thereof, and, when so certified, are presumptive evidence of the facts therein stated, as well as of the law or rule in pursuance of which

such registry was made, and of the authority to certify the same," applies as well to records made and kept without as to those kept within the state.

12. Where the record of a marriage in another state is admitted in evidence, a book admitted to be "the last Code" of that state is admissible to show who is the proper custodian of its marriage records, under Code Ala. § 2790, which provides that the statutes of another state, purporting to be printed by its authority, are evidence, without further proof.

13. Under Code Ala. § 2754, providing, *inter alia*, that the court may state the evidence to the jury when it is disputed, the court may state the theories which the evidence for both prosecution and defense, respectively, tends to establish.

14. A charge that statements of jurors on their *voir dire*, that they had no fixed opinion against capital punishment, and that they believed conviction could be had on circumstantial evidence, in no way interfered with their right to determine the amount or degree of proof necessary to convict, is properly refused, as misleading the jury to believe that they could acquit if the evidence were wholly circumstantial, though convinced beyond a reasonable doubt.

15. It is proper to refuse instructions that if defendant at the time of his second marriage, which occurred about the time of the alleged murders, believed he had been divorced from his first wife, the law imputes innocent motives to him in contracting the second marriage, as such instructions are irrelevant.

16. It is proper to refuse instructions that, beyond the presumption of innocence, the law presumes that defendant had an affection for his child, and that the jury might consider his natural relations and feelings towards her.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

R. R. Hawes, or Dick Hawes, was indicted for the murder of his young daughter, May Hawes, "by drowning her, or by smothering her, or by strangling her, or by some other means unknown to the grand jury;" and at the same time two other indictments were found against him, one charging him with the murder of his wife, Mrs. Emma Hawes, and the other with the murder of another daughter, Irene Hawes. The dead body of May Hawes was found floating on the water in East lake, near the city of Birmingham, on Tuesday evening, December 4, 1888; and the verdict of the coroner's jury was that she came to her death Monday evening or night, December 3d, at the hands of her father. Defendant was married in Columbus, Miss., on Wednesday, December 5th, to Miss Mays Story; and on his return to Birmingham with his wife, the next day, he was arrested on the charge of murder. Mrs. Emma Hawes and Irene, a daughter younger than May, had also disappeared, and their bodies were found several days afterwards, in the water at Lake View, near Birmingham.

The three indictments were returned January 21, 1889. On January 24th defendant filed an application for a change of venue in each of the cases, which was overruled on January 28th, and an exception duly reserved by defendant. A second application was made on February 8th, but the cases were continued from March 4th to April 22d; and on that day a third application for a change of venue was made, which the court refused, and defendant duly excepted.

Being arraigned on the first indictment, defendant moved to quash it, because the

grand jury which presented it "was not then a legally constituted grand jury, because said grand jury was ordered by the court to be summoned, and was summoned, to appear and serve as a grand jury for one week, commencing on the 7th day of January, 1889, whereas said indictment was presented and filed in court on the 21st day of January, after the expiration of the time for which said grand jury had been summoned to serve." The *venire* for the grand jurors was as follows: "You are hereby commanded to summon the following named persons, to appear and serve as grand jurors at the January term of the criminal court of Jefferson county, beginning on the 7th day of January, 1889, to serve as grand jurors for the week beginning on the first Monday in January, that being the 7th day of January, 1889; they having been drawn according to law to serve as grand jurors for said term of said court." The court overruled the motion to quash, and defendant excepted. Defendant then moved to quash the special *venire* of petit jurors summoned for the trial of this and other capital cases, on the grounds (1) that the special *venire* was ordered and drawn under the provisions of a law enacted after the commission of the offense, and after the finding of the indictment; and (2) because there was no record of the order, the minutes not having been written up by the clerk. The court also overruled this motion, and defendant excepted.

During the organization of the jury, the name of E. A. Penn having been drawn, he was examined under oath by the court touching his qualifications as a juror, was declared competent, and was accepted by the state. Defendant then asked the court to "ask him whether or not, up to this time, he has had an opinion, which would bias his verdict, as to the guilt or innocence of the defendant." The court declined to ask this question, and defendant excepted, and he then challenged said juror peremptorily. After 12 jurors had been chosen and sworn to try the case according to law, and before the indictment was read to them, G. B. Gordon, one of the 12 jurors chosen, applied to the court to be excused, because of the sickness of his wife; and Dr. A. M. Bolland, a practicing physician in Birmingham, being sworn, stated that the wife of said Gordon was under his treatment, that she was suffering from a complication of diseases, and that her safety, comfort, and life required the presence and attendance of her husband. The court thereupon excused said juror, and the defendant excepted. After said juror had been discharged, defendant then and there moved the court to discharge him; which motion was overruled by the court, and defendant excepted.

Defendant objected to all evidence showing, or tending to show, the death of Mrs. Hawes and Irene, and any and all circumstances connected with their death, and excepted to the overruling of these objections.

The prosecution offered in evidence what purported to be a transcript of the bond and marriage license authorizing the marriage of R. R. Hawes and Mays Story,

with the return of the officiating minister, which is certified by J. T. Armstrong, clerk and notary public. The license was issued on December 5th, and the minister's return stated that the marriage was celebrated on that day. The certificate of the clerk was in these words: "I, J. T. Armstrong, clerk of the circuit court in and for said county, [Lowndes,] and *ex officio* a notary public, certify that the above and annexed pages contain a true and perfect copy of the original affidavit, bond, marriage license, and official certificate of minister, as the same appears of record in my office. Witness my hand and seal," etc. Defendant objected to the admission of this transcript as evidence, "as being irrelevant, illegal, and incompetent," and excepted to the overruling of his objection. The prosecution offered in evidence, also, in this connection, the Revised Code of Mississippi of 1880 which purports on its face to be published by authority of the state, and which was admitted to be "the last Code of that state," and particularly sections 1148, 1149, and 1492, as therein contained. These two former sections relate to the issue and return of marriage licenses, and the last section (1492) makes the clerk of the circuit court "the legal custodian of the records and papers relating to marriage licenses and certificates of marriage." Defendant objected to the admission of this Code as evidence, and duly excepted to the overruling by the court of his objection.

J. T. Glover was introduced as a witness for the state, and testified that he was confidential clerk, in the office of Hewitt, Walker & Porter; that he knew defendant, and first saw him early in September; that Hawes came into the office, and asked him if he was a lawyer, and he answered that he was not; and that Hawes said that the object of his visit was to get a divorce. Defendant objected to any evidence by said Glover, showing any conversation between him and witness concerning a divorce proceeding, because witness was a confidential clerk of the law firm whom defendant went to consult; but the court overruled this objection, and defendant excepted. The witness continued: "Hawes said he wanted a divorce as soon as he could get it." Nothing was said to him by Hawes about where his wife was, but he did say that he had instituted proceedings of divorce in Atlanta two or three years ago, and wanted to know if they could be continued here. Defendant then moved the court to exclude from the jury "the whole of the testimony of this witness, on the ground that it was a privileged and confidential mission," and he excepted to the overruling of this motion.

J. I. Glover, a witness for the defense, testified, on cross-examination: "I have heard for the last few years that he [defendant] frequently had difficulties with and struck his wife." Defendant objected to the introduction of this last statement as evidence, and excepted to the court's overruling his objection.

The court thus charged the jury as to the different degrees of felonious homicide: "There are four degrees of felonious homicide,—murder in the first degree, murder in

the second degree, manslaughter in the first degree, and manslaughter in the second degree. Murder in the first degree is any willful, deliberate, malicious, and premeditated killing of a human being. 'Willful' means governed by the will; without yielding to reason. 'Deliberate' means formed with deliberation, in contradistinction to a sudden, rash act. 'Malicious' means with fixed hate, or done with intentions or motives, not the result of sudden passion. 'Premeditated' means contrived or designed previously. The law fixes no particular length of time these elements shall be shown to have existed in the mind. If they co-exist but a moment before, and prompt the fatal act, it is sufficient. There must have been a previously formed purpose to take the life of the person slain, and death must be the result of the voluntary, intentional employment of means calculated to produce it. Murder in the second degree is the unlawful and malicious killing of a human being. The distinction between the two degrees of murder is the deliberation and premeditation which characterizes murder in the first degree. Manslaughter is the unlawful killing of a human being, without malice, either express or implied. You will observe that in manslaughter the ingredient of malice is wanting. Manslaughter, by voluntarily depriving a human being of life, is manslaughter in the first degree; and manslaughter committed under any other circumstances is manslaughter in the second degree."

Defendant excepted to this part of the charge given by the court, and he also excepted to the following portions: "(1) The state claims that the deceased came to her death on Monday night, December 3, 1888; that the defendant was seen that night at the house of Fannie Bryant, [a negro woman who was implicated in the murders, was indicted, tried, convicted, and sentenced to the penitentiary for life, after the trial of this case,] where he called for the deceased, and went in the direction of the dummy; that a few minutes afterwards they boarded the Highland avenue dummy to Lake View, a short distance from Fannie Bryant's house, and came on the dummy to this city, [Birmingham,] and were seen to get off; that a short time afterwards, on the same night, they were seen on the East Lake dummy line, traveling in the direction of East Lake, where they got off at the pavilion; that he was seen within an hour afterwards, on an East Lake dummy, coming in the direction of Birmingham, without the deceased, and alighted from the dummy in the city; that the defendant's conduct and declarations show that he had a motive to commit the crime; that the defendant's wife and other daughter, Emma, and Irene Hawes, came to their death near the same time, in substantially the same manner, under circumstances tending to show that they were murdered by the defendant; that the murder of the deceased was part of a general plan or scheme formed by the defendant to rid himself of these three members of his family. This is a brief statement of the theory of the state. (2) The defense claims, on the other hand, that the defend-

ant was not at Fannie Bryant's house on Monday night, and was not on the Highland avenue dummy with the deceased that night, but was on the Saturday night before; that he then came with her to this city, from his home, in order to make some purchases preparatory to taking her to a convent in Mobile on the next day; that he returned home with her the same night, between eight and nine o'clock; that he came back, to the city about nine o'clock that night, with his little son Willie, in order to send him to Atlanta; that at that time Mrs. Emma Hawes, and May and Irene, were at home; that he returned home that night, between one and two o'clock, and found the door of his house open, and his family gone; that this was the last time he saw any one of these members of his family alive; that he was not on the East Lake dummy on Monday night, and was never at East Lake in his life but once, and that was three or four months before the death of May; that he has shown that it would have been impossible for him to have been at the scene of the crime,—in other words, that he has proved an *alibi*; that his conduct has been entirely consistent with his innocence, and he has made no declarations or admissions tending in any manner to criminate him; and that the state has failed to show either motive or opportunity to commit the crime."

Defendant requested the court to give the following charges in writing, and duly excepted to the refusal of each: "(1) When each of you was examined as to your qualifications as jurors, whether you had a fixed opinion against capital or any penitentiary punishment, or whether a conviction could be had on circumstantial evidence, this question the court was required to ask you by statutory provision, (Code, § 4333;) but this qualification or oath which you have taken, as to your qualifications, in no way restricts or interferes with your right [to decide] as to the amount, sufficiency, or degree of proof required by you, and each of you, to find the defendant guilty beyond all reasonable doubt. (2) The amount, sufficiency, and degree of proof on circumstantial evidence in this case is purely a question for the jury, and is not limited or restricted in any way whatever by questions asked as to your qualifications as jurors. (3) If the defendant knew that he was actually divorced, or honestly thought that he was divorced, at the time of his last marriage, then the presumption of law would be that his motives were innocent in contracting his second marriage. (4) If, from the evidence in this case, you have a reasonable doubt whether the defendant was actually divorced from his first wife, or honestly believed that he was divorced, at the time of his second marriage, the law presumes him innocent of any wrong motive or intent in contracting the second marriage. (5) As jurors, you have the right in weighing the evidence, and in considering all the questions arising in the case, to take into consideration all the facts, circumstances, and surroundings of the defendant. You have the right to take into consideration the fact that the de-

ceased was the child of the defendant; and the law presumes that a parent has an affection for his own offspring, and that, instead of doing her harm, he would rather protect her from injury. (6) The law entertains no presumption against the course of nature. On the contrary, it is strong presumption of the law that nature will take its usual course, and that the defendant, being the father of the child for whose murder he is here indicted, bore no malice or ill will towards the child, but, on the contrary, that he bore towards her the love which is natural for a parent to bear towards his offspring, and that in danger he would rather protect and take care of her than do her harm. (7) The law presumes that the defendant is innocent of this crime; and, in addition to the usual presumption of innocence, the law also presumes that the defendant did not kill or have anything to do with the killing or injury of the deceased, if the evidence shows that she was his own child. (8) The law presumes that the defendant was legally divorced at the time of his second marriage, and this presumption stands in his favor until the contrary is shown."

Code Ala. § 2790, provides that the statutes of another state, purporting to be printed by its authority, are evidence, without further proof. Section 2754 provides, *inter alia*, that the court may state the evidence to the jury when it is disputed. Defendant was convicted, sentenced to death, and appeals.

E. T. Taliaferro and *J. J. Altman*, for appellant. *W. L. Martin*, Atty. Gen., and *Jas. E. Hawkins*, for the State.

MCLELLAN, J. Three applications for a change of venue were made in this case, and denied by the court. The first was filed on January 24, 1889; the second, on the 8th of February; and the third, on the 22d of April. The first was overruled on January 28th. The second was passed until April 23d, and on that day it and the third application were severally and successively refused. Separate exceptions were reserved by the defendant to the action of the court in each instance. The first application, with its exhibits, was, by reference and adoption, made a part of the second; and both the first and second, with the exhibits thereto, respectively, were, in like manner, made a part of the third. By agreement of counsel all the affidavits and exhibits which had been filed in support or denial of former applications, as well as such applications themselves, were "taken and considered, with the last application, as a part of the proceedings thereunder." The appellant now severally assigns as error the overruling of the first two applications, as well as the last, and insists that, if the action of the court below was erroneous in either particular, he is entitled to a reversal. This presents a new question, and one not wholly free from difficulty. The statute provides that the application "must be made as early as practicable before the trial, or may be made after conviction on a new trial being granted; and the refusal of such application may, after final judg-

ment, be reviewed and revised on appeal."¹ This language clearly contemplates the reservation of an exception whenever the occasion for it arises, regardless of the time at which the trial is subsequently had; and doubtless an exception properly reserved at the time at which a change of venue is refused, and made a part of the record by a bill of exceptions taken as of that term of the court, would ordinarily be available on appeal from a final judgment thereafter rendered. Such was the state of facts involved in the case of *Hussey v. State*, 87 Ala. 121, 6 South. Rep. 420; and, though no issue was made on the point, the objection was treated as being well taken, at a term of the court prior to the trial. But the subsequent interposition of another or other applications, and action upon them, complicate the question. What, then, becomes of the exception first reserved? Does it still infect the record in such manner that whatever action may be taken on the subsequent motions, and however correct such action may be in itself, the final judgment will be reversed if this court concludes that, on the facts then presented, the first motion should have been granted? Suppose such an application is supported by proof of violent, all-pervading, and bitter prejudice in the county against the defendant, yet is denied, and an exception is lodged in the record, and, years after the case comes on for trial, another application is made, the proof is conclusive and overwhelming to the effect that all prejudice and bias against the defendant has entirely subsided, and, even, has been replaced by general sympathy for the defendant, and belief in his innocence, and this application is denied, and the trial is had, of the fairness and impartiality of which there is no sort of question, would this court reverse a judgment of conviction because of the denial of the first motion, though fully convinced of the propriety of the second denial, and the fairness and impartiality of the trial? Or, to further illustrate, suppose the first motion is improperly refused, the exception duly taken, and injected into the record. The next day, or at a later hour of the same day, another motion is made and granted. The trial is removed to another county, of defendant's own selection; and he is there tried and convicted. Can that conviction be avoided and annulled because of the court's refusal to grant the first application? We apprehend not. The end of the law is to secure a fair and impartial trial. When an application is made for a change of venue, because such a trial cannot be had in the county of indictment, that application is improperly refused, and if, without subsequent motion in that behalf, the defendant at any later time is tried and convicted, that judgment will be reversed. But if, after such erroneous refusal, the defendant again applies for a removal of his case, he thereby opens up the whole matter, invokes a trial *de novo*, and waives the infirmity of the record resulting from the first denial. The second hearing is in the

nature of a new trial of the specific issue; and the defendant's assault upon the finding of the court in that issue must fail or succeed, as error has or has not been committed on that hearing, just as error committed on a retrial, and not that infecting the former trial, is alone available to reverse the second judgment. To hold otherwise would lead to inextricable confusion and embarrassment, and result not infrequently in defeating the avowed purposes of the statute. This construction involves no curtailment of a defendant's right to apply for a change of venue as often as he may deem advisable, and secures to him a removal of his trial in all cases when in the judgment of the court below, or this court on appeal, he was entitled thereto at the time of his last application. Applying these views to the present case, it follows that only the action of the criminal court of Jefferson, on defendant's third and last application, will be reviewed. In discharging this duty, we shall confine ourselves strictly to the case made before, and passed on by, the primary court. We enter upon the inquiry, indulging the presumption that the proceedings of the lower court are free from error. Before its action will be reversed, this court must see affirmatively that error has been committed. It is not enough that it may not clearly appear the ruling below was right, or that we, acting as a court of original jurisdiction, would have hesitated to have decided as the primary court has decided; but we must see, and see clearly, that its action was wrong. *Edwards v. State*, 49 Ala. 384; *Lewis v. Teal*, 82 Ala. 288, 2 South. Rep. 908; *Spivey v. Allman*, 82 Ala. 378, 3 South. Rep. 523; *Ex parte Nettles*, 58 Ala. 268.

The question, then, is, did the criminal court err in overruling defendant's third application for a change of venue? The evidence in support of that application consisted of three several affidavits of the defendant himself, to which, and as a part of which, were exhibited sundry excerpts from newspapers published in Jefferson county; and a small book, entitled "The Hawes Horror," the affidavits of E. T. Tallafarro and William Vaughan, defendant's attorneys; and the affidavits of five other citizens of the county. Each and all the affidavits of the defendant himself are as strong, perhaps, as language could make them, to the effect in general terms, that he could not have a fair and impartial trial in the county. They give an account of the state of public feeling immediately after discovery of the crime, which was characterized by open and violent threats against him, and which culminated on December 8, 1888, in an assault on the jail by a large mob, with the avowed purpose of putting him to death. They allege that this state of public feeling was engendered by newspaper publications, and was kept alive and deepened and embittered, subsequent to the riot at the jail, by other newspaper publications, and the book referred to above; all of which were largely circulated and read in the county. All of these publications, he avers, were either absolutely false, or so exaggerated

¹ Code Ala. § 4485.

and distorted and denunciatory of him that the public mind was inflamed and excited against him, and so continued to the time of the trial. He further gives an account of the assault on the jail, and its bloody repulse, involving the death of 12 or 15 citizens, and the serious wounding of as many more, and affirms that this terrible calamity intensified public sentiment against him in such sort that it was necessary to his protection from mob violence to have the jail guarded for nearly a week thereafter by a large body of state troops, etc. We have given a very careful examination to the several publications exhibited to defendant's application. We fail to find in them any denunciation of the defendant calculated to arouse public resentment. They contained no undue assumption of his guilt, but, on the contrary, treat it as an open and disputable question. Nothing appears to have been stated for the purpose of arousing indignation, or tending to create prejudice, except in so far as the publication of the facts and circumstances of the murders as they were developed might have had that effect; and in stating the facts there appears to have been no disposition to suppress whatever was favorable to defendant. The statements may have been, more or less, overdrawn, and it would have been very strange if they had not been so, in view of the occasion and the circumstances under which they were made. They were, however, such publications only as papers all over the country are accustomed to make under like surroundings, and we do not doubt but the matter contained in them reached the public with a very much greater approximation to the exact truth than if it had passed from mouth to mouth, and thus been disseminated among the people. The publications, down to and for several days after the jail shooting, show, beyond all question, that there was, during that time, wide-spread and intense excitement and prejudice among the people of Birmingham and vicinity against the defendant. It is immaterial how this state of things was produced. Its existence alone concerns us. And its existence at that time is not seriously controverted by the state, though there is evidence in these exhibits, and in the affidavit offered by the prosecution, tending to show that the excitement was ephemeral in its nature; as, for instance, that intoxication was not an unimportant factor in the condition of things which precipitated the assault on the jail, and that by the result of that assault public feeling was diverted from the defendant, and directed against the officers who defended the jail in such manner that it was said: "In an instant Hawes and his murdered wife and children were forgotten, and the excitement and fury of the people were directed against Sheriff Smith," and confined to a certain class "of rash and excitable men, who do not constitute the juries of the county."

Did this excitement and resentment continue down to the trial? It may be remarked in the outset that the conditions for its continuance were much less favorable, in a large and rapidly increasing population like that of Birmingham and Jef-

ferson county, than they would have been, perhaps, in any other county of the state. The publications made subsequent to the disturbances on and about December 8, 1888, were not calculated to keep it alive, but, on the contrary, their tendency was to excite sympathy for Hawes, and doubt of his guilt, rather than prejudice against him, and assurance that he was the perpetrator of the atrocious crimes. Neither these publications, nor anything else, shows, or tend to show, a renewal at any time or any disposition to renew mob violence. The defendant swears that prejudice against him not only continued, but grew more bitter against him. Premitting the infirmity of interest which naturally infects his testimony, it is manifest that he was not in a position to know much about the state of the public mind, and for this reason, of itself, what he says is entitled to very little weight, except in so far as he is corroborated by other testimony. Messrs. Tallafiero and Vaughan, and five other witnesses—seven in all—affirm the continued existence of violence and bitter prejudice against the defendant to such an extent that he could not possibly get a fair and impartial trial. They speak from their knowledge of public sentiment, derived from conversations with very many citizens of the county. The attorneys say they have been unable to secure more affidavits, because very many persons to whom they have applied, while stating that they did not believe an impartial trial could be had, yet refused to make affidavit to that effect, lest the enmity against Hawes should be visited on them also. Against this showing of prejudice, on April 23, 1889, the state filed the affidavits of 65 citizens of the county, who show they had ample opportunity to know the condition of the public mind at that time on the subject under inquiry. Among them were officers of the county, necessarily much in contact with the people, newspaper men, bankers, physicians, mechanics, farmers, railroad men, contractors, merchants, mine operators, etc. They represent all classes and avocations, and come from the various sections of the county. Their evidence is not of the character held of little consequence in the case of *Seams v. State*, 84 Ala. 410, 4 South. Rep. 521. They do not give their opinion merely. But they state facts within their knowledge, as to public sentiment in the county of Jefferson, and they give the source of their information. They swear they have been thrown in contact, and have conversed about the Hawes cases, with very many people,—in some instances "hundreds," in others "many hundreds," in yet others "thousands,"—from all parts of the county. They give the expressions of these people, showing their own and the public sentiment and feeling in regard to the defendant, his guilt or innocence, and his trial. They state the expressions of these very many people on minor matters and facts tending to show public sentiment. They give the opinion of these very many people, based upon their own knowledge of the public mind, as to whether the case can be fairly and impartially tried in the county. All these expressions and indices

as to public sentiment are to the effect that whatever feeling at one time existed to prevent a fair and impartial trial had subsided, abated, and been dissipated, and that there was no such feeling or prejudice at the time of the affidavits as would prevent such a trial; and from their own knowledge of public sentiment, derived from these sources, these affiants swear that the excitement and prejudice existing against the defendant soon after his arrest have been allayed, that it did not exist at the time of the trial, and that defendant could then have a fair and impartial trial.

Here, then, was the case upon which the judge of the criminal court acted. The defendant showed excitement and prejudice against him early in December, 1888, which, under the rulings in *Seams' Case*, supra, would then have entitled him to a change of venue. Seven reputable witnesses testify, from their knowledge of public sentiment, that this excitement and prejudice continued to the time of the trial, in the latter part of April, 1889, and then infected the proceedings. *Per contra*, 65 reputable witnesses, with apparently better opportunities of knowing whereof they speak, testify, from their knowledge of public sentiment, that this excitement and prejudice did not continue to, and did not exist at the time of, the trial; that a fair and impartial trial could be had, and the result of it would be cheerfully accepted. On this showing the final application was denied. The authorities support the conclusion reached by the court below. The inquiry related necessarily to the time of the trial. *State v. Greer*, 22 W. Va. 800. The denial of motions for a change of venue, under the circumstances shown here, and on evidence similar to that presented in this record, has been universally sustained in the courts of last resort in other states. Thus in *Poe v. State*, 10 Lea, 673, it appeared that "when the prisoners were first arrested, in February, 1881, the people living in the vicinity of the place where the crime was committed were inflamed against the prisoners, and mob violence was threatened. * * * Nothing of the kind occurred, or appears to have existed, at the time of the second trial. All excitement had died out, a jury was readily impaneled, * * * and a verdict rendered in the usual way." The refusal of a change of venue was held proper. So in *State v. Rhea*, 25 Kan. 576, the application was supported by the affidavit of defendant, alleging prejudice, and setting out sundry newspaper articles published in the county, containing statements of facts similar to those disclosed on the trial, and severely denouncing the defendant; and also by the affidavit of one of the party which was engaged in the search for defendant, to the effect that public feeling was very bitter and denunciatory against him. There were 21 counter-affidavits, denying general prejudice against defendant; and the refusal of the application was sustained. And in the case of *State v. Adams*, 20 Kan. 311, the application was supported by "the affidavits of 17 persons, all showing more or less acquaintance with public opinion, some alleging that they had heard frequent threats against the defendant,

and all expressing an opinion that there was such a prejudice against him as would prevent a fair trial. In opposition thereto, the state filed the affidavits of 19 persons, showing fully as great, if not a greater, knowledge of the general talk and sentiment of the community, and expressing the opinion that there was no such prejudice against him, and that there was no reason why he could not obtain a fair and impartial trial. Without noticing in detail all the matters referred to in these affidavits," says Justice BREWER, "we may say, in general, that a perusal of them inclines us decidedly to the opinion that the ruling of the court [in refusing the application] was correct," and it was so determined. In *Bohan's Case* the application appears to have been rested on the existence of a "prejudiced, embittered, and poisoned" state of the public mind, which had been engendered by the killing of two men, and overdrawn and inflammatory newspaper accounts of the crime, and evidenced by the fact that a lawless mob had attempted the life of the prisoner, and had attacked the jail of the county in their efforts to summarily punish him. The application was supported by the affidavits of the prisoner, the sheriff, and the jailer, and excerpts from the newspapers. "These affidavits," says KINGMAN, C. J., "made out a *prima facie* case for removal; but the state read a great number [over ninety] affidavits, from citizens of each of the townships of the county, abundantly showing that there was no such state of feeling generally prevailing throughout the county as would prevent the accused from having a fair and impartial trial therein, or would even make it difficult to obtain an impartial jury for the trial." And the action of the lower court, denying the motion for a change of venue, was affirmed. *State v. Bohan*, 15 Kan. 407.

But perhaps the strongest case in support of the action of the criminal court of Jefferson, to be found in the books, is that of *People v. Goldenson*, decided by the supreme court of California. The defendant, himself a youth, had causelessly and wantonly murdered a girl about 14 years of age. The showing made for a change of venue, and the reasons of the court for sustaining a denial of the motion, are thus stated by PATTERSON, J.: "In support of their motion for a change of venue, counsel for defendant made what appears to be a very strong showing. It appears from the affidavits that, within a few days after the homicide had occurred, a crowd of people assembled in front of the house of said defendant, and some of them cried out: 'Close him up;' 'Make the Jew close up;' 'Hang him;' 'Lynch him.' That a guard of police was necessary at that time to protect the property of defendant's family. That for several days defendant's relatives feared to leave their home. That the shutters and windows of affiant's store were broken by some of the excited people gathered there, and that, on the occasion of the attempted removal of defendant's family, some of their property had been injured, and that for several days succeeding November 10, 1886, many people remained continuously in the vicinity of defendant's

home, uttering threats of violence against defendant and his family. That the newspapers in said city and county were daily denouncing said defendant, and demanding his immediate execution; and that, for the reasons given, it was impossible for defendant to receive a fair and impartial trial in said city and county. Mrs. Goldenson, the mother of defendant, incorporated in her affidavit clippings from the newspapers, describing a meeting which took place at Metropolitan Hall on November 12, 1886. It appears from said articles that said meeting was held for the purpose of raising money for the mother and grandmother of the deceased, and to engage counsel to assist in the prosecution of the defendant, but that many turbulent acts and threats of mob violence were indulged in by members of said meeting. That on the night of said meeting the sheriff and chief of police had the jail, where the defendant was confined, guarded by a large force of men, well armed, and precautions had been taken against any unlawful assault or attack. That, about 8:30 o'clock of the night in question, several thousand people assembled in front of said jail, and many appeals were made for immediate violence; and that, finally, the crowd was driven away and dispersed by a determined effort of a large force of police, but not until many blows had been given and interchanged. It further appears, from the affidavit first quoted, 'that an attempt to remove their property on November 13th was frustrated by the offer of violence; that on November 16th, under the protection of the police, a removal was effected; that affiant had read highly inflammatory articles in the papers, calling for the speedy trial and execution of defendant, and had heard many bitter and hostile expressions of opinion by citizens towards said defendant.' If this condition of affairs existed at the time of the trial, it must be admitted that the city of San Francisco was not a proper community from which to attempt to select a fair and impartial jury for the trial of the defendant. When the public mind is wrought into such frenzy, and the public press sustains enraged citizens, organized for avenging crime, in their unlawful attempts to overcome the duly constituted officers of the law, and only the superior force of the latter prevents mob execution, no man whose blood is thus demanded can hope to secure the rights guaranteed to him by the constitution. It is impossible, under such conditions, to secure an equal, exact, and impartial interpretation and execution of the laws; which is not only the right of every person, but which is essential to the welfare of all and the conservation of good government. But, while the facts stated in the affidavits on behalf of the defendant are admitted to be true substantially, there are two sufficient reasons why the order of the court below denying the motion for change of venue should not be disturbed: *First*. Because the principal occurrences, upon which affiants for defendant based their belief that a fair and impartial trial could not be had, transpired within a few days after the homicide, and the counter-affidavits filed by the prosecution tended

to show that the excitement which had been aroused by the homicide had entirely subsided, and had not prevailed for three weeks prior to the time of the application for a change of venue. We cannot say that, under the showings made by the respective parties, the court abused its discretion in denying the motion. Such applications are addressed to the sound discretion of the court, and, where error is assigned, a clear case should be shown by the record, or this court will not interfere." *People v. Goldenson*, 76 Cal. 328, 19 Pac. Rep. 161.

The excitement in Goldenson's Case appears to have been even greater than that shown to have existed in Birmingham on the 8th of December. The newspapers were inflammatory and denunciatory, which they were not in this case. Bitter feeling and prejudice, are even more clearly shown to have existed immediately after the crime in that case than in this. A much shorter time elapsed between the date of the crime and public excitement and the trial there than here. There it was three weeks; here it was over four months. The proof of abatement and subsidence is very much stronger in this case than in that. All in all, that was a very much stronger showing for a removal of the trial than is made here, and hence presented a very much stronger case for a reversal of the action of the primary court. We do not think we would, on that showing, have reached the conclusion which the California court reached, and hence we do not adopt the language we have quoted. But we do adopt the principle acted on by that court, that the existence of popular prejudice, however bitter and violent, at a given time, will not authorize a removal of the trial if there has been time for the subsidence of it, and if the affidavits, by a fair and reasonable preponderance, show that the excitement, bias, and prejudice have subsided and been allayed in such sort that it is fairly shown that a jury could and would be impaneled in the county, proceed with its deliberations, and reach its verdict free from the duress of public opinion, and undeterred from an acquittal of the defendant by the adverse sentiment of the community. Guided by this principle, and the authorities cited, and looking alone to the evidence adduced on the trial of this issue before the judge of the criminal court of Jefferson, which each member of this court has carefully examined, we are of one mind, that it does not appear that he erred in overruling the application for a change of venue.

We have not been aided to this conclusion by a consideration of the fact that a jury, presumably free from bias and prejudice, was readily and easily obtained. That matter was not before the primary court when it acted on the motion, and hence not properly before us in reviewing that action. Moreover, the personal qualifications of jurors is not the inquiry involved in the statute which authorizes a change of venue, so much as whether there is such a general public sentiment against the defendant as would tend to intimidate the honest and personally unbiased juror, and deter him, even without his being

conscious of the insidious influence, from acquitting the defendant, though he might have a reasonable doubt of guilt. *Seams v. State*, 84 Ala. 410, 4 South. Rep. 521; *Posey v. State*, 78 Ala. 490; *State v. Ford*, 37 La. Ann. 443. The court did not err in refusing to examine witnesses *ore tenus*, on the issue presented by the application for a change of venue. *Taylor v. State*, 48 Ala. 180.

It is contended for appellant that the action of the court in discharging the juror Gordon, after arraignment, plea, and the completion of the panel, and hence after the defendant had been put in jeopardy, was unauthorized and illegal, and operated to acquit him. The question as to when, and under what circumstances, a juror may be discharged before deliverance made, without affording the prisoner protection from further prosecution under the common law guaranty, now embodied in the federal, and most, if not all, the state, constitutions, that "no person shall, for the same offense, be twice put in jeopardy of life or limb," has been much discussed by jurists, and many times, with varying and inconsistent results, adjudged by the courts of this country and of England. The rule was thus announced by Lord Coke: "To speak it here, once for all, if any person be indicted for treason, or of felony or larceny, and plead not guilty, and thereupon a jury is returned and sworn, their verdict must be heard, and they cannot be discharged." Without impugning the doctrine thus stated, as a correct general rule, it becomes apparent, at an early day, that, in the nature of things, it must be subject to many exceptions. Perhaps the first of these to become established was that which allowed the discharge of the jury, without prejudice to further prosecution, when the judge had completed his circuit, and the court in the last county of his riding was adjourned, the jury in the meantime being carted after him through the circuit. Afterwards it was adjudged, upon full consideration by the judges en banc, that the prisoner's consent thereto would authorize the withdrawal of a juror, and a continuance of the prosecution; and, in the case in which this exception was established, it was suggested that there might be several other exceptions, resulting from the impossibility of proceeding further with the trial. And so, from time to time, other cases of necessity have been adjudged sufficient to authorize the discharge of a jury without verdict, and without the prisoner's consent. Each time a new exception to the rule has been admitted, it has been the custom of most courts to say that the additional exception thus allowed, with those theretofore established, constituted the only cases in which a jury could be discharged, and, in this way, not a few *dicta* have been lodged in the Reports which would exclude, not only the discharge of a juror on account of the sickness of his family, but many other exceptions which became afterwards to be well recognized. In this country there are two distinct lines of authority on the question. The supreme courts of the United States and of several of the states hold that the discharge

of the jury rests largely in the unrevisable discretion of the trial court. *U. S. v. Perez*, 9 Wheat. 579; *People v. Olcott*, 2 Johns. Cas. 301; *Com. v. Purchase*, 2 Pick. 521; *U. S. v. Shoemaker*, 2 McLean, 114. The courts of last resort of other states, and among them Alabama, hold that the exercise of the power to discharge a jury is not a matter of unbridled discretion in the primary court, but that its action in that behalf is always open to review on appeal or writ of error. *Com. v. Cook*, 6 Serg. & R. 577; *Mahala v. State*, 10 Yerg. 538; *Lee v. State*, 26 Ark. 281; *State v. Ephraim*, 2 Dev. & B. 162; *Ned. v. State*, 7 Port. (Ala.) 189; *Mixon v. State*, 55 Ala. 129; *Cook v. State*, 60 Ala. 89.

In these jurisdictions the discharge of a jury without verdict, and before the close of the court, or, at least, before impossibility of an agreement has been reasonably demonstrated, acquits the defendant, unless something has occurred after jury sworn which, in legal contemplation, necessitates the withdrawal of the case. The facts presenting such necessity, recognized by all courts as authorizing the discharge of the jury, are the sickness of the judge, (*Nugent v. State*, 4 Stew. & P. 72;) or juror, (*Fletcher v. State*, 6 Humph. 249; *Rex v. Edwards*, 4 Taunt. 309; *Hector v. State*, 2 Mo. 163;) or of the prisoner, (*Brown v. State*, 38 Tex. 482; *State v. Wiseman*, 68 N. C. 203; *Lee v. State*, 28 Ark. 260;) of the escape of a juror from his fellows, (*State v. Hall*, 9 N. J. Law, 256; *Reg. v. Ward*, 10 Cox, Crim. Cas. 573;) or the escape of the prisoner, (*In re Battle*, 7 Ala. 259;) and, it would seem, the sudden illness of the solicitor, unless he have assistants or associates who can proceed with the case, (*U. S. v. Watson*, 3 Ben. 1.)

In this state the broad doctrine of necessity has been thoroughly established, and it may be considered as settled law that whenever, from any cause, whether those enumerated above, or any other, the court is unable to proceed with the trial, and the jury with its deliberations, and such cause supervenes pending trial, and is of a nature not to be foreseen, and cannot be removed, the court is authorized to discharge the jury, and hold the prisoner for further trial. In *Nugent's Case*, where the sickness of the judge was held to justify the discharge of the jury, after reviewing several of the grounds upon which the discharge of the jury is authorized, the court proceeds: "But, whatever should be the ground of the discharge of the jury, it should be always on this selfsame principle of necessity. Otherwise it would seem that the prisoner should not be again put upon his trial. * * * The principle once settled, of necessity we will only have to inquire if the exception is embraced by it; and, although the progeny may be numerous, it seems to me that there will never be much difficulty in the application of the rule." "All the authorities admit that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and, whether the mental inability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same." *Nugent v. State*, 4 Stew. & P. 79.

In *Powell's Case* it is said: "The general rule, as laid down by the highest authorities on the criminal law, is that a jury, once sworn and charged in a case affecting life or member, cannot be discharged without giving a verdict. Among the exceptions to this rule is this: That a court may discharge a jury in any case of pressing necessity, and should do so whenever such a case is made to appear." *Powell v. State*, 19 Ala. 580. "The sudden illness of a juror, or of the prisoner, so that the trial cannot proceed, are ascertained cases of necessity, and serve as examples to show what the law means by a case of necessity." *McCauley v. State*, 26 Ala. 135.

In *Ned's Case*, *supra*, the following propositions were laid down, as being fully sustained by the authorities: "(1) That courts have not, in capital cases, a discretionary authority to discharge a jury after evidence given. (2) That a jury is *ipso facto* discharged by the termination of the authority of the court to which it is attached. (3) That a court does possess the power to discharge a jury in any case of pressing necessity, and should exercise it whenever such case is made to appear. (4) That sudden illness of a juror or of the prisoner, so that the trial cannot proceed, are ascertained cases of necessity, and that many others exist, which can only be defined when particular cases arise," etc. And; as further defining the necessity which will authorize the discharge of the jury, Mr. Justice GOLDTHWAITE continues: "The law declares that every one shall be entitled to the benefit of a trial by jury, and, as long as they continue in health and capable of reasoning on his case, he is entitled to the exercise of those powers. Whenever from exhaustion, or any other cause, a juror becomes unable to exercise these functions, and the fact is shown to the court to be such as must continue, then a case of necessity has occurred, and the jury ought to be discharged." *Ned v. State*, 7 Port. (Ala.) 213.

In the case at bar the necessity for discharging the juror Gordon resulted from the sickness of his wife in such sort that her life, as the record shows, depended, in the opinion of the attending physician, on the personal attention of her husband; and, as the record further recites, the critical illness of the wife, and the necessity of her husband's presence to save her life, incapacitated the juror for the performance of his duties as such. We can easily conceive how this state of things might, and naturally would, have rendered this juror incapable of that calm and deliberate consideration and reasoning which is of the essence of the office of juror, and for the absence of which, in any member of the panel, the jury should be discharged. As was said in *Parsons' Case*: "It certainly requires no argument to show that, if the wife or child of a juror is at the point of death, he would not be in a state of mind to discharge the duties which devolved upon him with that degree of patience, calmness, and deliberation which was due in the investigation of cases of this magnitude and importance; and it would unquestionably be the duty of the court to discharge a juror, under such circum-

stances." *Parsons v. State*, 22 Ala. 53. It is true that the point thus discussed was not directly at issue in the *Parsons' Case*, and hence the language we have quoted is *obiter dictum*. But it is in line with all previous adjudications in this state defining the necessity which will authorize the discharge of a jury, and is but the heralding of another "of the progeny of the principle of necessity," as expounded in the earlier case of *Nugent v. State*, *supra*.

But we need not rest our approval of the primary court's action alone on the cases and considerations above adverted to. There is no case to be found in the books which, in *dicta* or otherwise, expressly negatives the correctness of such action, under the circumstances shown by this record. In one case, and one only, so far as exhaustive investigation by the court and counsel discloses, this precise question was fairly presented, and upon its decision hung the life of the prisoner. In that case it was held that the serious sickness of the wife of a juror—an illness not shown to have been so critical as in the present case—presented a necessity for the discharge of the jury, without prejudice to further prosecution. *Com. v. Fells*, 9 Leigh, 613. And a strictly analogous case was decided by the West Virginia court, where it was held a necessity to discharge a juror was produced by the death of his son, and the effect on his mind of information of his bereavement. *State v. Davis*, 31 W. Va. 390, 7 S. E. Rep. 24.

The case in hand is strengthened by the fact that our statute authorizes the court to discharge a juror on account of his illness, or for any other cause which in the opinion of the court, renders it necessary. Code, §4453. And, while the necessity must be of the class defined by the adjudged cases to which reference has been had, sudden, unforeseen by the court, irremovable, and incapacitating a juror or the jury, or the judge, or prisoner, or, under some circumstances, the prosecuting officer, from properly and efficiently discharging their duties, or attending to the trial, yet the statute is, at last, a legislative expression to the effect that the instances of such necessity are much more numerous than were formerly supposed by some courts. Enactments of this character have been held to authorize the discharge of a jury under circumstances which would not have justified that action at the common law, (*Crookham v. State*, 5 W. Va. 510;) but, we apprehend, to accord them this effect would be to encroach upon the constitutional protection against putting a defendant twice in jeopardy for the same offense.

The motion of the defendant to quash the indictment, on the ground that the grand jury which returned it was summoned for one week only, and the indictment was not returned until after the lapse of that time, was properly overruled. The record does not support the averment of fact upon which reliance was had. On the contrary, it affirmatively appears that the grand jurors were drawn and summoned "for the term," as the law requires. The words, "to serve as grand jurors for the week," are inconsistent with and con-

tradictory of the terms of the writ required by law to be issued, and which was issued, in this case, and they were properly treated by the court below as surplusage.

The court did not err in overruling defendant's motion to quash the *venire*. In so far as that motion was predicated on the fact that the jurors for the trial of this case had been drawn and summoned under and in compliance with a statute passed after the commission of the offense, its denial is fully supported by the authorities. *Lore v. State*, 4 Ala. 173; *South v. State*, 86 Ala. 617, 6 South. Rep. 52, and cases cited. The other grounds of the motion are rested on the mere fact that the clerk had not written up the minutes of the primary court, and hence there was, strictly speaking, no record of the order for the special *venire*. The transcript before us demonstrates that the order, in due form, was made, and that a copy of it was regularly served on the defendant, as also a list of the jurors summoned under it for his trial. The prisoner thus had every right which the law secures to him in this connection, and he was not, and could not have been, prejudiced by the temporary delay—not at all unusual in practice—of the clerk in transcribing the order of the judge into the record of the court.

It is the duty of the court to ascertain whether jurors, examined on their *voir dire* have the statutory qualifications; and, among other things, he should inquire of them whether they have, at the time of their examination, a fixed opinion, as to the guilt or innocence of the defendant, which would bias their verdict. It is manifestly immaterial whether they at any time, or for any length of time in the past, have had such opinion. We understand from the record that this duty was fully performed with reference to the juror Penn; and he was declared to be a competent juror. Defendant's attorney then requested the court to propound to him the further inquiry whether he had not before that time had a disqualifying opinion on the question of guilt *vel non*. We are unable to see what bearing, or any relevancy, the answer to this question could have had on the issue which the court was called on to determine. He was equally a competent juror, whether he answered yea or nay. The only end to be subserved by inquiry on this point was to advise the defendant as to the expediency of peremptorily challenging the juror. Certainly there is no duty resting on the court to go into an inquisition, the sole purpose of which is to aid the defendant to determine whether he will challenge a juror peremptorily. But, even if it be conceded that an affirmative response to the question would have authorized a challenge for cause, the action of the court must still be held free from error. To require the court to enter upon such an investigation would be even more objectionable, because involving a greater expenditure of time, than the practice condemned in *Bales' Case*, of allowing such examination directly by defendant's attorney. There it is said: "We know of no authority, and we perceive no reason, for any such speculative, inquisitorial practice, consuming needlessly the time of the court,

and offensive to the persons subjected to it. The rule is ancient that neither party has a right to interrogate a juror before he is challenged." *Bales v. State*, 63 Ala. 38. See, also, *State v. Brooks*, 92 Mo. 542, 5 S. W. Rep. 257, 330; *Penn v. State*, 62 Miss. 450.

The theory of the prosecution in this case, as developed on the trial, was that the defendant conceived that the lives of Emma Hawes, his wife, and of their children, May and Irene, stood between him and the consummation of a second marriage, and hence that the motive which prompted the murder of each of them was the same. There was evidence tending strongly to support this theory, and to show that the death of each one of the victims was but a part of a system in which the lives of all were involved, and in the working out of which, to the accomplishment of defendant's ulterior purpose, the life of each was, in substantially the same manner, ruthlessly sacrificed. Under these circumstances, all evidence going in any way to connect the defendant with the murder of his wife, or of his daughter Irene, was relevant to the issues involved on his trial for the murder of May, and was properly admitted. *Lawson v. State*, 20 Ala. 65; *Alsabrooks v. State*, 52 Ala. 25; *Gassenheimer v. State*, Id. 313; *Cross v. State*, 78 Ala. 430; *Ingram v. State*, 39 Ala. 247; *McDonald v. State*, 83 Ala. 46, 3 South. Rep. 305; 2 Bish. Crim. Proc. §§ 189, 235, 261, 327; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. Rep. 452, and cases cited.

The witness Cann, being called to prove a conversation he had with the defendant at the time of his arrest, testified that he was then acting as a reporter for the *Evening Chronicle*; that he made notes of the conversation, and from them wrote out an account of what was said for the paper; and that this account was published in the paper, after being cut down, and some parts of it omitted. It was shown that the notes from which the article was written had been destroyed. Upon this showing, the witness was allowed to refer to and read the article as published, to refresh his memory in regard to what was said by the defendant at the time in question. To this there was an exception. We do not think it is tenable. The article as published was written by the witness. It contained, the witness swears, the substance of what the defendant said. The question presented by the exception comes within the principle adjudged in the case of *Horne v. Mackenzie*, 6 Clark & F. 628, where a surveyor was permitted to refresh his recollection by reference to a printed copy of his report, which had been made up from his original notes, of which it was, in substance, though not in words, a transcript; and in the case of *Topham v. McGregor*, 1 Car. & K. 320, in which the writer of an article in a newspaper was let in to swear to the facts stated in the article, though he had no independent recollection of them, but swore that all the statements made in a series of articles, of which this was a part, were true. The same principle is negatively asserted in *New York*, where the court held that the memory of a witness could not be refreshed

by reference to an article which "did not purport to be, and was not in truth, a statement of a conversation with or declarations made by the plaintiff," and which was therefore not competent for the purpose in view. *Downs v. Railroad Co.*, 47 N. Y. 87; 1 Whart. Ev. § 522; 2 Tayl. Ev. 1198 et seq.; *Acklen v. Hickman*, 63 Ala. 494.

It is a thoroughly well-settled and familiar principle that communications between client and attorney, or from any person to an attorney, with a view to establishing the relation of client and attorney as to a particular matter, and securing professional advice or other aid in respect thereto, are privileged, and cannot be put in evidence, unless the privilege be waived by the client. It is equally well established law that an interpreter, intermediary, agent, or clerk of an attorney, through whom communications between attorney and client are made, stands upon the same footing as his principal, and will not be allowed to divulge any fact coming to his knowledge as the conduit of information between them. But the rule extends no further than this. The reasons upon which it rests, the salutary objects, sought to be obtained by its observance, do not require that it should embrace communications made to an attorney otherwise than in securing or directing his professional services, or communications made to the agent or clerk of an attorney otherwise than for transmission to the attorney, or, at least, in and about and in furtherance of the discharge of the duties incident to the confidential relation. The privilege, in other words, is confined to communications between the attorney and his client; and extends to the necessary organs by which such communications are made, but no further. 1 Tayl. Ev. 791, 792; 1 Greenl. Ev. §§ 239, 240; Whart. Ev. §§ 581, 582; *Taylor v. Forster*, 2 Car. & P. 186; *Moss v. Brander*, 1 Phillim. Ecc. 254; *Studdy v. Sanders*, 2 Dowl. & R. 347; *Cotton v. State*, 87 Ala. 75, 6 South. Rep. 396.

The privilege does not include communications made by one person to another, under the erroneous supposition that the other is an attorney, (*Fountain v. Young*, 6 Esp. 113;) and hence not where they were made to a law student in the office of an attorney, although he represented himself, and was believed, to be the attorney, (*Barnes v. Harris*, 7 Cush. 576.) And, on the other hand, the rule of exclusion manifestly would not apply to communications made by a person to an attorney in ignorance of his professional character, and hence necessarily without any purpose of securing his professional aid. And it is equally clear that communications made to a person who was in fact the agent or clerk of an attorney, but of which fact the other was not advised, could not have been confidentially imparted, or made with a view to their being repeated to an attorney, and are not privileged. The facts last hypothesized are precisely those involved in the admission of the testimony of the witness Glover, to which an exception was reserved. Glover was the confidential law clerk of Hewitt, Walker & Por-

ter, attorneys. Defendant came to the office of that firm, and, finding the witness there, asked whether he was a lawyer. The witness replied in the negative. Then without further inquiry, or any knowledge respecting witness' relations to the attorneys, and without evincing any desire or purpose to have witness communicate to them what he was about to say, he made the statements deposed to by the witness. Very clearly these statements were not privileged communications, and there was no error in admitting them in evidence. *Weeks, Attys.* §§ 143, 144.

The transcript of the record of the defendant's marriage in the state of Mississippi was not certified as required by the act of congress for the authentication of the records of one state in the court of another. The act of congress, however, is not exclusive of any other method of authentication of public office books which the courts may deem it proper to admit, or the states see fit to adopt. 1 Greenl. Ev. § 489; *Packard v. Hill*, 2 Wend. 411; *Lothrop v. Blake*, 3 Pa. St. 483; *Hempstead v. Reed*, 6 Conn. 480. And the inquiry is whether Alabama has adopted a different mode of certification in respect to the record in question. Section 2780 of the Code provides: "Registers of marriages, births, and deaths, kept in pursuance of law, or any rule of a church or religious society, may be certified by the custodian thereof; and, when so certified, are presumptive evidence of the facts therein stated, as well as of the law or rule in pursuance of which such registry was made, and of the authority to certify the same."

It is insisted, however, that this statute has no application to registers of marriages, etc., made and kept out of the state. We are unable to admit this contention. The provision is found in the chapter of the present Code devoted to "Evidence," and is a part of an article thereof which undertakes to give the "General Rules of Evidence." In that article are several sections declaring entries in certain books to be competent evidence, and, though they contain no express declaration as to whether such books kept beyond the state would be admissible, yet it is clear that books of the class mentioned would be competent, wherever they were kept or the entries made. Such, for instance, are the books of physicians, provided for by section 2777, and entries and memoranda made by a deceased representative, guardian, or trustee, as provided for by section 2778. It can scarcely be doubted that the competency of such books is unaffected by state lines. Again, there are several other sections embraced in this article which provide that certain certificates, books, etc., made or kept in this state, shall be received in evidence. This limitation is very persuasive to show that the law-makers had in mind throughout the article the distinction between books, records, and certificates within the state and those without, and that, whenever it was the legislative purpose to confine the operation of the law to the boundaries of the state, that purpose was expressed. But, aside from these considerations, section 2780, we

think, clearly indicates on its face that it was not to be confined to the state. All of its terms are general, and its last clause is wholly inconsistent with the construction contended for by appellant. That clause makes the certificate of the custodian of the record authenticated, "presumptive evidence of the facts therein stated, as well as of the law or rule in pursuance of which the" record is kept, and of the authority to certify the same. With respect to such record kept in pursuance of law, the provision quoted could have no field of operation, were we to confine the act to registers kept within the state. The courts are held to know the laws of this state, which provide for records of marriages, etc., and they could not look elsewhere than in the statute books for evidence of what these laws contain. In like manner our courts judicially know the custodian of the records of marriages made in pursuance of laws of the state, and that he is authorized to certify transcripts thereof. But the laws of other states must be proved, and we cannot give effect to the plain terms of the section under consideration without holding that it was intended to provide one mode for the proof of laws of other states, under which marriage registers are kept, and for proof of the authority of the custodian thereof to certify copies of the same, and therefore that all the provisions of that section apply as well to records made and kept beyond, as to those kept within, the state. *Carhart v. Clark's Adm'r*, 31 Ala. 396.

The Code of Mississippi was properly admitted in evidence to show what officer in that state is the custodian of its records of marriages. *Clanton v. Barnes*, 50 Ala. 260; Code, § 2790. The evidence of the witness Glover, on cross-examination, as to the character of defendant,—that he "had heard for the last few years that defendant had frequent difficulties with and struck his wife,"—was properly admitted, under the rule laid down in the case of *Moulton v. State*, 6 South. Rep. 758, (at present term.)

The definitions of "murder" and "manslaughter," given by the court in its general charge, are in accordance with the doctrines elaborately discussed and adopted by this court in cases of *Judge v. State*, 58 Ala. 406, and *Mitchell v. State*, 60 Ala. 26, and reaffirmed in the cases of *De Arman v. State*, 71 Ala. 358; *Lang v. State*, 84 Ala. 1, 4 South. Rep. 193; *Cleveland v. State*, 86 Ala. 1, 5 South. Rep. 426; and many others.

The objections to that part of the general charge which undertook to state the theories which the evidence for the prosecution and defense, respectively, tended to establish, is untenable. The tendencies of the evidence on either hand appear to be very accurately set forth by the presiding judge, and his right to thus bring the facts at issue to the attention of the jury is undoubted. Code, § 2754; *Tidwell v. State*, 70 Ala. 44; 1 Bish. Crim. Proc. § 979.

Of the charges requested by the defendant, and refused, the first and second were to the effect that the statements of jurors, when examined on their *voir dire*,

that they had no fixed opinion against capital or penitentiary punishment, and that they believed conviction could be had on circumstantial evidence, in no way interfered with or restricted their right to determine the amount, sufficiency, or degree of proof necessary to a conviction, tended directly to mislead the jury into the belief that they would be authorized to acquit the defendant on the ground that proof of his guilt rested solely on evidence of circumstances, notwithstanding such evidence convinced them beyond a reasonable doubt.

Charges numbered 3, 4, and 8, to the effect, that if the defendant at the time of his second marriage had been, or honestly believed he had been, divorced from his first wife, the law imputes innocent motives to him in contracting the last marriage, were properly refused. He was not being tried for entering into the marriage relation a second time. The motives which actuated him in that behalf are beyond any issue involved, or which could have been raised, in this case. The utmost purity of purpose in that consummation may be conceded to him, and no light be thereby thrown upon the question of his guilt or innocence. His right to marry again was precisely the same, in legal contemplation, whether he had been divorced from Emma Hawes or had slain her; and his reasons for desiring to remarry may have been, and doubtless were, the same, however he put himself in a position to exercise the right.

The law presumes innocence of crime in all cases until the contrary is shown. But we know of no principle upon which to this general presumption of innocence, other presumptions, depending on the relations which the alleged criminal bore to the victims of the crime, could be added. If a man, in addition to the general presumption, is entitled to further protect himself from punishment by a presumption of affection for his daughter, we see no reason why the principle may not be extended to other relatives indefinitely, and to his friends, and even to mankind at large, upon evidence of his kindly and affectionate disposition, or relations general and special, thus multiplying the issues without limit, and confusing the jury. Such is not the law. The presumption is single, and the same in all cases, and in all must be overturned by evidence which excludes every other reasonable hypothesis than that of guilt. Beyond this, whatever the relations of the alleged author and the victim of the act charged, the prosecution need not go. Charges 5, 6, and 7 were, therefore, properly refused.

Moreover, all of the charges requested by the defendant and refused were mere arguments, and most, if not all, of them of themselves indicate that they were intended to meet some position advanced in argument on the part of the state. On this ground alone, each of them was properly refused.

Every exception reserved in this case has been carefully investigated. Every exception argued by counsel, and several which were not argued, have been treated in this

opinion. There are, however, several exceptions upon which we have not written, because they are patently without merit, and because of our desire to set some limit to an opinion already very long.

We find no error in the record, and the judgment of the Jefferson criminal court is affirmed.

The day fixed by the court below for the execution of the sentence of death pronounced against defendant having passed, it becomes our duty to specify another day for his execution. It is accordingly ordered and adjudged that on Friday, the 28th day of February, 1890, the sheriff of Jefferson county execute the sentence of the law by hanging the defendant, the said Dick Hawes, by the neck until he is dead, in obedience to the judgment and sentence of the criminal court of Jefferson county, as herein affirmed.

RAINS v. STATE.

(*Supreme Court of Alabama.* Jan. 28, 1890.)

MURDER—CHANGE OF VENUE—EVIDENCE—INSTRUCTIONS.

1. On a murder trial, a change of venue is not warranted by defendant's testimony that at the time of his arrest a mob was formed to hang him, and that the officer who arrested him avoided the mob by going another route, and by the testimony of two other witnesses that people generally believe defendant guilty, and think he ought to abide the consequences, where the arresting officer testifies that he never heard of any mob.

2. Where it appears that the acceptance of a loan by deceased, who was defendant's brother, from a third person, angered defendant, and contributed to the quarrel resulting in the killing, evidence that defendant had previously sued the third person for slander, the suit having been based on deceased's affidavit, but not of the particulars of such suit, is admissible.

3. When defendant testifies that, during the quarrel between himself and deceased, the latter spoke of defendant's daughter, he may be asked on cross-examination if what deceased said was slanderous.

4. Threats of defendant against deceased, running through many months down to just prior to the killing, are admissible on the question of malice.

5. It is improper to ask a witness if a certain portion of his testimony is as truthful as the balance.

6. Where defendant testifies in his own behalf, he may be asked, on cross-examination, where he was from the time of the killing until his arrest.

7. Where the evidence tends to show a motive for the crime, an instruction based on the hypothesis that there was no motive is properly refused.

8. A charge that, when the prosecution relies on circumstantial evidence alone, proof, by a preponderance of evidence, of a single fact inconsistent with defendant's guilt, calls for his acquittal, is properly refused where there is positive testimony that defendant committed the killing, and no fact inconsistent with his guilt is shown.

9. Where there is no proof that deceased had previously struck defendant, except that defendant had given that as a reason for threats he had made, a charge assuming it as a fact is properly refused.

10. Where there is evidence that defendant provoked the difficulty resulting in the killing, a charge that, "to warrant an acquittal on the ground of self-defense, the defendant must have been wholly without fault," is correct.

Appeal from circuit court, Morgan county; JOHN MOORE, Judge.

Robert J. Rains was convicted of the murder of his brother, Bone Rains, and sentenced to be hanged. Before trial, defendant applied for a change of venue on the ground that he could not get a fair and impartial trial in the county. In his application he stated that when he was arrested, and his arrest became known, a mob was formed to take him from the custody of the deputy-sheriff, and hang him, and the officer avoided the mob by traveling another route. J. M. Echols, the deputy-sheriff by whom defendant was arrested, being examined in his behalf, testified that he never heard of any mob, and that he traveled with his prisoner on the usual mail route; that he had heard "right smart talk about the killing, but no more than there is generally over any killing; never heard anybody say that defendant ought to be hung, or ought to have his neck broken, but the people generally believed that he killed his brother, and have heard people say that if he did kill his brother he ought to abide the consequences of the law." W. J. Owens, another witness for defendant, testified: "I have heard some people say that they thought that he ought to have justice; that they believed that he was guilty, and ought to be tried for it according to law, and have justice done him. Don't know that I ever heard any one say that he ought to be hung, but have heard people say that they believed that he killed his brother. The general opinion of the people I have heard speak of it is that he is guilty, but I have not heard many talk about it,—not more than two dozen." The affidavits of M. H. McCullom and W. C. Cornelius were also submitted, but whether for or against the application the record does not show. The court overruled the application, and defendant duly excepted.

It appeared on the trial that the dead body of deceased was found in or near the public road, about five miles from Hartselle, early in the morning, one day in January, 1889; and near by were found a pair of gloves, and a nubia or wrap, which were identified as belonging to defendant. It was shown, also, that, on the preceding day, defendant, deceased, J. L. Alexander, and several other persons, were in Somerville, in attendance on the county court, where a suit or criminal prosecution was pending against Alexander for slanderous words alleged to have been spoken by him about defendant's daughter; the affidavit on which the suit or prosecution was founded having been made by the deceased. The case was not tried, and the parties in attendance started for home in the afternoon; defendant and his brother, with J. D. Sims, being on horseback, and the others in Alexander's wagon. They all stopped at Hartselle about dusk, and ate some crackers and oysters, for which Alexander paid; and Alexander further testified that, "having made friends with Bone," the deceased, he lent him 25 cents with which to buy a pint of whisky. The parties separated at the fork of the roads, several miles beyond Hartselle; defendant, deceased, and Sims going to the right, while the others took the left road. Sims further testified, on the part of the prosecution: "Defend-

ant saw Alexander hand Bone the quarter, and immediately remarked: 'Bone has sold out to Alexander.' We got on our horses, and started home," separating from the others as stated above. "Defendant was quarreling with Bone, telling him he had sold out to Alexander, and that any one who would drink with Alexander was as mean as he was. This was kept up for some distance, Bone not being angry in the mean time, and telling him: 'I know what you want. You want a drink of this whisky,'—and gave him a drink or two of it. Just before the difficulty, defendant said to Bone, 'Why did you make that affidavit, any way?' to which Bone replied: 'If I had known it was going to cause me and my wife as much trouble as it has, I never would have made it.' We were then riding abreast, and I was between them. Defendant replied to what Bone had said, cursing him and his wife, and saying: 'They are no better than me and my wife.' In a very short time, Bone stopped, and got off his horse, standing by his side, with his back to me, and his face towards the horse's tail, as if making water. I next saw defendant, who I did not till then know had dismounted, going around in front of the horses towards Bone with his coat off and said to him: 'None of that, Bob. Let's behave ourselves, and go home as we should do.' Bone then turned around to look behind; and, as he did so, the defendant struck him somewhere about the head or shoulders. Bone then knocked defendant down and was on him when I pulled him off as soon as I could. As I pulled him up, he staggered, and fell to his knees, and asked me to help him, saying that he believed that he was drunk. I assisted him to the side of the road, and set him down, while I went after the horses, leaving the defendant there. I was gone twenty or thirty minutes, and, on returning with the horses, met defendant one hundred yards or more from the place. I asked him where Bone was, and he answered: 'Where you left him.' I went back, and found Bone lying on the ground, spoke to him, and shook him. He was dead, and I told defendant so. He replied: 'You can't say I did it. You did not see me do it.' I proposed to go and get some one to care for the body, but he said I should not; that it would give us away; and that we must get away. He also said to me: 'You have got to do as I tell you; and, if you don't, or if you tell it, I will kill you.'" On cross-examination, the witness admitted that he had said to several persons named that he knew nothing at all about it, and said this was before the defendant was put in jail, and that he said so because he was afraid defendant would kill him, as he had said he would. Defendant's counsel then asked him: "Is what you say about that as true as everything else you have testified in this case?" The court sustained an objection to this question, and the defendant excepted.

After two witnesses for the prosecution had testified as to the finding of the body, and before the examination of Sims or Alexander, J. H. Kitchen was introduced as a witness for the state, and thus testified: "I was in Somerville on the day preceding

the night on which it is said Bone Rains was killed. I came as a witness before the county court in a case in which Alexander was charged with having slandered the defendant's daughter. Defendant, Bone Rains, Sims, Alexander, and Knapp, and myself were here that day. The case was not tried, and we all left, about 3 p. m., to go home." Defendant moved to exclude from the jury what the witness said "about the trial in the county court, because it was irrelevant," and excepted to the overruling of this motion. W. R. Crow, another witness for the state, testified that, "within twelve months before Bone Rains was killed, defendant told him that Bone had knocked him down, and thought he had killed him; that he intended to do Bone just as Bone had thought he had done him, if it took him twenty years, or a life-time; and that he intended to do it when Bone was not expecting it." Arch Johnson, another witness for the state, testified that, "in the spring of 1888, defendant told him that Bone had knocked him in the head with a single-tree, and then went to the woods with his gun, and stayed there three days; that the next time Bone offended him, or made him mad, he would kill him in the woods, or out of the woods, if it took him twenty years to do it." Defendant objected to the admission of this part of the testimony of each of the witnesses "on the ground that it was too remote, and was incompetent;" but the court overruled his objection, allowed the same to go to the jury, and defendant excepted.

Defendant testified in his own behalf, and said: "We had been to Somerville, and on our way home, after leaving Hartselle, me and my brother had some words about my daughter. Just beyond Vaughan's bridge, where the difficulty took place, I got down to make water; and, the first I knew, Bone knocked me down, jumped on me, and was cutting me with his knife, when I pulled out mine, and made one cut at him. I did not know I had cut him." He was then asked, on cross-examination, "What were the words you and your brother had about your daughter?" and answered that he did not remember. The solicitor then asked him "if his brother said anything, or slandered his daughter," and he answered that he did not. Defendant objected to both the last question and the answer "because it was illegal and irrelevant," but the court overruled his objection, and he duly excepted. The defendant was further asked, on cross-examination, "where he was each day and night from the Monday night until he was arrested," and the court allowed this question, and the answer thereto, against the objection and exception of defendant.

The court charged the jury "that, to warrant an acquittal on the ground of self-defense, the defendant must have been wholly without fault; that he must not have provoked or encouraged the difficulty by word or act." Defendant excepted to this charge, and also excepted to the refusal of each of the following charges, which were asked by him in writing, together with others, not necessary to be set out here: (5) "When the evidence fails to

show any motive to commit the crime charged on the part of the accused, this is a circumstance in favor of his innocence."

(8) "When the prosecution relies for a conviction on circumstantial evidence alone, if there is one single fact proved to the satisfaction of the jury, by a preponderance of the evidence, which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit." (20) "The jury are authorized, in forming their conclusions as to whether the defendant had reason to apprehend danger of his life, or of great bodily harm, to take into consideration the fact that the deceased had at one time almost killed the defendant, having struck him on the head with a single-tree, and that deceased had him down on the ground, and was a much younger, larger, and more powerful man; and, if they do so find that the defendant's life was in danger, or that he was in danger of great bodily harm, without having first attacked deceased, and that he struck the fatal blow while laboring under such fear, then they must find the defendant not guilty."

Defendant appeals.

S. H. Gruber, for appellant. *W. L. Martin*, Atty. Gen., for the State.

STONE, C. J. After the able and exhaustive discussion of the question of change of venue called forth by the recent case of *Hawes v. State*, ante, 302, (at the present term,) it would seem to be unnecessary to repeat or reconsider what was then decided. The present application was supported by testimony much less convincing than was given in that case. In fact, taking all the testimony purporting to have been offered by the defendant, without reference to the proof in opposition, it fails to make a case for a change of venue.

None of the particulars of the slander suit were proven, or offered to be proven. It was simply referred to by the witnesses as introductory to the narration of their testimony proper. It tended to show why the participants and witnesses were brought together, and why they were present at the times and places mentioned. Up to this stage, there was nothing that could have done the defendant any injury. It was at most a reproduction of what is often witnessed in *nisi prius* courts,—a statement of what caused the assemblage, and why the witness was present. Such statements are never supposed to harm any one, unless they unnecessarily consume the valuable time of the court. In the progress of the trial, however, an incident, considered in its relation to that slander suit, does seem to have contributed to the quarrel which preceded, and, according to appearances, precipitated, the homicide. We allude to the trifling loan of 25 cents by Alexander to the deceased. Alexander was the defendant in the slander prosecution, and defendant's daughter was the subject of the alleged slander. Accepting the trifling loan from the alleged slanderer seems to have angered the defendant, and contributed to, if it did not cause, the quarrel. This authorized proof that there was a slander suit, and who were the parties to it. It did not authorize proof of the particulars,

and none such was made or offered. There was no error in the court's rulings on this question. It tended to give pertinency and point to the remark attributed to the defendant at the time deceased accepted the loan.

While the defendant was testifying in his own behalf, he stated that during the quarrel between him and the deceased the latter spoke of his (the defendant's) daughter. In the cross-examination he was asked if what the deceased had said in reference to his daughter was slanderous. This question was objected to, the objection overruled, and the defendant answered that it was not. There was nothing in this objection. The law has reasonable respect to the infirmities and natural resentments common to humanity, and certainly accords to a father some palliation if slanderous words are uttered to him in reference to his own daughter. It may have weight in determining the *animus* and grade of the homicide, or other violence that may ensue upon it. It could not excuse homicide, or other high crime. Disproof of what might otherwise have been inferred, namely, that the reference to the daughter gave offense, was clearly competent, as tending to aid the jury in determining who was the aggressor in the encounter.

The threats of defendant, running through many months, and coming down to a time very near the homicide, were all properly admitted in evidence. Each and all of them were admissible on the inquiry of malice *vel non*. *McAnally v. State*, 74 Ala. 9; *Garrett v. State*, 76 Ala. 18.

We know of no rule of law which requires or authorizes a witness to institute a comparison between the truthfulness of different parts of his testimony. All should be truthful, and equally truthful, if the witness observes his oath; and it is for the jury to determine to what extent they will believe or disbelieve his testimony. The question was properly disallowed as being immaterial, in the aspect in which it was sought to have the witness answer.

It is always competent to prove the conduct of a prisoner at the time a crime was committed, or shortly afterwards. Many crinating circumstances are thus brought to light. And the fact that this was sought to be proved by the defendant himself does not vary the question. He voluntarily made himself a witness in his own behalf, and, in doing so, submitted himself to cross-examination, to attack on his general character for veracity, and to every other mode of attack on his credibility, to the same extent as if he had been a disinterested witness, with the limitation expressed in *Clarke v. State*, 78 Ala. 474. "As to any fact or circumstance relevant to the issue, or which sheds light upon the commission and character of the offense, though inculpatory, he waives his constitutional right to protection against being compelled to give evidence against himself. But the waiver extends no further than to all such facts and circumstances as may tend to illustrate the particular offense charged. * * * Within these limits, the fullest cross-examination should be allowed; but its range into inquiries respect-

ing past transactions and offenses, separate and distinct, is prohibited by the constitutional inhibition." *Clarke v. State*, 87 Ala. 71, 6 South. Rep. 368; *Cotton v. State*, 87 Ala. 103, 6 South. Rep. 372.

Each of the charges asked by defendant was faulty, and was rightly refused. Charge 5 postulates that defendant was without motive to commit the homicide. The testimony, if believed, tends strongly to prove a double motive: *First*. Deep-seated feelings of revenge, harbored by defendant against deceased, for knocking him down with a single-tree, as he alleged he had done. This was the basis of his threats, as testified to by the witnesses. *Second*. The acceptance by the deceased of a trifling loan from Alexander. This was on the evening of the homicide, and shortly before it occurred, as testified to by the witness Sims. This witness also testified that the acceptance of this loan led to the quarrel which ended in the rencontre and homicide. No phase of the testimony tends to support the hypothesis of this charge, and it was rightly refused for that reason, if for no other. *Knowles v. Street*, 87 Ala. 357, 6 South. Rep. 273; *Perry v. State*, 87 Ala. 30, 6 South. Rep. 425; *Calhoun v. Hannan*, 87 Ala. 277, 6 South. Rep. 291; 3 Brick. Dig. p. 133, § 106; *Williams v. Barksdale*, 58 Ala. 288.

The same objection applies to charge 8. The prosecution did not "rely on circumstantial evidence alone." Sims, and even the defendant himself, gave positive testimony proving that defendant committed the homicide, if they be believed. Moreover no testimony is shown which tended in the slightest degree to prove any fact which was inconsistent with the defendant's guilt. A charge which is not supported in its hypotheses by any phase of the testimony is abstract, and should be refused, no matter how correct the legal proposition it may assert. Authorities *supra*.

Charge 20 postulates as a fact that deceased had "struck the defendant on the head with a single-tree." There is no proof that such had ever been the case, unless the fact that the defendant gave that as the reason and basis of the threats the witnesses testified he had made. The assumption that this was a fact required its refusal, even if it had been otherwise unobjectionable. It had the further fault of being argumentative. *Cotton v. State*, 87 Ala. 75, 6 South. Rep. 396; *Goldsmith v. State*, 86 Ala. 55, 5 South. Rep. 480; *Hussey v. State*, 86 Ala. 34, 5 South. Rep. 484; *Fire-Brick Works v. Allen*, 86 Ala. 185, 5 South. Rep. 454.

The charge given by the court, in view of the testimony before the jury, asserts the correct rule on the doctrine of self-defense, and is free from error. *De Arman v. State*, 71 Ala. 351; *Cleveland v. State*, 86 Ala. 1, 5 South. Rep. 426.

The judgment of the circuit court is affirmed.

The day fixed for the execution of the sentence of the law being passed, it is ordered and adjudged by the court that Friday, the 14th day of March, 1890, be set for such execution; and on that day the sheriff of Morgan county will inflict the death penalty by hanging the said Robert Rains by the neck until he is dead,—the ex-

ecution to take place between the hours of 10 A. M. and 4 P. M., and strictly according to the provisions of the statute. Code 1886, § 4667.

SOUTHERN EXP. CO. v. BROWN.

(*Supreme Court of Mississippi*. Feb. 17, 1890.)

MASTER AND SERVANT—NEGLIGENCE—DAMAGES.

1. In order to recover punitive damages for injuries caused by the negligence of defendant's servant, it is not necessary to show knowledge by defendant of habitual negligence or incompetency of the servant, and, if plaintiff attempts to show it, a failure will not prevent recovery.

2. Where it appears that an agent of defendant company was paid a certain salary for his services; that the defendant furnished a wagon, and the agent furnished and fed the horse, and employed the driver, for which he was allowed an extra sum; that the driver was engaged about the business of defendant and was liable to be discharged by it, though the agent testified that he was his servant,—a finding that he was the servant of defendant, so as to render it liable for his negligence, will be sustained.

3. Where plaintiff demanded \$5,000 damages for the negligent act of the defendant, an objection that punitive damages could not be recovered, because not claimed in the declaration, cannot be sustained.

Appeal from circuit court, Lowndes county; L. E. Houston, Judge.

Calhoun & Green, for appellant. *Humphries & Sykes*, for appellee.

COOPER, J. This is an action by appellee to recover damages against appellant for injuries inflicted upon him by the servants of appellant by driving over him a loaded express wagon. The evidence of the plaintiff tended to show that, on the night when the injury was received, he was walking along one of the public streets of the town of Columbus, and upon a foot-path on the side of the street, where pedestrians were accustomed to travel, and was overtaken and run down by the express wagon driven by appellant's servant, which was being rapidly driven, and was without lights to enable the driver to perceive and avoid pedestrians, and that the wagon was not accustomed, in its trips to and from the depot, to go upon the foot-path where plaintiff was injured. The injury inflicted was undoubtedly painful and serious, and has probably resulted in permanently impairing plaintiff's capacity to labor in his trade. On the other hand, the evidence for defendant tended to show that the wagon, while engaged in transporting the goods of the defendant, was driven by the servant of one Albright, who was the agent of defendant at Columbus, but who contracted for a certain sum to furnish the horse and driver, and to carry defendant's packages to and from the depot; that the wagon was being cautiously driven, at a slow pace; and that the injury, if inflicted by the wagon, was either unavoidable and accidental, or was contributed to by the negligence of plaintiff. The evidence also tended to prove that the injury was not inflicted by the express wagon, but by a carriage of another.

Among other errors assigned, is one to the action of the court in permitting the plaintiff to testify that he was a man of family, having a wife and two children depend-

ent upon his labor for support. The record is contradictory as to what transpired in reference to this matter. The appellant reserved special exceptions during the progress of the trial, and included them as a part of the general bill reserved to the action of the court in overruling the motion for a new trial. In the special bill the judge certifies that he overruled the defendant's objection to this evidence, but in the general bill he certifies that the objection was sustained. In this condition of the record we cannot know what action was really taken.

The court permitted the plaintiff to introduce much evidence tending to prove that Timberlake (the driver of the express wagon) was an habitual drunkard, and habitually careless and reckless in his driving. The defendant objected to the introduction of this testimony, unless the plaintiff would show that defendant had knowledge of such habits; and the court ruled that the testimony might be given, subject to exclusion, unless knowledge should be brought home to defendant. The position of defendant was that it was not liable for punitive damages for the willful act or gross negligence of its servant, unless it had impliedly consented thereto, by continuing him in service after knowledge of his character. The plaintiff, without objection, yielded to this false assumption, and undertook the wholly unnecessary task of proving the character of the servant, and knowledge thereof by the master. It is well settled in this state that the master is responsible in punitive damages for the willful act of his servant, engaged in his business, whether he did or did not know the servant to be incompetent or disqualified for the service in which he is engaged. *Railroad Co. v. Bailey*, 40 Miss. 395; *Railroad Co. v. Patton*, 31 Miss. 156; *Railroad Co. v. Albritton*, 38 Miss. 242; *Railroad Co. v. Hurst*, 36 Miss. 680.

If the plaintiff was injured by the negligence of defendant's servant, it must respond to him in damages, and cannot assign for error the unsuccessful effort of the plaintiff to prove what there was no need to prove, and which he was required to prove by an erroneous ruling secured by the defendant.

The appellant relies principally upon two points to secure a reversal of the judgment: *First*, that the evidence shows the plaintiff to have been guilty of contributory negligence; and, *second*, that the person in charge of the express wagon was the servant of Albright, an independent contractor, and not of defendant.

It is sufficient to say that these are both questions of fact, which were fairly submitted to the jury, and their verdict is supported on each by competent and sufficient evidence.

It is true that Albright, a witness for defendant, testified that Timberlake was his servant, and not that of defendant; but he stated the facts on which he rested this assertion, and they support the finding that Timberlake was the servant of the company. Albright was paid by the company \$90 per month for his services as agent. The company furnished a wagon,

and Albright furnished and fed the horse and employed the driver, for which the company allowed him \$45. The agreement was by parol, and its terms are not definitely stated; but it is not shown that the driver so employed was not the servant of the company, though selected by Albright. He was engaged in and about the business of the company; was, as Albright says, subject to be discharged by it. In a somewhat similar case to this, the supreme court of Massachusetts said: "The fact that there is an intermediate party, in whose general employment the person whose acts are in question is engaged, does not prevent the principal from being held liable for the negligent conduct of his subagent or under-servant, unless the relation of such intermediate party to the subject-matter of the business in which the under-servant is engaged be such as to give him exclusive control of the manner and means of its accomplishment, and exclusive direction of the persons employed therefor." *Kimball v. Cushman*, 103 Mass. 194.

The thirteenth instruction, the giving of which is assigned for error, was not given, but was refused by the court. The position assumed by counsel for appellant, that the plaintiff cannot recover punitive damages, because not claimed in the declaration, is not maintainable. The plaintiff demanded \$5,000 damages for the negligent act of the defendant, under which it was competent to show the character of the negligence and the extent of the injury inflicted. The jury were very fairly instructed as to the circumstances under which punitive damages could be awarded.

The verdict is not excessive, and the judgment is affirmed.

OHLEYER v. BERNHEIM *et al.*

(*Supreme Court of Mississippi*. Nov. 4, 1889.)

BILLS OF EXCHANGE—ACCEPTANCE—PLEA.

In an action on a bill of exchange accepted by defendant, a plea that the acceptance was for a debt due plaintiffs by a third person; that defendant did not promise to pay the debt when made, or request plaintiffs to give credit to the third person; that the acceptance was not in consideration of any forbearance to, or release of, the third person; that no security for the debt was given up; and that defendant has received no advantage and plaintiffs no detriment from the acceptance,—is good on demurrer.

Appeal from circuit court, Rankin county; A. G. MAYERS, Judge.

Action by Bernheim Bros. & Uri against John Ohleyer on a bill of exchange which they had drawn on said Ohleyer payable to their own order, and which was accepted by him by his writing his name across the face thereof.

Besides the general issue, the defendant filed the following second (amended) plea: "For further plea in this behalf, defendant says *actio non*, because he says that the acceptance in plaintiff's declaration mentioned was for a debt already due plaintiffs by L. A. Ohleyer, and not by this defendant. That defendant did not promise to pay the debt when it was made, or request plaintiffs to give the credit to L. A. Ohleyer; nor was said acceptance given in

consideration of any forbearance to said L. A. Ohleyer; nor was there any agreement to release the debt against L. A. Ohleyer; nor was there any security given up in consideration of said acceptance; nor did defendant receive any benefit or advantage from said indebtedness or acceptance; nor have plaintiffs suffered any detriment from said acceptance. There was no consideration good or valuable in law for said acceptance, and this said defendant is ready to verify."

Plaintiffs' demurrer to this plea was sustained, and the trial resulted in a judgment in favor of plaintiffs, from which John Ohleyer appeals.

Wm. Buchanan and John R. Enochs, for appellant. *A. J. McLaurin and Pat Henry*, for appellees.

COOPER, J. The demurrer to the second (amended) plea should have been overruled. This plea is unusually full and explicit, in that it not only states upon what consideration the acceptance was made,—the past-due debt of another,—but negatives specifically the existence of any agreement on the part of the plaintiffs to discharge their debtor from his obligation to forbear the collection of the debt, or surrender any security held by them. It then negatives the fact that the defendant was originally bound, by averring that the defendant did not promise to pay the debt when it was made, or request the plaintiffs to extend the credit.

Nothing now occurs to us, and nothing has been suggested by appellees' counsel not covered by the specific denials of the plea, which would be a sufficient consideration to uphold the defendant's promise to pay the debt. The plea is very much fuller than the one in *Nelson v. Serie*, 4 Mees. & W. 795, which was sustained by the court of exchequer chamber.

The objection which is taken, that to permit the defendant to plead a want of consideration would be to contradict the terms of the written instrument, is wholly untenable. It is not proposed to add to, or detract from, the terms of the promise, but to show that, according to its terms as written, it cannot be the foundation of an action, because it is not supported by any valuable consideration. *Cocke v. Blackburn*, 57 Miss. 689.

The judgment is reversed, the demurrer overruled, and cause remanded.

ROYSTON v. ILLINOIS CENT. R. Co.

(*Supreme Court of Mississippi*. Feb. 17, 1890.)

CARRIERS—ASSAULT ON PASSENGER—CONDUCT OF TRIAL.

1. In an action for injuries received by plaintiff, a colored man, while a passenger on defendant's train, it appeared that he was requested to leave a car where he was seated, and go into another car, because of his boisterous conduct, but refused to go into the other car, and remained on the car platform, where he received the injuries sued for, from another passenger. *Held*, that instructions that, as the law required separate accommodations on railroad trains for white and colored people, if defendant's failure to provide such separate cars was the proximate cause of plaintiff's injuries, he could recover, were properly refused.

2. Just as the jury retired, counsel excepted to a ruling as to how much of an affidavit for continuance, on account of the absence of a witness, should be considered; whereupon the court stated that he would reopen the whole case, and allow each side to introduce testimony, reargue the case, and present further instructions, and would exclude the affidavit. The jury was then brought back, and the witness, who had arrived in court, was sworn and testified. *Held* no error.

Appeal from circuit court, Benton county; W. M. ROGERS, Judge.

Action by Aaron Royston, a colored man, against the Illinois Central Railroad Company, for injuries received by plaintiff while a passenger on defendant's railroad train. Plaintiff, after taking a drink at a bar-room, bought his ticket, got on the train, and took his seat in what was called the ladies' car. Because of his boisterous conduct, on complaint of other passengers in this car, he was invited by the conductor to go to another car, which he refused to enter, and remained on the platform of the car. While there, another passenger knocked him over the head, and abused him, inflicting the injuries sued for. Before the trial was commenced an affidavit for a continuance was made on the part of plaintiff, on account of the absence of a witness, Milan, and defendant expressed a willingness to admit what he proposed to prove by him; but during the argument of the case a dispute arose as to what part of the affidavit of this witness' testimony should go before the jury. Milan having appeared in the mean time, the court recalled the jury, and stated that he would permit this witness, Milan, to testify, and would permit the parties to introduce other witnesses, and reargue the case, if they so desired. Milan was put on the stand, and testified. Verdict and judgment for defendant, and plaintiff appeals.

Calhoun & Green, for appellant. *W. P. & J. B. Harris*, for appellee.

CAMPBELL, J. If the testimony of the defendant is true, the verdict is manifestly right, and must stand, unless there was some error of law which may have produced it. It is plain that the jury believed the testimony for the defendant, and this settles the question in favor of its credibility for the consideration of the case by this court; especially as we think, after a careful examination of all the evidence, the jury was fully justified in the view taken. The errors of law insisted on in the court below, as shown by the motion for a new trial, are the action of the court in recalling the jury to hear the testimony of the witness Milan, after argument had been concluded, and upon the instructions on both sides. There was a dispute as to what part of an affidavit for a continuance, on account of the absence of one Milan, should be considered by the jury; and counsel for plaintiff, just as the jury retired, asked the court to note an exception to its ruling as to that; "whereupon the court, in order to remove all objection and meet the ends of justice, stated that he would reopen the whole case, and allow each side to introduce testimony and reargue the case, if they desired, and present further instructions, and would exclude all of the affidavit as to Milan's testimony.

* * * The jury was thereupon brought back into the box, and the witness Ben Milan (whose arrival in court just as the argument of the case was closed had been made known to the court) was sworn as a witness, and testified." This is a quotation from the bill of exceptions. There was no error in this. The course of the court is worthy of all commendation, since the true object of every trial in court is to ascertain the truth, and no right of the plaintiff was violated in the course pursued. As to such matters, large discretion must be permitted to the trial court.

The refusal of the second and third instructions asked by the plaintiff was made the ground of the motion for a new trial. These instructions are to the effect that, as the law required separate accommodations on the railroad trains for the white and colored races, if the company had not provided separate cars for them, and the injuries plaintiff had suffered were the proximate result of this failure to provide separate accommodations, he was entitled to recover. The proposition contained is that, if there had been separate cars, the plaintiff would have been undisturbed in his seat, and therefore he may charge the consequences that befell him to the want of such separate cars. The court did right to refuse these instructions. It was proper to affirm, as a matter of law, that there was no such connection or relation between the neglect to provide separate cars for the two races and the treatment of the plaintiff as to entitle him to claim anything in this action for such failure. The plaintiff sought and obtained passage on the train as it was, and cannot claim anything, except for some wrong done him on that train. The connection of his injury with the neglect to furnish separate cars is about as proximate as the drink of whisky he took in Holly Springs. Probably the relation of cause and effect between the drink and his rough treatment was more immediate than the neglect to furnish cars.

We perceive no error in the action of the court on the instructions, on either side. It is manifest that no liability for plaintiff's injuries was incurred by the defendant, if its testimony is true, and that was left to the jury, which credited it. The utmost limit of the novel modern doctrine, that common carriers are responsible for injuries to passengers by fellow passengers, was stated in the opinion of the court, composed of two judges, in *Railroad Co. v. Burke*, 53 Miss. 200. That doctrine does not receive the assent of our judgment; and if in future, when the question may be presented for decision, we shall feel constrained to yield to that decision as authority for the rule it announces, we shall certainly not extend the doctrine so as to embrace any other than a case falling clearly within it. As the instructions in this case conform to the announcement in the case cited, we are not presented an opportunity to say more in just criticism of that decision, but are justified in what we have said, in order to exclude the conclusion which might otherwise be drawn as to the view we entertain of it.

Affirmed.

v.780.no.8—21

KANSAS CITY, M. & B. R. Co. v. MYERS.
(Supreme Court of Mississippi. Feb. 17, 1890.)

RAILROAD COMPANIES—KILLING STOCK.

In an action against a railroad company for killing plaintiff's mule, plaintiff proved that the mule was grazing near by, and that no stock alarm was given before striking it. The evidence for defendant was that it was nearly dark at the time; that the head-light of the engine had been lighted a short time before; that the whistle blew and the bell was rung for the road crossing; and that the engineer did not see the mule at all, but that it was seen by the fireman, but it was so near the train, and was running so rapidly towards it, that he did not have time to call the attention of the engineer to it till too late to prevent the collision; and that the train was long and heavy, going down-grade, and running very rapidly, and could not have been stopped if the attempt had been made when the mule was first seen. Held, that defendant was not negligent.

Appeal from circuit court, Marshall county: W. M. ROGERS, Judge.

Appellee, Myers, sued the railroad company for killing his mule by a running train. He proved that the mule was killed at a point where the dirt-road crosses the railroad; that the mule was grazing near by; and that no stock alarm was given before striking the mule. The testimony of the railroad company was to the effect that at the time the mule was struck it was nearly dark. That the head-light of the engine had been lighted a short time before. That when the mule was first seen he was near to the railroad, and running towards it. That the whistle blew and the bell was rung for the road crossing, but the mule was struck before anything could be done. The engineer did not see the mule at all, but it was seen by the fireman, and another employe of the company riding on the engine at the time, but so near to the railroad, and running towards it so rapidly, that they did not have time to call the attention of the engineer to it till too late to effect anything to prevent the collision. That the train was an excursion train, very long and heavy, going down-grade, and running very rapidly, and could not have been stopped if the attempt had been promptly made when the mule was first seen. There was verdict and judgment against the company, from which it appealed.

J. W. Buchanan, for appellant. Fant & Fant, for appellee.

CAMPBELL, J. The verdict should have been for the defendant. The court might properly have instructed the jury to find for it. The evidence vindicates the defendant from all blame for the accident, which resulted from the rashness of the mule in attempting to cross the railroad in front of a rapidly running train.

Reversed and remanded.

LAZAR v. CASTON et al.

(Supreme Court of Mississippi. Feb. 24, 1890.)

EJECTMENT—DESCRIPTION OF LAND—HOMESTEAD.

1. The description in the declaration, and in plaintiff's chain of title, of the land sought to be recovered in ejectment, as the "north part of the south-west quarter of lot two," is insufficient.

2. In Mississippi, the homestead exemption cannot be allotted in an action of ejectment.

Appeal from circuit court, Amite county; J. B. CHRISMAN, Judge.

This is an ejectment suit by the appellant, Lazar, to recover from appellees, Caston and others, the "north part of the south-west quarter of lot two, the south half of lot four, and seventy-eight acres in lot five." There was verdict and judgment in favor of plaintiff, Lazar, for all the land, subject to the homestead rights of Caston and others, from which plaintiff appealed.

T. McKnight, for appellant. *Cassedy & Ratcliff*, for appellees.

COOPER, J. The court properly refused the instructions asked by the plaintiff. The first instruction is erroneous in so far as it announces the right of the plaintiff to recover the "north part of the south-west quarter of lot two." This description, which runs through the plaintiff's declaration and chain of title, is void for uncertainty. It is impossible to determine whether 1 acre or 40 is claimed, or where in the subdivision it is located.

The second instruction is erroneous in its assumption that the homestead exemption may be allotted in an action of ejectment. Homesteads are to be set apart by commissioners who view the premises, and not by a jury proceeding on evidence only.

We find no facts in the record warranting the third instruction asked.

But the court erred in directing the jury to find a general verdict for the plaintiff, subject to the defendant's homestead rights in the whole tract of land. The defendant himself denied that he owned any land in lot 4, a part of which is demanded by the plaintiff. If this be true, his homestead right cannot extend to that lot.

On the facts as they now appear, the verdict should have been for the defendant as to the land in lot 2, for the plaintiff for the south half of lot 4, and for the plaintiff for the 78 acres in lot 5, subject to the defendants' homestead rights therein.

Judgment reversed.

BRINSON V. BERRY *et al.*

(*Supreme Court of Mississippi*. Feb. 24, 1890.)

PARTNERSHIP—RIGHTS OF PARTNERS INTER SE— REFORMATION OF MORTGAGE.

1. Complainant, having bought an interest in a mercantile business and advanced money, afterwards made a contract with his partner by which the latter agreed to close up the business on a certain date, when complainant might, at his option, receive the amount he had paid for his interest, and the advances made by him, with interest, or the amount he had invested, and half the profits. The partner executed a deed of trust on land owned by him individually, to secure his compliance with the contract. He died before the day for closing up the business arrived, and complainant took charge, sold the goods, and paid the firm debts. *Held* that, at the time agreed upon, complainant could elect to be a creditor of the firm to the extent of his investment and interest, or to remain a partner.

2. On electing to be a creditor, he would have no more rights than other creditors, and could claim no rights as a partner.

3. The deed of trust given by his partner accidentally omitting to include land that was intended to be included, complainant is entitled to have it reformed as against the widow and heir of

the grantor, and a subsequent mortgagee of the land with notice of complainant's rights.

Appeal from chancery court, Simpson county; WARREN COWAN, Chancellor.

A. J. McLaurin and Cole & White, for appellant.

COOPER, J. In February, 1883, one Smith, now deceased, was a merchant in the town of Westville, having a stock of goods of the value of \$2,000. Brinson—a farmer, and unacquainted with business—paid \$1,000 for a half interest in the business, which was thereafter conducted by Smith, in his own name, for the joint account. Afterwards, Brinson advanced to the firm the sum of \$700. On the 1st day of February, 1887, a written contract was entered into between the parties by which it was agreed that Smith should continue to manage the business. The stipulation of the contract from which the present controversy springs is as follows: "And he (Smith) agrees and binds himself to refund to said A. S. Brinson the seventeen hundred dollars, and ten per cent. per annum interest thereon from the respective dates of the investments, or equally divide all the profits of the mercantile business, in lieu of interest on the sum of \$1,000.00, leaving it optional with said Brinson to elect and choose his money and interest, or his capital invested and one-half of the profits of the business; and, by mutual consent of the parties, it is agreed that said business shall be closed out and settled between the parties, either by said Smith refunding said Brinson his \$1,000.00 capital invested, and interest on the \$700.00, as aforesaid, or, in lieu of interest on the \$1,000.00, one-half of the profits of the business, as said Brinson may direct, which said Smith hereby obligates and binds himself to do on the first of December, A. D. 1887." Contemporaneously with the execution of this contract, Smith, to secure compliance on his part with the obligations he had thereby entered into, executed a deed of trust upon certain lands and personal property. By this deed, on default of Smith to comply with the contract, the trustee was to sell the property conveyed, and pay to Brinson what he should be entitled to receive under said contract.

Brinson exhibits the bill in this cause against Mrs. Berry, who was the widow and sole heir at law of Smith, and against Buchanan and McKee, and, having stated the facts above set forth, also shows that Smith died prior to the 1st day of December, 1887, and that at his death the firm had on hand a stock of goods, and owed several debts; that complainant took charge of the business after Smith's death, and sold the goods, and paid the debts of the firm; that, when the time arrived for him to make his election under the terms of the contract, he elected to receive back his money, and interest thereon; that there then remained in his hands a small balance arising from the sale of the assets of said firm, which he applied to the payment of the sum due himself under the contract; that he then caused the power of sale conferred by the deed of trust to be executed, and the property

thereby conveyed to be sold, and the proceeds applied to the payment of his said claim, but there yet remains due to him several hundred dollars. He alleges that, by accident and mistake, there was included in the deed of trust lands which Smith never owned, and did not intend to include, and that by like mistake there was omitted certain lands which Smith did own, and did intend to include; that, after the death of Smith, his widow executed a mortgage upon such omitted lands in favor of the defendant Buchanan, in which deed the defendant McKee is trustee; that Buchanan had notice of complainant's rights to have his mortgage corrected and reformed, and the omitted lands inserted therein according to the intention of the parties thereto. As to the lands accidentally omitted from his mortgage, complainant seeks, as against Mrs. Berry and the other defendants, to have the mortgage reformed and corrected, and the lands sold in payment of the sum still due him. Complainant also seeks relief as to another lot of land against the defendant Mrs. Berry, on this state of facts: During the continuation of the partnership between complainant and Smith, Smith bought with the partnership funds, and took title to himself, the lot and buildings in which the business was conducted. As to this land, the prayer of the bill is that it shall be declared to be partnership assets, and liable for the debt due complainant.

The defendants demurred to the bill; and, the demurrer having been sustained, and the bill dismissed, the complainant appeals.

The demurrer should have been overruled. We reject the proposition advanced by counsel for appellant, that the contract between Smith and complainant was that complainant was to be and continue a member of the firm, but guaranteed against loss, and secured as partner in profits to the extent of 10 per cent. per annum upon the capital by him invested in the business. By the contract, complainant was permitted to elect whether, as between himself and Smith, he should be a partner, and, as such, entitled to participation in the profits, or a creditor entitled to receive back the amount of his capital, and interest thereon at 10 per cent. per annum. If he should elect to be a creditor, he was to be secured in his debt and interest. If, on the other hand, he should elect to be a partner, he was entitled to receive only his part of the profits in the business, and repayment of the seven hundred dollars advanced to the firm, and interest thereon.

The averment in the bill is that Smith died before the time fixed by the contract for complainant's election, and that complainant acted as surviving partner, and wound up the business of his firm, but, when the time came for him to make his election, he elected to be creditor, and not partner. In view of this allegation, and of the fact that the time fixed by the contract for a settlement of the business was December 1, 1887, it must be assumed that complainant, at or before that time, elected to be creditor, and after that date did no act as surviving partner by which

he might be held as such. If such be the case, he is entitled to the repayment of his whole investment, and interest thereon, according to the contract entered into by Smith. It may be that the contract was an unwise one, but with that the courts have no concern. They must deal with it as made by the parties. If it be true that complainant exercised his right of election, and has stood on it, we are unable to perceive why, as against Mrs. Berry, who was a volunteer, and as against Buchanan, who, with notice of his rights, took security on the land intended to be conveyed by Smith, and as against McKee, his trustee, the deed should not be corrected, and the land sold, for the payment of the debt due. But, if this be done, complainant will not be entitled to disturb the title, nor in this proceeding condemn the store-house and lot. If he be creditor, and not partner, he has no greater right to go against this lot than has any other creditor. If Smith was sole trader, he rightly took the title to himself; and, if complainant has elected to be creditor, and not partner, he cannot have a right as partner to an interest in this lot.

It is clear that on the facts stated the complainant is entitled to relief, either as against the land omitted by accident from his mortgage, or, as partner, to have the store-house and lot declared to be partnership property. It is equally clear that he cannot have relief as to both. On the averments of the bill, his right is that of creditor.

The decree is reversed, demurrer overruled, and leave given defendants to answer within 30 days after the mandate shall be filed in the court below.

HIRSCH *et al.* v. RICHARDSON *et al.*

(*Supreme Court of Mississippi*, Feb. 17, 1890.)

FRAUDULENT CONVEYANCES—EVIDENCE.

Where an action is brought to set aside a sale on the ground that it was made in fraud of creditors, and the debtor admits that he was indebted to defendants when the sale was made, it is error to refuse to instruct the jury that defendants were not required to prove the items of their account, but that the indebtedness might be shown by the debtor's admissions, or by any evidence that satisfied the jury of the correctness of defendants' claim, as the refusal to give the instruction was calculated to make the impression that, as the account was not before the jury, the fact of the indebtedness was not established.

Appeal from circuit court, Clay county; L. E. Houston, Judge.

This case was before this court at a former term, and will be found reported in 3 South. Rep. 569. One Cohen owned two stocks of goods,—one in Nashville, and the other in West Point. Cohen sold the Nashville stock to appellants, Hirsch Bros. & Co., for a debt he owed a bank, for which Hirsch Bros. & Co. were sureties, and sold the West Point stock to Hirsch Bros. & Co. in payment of a debt he owed them. Appellees, Richardson, Mason & Co., who were creditors of Cohen, attached the stock at West Point after it came into the possession of Hirsch Bros. & Co., and attacked the sale and transfer to Hirsch

Bros. & Co. for fraud. Hirsch Bros. & Co. interposed their claim to the stock. On the former appeal, the case was reversed because of an erroneous instruction. The case went back, and was retried; resulting in a verdict and judgment in favor of Richardson, Mason & Co., from which Hirsch Bros. & Co. appealed.

Beall & Pope, for appellants. *Barry & Beckett* and *Fox & Roane*, for appellees.

CAMPBELL, J. The court erred in refusing the instruction asked by the claimants to the effect that the indebtedness of Cohen to them was not required to be proved by the items of the account, but might be shown by the admission of Cohen, or by any evidence that satisfied the jury that he did owe the claimants when he sold to them the goods in controversy. There was no necessity for the production of the open account, and we are unable to perceive why the claimants were so persistent in the effort to get the account before the jury. It could not add anything to the abundant testimony to the fact of the indebtedness of Cohen to Hirsch Bros. & Co. His admission, as a witness, that he was indebted was certainly evidence of the fact of his indebtedness, which we think is satisfactorily shown by all the evidence in the case. It seems to us that there is no just ground on which to doubt that Cohen was largely the debtor of Hirsch Bros. & Co., when the sale was made. The refusal to give the instruction mentioned was calculated to make the impression that, as the account was not before the jury, the fact of indebtedness was not established, while we think there was no necessity for the production of the account, and that it might properly have been dispensed with. The fact of the indebtedness of Cohen was the thing to be proved, and that could be established as any other fact, without the books, or a copy from them. If the account had been presented to him as a witness, and admitted to be correct, that would have made it admissible.

We will not undertake to pass in detail on the rulings of the court upon depositions, and parts of them. The objections to the depositions, in their entirety, are untenable, and were properly overruled; but there were answers to interrogatories which should have been rejected,—e. g., that part of the answer of E. R. Richardson to interrogatory 5, in which he relates that Cohen frequently had told him, before his pretended sale, that he owed less money and was in better condition financially than he had been in for several years; and so of the last sentence of the answer of this witness to the sixth interrogatory. In Price's deposition is an improper statement as "to the attachment of Hirsch Bros. & Co.," which, while of small moment, is wholly inadmissible, and should have been rejected. The last part of the answer of Joseph Frankland to the fifth interrogatory, in which he volunteered the opinion that the "sale to Hirsch Bros. & Co. was a sham" was grossly improper; and so, also, of the latter part of his answer to the sixth interrogatory; and his answer to the tenth interrogatory, in which he states

that he knew "that Hirsch Bros. & Co. were concerned in two large failures of their own, and two of others, within the last few years," was of like character. That part of the deposition of J. B. Richardson in which he states that the general impression made on him by Mr. Cohen was that the whole transaction was a fraud, etc., was inadmissible.

We regret the necessity to reverse the judgment in this case, but are convinced that a new trial should be had, in the hope that on a third trial no error will occur, and a verdict be rendered which cannot be set aside. Reversed and remanded.

LEFFEL v. MILLER.

(*Supreme Court of Mississippi*. Feb. 24, 1890.)

EXECUTION—CLAIMANT'S ISSUE—CONVEYANCES—DESCRIPTION.

1. The claimant's issue in Mississippi cannot be raised where the property levied on is real estate.

2. A deed of trust conveying "one ten-horse-power engine and boiler, James Leffel make," is void for uncertainty of description.

Appeal from circuit court, Clarke county; S. H. TERRELL, Judge.

Appellant, Leffel, had a judgment against one Riley, on which he had an execution issued, which the sheriff levied on an engine and boiler in the possession of Riley, and on his premises. Riley made an affidavit, which the sheriff returned with the execution, claiming the property as a part of his homestead, and therefore exempt; the same not being worth over \$2,000. Miller, the appellee, interposed a claim to the engine and boiler, as a part of the freehold, by virtue of a deed of trust he held on Riley's property, including the engine and boiler; and the trial of his claimant's issue resulted in a judgment in his favor, from which Leffel appealed.

W. N. King, for appellant.

COOPER, J. If the machinery was a part of the realty when the levy was made, it could only be levied on by levying on the realty. But in such case the claimant could not raise the objection by interposing the claimant's issue. The right of another than the defendant to interpose in this manner applies only to cases in which personal property is seized; there is no such thing known to the law as a claimant's issue where real estate is the subject of controversy.

If, on the other hand, the machinery was personalty, the claimant has failed to establish his right to the property. It was levied on in the possession of the defendant in execution, and, if it was personalty, such possession was *prima facie* evidence of title in the defendant in execution. To meet the *prima facie* case thus made, the claimant introduced a deed of trust, in which is included "one ten-horse-power engine and boiler, James Leffel make." This description is insufficient to identify the property, and the conveyance as to it was void for uncertainty. *Allen v. Dicken*, 63 Miss. 91; *Nicholson v. Karpe*, 58 Miss. 34.

Judgment reversed.

VOLKING v. HUCKABAY.

(Supreme Court of Mississippi. Feb. 24, 1890.)

TROVER AND CONVERSION—SALE—RESCISSON.

Where a chattel is sold on credit and delivered to the purchaser, with the understanding that he is to execute his note in payment, and also give satisfactory security, the fact that the seller, who was not satisfied with the security, fails to deliver the note on the return of the chattel does not make him guilty of a conversion of the chattel; the rescission of the sale renders the note valueless.

Appeal from circuit court, Clarke county; S. H. TERRAL, Judge.

One Seegars, agent for Henry Volking, sold to C. C. Huckabay a mule, the property of Volking, for \$85, on credit; the trade to stand if Volking was satisfied with the security. A note for \$85 (about which there is dispute as to whether it was executed) was to be given, and a deed of trust on the mule sold, and a written obligation to execute deed of trust on crop when the same should be growing. The deed of trust on the mule and the written obligation above referred to were executed and left in the hands of Seegars, till Volking had time to investigate and see if he was satisfied with the security. The deed of trust was not acknowledged. The mule was delivered, and afterwards Volking went out to Huckabay's place, and not being satisfied with the appearance of things, Huckabay not owning the land on which he proposed to make a crop, and the indications being unpropitious, he sent for the mule, and had it returned to himself, but did not deliver up the alleged note, the unacknowledged deed of trust on the mule, and the written obligation; whereupon Huckabay sued for the conversion of the mule by Volking, and recovered judgment, from which Volking appealed.

T. A. Wood, for appellant. J. A. Anderson, for appellee.

CAMPBELL, J. This case was made to turn in the court below on the fact that there had not been a return, or offer to return, to Huckabay of the note he says he gave for the mule. It is very doubtful whether a note was given, and, if it was, it was the note of Huckabay, which would be rendered valueless by the rescission of the contract of sale out of which it arose, and the failure to return this worthless paper was not an answer to the claim of the right to rescind the sale. This erroneous view caused erroneous action on the instructions on both sides, and, without further specification of error, we reverse the judgment, and remand the cause for a new trial.

WESTERN UNION TEL. CO. v. DOZIER.

(Supreme Court of Mississippi. Feb. 24, 1890.)

TELEGRAPH COMPANIES—NEGLIGENCE.

1. An action will not lie against a telegraph company, either under the statute or at common law, for failure to transmit a verbal message, orally delivered to the operator, in the absence of evidence of a custom to that effect.

2. In an action by a physician against a telegraph company for failure to transmit a message to him, a verdict in plaintiff's favor will be set aside, where it appears that no message for trans-

mission to plaintiff was charged or paid for, but that, after two ineffectual attempts to reach other physicians, the operator voluntarily inquired for plaintiff, and was informed that he was not in town.

Appeal from circuit court, Perry county; S. H. TERRAL, Judge.

The son of one Bilbo seriously wounded himself, Bilbo, and gave two friends, Stewart and Flannagan, 50 cents, with directions to telegraph from Poplarville to Hattiesburg for Dr. Dozier. Stewart and Flannagan talked the matter over, and, instead of following directions, first telegraphed to two other physicians at different places,—paying for one of the telegrams with the money sent by Bilbo, leaving the other to be paid afterwards by Bilbo. Finally they concluded to telegraph for Dr. Dozier. They testified that they told the operator so to do; but the operator testifies that no message was given him to send to Dr. Dozier, but that he himself asked the operator at Hattiesburg if Dr. Dozier was in town, and received a reply in the negative; and the operator also, of his own accord, telegraphed to Ellisville, to see if he could get a physician he knew there, and was unsuccessful. Bilbo came into town, and paid for the telegram which had been left unpaid, making two telegrams only for which he paid,—one to a Dr. Walker, and the other to a Dr. Watkins. He paid nothing for any telegram to Dr. Dozier, nor was anything demanded of him for any such telegram. It seems that Dr. Dozier was in Hattiesburg, though it was unknown to the operator there when the operator asked him from Poplarville. Dr. Dozier brought suit against the telegraph company to recover damages for failure to deliver a message, and recovered judgment for \$110, the amount he would have charged if he had gone to attend on Bilbo's son, from which the company appealed.

W. P. & J. B. Harris, for appellant. Calhoon & Green, for appellee.

CAMPBELL, J. The verdict is contrary to the law and evidence, and should have been set aside. There is no warrant in the evidence, in any view of the law, for a recovery of any actual damage, for none is shown; it not appearing that Dr. Dozier sustained any by reason of the non-receipt of a message requesting his services. The truth appears to be that no message was sent to Dr. Dozier, but that, an ineffectual effort having been made to get Dr. Walker at Nicholson, and Dr. Watkins at Hattiesburg, the operator at Poplarville inquired of the operator at Hattiesburg if Dr. Dozier was in the town, and was informed, in reply, that he had removed to Gulf Port, and, this being supposed to be true, no message was sent to Dr. Dozier. It is certain that no message to him was charged for or paid for, and therefore nothing was received by the company on this account. It appears that the operator, Mr. Atkins, was in full sympathy with those trying to procure a physician; and at his own instance, and free of cost to them, wired to Ellisville for the purpose of getting a physician known to him, who lived there; and this suggests the improb-

ability that he should have failed to transmit any message delivered to him to be sent to Dr. Dozier.

The only messages actually written for transmission were to Dr. Walker at Nicholson, and to Dr. Watkins at Hattiesburg, and they were transmitted. If it be true that Stewart and Flannagan, or either, told the operator to wire Dr. Dozier, the question is whether that was the delivery of a message, within the meaning of the law, for the non-transmission and delivery of which liability would be incurred by the company. In the absence of satisfactory evidence of a known course of business by the telegraph company to receive verbal messages orally delivered to operators for transmission, we are not willing to sanction the proposition that failure to transmit such a message is a ground for recovery against the company, either by statute or common law. It is common knowledge that messages are required to be written, and upon the blanks of the company, and it would be hazardous to pursue any other course. The very expression, as to a message delivered to be sent, carries with it the idea of a written or printed message; and it would seem that for one to talk to the operator, as to the message he desired to send, could not, in view of the course of business of telegraph companies, impose any liability on such company.

Reversed and remanded.

GREEN V. STATE.

(*Supreme Court of Mississippi*. March 3, 1890.)

ATTEMPT TO COMMIT RAPE—EVIDENCE.

On a trial for an attempt to commit a rape, the prosecuting witness testified that, while riding horseback, she stopped her horse, intending to ask defendant's assistance in holding it while a train was passing; that, after the train had passed, defendant caught hold of her riding skirt; and that she struck her horse, and in this way got loose from defendant. *Held*, that a verdict of guilty would be set aside, as these facts do not give rise to a reasonable inference that defendant intended to commit a rape.

Appeal from circuit court, Copiah county; J. B. CHRISMAN, Judge.

Ben Green was indicted for attempt to commit rape. On the trial the following facts were testified to by Mrs. B., upon whom the alleged attempt was made: That she was riding horseback along the public road; had arrived at a point where said public road crosses the railroad, and, knowing that a train would soon be along, she stopped and turned her horse's head from the railroad, expecting to ask the assistance of a negro man (the defendant) whom she saw near; that the train did pass, and she proceeded on her way, when the negro ran after her, and caught hold of her riding skirt, when she "hollered," and struck her horse, which had become frightened at the approach of the negro so rapidly, and in this way got loose from him; and that the negro ran towards the "poor-house," while she called for assistance, had him arrested, etc. She also positively identified Ben Green as the negro who so acted. There was a verdict and judgment of guilty, from which Green appealed.

Ramsey & Willing, for appellant.

COOPER, J. The evidence is insufficient to support the verdict of the jury. We may conjecture the purpose of the defendant to have been to commit a rape, but, on the facts disclosed, it is conjecture only, and not an inference reasonably drawn from the evidence. The probabilities may be greater that a rape was intended, rather than robbery or murder; but mere probability of guilt of a particular crime, and that, too, springing more from instinct than from proved facts, cannot support a verdict of guilty. There is great danger of improper convictions in cases of this character, and, while the courts should not for that reason invade the province of the jury, the danger admonishes us of the necessity of standing firmly upon the right and duty of proper supervision and control over them.

The judgment is reversed.

DEES V. STATE.

(*Supreme Court of Mississippi*. March 3, 1890.)

ROAD LABOR—WHO LIABLE TO.

One appointed overseer of a public road by the board of supervisors, in Mississippi, is not subject to be called to work as a hand on another road.

Appeal from circuit court, Jackson county; S. H. TERRAL, Judge.

M. A. Dees had been appointed overseer of a public road, and was afterwards summoned to work on another road as a hand, but failed to obey. An affidavit was made against him as a delinquent road hand, he was tried and convicted before a justice of the peace, and appealed to the circuit court, where he was again convicted and sentenced, from which he appeals.

M. A. Dees, pro se.

COOPER, J. The appellant, having been appointed overseer of one public road in the county by the board of supervisors for the year 1889, was not subject to be called upon as a hand to work another. The verdict is clearly wrong, and should have been set aside by the court.

Judgment reversed.

DAY *et al.* V. STATE.

(*Supreme Court of Mississippi*. March 3, 1890.)

LARCENY—EVIDENCE.

A conviction of petit larceny, resting on the unsupported testimony of one witness, which is contradicted in several material matters, which contradiction cannot reasonably be attributed to mistake on part of such witness, cannot be sustained.

Appeal from circuit court, Lincoln county; J. B. CHRISMAN, Judge.

Henry Day and two others appeal from a conviction of petit larceny in stealing hogs.

A. C. McNair, for appellants. *T. M. Miller*, Atty. Gen., for the State.

CAMPBELL, J. We are reluctant to disturb a verdict approved by the circuit judge, but our conviction is so strong in this case that the appellants were wrongly

found guilty that we do not hesitate to send the case back for another trial. The conviction rests upon the unsupported and suspicious testimony of Cephas Mitchell, who was contradicted in several material matters, which contradiction cannot be accounted for, reasonably, on the assumption of mistake on his part. Mr. Allgood swore that his hogs were stolen on the 11th of January. Cephas Mitchell swore that he made a memorandum of the date when defendants killed the hogs in the stable at the Reading place, and it was 11th January; and it is proved that the defendants were not at the Reading place, but three miles off, at Cassedy's place, until the 17th January. Allgood says three of his hogs were black, and two of them black and white spotted. Although Mitchell made a memorandum of the date, and, it would seem, should have made a memorandum of the color and marks of the hogs, he testified that the five hogs killed by defendant were black, and he misplaced the ear-marks, testifying to a different marking from that proved by the owner. If this was the only error of the witness Mitchell, it might be ascribed to mistake; but his mistakes are too many and too significant to have any such charitable view taken. He seems to us utterly unworthy of belief, and, although he was believed by a Lincoln county jury, we are unwilling for the appellants to endure the penalty until a further investigation shall be had of this case. There may have been before the jury other facts than the record contains, but, if not, one should not be adjudged guilty in such a case.

Reversed and remanded.

DOBSON V. STATE.

(*Supreme Court of Mississippi*. March 3, 1890.)

LIVE STOCK—ALTERING MARKS.

On trial for altering the marks of stock, where the only evidence is that a lamb was found with its mark changed from that of its owner to that of defendant, a conviction should be set aside.

Appeal from circuit court, Harrison county; S. H. TERRAL, Judge.

Robert Dobson was indicted for altering the marks of stock. Mrs. Davis owned some sheep, and her husband found a lamb with its mark changed from that of Mrs. Davis to that of Dobson, on which testimony Dobson was convicted and sentenced. He appeals.

E. J. Bowers, for appellant. T. M. Miller, Atty. Gen., for the State.

CAMPBELL, J. The verdict should have been promptly set aside. Indeed, the jury might properly have been directed by the court to give a verdict of not guilty. There is no evidence tending to show the guilt of the defendant, and no such a verdict should be allowed to stand. An important factor, influential in determining this court not to disturb verdicts, where there is evidence to sustain them, is that the circuit judge sanctions the verdict by refusing to set it aside; and the presiding judge, while using due caution not to set his opinion against that of the 12 men in the jury-box, in case of disputed facts and

discordant witnesses, should not hesitate to set aside any verdict which is not supported by evidence.

Reversed and remanded.

STATE V. DORSEY.

(*Supreme Court of Louisiana*. March 3, 1890.
42 La. Ann.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

An application for a new trial, based on newly-discovered evidence, is properly overruled, on the assignment of the trial judge that the witnesses relied upon were summoned by the accused to attend the trial, and were personally present during the trial, and were not interrogated by him.

(*Syllabus by the Court*.)

James Ducoté and Cullom & Cappel, for appellant. Walter H. Rogers, Atty. Gen., for the State.

WATKINS, J. Appeal from the twelfth judicial district, parish of Avoyelles. The defendant appeals from a judgment convicting him of larceny, and sentencing him to two years at hard labor, relying on a motion for new trial and one in arrest of judgment. Both appear to have been taken *pro forma*, and without merit. The motion for a new trial is grounded on an alleged discovery of additional and important testimony, by which his ownership of the property charged to have been stolen could be proved. The judge assigns, in his reasons for overruling the motion, that the witnesses, by whom this new evidence is expected to be obtained, were duly summoned by the defendant, and were in attendance upon the court during the progress of the trial, and were not interrogated. It passes comprehension how his counsel could have failed to ascertain that they possessed such information on this most vital question in the case; and it is even more incomprehensible to us that we should be expected to accept the bare statement of the accused as to his exercise of due diligence to obtain this testimony, under these circumstances. The grounds assigned for the arrest of judgment are: (1) That the verdict of the jury was contrary to law and evidence; and (2) that the judge's refusal to grant a new trial was contrary to law. This motion is frivolous. Judgment affirmed.

SUCCESSION OF DUHE.

(*Supreme Court of Louisiana*. Feb. 10, 1890,
42 La. Ann.)

RES ADJUDICATA—ADMINISTRATORS—RESTATEMENT OF ACCOUNT.

1. A matter tendered as an issue on an executrix's final account, regularly opposed by a creditor of the succession, evidence adduced thereon *pro et con*, and finally and contradictorily determined by a definitive judgment on appeal, cannot be thereafter litigated between the same parties.

2. Such a decree constitutes *res adjudicata*.

3. When, upon the final trial of such an account in this court on appeal, the executrix is adjudged and decreed to restate her account "according to law, and the views therein expressed," it is not competent for the executrix to raise new issues, but she is bound to comply with the decree, and restate her account accordingly. The original

controversy is at an end, and old issues cannot be again agitated and raised on her restated account. (*Syllabus by the Court.*)

Jules Reine and Charles Longue, for appellants. L. De Poorter, for appellee.

WATKINS, J. Appeal from the twenty-sixth judicial district, parish of St. John the Baptist. This appeal is a supplement of a previous one in the same succession, (41 La. Ann. 209, 6 South. Rep. 502,) and brings up for review the administratrix's restated account and opposition of Moll, a special mortgage creditor.

The account presented allows in favor of the minors of Duhe's first marriage, in capital and interest, the sum of \$3,604.88, and to its payment applies the proceeds of the adjudication of the community real estate to the deceased, as surviving partner of the first community, by preference; and, by this means, there is a balance of \$195.48 remaining due and unpaid said minors, and nothing applicable to the payment of opponent's mortgage, which is first in rank as to property of the second community. Without attending to details, we may state that this item of credit is the chief ground of opponent's complaint. If his opposition should not prevail, and the administratrix's account be homologated, he would lose his entire debt, as the succession is insolvent. It is sufficient to say that the allowance *vel non* of the minors' claim, as now presented, is precisely the same question that was discussed and determined by us when the original account was examined. 41 La. Ann. 209, 6 South. Rep. 502.

The grounds of opposition are: (1) That the account has not been recast and restated conformably to the opinion and decree of this court; and (2) that our previous decree finally determined all the litigated issues in said succession, and issues thus terminated cannot be litigated anew on a restatement of an account in pursuance of said decree. The latter is in purport a plea of *res adjudicata*. In pursuance of the same theory, evidently, the opponent's counsel has filed what he denominates "an exception and motion to dismiss appeal," but which, in effect, is an answer to the appeal of the executrix, and a reiteration of the former plea, though clothed with slightly different phraseology.

On the trial of the account, counsel for the executrix offered proof that the minors' claim as to the amount of the item mentioned, ante, exceeded that allowed in our previous judgment and decree. To this offer of proof, opponent's counsel objected on the grounds stated in his opposition, and, his objections being sustained, and the proffered testimony rejected, counsel for the administratrix reserved a bill of exceptions. The ruling of the court resulted, necessarily, in the rejection of the tendered account, and a judgment sustaining the creditors' opposition. Was the judge *a quo* right in thus ruling and deciding? Reference to our former opinion will show that when the property of the first community was adjudicated to Duhe the item of merchandise valued at \$2,000

was not included in the *procès-verbal* of adjudication; but it does appear on his account of tutorship, subsequently filed, and homologated by a chambers and *ex parte* decree. When his surviving wife, as administratrix, filed her final account,—the one last opposed,—she placed the minors' claim at \$2,818, with interest, as stated in the aforesaid tutor's account, with rank of legal mortgage, and to be paid in full from the proceeds of said adjudication, in preference to opponent's special mortgage. The present opponent opposed that account, and specially averred that there was no such stock of merchandise on hand in 1870, at the death of the decedent's first wife, and mother of the minors, and, in the alternative, alleged that, "if there was, there is in the record no sufficient proof of its existence." In our opinion, at page 215, 41 La. Ann., and page 504, 6 South. Rep., we say: "On the trial of the account and opposition, there was no other proof offered of the existence and the value of the stock of goods and merchandise, placed at \$2,000, than the inventory of the first community," and "to the introduction of same, opponent urged several objections," enumerating them. On considering the question, we said: The "judgment and inventory do not constitute such proof of this item of \$2,000 as is necessary to establish it as against a special mortgage creditor of the tutor, individually. In the adjudication to the surviving husband of their mother's half interest in the common property, there is no mention made of it; and opponent was not cited and made a party to the final account, which is relied upon as establishing it. Opponent put administratrix fully on her guard by specially denying and challenging the validity of that item. * * * This item was properly rejected by the judge *a quo*, and the debt of the minors reduced to \$1,818; but it was correctly held that it was secured by the ranking mortgage. This reduction will enable opponent to realize the amount of his debt, with interest and 10 per cent. attorney's fees, and there will be a surplus remaining." On this hypothesis, various amendments were suggested and enumerated, and among them the following, viz.: "(8) The amount due the minors must be reduced from \$2,818 to \$1,818," etc.

We have no doubt of the correctness of the conclusion of the district judge. Our former decree forms *res judicata* as to the claims of the minors, and the proffered evidence was properly refused.

Judgment affirmed.

FENNER, J., absent.

Rehearing refused.

STATE V. BROWNSON.

(*Supreme Court of Louisiana. March 3, 1890.*
42 La. Ann.)

CRIMINAL LAW—EVIDENCE AT FORMER TRIAL.

1. In a criminal prosecution, evidence to show what the accused, testifying in his own behalf, had stated on a previous trial on the same charge, in which the jury had failed to agree, is irrelevant and inadmissible, unless it be to prove a

confession or admission of guilt, if it appears that the defendant did not testify at all on the second trial, at which he was convicted.

2. It cannot be allowed to impeach a witness before he has been heard, and under Act 29 of 1886, which allows an accused party to testify, his testimony must be weighed and considered according to the general rules of evidence.

(*Syllabus by the Court.*)

Appeal from district court, parish of Natchitoches; PIERSON, Judge.

Jack & Dismukes, for appellant. *Walter H. Rogers* and *D. C. Scarborough*, for the State.

POCHE, J. Under an indictment for rape, the defendant was convicted, without capital punishment. His appeal brings up for discussion two bills of exceptions which are both taken to the rulings of the trial judge in admitting testimony over his objections. It appears that a previous trial of the accused, on the same charge, had resulted in a mistrial; and that on the first trial the defendant had offered in evidence, with a view of showing intimacy between himself and the prosecutrix, a certain written order in her favor, executed by himself, addressed to a country store-keeper, and calling for the delivery of certain merchandise to the prosecutrix on his account. In connection therewith the accused had testified, with the view of showing that the order had been drawn by himself and delivered to the prosecutrix, and that he had subsequently obtained possession of the same from the store-keeper on whom it had been drawn. Now, on the second trial, resulting in this appeal, while the district attorney was introducing his testimony in chief, and, of course, before the accused had offered the order or any other evidence, and, above all, before he had offered to testify, the state was allowed, over the objection of his counsel, to prove by a witness who was present at the first trial the statements which the accused had made in connection with the order in question. It also appears that the accused did not testify at all on the second trial, and it does not appear that he even offered the order in evidence during that trial. The district judge rests his ruling on the ground that the testimony was relevant and competent, in connection with other testimony, and circumstances, to show that the order had no real or genuine existence, but that it had been manufactured by the prisoner in view and for the purposes of his trial.

We cannot agree with the trial judge. Had the order been offered with the avowed purpose of seeking any advantage therefrom, and had the accused testified on the point, as he had done on the first trial, it would beyond a doubt have been competent for the state to have attempted to rebut the effect of both the order and the testimony of the prisoner. If the latter had testified on the second trial, it would have been competent to contradict him or weaken his testimony by proving his statements made either on the previous trial, or at any other time and place, on the same subject-matter. Conceding, even, on his previous trial, the accused had had recourse to unfair means, or to false witnesses, to

meet the evidence offered against him, we fail to discover any law or authority which would justify the introduction of testimony to that effect, to prove his guilt of the only crime with which he was charged. And, while we recognize the right of the state to introduce in evidence any statements previously made by the accused under the indictment against him, we cannot recognize the relevancy of testimony covering statements which he had previously made in his own favor, for the purpose of showing by other testimony that his statements were untrue and false. As the accused had not yet testified, and as in such matters his testimony, when given, must "be weighed and considered according to the general rules of evidence," (Act 29, 1886,) the state could not be allowed to impeach his testimony before he had been heard, (*State v. Chevallier*, 38 La. Ann. 81.) We therefore conclude that there is error in the ruling complained of, and that the accused must have been injured thereby. We find no error in the ruling complained of in the other bill of exception contained in the record, but we deem it unnecessary to elaborate our views on the subject. It is therefore ordered that the sentence appealed from be annulled and reversed, that the verdict of the jury be quashed and set aside, and that the case be remanded to the district court for further proceedings according to law, and according to the views herein expressed.

STATE v. HEUCHHERT.

(*Supreme Court of Louisiana.* March 3, 1890.
42 La. Ann.)

CRIMINAL LAW—APPEAL—VIOLATION OF MUNICIPAL ORDINANCE.

1. An appellant from a recorder's sentence, condemning him to pay a fine, and, in default, to be imprisoned for a number of days, for the violation of a municipal ordinance, cannot be viewed as an accused in a criminal prosecution, by indictment or information, before a court of general criminal jurisdiction, for the commission of a crime punishable with death or hard labor, or a fine exceeding \$300, and is bound, as a condition precedent to the filing of the transcript of appeal, to deposit with the clerk the amount provided by the rule.

2. Act 16 of 1884, and Act 19 of 1886, invoked, apply to cases of prosecutions for crime, and not proceedings for violation of city ordinances.

(*Syllabus by the Court.*)

On rule against clerk.

Branch K. Miller, for defendant.

BERMUDEZ, C. J. The defendant complains that the clerk of this court refuses to file the transcript herein, unless a deposit in money, to cover the costs, be previously made. He insists, under the provisions of Act No. 16 of 1884, amending section 1042 of the Revised Statutes, no such prerequisite is allowed to be asked. The answer of the clerk, to the rule on him, denies that this case is a criminal case, and avers that it is a civil case, in which the deposit should be made. The mover states that he was prosecuted, convicted, and sentenced by a recorder in the city of New Orleans, for violating a city ordinance, and fined \$25, or 20 days' imprisonment; that the constitutionality and legality of said city ordi-

nance was specially pleaded by the defendant previous to trial, and overruled; and that the defendant appealed to this court, the appeal being made returnable on Monday, February 3, 1890, etc.

The act relied on by the mover is substantially to the effect that all expenses incurred by the prosecution of persons accused or convicted of crimes shall be paid by the respective parishes in which the offense charged may have been committed, or by the city of New Orleans, as the case may be, etc. Under Articles 5 and 7 of the constitution, criminal prosecutions must be by indictment or information, and in all such the accused enjoys the right to a trial by jury. Under article 130, the criminal district court for the parish of Orleans has exclusive general criminal jurisdiction. By article 81, the supreme court is vested with appellate jurisdiction over criminal cases, whenever the punishment may be death, imprisonment at hard labor, or where a fine exceeding \$300 is actually imposed. Under Act 30 of 1878, p. 56, all appeals in criminal cases must be made returnable to this court within 10 days.

A crime is an act committed or omitted, in violation of a public law either forbidding or commanding it,—a breach or violation of some public right or duty due to a whole community in its aggregate capacity. 4 Bl. Comm. 5. The distinction between crimes against the state and mere violations of municipal ordinances, and the bearing of constitutional provisions touching the respective modes or methods for the prosecution and punishment of offenders against the same, is clearly recognized by elementary writers, and confirmed by frequent adjudications. *Mayor v. Meuer*, 35 La. Ann. 1193, and authorities cited. It is therefore apparent that the cases provided for by the statute invoked are those in which a person has been accused or convicted of a crime. Under the constitutional provisions, this could only be on a prosecution by indictment or information, with a jury trial, before a court of general criminal jurisdiction, the punishment being death, hard labor, or the actual infliction of a fine. *State v. Wikoff*, 28 La. Ann. 654.

From the face of the rule, and from the record to which it refers, it appears that the proceeding was not on a prosecution by indictment or information, for the commission of any crime, before a court of general criminal jurisdiction, with jury trial, punishable by death, hard labor, or a fine, appealable to this court within 10 days. It is a proceeding nominally in the name of the state, but in reality in that of the city of New Orleans, for the violation of a municipal ordinance, before a mere police magistrate, specially vested with jurisdiction to enforce such ordinances, (article 92, p. 136, City Charter 1882; Act No. 20, § 49, of 1882;) the punishment for which is neither death, hard labor, nor a fine exceeding \$300, and the judgment in which is not appealable and returnable to this court within 10 days. Act 19 of 1886, p. 30, to which mover refers, provides that no costs shall be demanded from a party accused in any criminal prosecution in the state, and that such party shall not be required to pay any costs until he shall have been convicted

and condemned to pay costs. It provides an immunity in a criminal prosecution, and, as we have found that this case is not one involving a prosecution for the commission of a crime, it finds no application on this occasion; so that it is manifest, even if the statute invoked did in terms exempt an appellant from making in this court a deposit of money, this case, not being criminal in character, nor one in which a person is accused or convicted of a crime, does not fall within its purview, and the clerk had a right to require the deposit demanded. It is therefore ordered that the rule be discharged, with costs.

POCHE, J., recused.

STATE V. MCCOY.

(*Supreme Court of Louisiana*. March 3, 1890.
42 La. Ann.)

LARCENY—VENUE.

1. An indictment for larceny must be tried in the parish in which the offense was, either actually or in contemplation of law, committed.
2. An offender who has stolen property in one parish and carried it to another may be tried in either parish. The continuance of the asportation is a new caption.
3. Quashing an indictment found in the parish to which the property was carried, on the ground of want of jurisdiction, is error.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; *Lewis*, Judge.

E. P. Veazie and *L. Duple*, for appellant.
Walter H. Rogers, Atty. Gen., for the State.

BERMUDEZ, C. J. The state appealed from a judgment quashing the indictment for larceny herein, and discharging the accused; the court considering that it had no jurisdiction to try the case. The motion to quash charged that, if true it be that the larceny was committed in one parish, and the property stolen taken to another, contiguous one, the court of the latter parish had no jurisdiction, and that the court of the former was the only one having authority in the premises.

The law is clear on the subject. "When the larceny has been committed in one county, *animo fraudis*, the offender is, in the eye of the law, guilty of larceny in every county into which the goods may have been carried. The rule applies as well to property which is made the subject of larceny by statute as to the property which is the subject of larceny by the common law. When there is one continuing transaction, though there may be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first or immediate act. "One aiding or abetting in a larceny in one county, and afterward concerned in the possession and disposal of the stolen property in another county, though the goods were removed to the latter county without his agency, may be convicted of larceny in the latter county." *Whart. Crim. Law*, (9th Ed.) § 928 et seq. An indictment for larceny must be tried in the county in which the offense was, either act-

ually or in contemplation of law, committed; but, where goods stolen in one county are carried by the offender into another or others, he may be indicted in any of them, for a continuance of the asportation is a new caption. *Rosc. Crim. Ev.* 644.

Besides, section 988 of the Revised Statutes distinctly provides that, whenever any crime or misdemeanor shall be begun in one parish, and completed in another, it may be dealt with, inquired of, tried, determined, and punished in either of the parishes in the same manner as if it had been actually and wholly committed therein. Quashing an indictment found in the parish to which the stolen property was carried, on the ground of want of jurisdiction, is error.

It is therefore ordered and decreed that the judgment of the lower court be reversed; that the motion to quash be overruled; that the indictment be reinstated; and that the case be remanded to the lower court for further proceedings according to law.

87-Ala 507

CUTCLIFF v. McANNALLY.

(Supreme Court of Alabama. Jan. 31, 1890.)

MECHANICS' LIENS—HUSBAND AND WIFE—CONTRACTS—PERFORMANCE—ACCIDENT.

1. The mechanic's lien law of Alabama (Code 1886, §§ 3018-3048) creates (section 3018) a lien for work done or materials furnished in constructing or repairing any building on land by virtue of "any contract with the owner or proprietor thereof," and declares (section 3046) that "every person, including married women, * * * for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor.'" *Held*, that an oral contract with a married woman, without the assent of the husband, is sufficient to create a lien for work done or materials furnished, notwithstanding Code Ala. 1886, § 2346, which limits the wife's power to make contracts to those in writing, "with the assent of the husband expressed in writing." *Wardsworth v. Hodge*, ante, 194, followed.

2. A building contract provided for the construction of a house, and the furnishing of the material, for a stipulated compensation, payable in several specific installments according to the progress of the work; the last, including a sum retained by the owner as security for faithful performance, being payable on the completion of the house. While in the process of construction, the house was willfully burned by the owner's agent, without the contractor's fault. *Held*, that the owner's obligation to repay the sum retained as security accrued on the destruction of the house, within the meaning of Code Ala. 1876, § 3444, which requires every contractor who seeks to enforce a mechanic's lien to file his demand within six months after the indebtedness has accrued.

3. Where there is no provision in the contract against accident or inevitable necessity, the contractor cannot recover a sum retained by the owner as security for the faithful completion of the work, though the house, when nearly completed, was destroyed by fire without the contractor's fault.

Appeal from circuit court, Jefferson county: J. B. HEAD, Judge.

Action by William Cutcliff against Catherine McAnnally to enforce a mechanic's lien on a house partially built by plaintiff, but which, before completion, had been destroyed by fire. The court directed a verdict for defendant, and plaintiff appeals.

Code Ala. 1886, § 2346, provides: "The wife has full legal capacity to contract in writing as if she were sole with the assent

or concurrence of the husband expressed in writing." Section 3018 creates a lien in favor of every mechanic or other person for work or labor done or material furnished in constructing or repairing any building on land "under or by virtue of any contract with the owner or proprietor thereof, or his agent," etc. Section 3046 provides: "Every person, including married women and *cestuis que trustent*, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor,' as used in this chapter."

R. L. Thornton, for appellant. *Brickell, Harris & Eyster, F. S. Ferguson*, and *W. R. Houghton*, for appellee.

SOMERVILLE, J. 1. The first question raised on the record in this case is whether a married woman can create a mechanic's or material-man's lien on her separate estate by her verbal contract, and without the written assent of her husband; or whether, on the contrary, her legal capacity to contract for such a lien is limited by section 2346 of the present Code, which restricts her general power to contract as a *feme sole* to an instrument in writing, with the superadded assent of her husband, also expressed in writing. The case of *Wardsworth v. Hodge*, ante, 194, (decided at the present term,) settles this question against the contention of the appellee. We there held that a married woman could charge her separate estate under the provisions of the mechanic's lien law, as embraced in sections 3018-3048, Code 1886, by her oral contract for labor or improvements, and without her husband's consent, written or otherwise. Our ruling was placed upon the broad basis of the statute itself, which provides for the creation of liens of this nature by an oral contract, and expressly authorizes such a contract to be made by a married woman. Code 1886, § 3046.

2. A second point of inquiry is whether the requisite written statement of the plaintiff's demand was filed in the office of the judge of probate within the time prescribed by statute. If not, the lien is admitted to be barred and lost. The contract in this case was made under the Code of 1876, and must therefore be governed by its provisions. The statute then required every original contractor to file his demand within 6 months after the indebtedness had accrued, and actions to enforce the lien were required to be commenced within 90 days after filing such demand. Code 1876, §§ 3444, 3454. The present Code contains the same provision as to filing, limiting the time to six months after accrual of the indebtedness, and declares, further, that, with certain exceptions, all liens arising under this law "shall be deemed lost unless suit for the enforcement thereof is commenced within six months after the maturity of the entire indebtedness secured thereby." Code 1886, §§ 3022, 3041. We are concerned here, however, only with the question of filing. Was the statement of the demand filed with the judge of probate within six months after the indebtedness accrued, within the meaning of the statute? In this connection, the word

"accrued" is evidently used in the sense of having come to maturity, so as to be due and payable. Or, in other words, it indicates the time when the work contracted for is completed, or the materials furnished,—one or both, as the case may be,—and the account for the same is past due. This is implied in the further description of such indebtedness, thus required to be filed, as "a just and true account of the demand due him." Code 1876, § 3444. Requiring suit to be instituted on such claim within 90 days after filing, moreover, implies that the demand must have been due and payable when filed.

It has accordingly been held, both under our own statute and the similar one in Missouri, that, where work is done and materials furnished under one continuous or running contract, the indebtedness created is said to accrue from the last item of the account, and the time of filing must be computed from this date. But if there be several distinct and independent contracts, separately made, for the different parts of a building,—as, for example, one for the brick-work, another for the wood-work, and a third for the painting,—each must be filed within the time of its own separate accrual. *Lane & Bodley Co. v. Jones*, 79 Ala. 156; *Livermore v. Wright*, 33 Mo. 31; *Rev. St. Mo. 1879, § 3172*; *Page v. Bettles*, 17 Mo. App. 366; 2 *Jones, Liens*, §§ 1432-1437; *Peck v. Bridwell*, 10 Mo. App. 524; *Henry v. Hinds*, 18 Mo. App. 497.

It is an uncontroverted fact in this case that the building in process of erection was never completed, but was destroyed by fire, when approaching completion, without the fault of the plaintiff, on September 12, 1888, having been willfully burned by the husband of the defendant, who was superintending the work as her agent. The sum sued for—something over \$200—was a percentage retained by the defendant, as usual in such contracts, as a security for the faithful completion of the work; and it was not due to plaintiff until the house was completed. On the 15th of October, 1887, the parties compromised the indebtedness; and, as a convenient mode of liquidating the same, the defendant executed her note to the plaintiff for \$200, payable in 60 days after date. The required statement of the demand was filed April 9, 1889.

The defendant contends that the entire demand became due on September 12, 1888, when the progress of the work was interrupted by the destruction of the house. If this be true, the filing of the statement on the 9th of April following was too late; the lapsed time which had intervened being more than the statutory limit of six months. The plaintiff, on the contrary, contends that the filing was in time, because the sum sued for would not have become due until the house was completed, and the house would not have been completed until about two months after the burning. The case, in this aspect, thus turns on the inquiry, when did this demand accrue, or become due and payable?

The plaintiff's contract, made in writing on June 6, 1887, was to build for the defendant a house, and furnish the materials, for a stipulated compensation of \$2,150, pay-

able in several specified installments, according to the progress of the work; the last, including the sum sued for, not being payable until the completion of the building. If the destruction of the house before completion excused the performance of the contract by plaintiff to build it, and gave him any right of action on a *quantum meruit* or *quantum valebant*, and such claim included the retained percentage here sued for, we are of the opinion such demand accrued at the time of the fire, and not afterwards. Whatever right of action the plaintiff had, he acquired it then,—not afterwards. The note given by the defendant was void as a contract by reason of her coverture; and, being made without her husband's written consent, it imposed on her no liability additional to that already existing. Code 1886, § 2346. It was no payment of the debt, and the offer is made in the complaint to deliver the paper up for cancellation, which is all that could be required. *Lane & Bodley Co. v. Jones*, 79 Ala. 156. The filing was therefore too late; and the claim, if it ever had any validity, was extinguished.

3. But there is another view of the case which would justify the general affirmative charge given by the court to find for the defendant. The contract of the plaintiff to construct the house on the defendant's premises was not excused by the destruction of the house by fire while in process of completion. This is upon the settled principle that when one, by his own voluntary contract, creates a lawful duty or charge on himself, he is bound to make it good, if he may, despite obstructions interposed by accident or inevitable necessity, because he might have provided against the difficulty by his contract. If the obligation is created by law, a different rule would prevail.

In *School-Dist. v. Dauchy*, 25 Conn. 530, where defendant was sued for non-performance of a contract to build a school-house for the plaintiffs, he was held liable in damages although performance was prevented by the accidental destruction of the house by lightning a few days before its completion. A like ruling was made in *Adams v. Nichols*, 19 Pick. 275, where one who had agreed to build a house on another's land was held not to be released from his obligation by the destruction of the house by fire after it had been nearly completed. In *Andrews v. Durant*, 11 N. Y. 35, it was held that a contract for the construction of a vessel did not pass title until the entire work was completed, and the vessel delivered, and that the fact that the work was inspected and approved by the purchaser as it proceeded, and installments of the agreed price were paid from time to time, made no difference. This case was approved in principle by this court in the recent deliverance of *Insurance Co. v. Insurance Co.*, 81 Ala. 320; and the rule was applied to a contract for the construction of a house on the land of another, the performance of which was prevented by the accidental destruction of the house by fire before completion. Of course there may be cases where a contract to build is not entire, and the stipulations of the promisor to pay at specified dates, as

the work progresses, are absolute, and not dependent on the completion of the building; and, in such cases, the *pro rata* value of the materials furnished and the work may be recovered. *Partridge v. Forsyth*, 29 Ala. 200; *Drake v. Goree*, 22 Ala. 409.

The present case differs entirely from another class, where one agrees to sell and convey a house and lot, and before execution of the deed the house is destroyed by accidental fire. In such event, there is a failure of consideration, and the vendor cannot recover or retain any part of the purchase money. *Wells v. Calnan*, 107 Mass. 514. So, where a contract is made for the sale and delivery of specific articles of personal property, the accidental destruction of the property before delivery, without fault of the vendor, excuses performance, and discharges the contract. *Dexter v. Norton*, 47 N. Y. 62. See, also, *The Tornado*, 108 U. S. 342, 351, 2 Sup. Ct. Rep. 746. If, then, the plaintiff was not entitled to recover in this case until full performance of his contract, the destruction of the building by fire not discharging or excusing him, he would have been liable in damages to the defendant for non-performance. The sum sued for was presumptively retained for indemnity for these damages, and could not be recovered back until the full performance by the plaintiff of his obligation to complete the building, which still rested on him, and which he has failed to perform.

In any aspect of the case, the court did not err in the charge given, and the judgment must be affirmed.

JAFFREY et al. v. McGOUGH.

(*Supreme Court of Alabama*. Jan. 8, 1890.)

HOMESTEAD—SELECTION.

Under Code Ala. § 2534, providing that, in homestead exemption contests, the commissioners shall make allotment by metes and bounds, having consideration of the debtor's selection, and the quality and quantity of the real estate, from the land most contiguous to the dwelling, and including the dwelling and appurtenances, the debtor cannot select the land in an irregular and arbitrary manner, and without reference to contiguity, or the former use to which it was put.

Appeal from chancery court, Russell county; JOHN A. FOSTER, Judge.

Bill by E. S. Jaffrey, etc., and others against John McGough, to set aside and have vacated certain deeds of conveyance made by John McGough, and to have the lands therein sought to be conveyed condemned to the payment of their demands against him. The chancellor granted the relief sought in part, and ordered a reference made to the register to state the accounts, etc. On the reference McGough sought to have allotted to him his constitutional amount of real property—160 acres—as a homestead, and exempted from levy and sale. In the selection of his homestead the appellee did not select the lands immediately contiguous to his dwelling, but selected the amount in a very zigzag manner, having no regularity in the selection, and making a very remarkable plat of land. The complainants contested this attempted selection, but the register allowed it. Upon

the report of the register, the contest was renewed before the chancellor, who refused to grant the contest, and to set aside the selection, but confirmed the report of the register. From this decree, confirming the report of the register, the complainants appeal. Code Ala. 1886, § 2534, provides that, in contests of homestead exemptions, the sheriff shall summon three disinterested householders or freeholders of the county in which the homestead is situated, who "shall, if practicable, set off and allot, by metes and bounds, the homestead exempt to the defendant from levy and sale under the process, having regard both to the quality and value of the real estate, and to the selection of the defendant, and taking land most contiguous to the dwelling, and including such dwelling and appurtenances." * * *

Norman & Son, for appellants.

SOMERVILLE, J. The only question raised for our consideration in this case is the correctness of the chancellor's decree in the allowance of the homestead, as selected by the appellees, in the arbitrary and irregular form in which the selection was made, as illustrated by the peculiar diagram accompanying the record. It is not denied that the appellee, as debtor, is entitled to a homestead of 160 acres, not to exceed a valuation of \$2,000. But it is contended that this selection cannot be made on arbitrary principles, unrestrained by any limit of discretion except the mere caprice of the debtor. We are satisfied this contention is correct, and that the debtor's power of selection must be confined within the bounds of reason and justice on the one hand, and cannot be permitted to be entirely arbitrary and capricious on the other.

Both the constitution and the statutes of this state contemplate that the homestead, exempted from execution or administration in any allotment of its area that may be made, or any declaration of claim made and filed under the statute, shall be "selected," as the case may be, by the debtor, widow, or other claimant. Const. 1875, art. 10, § 2; Code 1886, §§ 2507, 2515, 2534, 2551. This power of selection necessarily involves some latitude of discretion, but it is also, *ex vi termini*, limited by the nature of the thing to be selected, and by those broad principles of justice and reason which must control and regulate the exercise of every legal right. The thing authorized to be selected is "the homestead" of the resident owner, "with the improvements and appurtenances," of the area and value designated. Code, §§ 2507, 2543. Where the allotment is made by commissioners, after levy of execution and under an order of court, while regard is had to the selection of the defendant, it is provided that the commissioners must take the "land most contiguous to the dwelling, and including such dwelling and appurtenances." Code 1886, § 2534. Where the exemption is selected from administration by the widow or guardian of minor children, it is regulated by section 2551 of the present Code. But the limitation contained in the latter section, restraining the selection to "land most contiguous to the

dwelling," it may be observed has been stricken out by a recent legislative amendment, approved February 23, 1889. Acts 1888-89, pp. 86, 87. The selection in this case, being made by the debtor, is governed by section 2534; so that we need not consider what effect, if any, was accomplished by the amendment in question.

The appellee, then, was authorized to select the homestead owned by him, "with the improvements and appurtenances," embracing "the land most contiguous to the dwelling, and including such dwelling and appurtenances." This is nothing more, perhaps, than would be imported by the term "homestead" itself, which is defined to mean, "the place of the house; a mansion-house, with adjoining land." Worcester. Dict. And again: "A mansion-house; a person's dwelling; the place with the inclosure, or ground immediately contiguous; an abode; a home." Imperial Dict. As said in a well-considered case: "It is the home, the house, and the adjoining land, where the head of the family dwells; the home farm. It does not extend to other tenements, lots, and farms, that are not occupied personally by the owner and his family, houses in which they do not dwell, and farms on which they do not live." *Hoitt v. Webb*, 36 N. H. 158.

This exempted "homestead" was supposed by the framers of our constitution and laws to have some definite dimensions, capable of reasonable identification; varying and shaded, it may be, in its boundaries by the principle of selection. This is assumed in the prohibition directed against its alienation by a married man, "without the voluntary signature and assent of the wife," duly acknowledged and properly certified by the requisite officer. Code, § 2508. As to what part of the occupied premises shall be deemed to fall within this area, all purchasers from the husband are required to take notice. The same is true of purchasers at an execution sale, who buy a large tract, including the homestead. They are put on notice as to what part of the land the debtor may choose to select. What shall be the limits on the discretion of the debtor's power of selection?

We assert, first, that it must be reasonable, and not purely arbitrary and capricious, or fanciful. If the limits of the homestead are already fixed, whatever the shape or form of the tract, by actual occupancy and use, and the area is within the amount exempted, (160 acres,) there is no room for any exercise of discretion, much less of caprice. A homestead, if we could suppose such a case, fenced in the shape of an animal, a bird, a flower garden, or other fantastic shape, would not cease to be exempt from execution on this account, provided it be of lawful area and value, and the entire tract owned was in this particular form; although it is manifest that a selection in these quaint forms, made from a larger tract of land, would be unreasonable and capricious, and not allowable. If so, like the cloud described by Hamlet to Polonius, it might just as well be "in the shape of a camel," a "weasel," or a "whale," as in any other that might be dictated by the fancy of the person making the selection. So where a discon-

nected tract of land, not contiguous to the homestead, is *bona fide* and habitually used as a part of it, and the two tracts together do not exceed the area or value allowed, they may both be selected in the shape in which they already exist. This is on the principle that "the use made of the land may determine its character as part of a homestead or not, as well as its proximity to, or remoteness from, the residence or mansion house." Railroad Co. v. Winter, 44 Tex. 597, 611; David v. David, 56 Ala. 49; Thomp. Homest. & Ex. § 146. While the authorities are repugnant in the conclusions reached on this subject, some of them holding that the homestead tract must be in one solid compact body, and cannot consist of non-contiguous parcels, this court has adopted the rule that two tracts or lots may be so connected in their particular use and appropriation as to be exempted as one homestead, although they are not contiguous. This ruling, however, has not been extended further than to embrace two parcels, already used and appropriated to homestead purposes, where they together do not exceed the statutory area and valuation. *Dicus v. Hall*, 83 Ala. 159, 3 South. Rep. 239; Pryor v. Stone, 19 Tex. 371, 70 Amer. Dec. note, 350-353. In such cases there is no latitude for the unjust exercise of caprice, fancy, or arbitrary will power in making the selection. The selection, in a certain sense, is already made.

It is a fact not to be ignored that the quantity of land exempted for homestead purposes in this state, and not in a city, town, or village, is, and has always been, a multiple of 40 acres, which is an established legal subdivision of land, according to the survey of the general government. The present real estate exemption in Alabama is 160 acres; and it has been at different times 40, 80, 160, and 320 acres,—each equally divisible by 40. The same is generally true as to other states whose statutes we have had occasion to examine. Is there no significance in this fact? Is it merely accidental, or was it by design? Has it no just relation to the existing fact that all the government lands have been surveyed upon the basis of this unit of 40 acres? It is commonly known that the acts of congress, relating to the entry of public lands for homesteads, require such selections to be made according to the lines marked out by this survey. So in common business transactions, involving the sales of land in bodies of any considerable size, the quantity sold, and the description given, accord usually with the public survey. The wisdom of this habit is only surpassed by its convenience. It has the advantage of following lines already fixed by high authority, and known from the permanent land-marks, and the surveys of which are easily accessible. Its strong tendency, therefore, is to prevent contentions as to land titles, and to promote public and private peace by quelling litigation.

These considerations induce us to believe that it was intended that these lines of established governmental surveys should be regarded as far as practicable in regulating the selection of homesteads. Aldrich

v. Thurston, 71 Ill. 324. We adopt it, therefore, to govern as a general rule. Not that it will accomplish exact justice in all cases, for this is impossible, with any fixed rule of law. There never was, and never in the nature of things can be, such a rule that will not work injustice or bear with hardship in individual cases. The greatest good to the greatest number is the highest attainment of human wisdom in the enacting or construing of laws.

Cases will no doubt arise in the future, as in the past, where exceptions must be established to this general rule of selection. Time and experience will develop the wisdom and necessity of these exceptions. They need not be anticipated. For example, in one state, where only 40 acres of land was exempt for use as a homestead, the dwelling was on one 40, and the barns, out-houses, garden, and other appurtenances of the homestead were situated on the other adjoining 40's, so that the selection of the several adjacent 40's would embrace more than the law allowed. It was held that the government survey lines, in such a case, need not be followed, because impracticable. *Kent v. Agard*, 22 Wis. 150. Other instances of an analogous character may be readily imagined.

It may be urged that a selection by contiguous 40's would often operate unjustly in compelling the selection by a debtor, a widow, or a guardian of land of inferior quality and insignificant value, and thus prevent the equal distribution of the more valuable lands. This is no doubt true. But the main object in view is the dwelling-house; a place of shelter and residence for the debtor; a home for the widow and children. As observed in a recent case by the supreme court of Texas, answering such a suggestion: "The object of the constitution was not to protect the home with 200 acres of the most valuable land that might be in a large tract, but to protect the house and the farm, tan-yard, mill, gin, or whatever had been used in connection with the residence, to make a support for the family." *Winter's Case*, 44 Tex. 597, 611, *supra*. There is significance in the statutory description of the homestead as embracing "the improvements and appurtenances," and no latitude of discretion in making the requisite selection can exclude these indispensable elements.

As to the matter of contiguity, we may further observe that where the selection is confined to 40's, and is made from a larger tract, including no fractional subdivision less than such a unit of survey, so as to fall within the rule above declared, the selected homestead must embrace one solid and compact body of land, no one 40 separated from the remainder, except, perhaps, by an intervening highway or water-course. *Smyth, Homest. & Ex. § 133*; *Pryor v. Stone*, 70 Amer. Dec. 352, note. But it has been held, and in our opinion properly, that, where the 40's mutually touch only at a common corner or right angle, they cannot be regarded as "contiguous," within the proper meaning of the word. *Kresin v. Man*, 15 Minn. 116, (Gil. 87.) They must be adjacent, one to the other, for their full length, in order to constitute one compact body, as part of a lawful homestead.

Mr. Thompson, in his treatise on Homesteads and Exemptions, marks "a growing disposition on the part of the courts, in determining what is to be included in the homestead, to take into consideration the legal subdivisions of land, such as public surveys and recorded town plats;" and forcibly adds that "a person, in laying off his homestead, will not be permitted to gerrymander through different public surveys, making a tract irregular and unusual in shape, in order to bring within it land of a peculiar value, when to do so will work a fraud on those who have innocently purchased from him." *Thomp. Homest. & Ex. § 120*. The doctrine announced is equally sound and just in its general application to the selection of homesteads as to others than purchasers whose rights may be prejudiced. An inspection of the remarkable diagram of the homestead attempted to be selected in this case,—running, as its boundaries do, in a zigzag direction, and shifting towards every possible point of the compass, shapeless in its capricious irregularity, and without apparent design except to take unjust advantage,—a most casual inspection of it, we repeat, is the surest demonstration that such a thing cannot be tolerated by the law. It stamps itself as a freak of unbridled discretion, arbitrary and capricious in character, unreasonable in mode, and unjust in consequence. It wrongs the adjacent owners, whose lands are disfigured in shape and mutilated in their boundaries, and, if permitted, would establish a rule of law which would become the ready instrument of fraud and injustice. It would be a reproach to our jurisprudence to recognize any principle which would allow it to stand, or which would tie the hands of a court of conscience so as to prevent its being effectively remedied. We perceive no reason in this case why the selection of the debtor's homestead should not be made with reference to the lines established by the government survey.

The chancellor erred in refusing to set aside the selection as thus made. The case is not one where the question should be raised by exceptions to the report of the register under the rules of chancery practice. That officer only reported for the information of the chancellor what had been done by the debtor, McGough, and that act was a thing not countenanced by the law. It was not a matter upon which the register had any authority to make a ruling. The decree is reversed, and the cause remanded.

RUTLEDGE v. STATE.

(*Supreme Court of Alabama. Jan. 27, 1890.*)

MURDER—EVIDENCE—INSTRUCTIONS.

1. On a trial for murder, where the evidence for the prosecution shows an unprovoked, deliberate, and malicious killing, and defendant's testimony shows that he brought on the difficulty which resulted in the killing, and there is no evidence that defendant was in any real or apparent danger which he could not have avoided by retreating, evidence of former difficulties between deceased and defendant, and of deceased's ill feelings towards him, is inadmissible.

2. Where such evidence goes to the particular merits of the difficulties, as distinguished from

their collective force, it is properly excluded on that ground.

3. Instructions concerning self-defense which pretermitt all inquiry as to the duty and feasibility of retreat by defendant are properly refused.

4. Where the evidence shows that defendant was the aggressor, a charge on self-defense authorizing an acquittal without inquiry as to who provoked the difficulty, is properly refused.

5. A charge that if defendant did not provoke the difficulty, and deceased had previously made threats against his life which had been communicated to him, the jury might consider those threats in determining whether or not defendant acted in self-defense, is argumentative, and gives undue prominence to one portion of the evidence.

Appeal from circuit court, Madison county; H. C. SPEAKE, Judge.

James Rutledge was convicted of murder in the second degree, and sentenced to the penitentiary for 48 years. The killing occurred on the evening of February 20, 1889, as deceased, David Donagan, was about entering a barber shop, having his hand on the door-knob when the fatal shot was fired; and, having entered, and shut the door behind him, defendant fired two more shots through the window. Deceased died, from the effects of the wound, on the third day afterwards. It was shown that the parties had had a fight on the morning of the same day, at the store where defendant was employed, and two or more former difficulties, and had been on unfriendly terms for some time; that on the evening of the difficulty, and just before it, defendant had followed deceased down the street, and accosted him, just as he stretched out his hand to open the door of the barber shop, saying: "Dave, you hit me." According to the witnesses for the state, deceased made no reply, but turned towards the door, when defendant at once fired. But the defendant, testifying in his own behalf, said that the deceased replied, "No, and I intend to kill you now," at the same time drawing a knife. One witness testified that when the shot was fired the parties were not more than two feet apart; and another, that defendant was standing about the middle of the sidewalk, while the deceased had his hand on the door-knob, or stretched out towards it. The state adduced evidence of former threats made by defendant against deceased, and declarations of ill feeling; and defendant adduced evidence of recent threats made by deceased against him which had been communicated to him before the killing. In this connection, defendant reserved several exceptions to the rulings of the court on the admissibility of evidence, as follows: Defendant, while testifying as to his fight with the deceased on the morning of the day of the killing, was asked by his counsel to "state whether or not you were hurt in that difficulty by the deceased, and to what extent." The court sustained an objection to this question, and defendant excepted. Ben Scott, a witness for the defense, testified to the particulars of certain difficulties between the parties. The court sustained objection to this evidence relating to the particulars of the difficulties, and defendant excepted. Other exceptions were reserved, to the exclusion of evidence of uncommunicated threats by the deceased against defendant. Defendant asked the

following charges, among others, in writing, and duly excepted to the refusal of each: "(1) At the time the defendant fired at the deceased, if the jury believe that the circumstances were such as to create in his mind a reasonable belief of impending necessity, these circumstances are to be ascertained by the jury, and they may consider the condition of the party killing, as well as the party slain; and, if they find the circumstances such as to create in the mind of the accused a reasonable belief that this danger was imminent, then the law would say that he might strike in his own defense. (2) If the jury believe from the evidence that the defendant did not provoke the difficulty, and that the deceased had previously indicated hostility to the defendant by different acts, and had made threats against the life of the defendant which had been communicated to the defendant, then the jury can look to these threats of hostility in determining whether the defendant, when he fired the fatal shot, acted under the reasonable and honest conviction that it was necessary for him to fire in order to save his own life, or to prevent great bodily harm." Defendant appeals.

William Richardson, for appellant. *W. L. Martin*, Atty. Gen., for the State.

McClellan, J. We understand the rule in respect to the admission of evidence, on the part of a defendant on trial for murder, of previous threats by, or difficulties with, or ill feeling on the part of, the deceased to be this: that when any phase of the testimony would, if believed, present a case of self-defense, then the accused, using this aspect of the facts adduced as a predicate therefor, may go further, and strengthen it by showing that the deceased had threatened him, or entertained ill feeling towards him, or that there had been difficulties between them; and a like doctrine obtains with respect to evidence of the violent character of the person slain. Or, to state the principle in a more concrete form, the evidence adduced must have some tendency to establish the constituents of the right to destroy life that life may be preserved, which are that the accused was without fault in bringing on the fatal encounter; that he was in imminent peril, real or reasonably apparent, of loss of life or limb; and that he could not, as the matter presented itself to him, retreat or avoid the combat with safety to himself,—before any state of facts exists in the case upon which testimony of character, threats, ill feeling, etc., of the deceased could shed any light. The theory of the rule is that a right to kill can never be the result of the violent, blood-thirsty disposition, revengeful feeling, or threats of the deceased; and hence, until there are facts offered which go in some measure to establish the necessity to strike, as the law defines that necessity, such evidence is patently irrelevant. These matters, in other words, are competent to give character to a necessity otherwise shown; and, no such necessity being otherwise shown, there is an utter absence of the predicate upon which alone such qualifying evidence should be received. *Pritchett v. State*, 22

Ala. 39; Quesenberry v. State, 3 Stew. & P. 308; Franklin v. State, 29 Ala. 14; Roberts v. State, 63 Ala. 156; Myers v. State, 62 Ala. 599.

We are aware that there are some cases, notably that of Dupree v. State, 33 Ala. 380, which militate against the views expressed above as to communicated threats, and evidence of ill feeling, difficulties, and character (of the deceased) stands upon the same footing, when brought to the touch of the principle under consideration; but we cannot follow them. We are unable to conceive how any sort of proof as to the *animus* of the deceased can be of importance in a case where the worst character, the bitterest enmity, and the most deadly threats on his part may be fully conceded, and it be shown that no act consonant with such character, or resulting from such enmity, or in the execution of such threats, was done by the deceased, or that, if an act was committed by him, it grew out of a present provocation on the part of the defendant, or was not greatly dangerous to life, or was of such character as that the defendant might have safely retreated, and avoided the danger.

In the case at bar, the evidence for the prosecution shows an unprovoked, unnecessary, deliberate, and malicious killing. The testimony of the defendant in his own behalf entirely fails to make a case of self-defense, in that it affirmatively shows that he followed the deceased, accosted him in relation to a difficulty they had had that morning, and thus brought on, and was the aggressor in, the difficulty; and, also, in that there is nothing adduced which tends in any degree to show that defendant was in any real or apparent danger, which he could not have easily and safely avoided by a retreat. On no phase of the evidence, therefore, was there a predicate for the admission of proof of former difficulties in the interest of defendant, or ill feeling on the part of the deceased towards him. The evidence excluded was all of this character, and the action of the circuit court in that behalf was free from error.

The evidence as to previous difficulties, moreover, went to the particulars or merits of such difficulties, as distinguished from the collective fact of their gravity or the reverse, and was on this ground alone properly excluded. Lawrence v. State, 84 Ala. 424, 5 South. Rep. 33; Garrett v. State, 76 Ala. 18; McAnally v. State, 74 Ala. 9; Gray v. State, 63 Ala. 66; Ross v. State, 62 Ala. 224.

All the charges requested by the defendant which were refused by the court below were bad, in that they pretermitted all inquiry as to the duty and feasibility of retreat on the part of the defendant. Eiland v. State, 52 Ala. 322; Mitchell v. State, 60 Ala. 30; Poe v. State, 87 Ala. 65, 6 South. Rep. 378; Cribbs v. State, 86 Ala. 613, 6 South. Rep. 109.

Some, if not all, these instructions were faulty on other grounds also. Thus, the aspect of the evidence most favorable to the defendant shows that he was the aggressor on the occasion of the homicide. (Jackson v. State, 83 Ala. 76, 3 South. Rep. 847,) yet charge No. 1 authorizes an ac-

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quittal without any inquiry on the point whether he provoked or brought on the fatal encounter, (Jackson v. State, 77 Ala. 18; Tesney v. State, Id. 33; De Arman v. State, 71 Ala. 351; Cleveland v. State, 86 Ala. 1, 5 South. Rep. 426.)

Charge No. 2 was bad, also, as being argumentative, and singling out, and giving undue prominence to, selected portions of the evidence. Goley v. State, 85 Ala. 334, 5 South. Rep. 187.

The record discloses no error, and the judgment below is affirmed.

DANIELS v. STATE.

(Supreme Court of Alabama. Jan. 31, 1890.)

JURY—IMPANELING—QUALIFICATIONS.

1. After conviction on a charge for carrying a concealed weapon, defendant moved for a new trial on the ground that one of the jurors was a first cousin of the first witness, whose name was indorsed on the indictment, and who was in charge of the place where and when the pistol was said to have been exhibited; that he did not know this fact when he accepted the juror; and that his counsel, in making inquiry before accepting the jury, was informed that there was no relationship between them. *Held*, that the refusal of the motion was discretionary with the court.

2. The state may revoke an acceptance of a juror before the defendant has accepted him, and before the impaneling of the jury is completed, or the trial commenced.

Appeal from county court, Hale county; JAMES M. HOBSON, Judge.

The defendant in this case was indicted for carrying a pistol concealed about his person. The indictment was found by the grand jury in the circuit court, and was removed to the county court by authority of an act conferring additional jurisdiction on the county court of Hale county. The opinion shows the first exception, and the ground thereof. After conviction the defendant moved for a new trial on the ground that W. P. Martin, one of the jurors, was a first cousin of Pink Martin, the first witness, whose name was indorsed on the indictment, and who was in charge of the place where and when the pistol was said to have been exhibited; that he did not know this fact when he accepted said Martin as juror; and that his counsel, on making inquiry before accepting the jury, was informed that there was no relationship between them. The court overruled the motion, and the defendant duly excepted.

Thos. R. Roulhac, for appellant. Atty. Gen. Martin, for the State.

SOMERVILLE, J. An appeal lies to this court directly from the county court of Hale county under the provisions of the act approved February 12, 1879, conferring additional jurisdiction on that tribunal, and regulating the proceedings therein. Acts 1878-79, p. 291, § 14.

The first exception taken to the rulings of the court is allowing the state to challenge peremptorily the juror Mayfield. The solicitor had accepted this juror; and the court permitted him in behalf of the state, to revoke such acceptance. This was done before the defendant had expressed his satisfaction with the juror, and

before the impanelling of the jury was completed, or the trial had commenced.

The rule is generally stated to be that after a juror has been accepted by both parties, and the jury has been impaneled, or the trial has been entered on, by swearing the juror or otherwise, the right to challenge is waived, unless for cause, where the disqualification was unknown at the time, and could not have been discovered by the exercise of proper diligence on the part of the objector. *Spigener v. State*, 62 Ala. 383; *Smith v. State*, 55 Ala. 1; *Roberts v. State*, 68 Ala. 515. Until the cause is opened or put to the jury, which may be considered, usually, as done when the jury is sworn, it is within the discretion of the court to permit an inadvertent acceptance of a juror to be withdrawn. *Whart. Crim. Pl. (8th Ed.)* §§ 617, 672; *Murray v. State*, 48 Ala. 675. The facts of this case show that the juror had not been accepted by both parties, and the cause had not been put to the jury, when the challenge in question was allowed. It follows, from this view of the law, that the court did not err in its ruling on this subject.

The refusal of the court to grant a new trial on the ground assigned, as our decisions uniformly hold, was discretionary, and is not reviewable by us on appeal. Judgment affirmed.

YELLOW-STONE KIT V. STATE.

(*Supreme Court of Alabama. Jan. 31, 1890.*)

LOTTERY.

Defendant gave exhibitions consisting of acrobatic contortions, magic lantern, music, dancing, and song, and the like; and between the acts sold medicines. The exhibitions were given in a tent. There was no charge for entrance; the only fee charged was for the occupancy of a seat. Before the exhibition defendant distributed tickets to the public, free, each ticket entitling the holder to a chance for the prizes, 8 in number, there being some 8,000 tickets. The distribution was made by choosing 2 persons from the audience, who selected by lot 8 tickets from a large number of duplicates which were thrown by the defendant at random on the stage. These tickets were numbered, and the persons holding the corresponding numbers were entitled to the prizes, according to their number. Held not a lottery, such as to render defendant liable to indictment, as there was no consideration paid directly or indirectly for the chance of participating in the distribution.

Appeal from city court of Mobile; *SEEMES, Judge.*

Indictment for carrying on a lottery. The indictment in this case charged, in a single count, that the defendant "set up, or was concerned in setting up or carrying on, a lottery, against the peace," etc. On all the evidence adduced, which it is unnecessary to state, the defendant requested the court to instruct the jury that, if they believed the evidence, they must find him not guilty, which charge the court refused, and the defendant duly excepted. Many other charges were asked and refused, and exceptions reserved, but they require no notice. The opinion of this court sufficiently sets forth such other facts as may be necessary to a complete understanding of this decision.

McCarron & Lewis and *B. M. Allen*, for appellant. *Atty. Gen. Martin* and *Leslie B. Sheldon*, for the State.

SOMERVILLE, J. The defendant was convicted of the offense of carrying on a lottery in this state. The case turns largely on what is to be taken as a proper definition of the word "lottery," within the meaning of the statute, and the constitution of Alabama. Code 1886, §§ 4068, 4069; Const. 1875, art. 4, § 28. The word cannot be regarded as having any technical or legal significance different from the popular one. It is defined by Webster as "a distribution of prizes by lot or chance." This definition is substantially adopted by Bouvier and Rapalje in their law dictionaries. Worcester defines it as "a distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value." So the American Cyclopaedia thus defines a lottery: "A sort of gaming contract, by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks." In *Buckalew v. State*, 62 Ala. 384, it was said, after citing Webster's definition, that "wherever chances are sold, and the distribution of prizes determined by lot, this, it would seem, is a lottery. This, we think, is the popular acceptance of the term." In *Bishop on Statutory Crimes*, § 952, it is said: "A lottery may be defined to be any scheme whereby one, in paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine." In *Hull v. Rugles*, 56 N. Y. 424, the New York court of appeals adopts the following as the result of the accepted definitions: "Where a pecuniary consideration is paid, and it is to be determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to receive for it, that is a lottery." This definition is approved in *Wilkinson v. Gill*, 74 N. Y. 63, as the popular meaning of the word, and one proper to be adopted with a view of remedying the mischief intended to be prevented by the statutes prohibiting lotteries; and it is said: "Every lottery has the characteristics of a wager or bet, although every bet is not a lottery."

It may be safely asserted, as the result of the adjudged cases, that the species of lottery, the carrying on of which is intended to be prohibited as criminal by the various laws of this country, embraces only schemes in which a valuable consideration of some kind is paid, directly or indirectly, for the chance to draw a prize. *U. S. v. Olney*, 1 Deady, 461, 1 Abb. (U. S.) 275; *Governors, etc., v. Art Union*, 7 N. Y. 223; *Ehrgott v. Mayor*, 96 N. Y. 264, 48 Amer. Rep. 622; *Bell v. State*, 5 Sneed, 507; *Com. v. Thacher*, 97 Mass. 553. There is no law which prohibits the gratuitous distribution of one's property by lot or chance. If the distribution is a pure gift or bounty, and not in name or pretense merely, which is designed to evade the law,—if it be entirely unsupported by any valuable consideration moving from the taker,—there is nothing in this mode of conferring it which is violative of the policy of our statutes condemning lotteries, or gaming. We may

go further, and say that there would seem to be nothing contrary to public policy, or *per se* morally wrong, in the determination of rights by lot. A member of the College of Christian Apostles, as sacred history informs us, was once chosen by lot. And under the law of this state a tie vote on a contested election of any state officer is required to be settled in the same mode. So our statutes authorize a distribution of property owned by joint tenants to be made by lot under the direction of the judge of probate. These are not the evils against which the law is directed. The gratuitous distribution of money or property by lot has never prevailed to such extent as to require police regulation at the hands of the state, nor, so long as human nature remains as it now is and has been for so many thousand years, is it likely ever to be otherwise. The history of lotteries for the past three centuries in England, and for nearly a hundred years in America, shows that they have been schemes for the distribution of money or property by lot in which chances were sold for money, either directly, or through some cunning device. The evil flowing from them has been the cultivation of the gambling spirit,—the hazarding of money with the hope by chance of obtaining a larger sum,—often stimulating an inordinate love of gain, arousing the most violent passions of one's baser nature, sometimes tempting the gambler to risk all he possesses on the turn of a single card or cast of a single die, and "tending, as centuries of human experience now fully attest, to mendicancy and idleness on the one hand, and moral profligacy and debauchery on the other." *Johnson v. State*, 83 Ala. 65, 3 South. Rep. 790. It is in the light of these facts, and the mischief thus intended to be remedied, that we must construe our statutory and constitutional prohibitions against lotteries and devices in the nature of lotteries. *Ehr Gott v. Mayor*, 48 Amer. Rep. 622. The cases on this subject are very numerous, and while the courts have shown a general disposition to bring within the term "lottery" every species of gaming involving a distribution of prizes by lot or chance, and which comes within the mischief to be remedied,—regarding always the substance and not the semblance of things so as to prevent evasions of the law,—we find no decision in which the element of a valuable consideration parted with, directly or indirectly, by the purchaser of a chance, does not enter into the transaction. *Buckalew v. State*, 62 Ala. 334; *State v. Bryant*, 74 N. C. 207; *Com. v. Wright*, 50 Amer. Rep. 306; *State v. Clarke*, 66 Amer. Dec. 723; *State v. Shorts*, 90 Amer. Dec. 668; *Wilkinson v. Gill*, 30 Amer. Rep. 264; *Governors v. Art Union*, 7 N. Y. 228; *State v. Mumford*, 73 Mo. 647; *Hull v. Ruggles*, 56 N. Y. 424; *Thomas v. People*, 59 Ill. 160; *Dunn v. People*, 40 Ill. 465; *Seldenbender v. Charles*, 8 Amer. Dec. 682; *U. S. v. Olney*, 1 Dedy, 461; *Bell v. State*, 5 Sneed, 507; *Bish. St. Crimes*, (2d Ed.) § 952; 2 Whart. Crim. Law, (9th Ed.) § 1491.

In this case it is not denied that the defendant has distributed presents or prizes to the holders of tickets given to the public,—8 prizes among some 8,000 ticket-hold-

ers. It is also uncontroverted that this distribution has been made by lot or chance. This was done by 2 children chosen from the audience, who selected by lot 8 tickets from a large number of duplicates which were thrown by the defendant at random on the stage or platform. These tickets were numbered, and the persons holding the corresponding numbers were entitled to these prizes, or presents, according to their number. But we can see nothing in the evidence from which it can be inferred that any one, present or absent, paid any valuable consideration, directly or indirectly, for these tickets, or for the chance of getting a prize. It is true that, on the day of the drawing, the defendant had held one of his customary performances, consisting of acrobatic contortions, exhibitions of a magic lantern, and of music, dancing, and song, and the like; and between the acts he always sold his medicines for which he claimed great curative virtues. These exhibitions were in a tent which would seat between 900 and 1,000 people, and would furnish standing room for about 2,500 persons. For tickets of admission to see this performance, the closing one of the season, advertised as a "Jubilee" performance, a charge of 10 cents was made. But these tickets had no connection whatever with those entitling the holders to a chance for the 8 prizes. For these latter tickets or chances nothing was charged. They had been distributed, free, to any and all persons present at his previous performances, and for admission to these exhibitions no charge was made. The only fee charged was for the occupancy of a seat; there was none for entrance. Nor was it necessary that a holder of a successful ticket should be present to get his prize in case he drew one. It would be delivered as well at the defendant's private house. This fact was advertised in a Mobile paper, and one of the prizes was actually delivered there. The suspicion, even though well founded, that these presents may have been given away in order to induce a larger crowd to assemble at the defendant's performances, with the expectation that they would buy medicines, or pay a fee for occupying a seat in the tent, would be too remote to constitute a legal consideration for the tickets. So with the expectation that it would increase the attendance at the so-called "Jubilee" performance. The holders of thousands of these tickets given away as gratuitous, were not present, and yet stood an equal chance in the distribution with those who were. And the doors were thrown open for free admission when the distribution took place, this event, occurring just after the close of the exhibition, or performance proper. The element of gaming which is wanting to constitute this transaction a lottery is the fact that no money was paid, directly or indirectly, for the chance of receiving a prize, or of participating in the distribution by lot. Nor would a jury be authorized to make a contrary inference, reasonably, from any evidence contained in the bill of exceptions. Many rulings of the court are directly opposed to these views. It follows from what we have said that the city court erred

in not giving the general affirmative charge requested by the defendant.

The judgment of conviction is reversed, and a judgment will be rendered in this court discharging the defendant from further prosecution under the present indictment. Reversed and rendered.

GASTON V. STATE.

(Supreme Court of Alabama. Jan. 31, 1890.)

BILL OF EXCEPTIONS—SUITS BY STATE—EJECTMENT—SCHOOL LANDS.

1. A bill of exceptions not tendered and approved within the time prescribed in the order of the court will be stricken from the record, and all assignments of error based on it will be disallowed.

2. A plea not verified, as required by statute, is properly stricken from the files.

3. Code Ala. § 2573, authorizes suits in ejectment by the state in all cases where under like circumstances an action could lie between individuals.

4. Under Code Ala. § 960, cl. 4, the state may maintain ejectment for lands constituting the sixteenth sections, which it holds in trust for the several townships of the state.

Appeal from circuit court, Henry county; J. M. CARMICHAEL, Judge.

This action was brought in the name of the state of Alabama, "for the use of township seven, (7,) range eight (8) west of the Tallahassee meridian," against Ned Gaston, to recover the possession of a tract of land containing 80 acres, which was described as "the east half of the south-east quarter of section 16, township seven, (7,) range eight (8) west of the Tallahassee meridian," and was commenced on the 15th of August, 1888. The defendant pleaded in abatement, on the ground that the state of Alabama cannot sue in ejectment except for sixteenth section lands, and the land here sued for is not part of a sixteenth section. The court struck this plea from the files, on motion, and the defendant then demurred to the complaint, assigning, as causes of demurrer, (1) because the state cannot maintain the action; (2) because the complaint shows that the state has no title to the lands described. The court overruled the demurrer, and the defendant then filed a special plea of adverse possession for 15 years, exercising acts of ownership, but without any paper title or color of title. The court sustained a demurrer to this plea, and the cause was tried on issue joined on the plea of not guilty. A bill of exceptions was reserved by the defendant on the trial, but it requires no notice, being stricken from the record by this court. The rulings on the pleadings and the rulings shown by the bill of exceptions are assigned as error.

Walker & Espy, for appellant. *P. A. McDaniel*, for the State.

MCIELLAN, J. The motion to strike out the bill of exceptions in this record must prevail. Judgment was entered on September 17, 1889, and with it an order that 30 days be allowed the defendant in which to file a bill of exceptions. On October 15th it was ordered that "the time for preparing and presenting a bill of exceptions by defendant is hereby extended for twenty days from this date." The bill

of exceptions shows that it "was tendered and approved" on November 5, 1889, beyond the time prescribed in the order of October 15th theretofore. The bill of exceptions, therefore, must be stricken from the record, and all assignments of error based on it will be disallowed. *Powell v. Sturdevant*, 85 Ala. 243, 4 South. Rep. 718.

The action of the primary court in striking defendant's plea in abatement from the files may be justified on either one of two grounds: (1) The plea was not of matter of record, and was not verified as required by statute. Code, § 2576; *Hall v. Wallace*, 25 Ala. 438. (2) The plea, had it been properly verified, would have been clearly bad in its assumption or statement of law that the state of Alabama is not authorized to maintain ejectment, except in respect to sixteenth section lands. The statute authorizes suits by the state in all cases where, under like circumstances, an action would lie between individuals. Code, § 2573. What is said last above applies, also, to defendant's first assignment of demurrer, which proceeds on the idea that the state cannot maintain the action of ejectment.

The second assignment of demurrer to the complaint, setting up the alleged incapacity of the state to maintain ejectment for lands constituting the sixteenth sections, which it holds in trust for the several townships of the state, is palpably untenable. Code, § 960, cl. 4.

Actions by the state for the recovery of any real or personal property, and actions by or for the use of any township for the recovery of sixteenth section or other school lands, by the express terms of the statute of limitations may be brought any time within 20 years from the time the cause of action accrued. Code, § 2613.

We apprehend, however, that, title by adverse possession not being perfected against the trustees of the township when the 20-years limitation was broadened so as in terms to embrace all suits for recovery of lands belonging to a township, it was competent for the legislature to invest other parties than the trustees with the right to maintain such suits in behalf of the township, and no defense could be made to suits instituted by parties thus invested with the right of action which could not have been made to a suit prosecuted in the name of the trustees. The statute was a mere legislative change in the trustee authorized to sue, and could not operate to deny any substantial right of the *cestuis que trust*, or authorized any defense not before tenable.

The judgment of the circuit court is affirmed.

HALL et al. v. STATE.

(Supreme Court of Alabama. Jan. 27, 1890.)

ADULTERY—INSTRUCTIONS.

On the trial of an indictment for adultery, the court charged the jury: "The fact that a married man makes frequent visits in the day-time, and sometimes at night, to the house of a woman of known bad reputation, without any legitimate business, is a fact tending to show an adulterous connection between them." The evidence that defendant had no legitimate business at the said

house was wholly negative in its character, and did not exclude a contrary inference. *Held*, that the charge was erroneous, in denying to the jury the right to draw this inference.

Appeal from circuit court, Geneva county; C. H. LANEY, Special Judge.

Indictment for living in adultery or fornication. The indictment charged that the defendants, Nathan Hall, a married man, and Betsy Skipper, an unmarried woman, "did live together in a state of adultery or fornication." On their joint trial, as the bill of exceptions shows, it was proved that the defendants lived a few miles apart; that Betsy was a woman of bad reputation for virtue, having several children, though she was never married; that Hall was frequently seen at her house, by persons passing along the public road in front of her house; and several of the witnesses stated that, if he had any business there, they did not know it. R. E. Jordan, one of the witnesses for the state, testified that on passing Betsy's house after sunset one evening, within the time covered by the indictment, he saw her and Hall in the act of sexual intercourse at the corner of the house; that he was about 50 yards distant from the parties, "and thought and took the man to be Hall, and thought and took the woman to be Betsy." One Patterson, another witness for the state, testified to acts of indecent familiarity between the defendants, one night in October, within the time covered by the indictment, when he and his father had entered Betsy's house for shelter from a heavy rain, and which induced them to leave the house at once. It was proved, also, that there was a good well in the front yard at Betsy's house, where persons passing frequently stopped to get water, and some of the witnesses said that they had seen Hall watering his horses at this well. On this evidence the court charged the jury: "The fact that a married man makes frequent visits in the daytime, and sometimes at night, to the house of a woman of known bad reputation for virtue, without any legitimate business, is a fact tending to show an adulterous connection between them." The defendant excepted to this charge, and also to each part of the following charge, which was given by the court at the instance of the solicitor: "If the jury believe beyond a reasonable doubt, from the evidence of R. E. Jordan, that the defendants had sexual intercourse with each other, just before the finding of the indictment, and in said county, this is sufficient proof of the fact of adultery or fornication; and if, in addition to this one act, they believe beyond a reasonable doubt, from all the evidence, that the minds of the defendants agreed or consented together that they would repeat the act, opportunity offering, then the defendants are guilty of living in adultery or fornication, and they should so find by their verdict."

Atty. Gen. W. L. Martin, for the State.

McCLELLAN, J. That part of the general charge to which an exception was reserved, should not have been given. It is abstract, in a sense, and misleading, in that it assumes as a fact that the defend-

ant Hall had no legitimate business at the house of the defendant Skipper, when the evidence on this point was wholly negative in its character, and did not exclude a contrary inference. The charge, moreover, was upon the effect of this negative testimony, and directed the jury to consider the fact of Hall's having no legitimate business at Skipper's house, as tending to show adulterous intercourse, when, in view of the character of the testimony on that point, they might have inferred the non-existence of the fact itself. The right to draw this inference was, in substance, denied to the jury, and for this error the judgment must be reversed. *Burney v. State*, 87 Ala. 80, 6 South. Rep. 391. The charge, in other words, assumes a fact as proved, when the evidence only tends to establish it, and is an invasion of the province of the jury. *Jones v. Fort*, 36 Ala. 449. The charge given at the instance of the solicitor appears to be in the language of an instruction held to be proper in the case of *Bodford v. State*, 86 Ala. 67, 5 South. Rep. 559. We are all now inclined to the opinion that it is not a correct exposition of the law, but, as the present case must be reversed on the other point adverted to, we deem it unnecessary to decide this question. The judgment of the circuit court is reversed, and the cause remanded.

FITZ GERALD et al. v. REES.

(Supreme Court of Mississippi. Feb. 17, 1890.)

HOMESTEAD—WHAT CONSTITUTES.

Under Code Miss. 1880, § 1248, providing that every citizen, having family, shall be entitled to hold as exempt the land and buildings owned and occupied by him as a residence, provided the land shall not exceed 160 acres in quantity nor \$2,000 in value, and section 1249, providing that every person having a family, residing in any city, town, or village, shall be entitled to hold as exempt the land and buildings occupied by him as a residence, not to exceed \$2,000 in value, a homestead may be located partly within and partly without the limits of an incorporated town.

Appeal from circuit court, Yalobusha county; W. M. ROGERS, Judge.

Geo. H. Lester, for appellants. Ro. H. Golladay, for appellee.

COOPER, J. Appellant, a judgment creditor of appellee, caused an execution under his judgment to be levied on certain lands of appellee, and at the execution sale he became the purchaser. This is an action of ejectment to recover the land so sold and bought. The appellee defended upon the ground that the land in controversy was a part of his homestead, and exempt from sale under execution. The single question presented is whether the land was a part of the homestead. The facts are not controverted, and the question is purely one of law.

The residence of appellee is located within the corporate limits of the town of Oakland. The land on which it is situated is less in quantity than 160 acres, and less in value than \$2,000. Appellee devotes his land to agriculture, and the whole comprises one place. While the residence is within the corporate limits of the town, all of the land, except 15 or 20 acres, is

without such limits. The question, then, is whether the homestead exempt by law may be one located partly within and partly without an incorporated town. It is determinable by a construction of sections 1248 and 1249 of the Code of 1880, which are as follows: "Sec. 1248. Every citizen of this state, male or female, being a householder and having a family, shall be entitled to hold exempt from seizure or sale, under any execution or attachment, the land and buildings owned and occupied as a residence by such debtor: provided, the quantity of land shall not exceed 160 acres, nor the value thereof, inclusive of improvements, the sum of two thousand dollars.¹ Sec. 1249. Every person being a householder, and having a family, residing in any city, town, or village, shall be entitled to hold, exempt from seizure or sale under any execution or attachment, the land and buildings owned and occupied as a residence by such debtor, not to exceed in value two thousand dollars, and personal property to be selected by him, not to exceed in value two hundred and fifty dollars, or the articles specified in the first section of this act."

The articles specified in the first section of the act are those that are exempt to all persons, those exempt to persons following particular callings, and some articles exempt to heads of families.

The argument of appellants' counsel is this: By section 1248 there is exempt to every citizen, being a householder and the head of a family, the land and buildings owned and occupied as a homestead, provided it does not exceed in quantity 160 acres, nor in value \$2,000. Unless, therefore, section 1249 was intended to limit the urban exemptionist to the limits of the town, that section, it is said, has no meaning as applied to homesteads; and, since it is the duty of the court to so construe statutes as to give some meaning to every provision, section 1249 should be held to confine the urban exemptionist to the corporate limits of the town.

We recognize the rule appealed to as valuable in aiding the court to discover the legislative purpose, which is the paramount end of construction; but it is not permissible to absorb the statute in the rule, nor overturn the legislative will that the rule may live. It is our duty to look at the statute from its four corners; to change the collocation of words and sentences, if necessary; to consider the general purpose, if that be clear; to look to the history of legislation on the subject; and, if within the words of the statute so considered the intent can be discovered, to give effect to it.

If we consider section 1249 alone, there is nothing in it indicating the intention of the legislature to confine the homestead to any merely imaginative line. The paramount purpose disclosed is to exempt the "land and buildings owned and occupied by the debtor as a residence," provided the same does not exceed in value the sum of \$2,000. The statute does not say that the land shall lie wholly within the village or town. Every condition required by the section is disclosed by the facts of this

case. The appellee is a citizen and householder, and has a family. He owns and occupies the land and buildings thereon as a residence, and the value thereof does not exceed \$2,000.

The idea that it was intended to restrict the homestead to the limits of the corporation is inferentially drawn, because, it is said, if such purpose be not found the section need not have been enacted, since under the preceding one the exemption might have been claimed. But a mere transposition of the sections would answer this objection. So transposed and read, it would appear that the legislature, having by one section provided for urban exemptionists, turned its attention to the cases of those living in the country, and as to these added another limitation, viz., that the area should not exceed 160 acres. It may fairly be supposed it to have been assumed that the home in a town or village reaching in value \$2,000 would not exceed in area 160 acres, while in the country the limitation of value might include a greater quantity of land than it was thought desirable to exempt.

When we look to the history of legislation on the subject of exemptions, it is at once perceivable how the two sections came into existence. By the Code of 1857 (article 281, p. 529) there was one provision, applicable alike to persons living in towns and in the country. The limitation was that the quantity should not exceed 80 acres, nor the value \$1,500. By the act of November 28, 1865, (Acts 1865, p. 137,) there was exempted to the rural exemptionist 240 acres of land regardless of value, and to the urban exemptionist real and personal property to the value of \$4,000. By the act of July 25, 1870, (Acts 1870, p. 98,) there was exempt to the ruralist 80 acres of land, regardless of value; and to those living in a city, town, or village, "two thousand dollars worth of real property, comprising the proper homestead and other buildings connected therewith." In the codification of 1871, the limit of valuation, theretofore imposed only on homesteads in cities, towns, or villages, was applied also to the rural homestead. The attention of the legislature and the codifiers was evidently directed to the purpose of changing the law in reference to the rural homestead, by adding a limitation of value. No change whatever was made of the homestead in cities, towns, or villages; and it is not, in the absence of clear evidence of such purpose, permissible to imply the intent to make such change from the mere fact that a new limitation was imposed on another character of homesteads.

We are therefore of opinion that the appellee's homestead was not limited by the corporate lines of the village in which his residence is located.

Affirmed.

COOPER v. FOX *et al.*

(Supreme Court of Mississippi. March 10, 1890.)

PARTITION—ADVERSE TITLE.

In a suit for partition between the heirs of an alleged owner of the land, one of the defendants, a married woman living with her hus-

¹So amended by Acts Miss. 1882, p. 140.

band on the premises in controversy, is not estopped, as a tenant in common, from setting up title in her husband by adverse possession.

Appeal from chancery court, Lawrence county; WARREN COWAN, Chancellor.

A. C. McNair, for appellant. R. H. Thompson, for appellees.

COOPER, J. The complainants and defendants are heirs at law of Mrs. Anna Prestidge, who died intestate in December, 1883. The petition is filed for partition of certain lands which it is alleged descended to the parties on the death of Mrs. Prestidge. The defendant Mrs. Cooper is the daughter, and the defendants William Prestidge and Mrs. More are the grandchildren, of Mrs. Anna Prestidge; the two latter being children of John Prestidge, deceased, who was son of Anna. The land described in the petition consists of a single tract, but it is intersected by Fair river, about two-thirds being upon the north and one-third on the south of said river. Mrs. More failed to answer the petition, and no *pro confesso* was taken against her. William Prestidge and Mrs. Cooper filed separate answers, but the same facts are set up in each. Shortly stated, the facts relied on by them are that Mrs. Anna Prestidge had no title to any of the land at the time of her death; the history of her claim to the land, and of her disposition of it, being this: In the year 1854 the land was sold by John Dickerson, administrator of the former owner, and at the sale Mrs. Anna Prestidge became the purchaser at the price of about \$2,000, to be thereafter paid. After the purchase by her she discovered that she would be unable to pay the purchase price, and, at her instance, William Cooper (the husband of the defendant Mrs. Cooper) and John Prestidge agreed to assume the payment of the purchase price, in consideration of which they were to become owners of the land. No deed had been made by the administrator to Mrs. Prestidge, but, under the contract between the parties, the administrator was to make the conveyance directly to John Prestidge and William Cooper. Under this agreement Prestidge and Cooper entered upon the land, and made parol partition thereof; Prestidge taking all north of Fair river, and Cooper all south of the river. Cooper and Prestidge paid the purchase price, and since their entry upon the land have been in adverse possession thereof, each claiming the portion allotted to him by parol partition; and, though no deed was ever made to them, the defendants claim that the title was vested in said John Prestidge and William Cooper by adverse possession long before the death of Mrs. Anna Prestidge, who during her life never set up any claim to any part of the land after her contract with the parties. The defendant Prestidge disclaimed any claim or interest in the lands south of Fair river, but claimed to be the sole owner of all north of the river, he having received a conveyance from Mrs. More (the only other heir at law of John Prestidge) of her interest in the same. Mrs. Cooper denied that she or complainants had any interest in any of the lands,

and denies that she is now or ever has been in the possession of any part thereof, save as the wife of William Cooper, living with him on his own land. The evidence leaves it somewhat in doubt whether Mrs. Anna Prestidge did or did not receive a conveyance from the administrator, Dickerson. It is immaterial how it was. All other facts set up by the answers are as satisfactorily and clearly proved as it is possible to do where there are conflicting interests, and the consequent conflict of testimony. The complainants were themselves witnesses in their own behalf, and, while they deny the extent of the contract between Mrs. Anna Prestidge and John Prestidge and Cooper, they yet admit that there was some agreement by which these parties were to go on the land, and pay the purchase money due on it. They seek, however, to draw the unnatural inference that the land when paid for was to be the property of Mrs. Anna Prestidge. In this they are contradicted by a number of witnesses, who clearly and unquestionably support the claim of the defendants. The chancellor, impressed with the conviction that truth was with the defendants, denied the right of partition as to the lands claimed by the defendant Prestidge, thus recognizing his title by prescription, and from the decree as to these lands the petitioners do not appeal. But as to the lands, title to which was asserted to be in William Cooper, on the ground, as we are informed by the briefs of counsel, that Mrs. Cooper could not set up an outstanding title, partition was decreed. Counsel for appellees rely upon a line of authorities by which it is held, and rightly, that, where one tenant in common receives possession of the common estate by reason of the common title, he may not, while in possession, set up an outstanding title as against his co-tenant.

In all cases relied upon, except *Burleson v. Burleson*, 28 Tex. 383, the decisions are put upon the ground of estoppel against the party in possession to set up the outstanding title, because he had entered under the common title. In *Burleson v. Burleson*, the decision proceeds upon the reason that, under the law of Texas, all persons having an interest in the subject-matter may be made parties defendant to the partition suit. Such is not the practice in this state, for with us only those having an interest in the result sought—the partition—can be made parties. *Nugent v. Powell*, 63 Miss. 99.

We are somewhat surprised by the decree of the court below, in view of the fact that it correctly appreciated the law, and permitted William Prestidge, who was actually in possession of a part of the land, to prove want of title in the petitioners, as to the land he held, by proving title in his father, and now held by himself. This was correct, for the reason that possession was taken against, and not in subservience to, the claim of Mrs. Anna Prestidge, the common ancestor of petitioners and defendants. We fail to perceive why a different principle was applied, as against Mrs. Cooper, who not only never entered under the common title, but in fact was never in possession of the land at all. If

petitioners have no title, they have no standing in court, and their want of title is as fatal to them, if the true title and possession is in a stranger, as it would be if it were Mrs. Cooper. There must be a *res* for the proceedings in partition to attach to, and that *res* is a common estate. Where the defendants are prevented by the doctrine of estoppel from denying the common estate, it is just as though it was proved to exist; but where, as here, there is no element of estoppel, and the defendant clearly shows that there is no title in the petitioners, there is nothing to which the jurisdiction of the court can attach. *Ingram v. War*, 5 Smedes & M. 746; *Shearer v. Winston*, 33 Miss. 149; *Mattair v. Payne*, 15 Fla. 682.

The decree is reversed, and petition dismissed.

CONNELL V. MOBILE & O. R. CO.

(*Supreme Court of Mississippi*, Feb. 17, 1890.)

CARRIERS OF PASSENGERS—REGULATIONS.

Plaintiff's husband bought for her a regular ticket, to be used on a freight train with passenger-coach attached, which was run by defendant under special regulations posted at the stations along the road, to the effect that the train could not be required to stop at the platforms of stations to take on or put off passengers. Special tickets, in accordance with such regulations, were sold for this train, but the agent at the time had none on hand, and the husband was acquainted with the regulations. Plaintiff and her husband waited on the platform for the train to be pulled up, not because they expected it to do so as a custom, but because they had been informed by a by-stander that he had requested the conductor to do so, and the train pulled out and left them. Plaintiff then bought another regular ticket for the passenger train, which did not pass till night, and brought an action against the company for damages. *Held* that, as the regulation prescribed by the company was a reasonable one, plaintiff was not entitled to recover.

Appeal from circuit court, Clay county; L. E. Houston, Judge.

Two trains of the appellee's road pass the town of West Point, going south,—the regular passenger train during the night, and a freight train with a passenger-car attached during the day. Parties are permitted to ride on the freight train under special regulations to the effect that they cannot require the passenger-coach attached to said train to be pulled up to the platform at stations for the purpose of getting on and off; that such passengers took the risk of being put off at the platform, as on regular passenger trains. Tickets, in accordance with this special regulation, were sold to passengers for this freight or mixed train. Appellant, Mrs. Connell, had been at West Point under treatment of a physician, who permitted her to go home, some seven miles south of West Point, provided she would go in the day-time. Notices containing the regulation were posted at the depot. Mrs. Connell and her husband went to the depot. The husband bought regular tickets, because the agent was then out of the special tickets, he being acquainted with the regulations. They waited on the platform at the depot for the passenger-coach to be pulled up, not because they expected it as a custom, but because some by-stander had stated that

such would be done; but, instead, the train pulled out from the station, and left Mrs. Connell and her husband. They went to the hotel, and remained until the regular passenger train came along at night, which they took, not using the tickets first bought, but buying others; and afterwards Mrs. Connell brought this suit to recover damages for failure to stop at the platform for her, when she had regular tickets. The court instructed the jury to find for the defendant, which was done, and judgment so entered, from which Mrs. Connell appealed.

F. M. Beall, for appellant. *E. L. Russell* and *Barry & Beckett*, for appellee.

COOPER, J. The court properly instructed the jury to find for the defendant. The evidence incontrovertibly shows that the train, which is spoken of by the witnesses as an accommodation train, was a freight train on which persons desiring to travel were permitted to be carried under certain limitations and restrictions. The fact that the company, for the comfort of the persons availing themselves of the opportunity of traveling on said train, attached a coach, instead of an ordinary "caboose" car, did not change the character of the train, nor make it one intended to serve the public as the usual means of transportation. Notice was given by the company, by posters in its station, that the train would not stop at the platform of stations to receive or deliver passengers; and the husband of appellant, who acted for her on the occasion of her seeking to take passage, recognized the existence of the regulations prescribed, and relied on the train being stopped at the platform because he had been informed that a gentleman then present had requested the conductor to do so, and did not expect it so to stop in pursuance of custom or obligation. The regulation prescribed by the company was a reasonable one, and the plaintiff cannot recover, since there has been neither a breach of contract nor of duty by the company. The judgment is affirmed.

BUIE *et al.* v BUIE.

(*Supreme Court of Mississippi*, March 10, 1890.)

GIFTS—UNINDORSED NOTE—LAPSE OF TIME.

1. The possession by the widow of a note payable to testator, but not indorsed by him, nor shown to have been delivered to her, and evidence that he owed her money, are not sufficient to establish her right to the note.

2. Where she presents such note to the makers, claiming it as her own, and takes from them a new note, payable to herself, in the place of it, she does not thereby get such possession of the debt as will enable her to acquire the right to it by lapse of time; but it remains a debt due the estate, for which suit may at any time be brought by the executors, or those entitled to receive it.

3. Where, however, payments have been made to her on the debt, lapse of the statutory period will bar a suit to recover them from her.

4. She cannot be considered a trustee for those entitled to the note, and be made, as such, to render an account of the payments so received.

Appeal from chancery court, Copiah county; WARREN COWAN, Chancellor.

Gilbert Buie loaned money to the firm of Blue & Co., and took their note, payable to himself or order. Buie died in Decem-

ber, 1873, testate, bequeathing to his widow the sum of \$1,200 in gold, and certain personalty, and devising to her his real estate for life, with remainder to his two daughters. By a general residuary clause, he gave the remainder of his estate to these daughters. The will was probated, but letters testamentary were never taken out: the legatees and devisees having agreed to distribution *in pais*, in accordance with the provisions of the will. After the death of Buie, his widow presented the note of Blue & Co. to that firm, and, claiming to be the owner thereof, procured the firm to give in lieu of it a note payable to herself. On this latter note, Blue & Co. made large payments to the widow. The residuary legatees of Buie learning these facts, set up a claim to the money due by Blue & Co., who thereupon exhibited a bill for interpleader, paid the money into court, and were discharged. The legatees thereupon exhibited their bill, claiming the fund in court, and seeking to recover a personal decree against the widow for the sums she had collected from Blue & Co. There was a decree against the residuary heirs, from which they appealed.

A. C. McNair, for appellants. J. S. Sexton, for appellee.

COOPER, J. The claim of Mrs. Mary Buie, the widow of Gilbert Buie, to the note of Blue & Co., is wholly unsupported by any competent evidence. Blue & Co. were indebted to Gilbert Buie for borrowed money, and he held their note, payable to himself or order. The note was never indorsed by him, and there is no competent evidence from which it can be inferred that he made any disposition of it before his death. After his death, Mary Buie, his widow, delivered his papers to the persons who were by his will nominated as executors, and, she says, informed them of the existence of the note of Blue & Co., and made claim to it, by virtue of its delivery to her by her husband a short time before his death in payment of a debt he owed her. It may be that the claim of the widow is a just one; but, unfortunately for her, she is without evidence to support it. Here evidence is excluded by express provision of law, because it is to establish her right against the estate of a decedent. No other witness can testify to the fact of the delivery of the note, though one or more persons testify to having heard Gilbert Buie say he owed his wife for Confederate money of hers he had used. It is shown that the transaction from which this supposed debt sprung arose about the time of, if not after, the surrender of the Confederate armies, and the declaration of peace. But whether the claim in favor of the wife was or was not a valid one is immaterial, since, admitting its validity, she shows no right to the note of Blue & Co.

On the facts disclosed, the residuary legatees are entitled to the fund paid into court by Blue, unless the widow has secured a right to it by lapse of time. As to this fund, we do not see how the statute of limitations can be invoked. Mrs. Buie has never had possession of it; and, until it was paid into court by Blue, the debtor, it was a debt due by him by reason of the

original loan of money to him by Gilbert Buie. Mrs. Buie delivered up to the makers the original note, and received in lieu of it one payable to herself. But this substituted note was not the debt, nor were the representatives of the estate of Gilbert Buie, by reason of its execution, confined to their action of trover against her for converting the note. The executors of the will of Gilbert Buie might have brought such action upon taking out letters testamentary of his will; but their failure to take out letters testamentary, and to bring such suit, interposes no bar to the right of complainants to resort to chancery for relief. If, after Blue & Co. gave the substituted note to the widow, they had paid the sum due to the true owners, the residuary legatees of Gilbert Buie, such payment would have been a discharge of the debt they owed, notwithstanding the fact that the widow held the note given to her. The debtor has now paid the money into court, and been discharged of further liability by its order. He sets up all the facts known to him, and asks the court to determine to whom the money should be delivered. His payment is of the debt due, and is in discharge of the whole obligation which rests upon him, whether it exists by virtue of the original note, or of the substituted one.

The widow has no claim, legal or equitable, to the fund, unless it has arisen by her wrongful dealing with the note through so many years. The lapse of time may protect her from personal responsibility, but cannot operate to transfer to her appellants' right of action against Blue. The fund in court should have been decreed to appellants.

As to the sums which appellee has collected from Blue, she is protected from liability by lapse of time. The last collection was in 1879. More than 10 years has passed since then, and more than 6 years since the adoption of the Code of 1880, and before the institution of this suit. We think the appellee may rely upon the bar of the six-years statute of limitations.

It is a mistake to assume that a court of equity will convert into a trustee any person who unjustly takes possession of the property of another. If this were so, all persons claiming property under defective titles would be trustees for the true owner. No facts are shown from which Mrs. Buie can be converted into a trustee *ex malicio* and, as to the money actually collected, the appellants are not entitled to an account.

The court below should have decreed the fund in court to appellants, and otherwise to have dismissed the bill. That decree will be entered here. The appellee to pay the costs of this appeal; the costs of the court below to be paid equally by the parties,—appellants and appellee one-half each.

CONN *et al.* v. BERNHEIMER *et al.*

(Supreme Court of Mississippi. March 10, 1890.)

CHATTEL MORTGAGES—RES ADJUDICATA.

The facts that mortgage creditors brought replevin for mortgaged chattels which had been taken under execution, and that judgment was

rendered against them under Code Miss. § 2633, which forbids such an action in such case, and provides a remedy by claimant's issue, does not preclude them from thereafter maintaining a bill to foreclose.

Appeal from chancery court, Claiborne county; L. McLAURIN, Chancellor.

Bill to foreclose a chattel mortgage, and or injunction, by S. Bernheimer & Son against H. C. Conn and J. P. Martin. Complainants had previously brought replevin for the mortgaged property, which had been seized on execution, and a judgment dismissing the action was affirmed on appeal, (6 South. Rep. 326,) and the cause was remanded for the execution of a writ of inquiry, and judgment was rendered against complainants. An injunction to restrain the collection of such judgment was granted, and defendants appeal.

E. S. Drake and Miller & Conn, for appellants. J. McC. Martin, for appellees.

COOPER, J. The fact that appellees resorted to an action of replevin to recover the mortgaged cotton, in a state of case in which they were not entitled to that remedy, does not preclude them from asserting their incumbrance against it in this proceeding. They neither gained nor lost any right by the unauthorized suit, nor by converting the cotton into money while that suit was pending. They might have paid the value of the cotton to the officer from whose possession they had taken it, and then have interposed their claim to the fund in court, which would have stood as the representative of the cotton. Clark v. Clinton, 61 Miss. 337.

But the existence of this right does not prevent resort to equity, where the rights of all the parties may be settled once for all, and complete justice done. Section 2633 of the Code prohibits only the action of replevin to one whose property is seized under execution against another. Its sole purpose is to prevent the piling up of suits for the possession of property under legal claims, and in lieu of such suits it provides the simple and cheap remedy of a claimant's issue. The right of one having a claim cognizable in a court of chancery, to proceed in that court, is not at all restricted by this statute. Nothing that was done in the suit at law operates as a bar to this action to foreclose the mortgage. In truth, the present complainants, as plaintiffs in the law court, found themselves in a situation in which they could not introduce any evidence in support of their right to the property, because they had no standing in that court. Under such circumstances, the judgment against them for a return of the property has none of the elements of an adjudication of their rights.

The decree is affirmed.

ELTRINGHAM V. EABHART.

(Supreme Court of Mississippi. March 10, 1890.)

ASSAULT AND BATTERY—DAMAGES.

In a civil action for assault and battery, the pecuniary condition of both parties may be considered in estimating damages.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

J. M. Gibson and Jas. G. Leach, for appellant. Claude Pintard, for appellee.

COOPER, J. This is an action by appellee to recover damages for injuries inflicted by appellant by an assault and battery. From a verdict and judgment for \$200 appellant appeals. The principal error assigned is to the action of the court in giving the sixth instruction asked by appellee, which is as follows: "The court instructs the jury that, if they find for plaintiff, they have the right to take into consideration, in estimating the damages, the pecuniary condition of both the plaintiff and defendant." It is said by counsel for appellant that there is neither principle nor authority for instructing a jury in cases of this character to take into consideration the poverty of the plaintiff. We find no difficulty in supporting the charge upon both principle and authority. The evidence shows that the plaintiff was a poor man, dependent upon his personal labor for his support, and that by reason of the injuries inflicted upon him he was for more than two weeks unable to properly perform his duties, and yet feels the effects of the blows and kicks administered by the defendant. In actions of this character, in which insult and mortification bear so large proportion to the injury inflicted, juries are not restricted to the actual pecuniary damages sustained. Treating of such actions, Greenleaf says: "Nor are the jury confined to the mere corporal injury which the plaintiff has sustained, but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may in their judgment require." 2 Greenl. Ev., § 89.

In *McNamara v. King*, 2 Gilman, 432, the trial court had permitted evidence of pecuniary condition of both plaintiff and defendant, and this was assigned for error. The court said: "We are of opinion that the circuit court decided correctly in admitting the evidence and giving the instructions. In actions of this kind the condition of life and circumstances of the parties are peculiarly the proper subjects for the consideration of the jury in estimating damages. Their pecuniary condition may be inquired into. It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessities of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured." In *Gaither v. Blowers*, 11 Md. 546, this decision was approved as "good sense," and as such we add our concurrence in it. We find no error

in the proceedings. The appellant may congratulate himself upon escaping with so moderate a verdict. A very much larger one would have been supported by the evidence, and would have met our hearty approval.

Affirmed.

EARHART v. STATE.

(*Supreme Court of Mississippi*. March 10, 1890.)

CONCEALED WEAPONS—EVIDENCE.

Code Miss. § 2985, providing that "any person not being threatened with, or having good and sufficient reason to apprehend, an attack," shall not carry concealed weapons, was amended by act March 9, 1888, which provided that the words "or having good and sufficient reason to apprehend an attack" be stricken out. *Held*, that the words "an attack" were not intended to be stricken out, and that, on a trial for violation of the section, evidence for defendant of a threatened attack on him was admissible.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

John D. Earhart was indicted for carrying concealed weapons, and upon his trial admitted that he did so carry a pistol, but alleged that he had the right so to do, because he had been assaulted, and threatened with attack, by one Tuttle. The court ruled out all the evidence to the effect that Tuttle threatened defendant; and defendant was convicted, and appeals. Section 2985 provides that "any person, not being threatened with, or having good and sufficient reason to apprehend, an attack, * * * who carries concealed" any deadly weapon, etc., shall be punished, etc. Act March 9, 1888, amended this section as follows: "That the words, 'or having good and sufficient reason to apprehend an attack,' be stricken out."

Claude Pintard and *Frank Winchester*, for appellant. *T. M. Miller*, Atty. Gen., for the State.

CAMPBELL, J. We must hold either that the legislature, in amending section 2985 of the Code by an act approved March 9, 1888, nullified the section, by making it senseless and uncertain, so as to be unenforceable, or that it committed a clerical mistake, in striking out two words more than was intended, viz., the words "an attack." The latter is the more probable; and to read the section, as amended, retaining those two words, will accomplish what was manifestly the legislative purpose, and leave the law in force. We therefore adopt that view, and under it the section, as amended, will be read: "Any person, not being threatened with an attack, * * * who carries concealed," etc. It is true that an attack may be threatened by both persons and things; but no one could fail to understand that the attack against which one may arm himself, and carry a weapon concealed, is one by a person, in contemplation of the statute. The appellant should have been permitted to prove all that Tuttle had said indicating a threatened attack on him, and it should have been left to the jury to say whether or not he was threatened with an attack.

Reversed and remanded.

POLKINGHORNE v. STATE.

(*Supreme Court of Mississippi*. March 17, 1890.)

EMBEZZLEMENT—INDICTMENT—VARIANCE.

1. The fact that an indictment for embezzlement of money charges that defendant, as broker, received certain merchandise from "G. P. H. & Co.," and that he sold it, and received the money for account of "G. P. H.," is no reason for quashing it.

2. But where the evidence shows that the money was received for account of G. P. H. & Co., and there is no evidence that G. P. H. was a member of that firm, the variance is fatal.

Appeal from circuit court, Adams county; RALPH NORTH, Judge.

Albert Polkinghorne was indicted for embezzlement. The indictment charged that defendant received a number of barrels of meal from George P. Hellman & Co., as a broker, and that he sold the same and received the money therefor for account of George P. Hellman, and that defendant fraudulently converted to his own use and embezzled the greater part of said proceeds. Defendant moved to quash the indictment, which motion was overruled. Defendant was convicted, and appeals.

Martin & Lanneau, for appellant.

COOPER, J. The indictment is seemingly contradictory, but it may be possible that the course of business between the parties was such that the broker was to receive the proceeds of the sale of the meal of the firm consigned to him for account of one member of the firm. The court, therefore, properly refused to quash the indictment.

But there is not only a failure to prove the averment as laid, that the money was received for the account of George P. Hellman, but the evidence is that it was received for account of George P. Hellman & Co. There is in this respect a fatal variance between the charge laid and the proof. The record is entirely free of anything tending to prove that the firm of George P. Hellman & Co. was composed of George P. Hellman and William Hellman, as is alleged in the indictment. For anything that appears in evidence, it is no more probable that the money alleged to have been embezzled belonged to George P. and William Hellman than to any other citizen of the United States.

The judgment is reversed, and cause remanded.

WING v. MINOR.

(*Supreme Court of Mississippi*. March 10, 1890.)

TAXATION—ASSESSMENT—DESCRIPTION.

An assessment of "lots 7, 8, and 9 of block 5, Ocean Springs, in section 30, township 7, range 8," as "lots 7, 8, 9, and 10 of block 5, O. S., section —, township 7, range 8," is void, and does not authorize the sale of the land.

Appeal from circuit court, Jackson county; S. H. TERRAL, Judge.

J. D. Minor bought the land mentioned in the opinion from the state, the same having been sold for taxes. He brought this action of ejectment to recover the same, and had judgment, from which Wing appealed.

T. S. Ford, for appellant. *Brame & Alexander*, for appellee.

COOPER, J. The tax collector sold lots 7, 8, and 9 of block 5, Ocean Springs, in section 30, township 7, range 8, on an assessment of lots 7, 8, 9, and 10 of block 5, O. S., section ———, township 7, range 8. This was no assessment at all, and did not warrant the sale of any land in the county.

Judgment reversed.

McKEE V. JONES.

JONES V. McKEE.

(*Supreme Court of Mississippi*. March 10, 1890.)

SUNDAY CONTRACTS—SALE—SPECIAL WARRANTY.

1. In a suit in Mississippi on a contract executed in another state, the defense that the contract was made on Sunday, and is void, cannot be set up, if it is not void under the law of the state in which it was made.

2. Under Revised Civil Code La. art. 2503, providing that in case of sales "the parties may, by particular agreement, add to the obligation of warranty which results of right from the sale," where a person, in selling a horse, specially guarantees that he is free from a certain disease, and it is afterwards found that he did have such disease, the buyer may recover, not only for this particular horse, but for other horses to which the disease is communicated, and which die therefrom; nor can the seller escape liability on the ground that he did not know the horse was diseased.

Appeal from circuit court, Wilkinson county; RALPH NORTH, Judge.

Jones bought some horses from McKee, in the state of Louisiana, on Sunday. He thought that one of the horses—a "dun-colored" horse—had glanders; but McKee, in addition to a general guaranty that the horses were all sound, gave a special guaranty that the horse was free from glanders, assuring Jones that he was only affected with distemper. Jones brought the horses home, and it turned out that the dun-colored horse did have glanders, and not only died, but communicated the disease to six other horses belonging to Jones, from which they also died. Wherefore Jones brought this suit against McKee to recover damages for the dun horse, and also for the loss of his other horses. McKee pleaded that the contract of sale was made on Sunday, and was therefore void, and also pleaded that he did not know that the dun horse had glanders, and therefore, under the Civil Code of Louisiana, he was not bound. The court ruled that the contract was not void because made on Sunday, such not being contrary to the laws of Louisiana, and also ruled that Jones could only recover for the value of the dun-colored horse. Both parties were dissatisfied with the judgment, and have appealed.

A. G. Shannon, for plaintiff. D. C. Bramlett and H. C. Capell, for defendant.

CAMPBELL, J. As the sale in Louisiana was not invalid because made on Sunday, the defense on that ground is not available in this state. Therefore the judgment in respect whereof complaint is made, as to the validity of the contract, is unassailable.

The court ruled erroneously in holding that the seller of the horse was exempt from liability for damages as alleged because of a want of knowledge by him that the

horse had the disease specially guaranteed against. Revised Civil Code La. art. 2503. This provides that "the parties may by particular agreement add to the obligation of warranty which results of right from the sale, or diminish its effect," etc.

The judgment of the court below is reversed, and its action on the pleadings, so far as not consistent with this opinion set aside; and the cause is remanded for proper entries on the minutes of the circuit court in accordance with the view we announce, and for further proceedings in the cause, which is to be dealt with as if no judgment had been given in it. Each appellant to pay the costs of his appeal to this court.

BAILEY V. STATE.

(*Supreme Court of Mississippi*. March 10, 1890.)

INTOXICATING LIQUORS—ILLEGAL SALES.

On a trial for unlawfully selling intoxicating liquor, where it is apparent that the indictment refers to a sale testified to by a witness for the state, it is error to ask defendant, on his cross-examination, as to a different transaction with respect to intoxicating liquor.

Appeal from circuit court, Copiah county; J. B. CHRISMAN, Judge.

T. J. Bailey was indicted for unlawfully selling intoxicating liquors within five miles of the towns of Beauregard and Weason, contrary to statute. One Quarrels, a witness for the state, testified that he got half a pint of whisky from Bailey, at Bailey's residence, which was within the limits prohibited; that he afterwards paid Bailey for the whisky. Defendant, testifying in his own behalf, swore that he never sold Quarrels any whisky, but gave him some for a special purpose; that he had no recollection of ever having received any pay for such whisky, and knows that he never made any charge or demand for pay. On cross-examination, in answer to a question as to whether he had ever received any money for whisky, defendant replied that at one time, while some persons (Flint, Quarrels, and Parker) were at his house, he set a flask of whisky on the mantel for them to drink, and a week afterwards his little son found two "quarters" in a cigar-box on the same mantel; that he did not know how they got there till long afterwards, when Parker said that he had put them there. Defendant was convicted and appeals.

J. S. Sexton, for appellant. T. M. Miller, Atty. Gen., for the State.

CAMPBELL, J. The appellant was perhaps convicted of an offense for which he was not indicted. It is manifest that he was indicted for selling whisky on an occasion known to and testified of by Quarrels; and on cross-examination by the district attorney he was made to testify as to a transaction with respect to whisky for which he may have been convicted, which was another and different occasion from that testified to by Quarrels. It is impossible to determine to which occasion the verdict relates. The interrogation of the defendant, as to an occasion different

from that sworn to by Quarrels, should not have been permitted. *King v. State*, 6 South. Rep. 188.

Reversed and remanded.

PERROW V. STATE.

(*Supreme Court of Mississippi*, March 10, 1890.)

OBSTRUCTING JUSTICE—INDICTMENT—VARIANCE.

An indictment for aiding, inciting, and advising a witness not to answer a subpoena is sustained by evidence that defendant aided, incited, and advised a witness not to permit an attachment to be served on him as a defaulting witness.

Appeal from circuit court, Pike county; J. B. CHRISMAN, Judge.

S. R. Perrow was indicted for aiding, inciting, and advising a witness not to answer a subpoena. His son had been summoned as a witness in the circuit court. He did not obey the summons, and an attachment was issued for him, when defendant took him out of the state into the state of Louisiana, thus preventing the attachment from being executed. Defendant was convicted and sentenced, and appeals.

W. P. Casedy, for appellant. T. M. Miller, Atty. Gen., for the State.

COOPER, J. The position of counsel for appellant that the conviction must be set aside because the defendant was indicted for aiding, inciting, and advising the witness not to appear in answer to a subpoena, and the evidence shows that he aided, incited, and advised the witness not to permit an attachment to be served upon him as a defaulting witness, is without merit. The gist of the offense is in obstructing the course of public justice by counseling the witness not to appear, and in assisting him to elude the officer of the law. The averment in the indictment that the witness had been subpoenaed was mere matter of inducement. The subpoena had performed its function when it was served upon the witness. The duty of the witness was thereby fixed to attend upon the court in conformity with its order, and if thereafter the appellant did anything to prevent his attendance he was guilty of obstructing the course of justice, and punishable therefor. 1 Bish. Crim. Law, § 468; *State v. Keyes*, 8 Vt. 57; 3 Chit. Crim. Law, 235.

Judgment affirmed.

LOUISVILLE, N. O. & T. RY. CO. v. DAY.

(*Supreme Court of Mississippi*, March 10, 1890.)

TRESPASS—EVIDENCE.

In 1873, plaintiff began to occupy land belonging to his father under oral authority from the latter, who told him that, on a certain contingency, he (the father) would convey the land to him. Plaintiff paid the taxes, but the land was assessed to his father, and paid on as part of a larger tract belonging to the father. In 1882 the father granted to a railroad company a right of way over all his land, and the road was built across the land occupied by plaintiff without objection from him. The road not having been built within the required time, plaintiff's father sued the railroad company for trespass on land, including that occupied by plaintiff, and recovered for damage to another portion. He thereafter

compromised with the company, and in 1887 conveyed to it a right of way across certain lands, including the section in which the land occupied by plaintiff was situated. During this litigation plaintiff asserted no claim. In an action against the company for cutting trees on the land, under a right given in the second grant to it, plaintiff alleged that, in 1886, his father had conveyed the land to him, but the conveyance was not produced, and it was not claimed to have been recorded. *Held*, that plaintiff was not shown to be the owner of the land, and could not recover.

Appeal from circuit court, Wilkinson county; RALPH NORTH, Judge.

Action by J. J. Day against the Louisville, New Orleans & Texas Railway Company for damages for trespass on land claimed by him, and for cutting trees on said land. Judgment for plaintiff, and defendant appeals.

W. P. & J. B. Harris, for appellant. D. C. Bramlett, for appellee.

CAMPBELL, J. The evidence of the defendant should not have been excluded. It should have been left to the jury to say whether, upon all the evidence, the plaintiff was entitled to recover anything, and we have no hesitation to say that a verdict for the defendant would have been sustained. In 1873 the father of the plaintiff, having a large quantity of land, it appears authorized him to settle upon the western part of section 20, the land with respect to which this suit arose, telling him to occupy and pay taxes; that he would not convey it to him, but at an indefinite future date, and on a certain contingency, (which might or might not occur,) he would convey it to him. The son proceeded, under this mere license, to occupy the land, and continued on it, and annually paid the taxes on it, but it was all the time assessed to the father, and paid on as part of his; one receipt for all being given in the name of the father. In 1882 the father united with other land-owners in that part of the country in granting the right of way over all their lands for the construction of a railroad. This grant was general over all lands owned by the grantors in Wilkinson county, and was to be void, if the road should not be built in 18 months. The road was not completed in that time, but a survey was made, and a location, and grading and constructing went on, and the road was completed in the summer of 1884. It was built on the western part of section 20, which all this time was occupied by the plaintiff, and no objection was ever heard from him, no claim that he should be consulted or compensated, or in any way treated as owner. This particular land is part of a much larger tract of the father. The legal title was in him. All was assessed to him, and paid on in his name as one property. In 1885 he (the father) sued the railway company for trespass on his land, including section 20, and recovered for damage to part of the land other than this section, in October, 1886. About this time there was a proceeding for condemnation of the right of way over the lands of the elder Day, and a compromise was agreed on between him and the railway company, by which he was to be paid \$800, and it was paid him; and on the 21st day of January,

1887, he made a conveyance to the company of the right of way across certain of his lands, and among them over and across section 20, and of the right "to fell any timber beyond the right of way which is sufficiently near the track of said road to fall on and obstruct the same." In virtue of this purchased right the company caused the overhanging trees to be cut down. During the litigation between his father and the company, ended as aforesaid, the plaintiff in this action, who was cognizant of it, asserted no claim of any sort against the company; but in the early part of 1889, when it appeared that his father had got through with the company and got out of it all he could, instituted this action, and now claims the land by "a verbal deed," as he calls it, in 1873, and his continued occupancy since, and a conveyance by his father, he says, in 1886, of this land. This conveyance was not produced, and he testifies doubtfully about it. It is not claimed to have been recorded. It is not denied that during all the years of building the road, and litigating with his father, he was silent as became him in his position of a mere licensee of the land in whose favor no statute of limitations ran; and it would be simply insufferable to permit him, under the circumstances shown by this record, to be treated as owner of the land, and entitled to recover the damages he seeks. He was certainly not owner until it was conveyed to him in 1886, and if it was then conveyed to him, and the deed pocketed, he could not be treated as owner as against the defendant; and if his conveyance was recorded, when the company purchased of his father, 21st January, 1887, a grave question would arise as to its efficacy under the history of this case.

Counsel for the appellee asks to be permitted to remit so much of the judgment as will satisfy us, and cause judgment here for what we regard as the proper sum, but, in our view, a new trial should be had; for, if the record shows the facts of the case, we think no recovery should be had, and if the truth of the case entitles the appellee to a recovery of all or any part of his demand we have no desire to hinder him. We deal with the case as presented by the record only, and know nothing and care nothing about it, except that the law shall be properly applied to the facts of the case.

Reversed and remanded.

COWART, Tax Collector, v. TAXWORTH *et al.*
(*Supreme Court of Mississippi.* March 10, 1890.)

TAXATION.

The statute of Mississippi limits county taxation for Marion and other counties to 13 mills, only 3 mills of which are for school purposes, but provides that the levy may be 15 mills, where the counties owe debts. *Held* that, in addition to the levy of 3 mills for school purposes, a levy may be made to pay teachers' warrants issued in a previous year, provided such additional levy does not raise the amount of taxation above 15 mills, since such warrants are debts of the county.

Appeal from chancery court, Marion county; S. EVANS, Chancellor.

In 1888 the board of supervisors of Marion county, in addition to other taxes, levied 5½ mills on the assessed value of property in said county, for school purposes for the years 1888 and 1889, and for the deficit in the teachers' fund for the years 1887 and 1888. In other words, there were outstanding teachers' warrants in said county, and, in addition to the regular levy of 3 mills for school purposes, the board of supervisors levied 2½ mills additional to pay said outstanding teachers' warrants. The total levy by said board for all purposes did not exceed 15 mills. The law limits taxation generally to 13 mills, but provides that the levy may be 15 mills where counties owe debts to be paid. The sheriff and tax collector, Cowart, was proceeding to collect the taxes when appellees, citizens of the county, filed a bill to enjoin the collection of the tax levied to pay outstanding teachers' warrants. From a decree overruling a demurrer to the bill this appeal is prosecuted.

S. E. Packwood, for appellant. W. P. & J. B. Harris, for appellees.

CAMPBELL, J. In *Foote v. Brown*, 60 Miss. 155, we held that a tax collector could not be compelled to receive in payment of the tax for school purposes in the year 1882 a teacher's warrant issued in a previous year, and that a county treasurer could not be required to pay such a warrant out of money collected for the year 1882, unless there was in his hands a surplus of such fund beyond what was required for schools for that year; but it was not decided or suggested that the board of supervisors might not levy a tax, within the limit of taxation allowed by law, to provide a fund to pay any deficit of a previous year. Teachers' warrants, lawfully issued, constitute an indebtedness of the county, and may and should be provided for and paid; and, as the levy by the board of supervisors in this case was within the limit prescribed by law for counties situated as Marion county was according to the bill, it was authorized, and the demurrer to the bill should have been sustained. Reversed, and demurrer sustained, and bill dismissed, and cause remanded to the chancery court for a decree, according to section 576 of the Code.

LOUISVILLE, N. O. & T. RY. CO. v. NATCHEZ, J. & C. R. CO.

(*Supreme Court of Mississippi.* March 10, 1890.)

NEGLECTANCE—OPINION EVIDENCE—FIRES.

1. In an action for burning cotton, by sparks from defendant's engines, where it appears that the cotton was loaded by plaintiff on flat-cars, without covering, the opinion of a witness as to whether or not it would have burned if it had been loaded in box-cars or covered is not admissible.

2. Instructions that the burden of proof is on plaintiff, not only to show negligence on the part of defendant, but also that he himself was free from negligence, are not accurate statements of the law, and are properly refused.

3. An injury caused by fire communicated by a train is an injury "inflicted by the running of the locomotives or cars" of a railroad company,

within the meaning of Code Miss. § 1059, making proof of such an injury *prima facie* evidence of negligence of the company.

Appeal from circuit court, Jefferson county; RALPH NORTH, Judge.

Action by the Natchez, Jackson & Columbus Railroad Company for the use of the Phoenix Insurance Company against the Louisville, New Orleans & Texas Railway Company, to recover damages for the burning of cotton. The cotton had been delivered to the nominal plaintiff for transportation, and part of it was loaded on flat-cars, part in box-cars, and part was on the depot platform. That in the box-cars was not burned. The cotton was discovered to be on fire just after two trains of defendant had passed, and the testimony shows that the cotton was set on fire by sparks emitted from the locomotives drawing these two trains. Judgment for plaintiff, and defendant appeals.

W. P. & J. B. Harris, for appellant. Martin & Lanneau, for appellee.

COOPER, J. The appellant seeks a reversal of the judgment in this cause on three grounds: (1) Because the verdict is against the preponderance of the evidence; (2) because the court erred in excluding from the jury evidence offered by the defendant to show contributory negligence on the part of the plaintiff, and refused instructions of defendant that the plaintiff could not recover if it was guilty of contributory negligence; and (3) because the court erred in instructing the jury that, if the injury was caused by fire communicated by the servants or agents of defendant in the running of its trains, the law presumed negligence, and the burden of proving the exercise of care was on the defendant.

On the first point it is sufficient to say that the evidence supports the verdict.

The second assignment of error is not supported by the record. The defendant was permitted to prove the circumstances of the fire, the condition in which the cotton was at the time, its proximity to danger, and the manner in which it was loaded by the plaintiff company on flat-cars without protection by tarpaulin or other covering. The evidence to which objection was interposed and sustained was the opinion of a witness sought to be put in evidence, as to whether or not the cotton would have been burned if it had been loaded in box-cars or covered by tarpaulins. The circumstances of the case were not such as to justify the introduction in evidence of the opinion of this witness. The jury were as capable of forming opinion from the proved facts as this witness, and the evidence was properly excluded. Nor were instructions refused by which it was announced that the contributory negligence of the plaintiff would preclude recovery.

The instructions asked by defendant, and refused, (the third and fourth,) do not announce the principle that no recovery can be had if the plaintiff is guilty of contributory negligence. The proposition they declare is that the burden of proof is on the plaintiff, not only to show negligence on the part of defendant, but also to show that he himself was free from negli-

gence. This is not an accurate statement of the law, and they were properly refused.

The remaining question is whether fire communicated by a train is an injury "inflicted by the running of the locomotive or cars," within the meaning of section 1059 of the Code, which declares that, "in all actions against railroad companies for damage done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of such company, in reference to such injury." We agree with counsel that the primary purpose of the law is to put upon the company the burden of establishing the fact of the exercise of skill and care in those cases in which, by actual contact between the train and persons or property, the injury is inflicted. But we are unable to limit the statute to such cases only. The reason of the statute was the known difficulty which usually attended plaintiffs in these actions of making proof of the circumstances under which the injury was inflicted by running trains. In the larger number of cases it will be found that the injury springs from actual contact with the running trains. But we think the communication of fire from running trains (and it would be the same if the fire was originated in a train temporarily at rest) is an instance in which the statute applies. Fires in locomotives are sources of danger from which it is the duty of the employees to guard by the exercise of care and prudence, and the escape of which, in the shape of sparks, the company itself must secure against by the use of known appliances and safeguards. Danger from this cause constantly attends the running of trains, and by the great number of such trains, and the extent of country over which they are daily and hourly passing, the owners of property exposed to risk would in most cases be denied all hope of recovery if there rested upon them the burden of establishing by affirmative testimony the absence of reasonable skill and care by the servants of the company. We have been unable to find any other statute similar to ours, except that of the state of Arkansas, and in that state it has been held to apply to cases of this character.

We find no error in the record, and the judgment is affirmed.

LOUISVILLE, N. O. & T. RY. CO. v. PETTY.
(Supreme Court of Mississippi. March 10, 1890.)

FELLOW-SERVANTS—NEGLIGENCE.

A railroad company is not liable for an injury to its brakeman, caused by a want of sufficient sand in the sand-box on the engine, if the insufficiency be due to the failure of that servant whose duty it is to fill the sand-boxes suitably, before the trains start to perform his duty properly, when it does not appear that the company was negligent in his selection and retention, as he is a fellow-servant of the brakeman.

Appeal from circuit court, Wilkinson county; RALPH NORTH, Judge.

Action by J. W. Petty against the Louisville, New Orleans & Texas Railway Company for personal injuries. Plaintiff was a brakeman on defendant's train, and was

injured by being thrown from the train. While the train was ascending a grade, the engine jerked and slipped, causing the accident. The evidence tended to show that the jerking and slipping of the engine was caused by an insufficient supply of sand in the sand-box on the engine. Verdict and judgment for plaintiff, and defendant appeals.

W. P. & J. B. Harris, for appellant. *D. C. Bramlett* and *H. C. Capell*, for appellee.

CAMPBELL, J. The evidence tends to show that the injury received by the appellee was caused by the want of sand in sufficient quantity in the sand-box on the engine, but there is no evidence how it came about that the supply of sand was insufficient. Whether the engine was furnished properly, in this respect, at the start, and had exhausted the supply, or started unfurnished, does not appear. If the latter be true, it was because of the failure of duty of that servant of the company whose duty it was to fill the sand-box suitably; and for an injury suffered by reason of the negligence of such fellow-servant the appellee, a brakeman on the train, has no claim on the company; it not being made to appear that it was at fault as to the selection or retention of the servant, or in any other respect, as to this service. No rule of common law is more universally affirmed than non-liability of the master to one of his servants for an injury caused by the negligence of a fellow-servant engaged in the common service; and it was distinctly announced in this state, more than 16 years ago, that all employees of a railroad company, engaged in merely operative service connected with the carrying on of the business of running trains, are fellow-servants, and that the common employer is not responsible to one of these for injuries caused by the negligence of another. Undoubtedly the "hostler" or yard servant, charged with the duty of supplying the engine before starting it on the road, with fuel, water, sand, or other needed thing, is a mere servant, and not the agent or representative of the master, except in that qualified and subordinate sense in which every servant may be said to be; and if it be true, which has not yet been affirmed in this state, that certain employees of a railroad company are not fellow-servants of the master, but are employed in doing the work of carrying on the business, it would yet be true that the appellee and the laborer whose default is supposed to have led to his hurt were fellow-servants, and no liability attached to the common master. The rule on this subject announced in *Railroad Co. v. Hughes*, 49 Miss. 258, (decided in 1873,) and reaffirmed with emphasis in *Howd v. Railroad Co.*, 50 Miss. 178, (1874,) has remained undisturbed by judicial or legislative enactment, and must be regarded as the accepted doctrine in this state; and we must not be expected to follow the devious ways of those courts which, in bending the rule, which all acknowledge, to effect their ideas of justice in particular cases, have well nigh destroyed the rule itself. This rule, as held in this state, and in several other states of the United States, and in England,

is a simple one, just in its principle, politic in its application, because conservative of life and property, and easily understood and applied, while all efforts to vary and qualify it have involved courts undertaking it in endless contradictions and difficulties.

The writer of this opinion was at the bar, and was sought to be employed to bring the action of *Railroad Co. v. Hughes*, cited above, and after careful consideration of the case, with the facts before him, declined to act as counsel, on the ground that the law was believed to be against the right to recover on those facts; which circumstance is mentioned to show that, before any announcement of the law on this subject in this state, the writer had reached the conclusion afterwards announced in the very case which had been offered him as counsel and declined. This conclusion was based on the law of master and servant as laid down in books which were accessible. The case was not tried on the principles announced in this opinion, and a new trial must be had.

Reversed and remanded.

TEDFORD *et al.* v. STATE.

(*Supreme Court of Mississippi*. March 8, 1890.)

BAIL—SUBSEQUENT ARREST.

Where defendant has been released on bail, his subsequent arrest for another offense does not operate, *ipso facto*, to discharge the sureties on the bond.

Appeal from circuit court, Lincoln county.

To a *scire facias* on a forfeited bail-bond, the sureties, J. M. Tedford and others, pleaded that after its execution, and before forfeiture, the grand jury returned into the circuit court of the same county other indictments against their principal, (Allen,) upon which bench-warrants issued, under which the sheriff arrested said Allen, and took him into custody. The state demurred to this plea. The demurrer was sustained, and judgment final was rendered against the sureties, from which they appeal.

H. Cassidy, for appellants. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. The appellants were not released from the obligation as sureties on the bail-bond of their principal by reason of his subsequent arrest on another charge. The plea does not aver that the principal was in custody under such subsequent arrest at the time at which the appellants had become sureties for his appearance. The facts pleaded may be true, and yet it may be that the principal had been released in time to appear for trial of the offense to answer which appellants were his sureties. The contention that the subsequent arrest for another offense operated *ipso facto* to release the prior bond to appear is wholly fanciful, and springs from the assumption that the state, by accepting the bond on which the sureties were bound, delivered the accused to the manual possession of the sureties, and impliedly agreed not to disturb that possession

for any cause, except on condition of releasing them from their obligation as sureties.

Judgment affirmed.

BALL et al. v. STATE.

(Supreme Court of Mississippi. March 3, 1890.)

FORMER CONVICTION—JOINT OFFENSE.

1. A plea of former conviction to an indictment for disturbing religious worship is not sustained by showing a former conviction for intoxication and profanity indulged in on the same occasion, when the evidence shows that defendant was guilty of disturbing religious worship by other modes than by being drunk and profane, as there is a want of identity of the two charges.

2. On a joint indictment of two persons for disturbing religious worship, it was proved that one of the defendants left the place of worship, a camp-ground, after night, and called to "the boys" to follow him; that others went out with him, and there was firing of pistols, and much boisterous conduct in and around the camp-ground for several hours. As to the defendant who first went out, the evidence showed clearly that he was guilty; and, as to the other, the evidence was that he was arrested with the crowd. He also failed to furnish any explanation of his being out at 2 o'clock in the morning, and in the crowd, when arrested. *Held*, that the evidence was sufficient to sustain a verdict of guilty as to both defendants on a joint indictment for a common participation in the boisterous conduct.

Appeal from circuit court, Pike county; J. B. CHRISMAN, Judge.

Ball and Badon, the appellants, were jointly indicted for disturbing religious worship. On the trial, it was proved that Ball left the tabernacle of the China Grove Camp-Ground, where religious worship was being conducted, on Saturday night, and called to "the boys" to follow him; that Ball, with others, went out; and that there was firing of pistols, and much boisterous conduct, in and around the camp-ground, for several hours. Ball and Badon were arrested by the special constable who had charge of the duty of keeping the peace. Ball offered to show that he had been convicted at a former term of the court for intoxication and profanity, on the same occasion, at China Grove Camp-Ground, as that for which he is now indicted for disturbing religious worship, which the court refused to allow. Badon failed to show non-participation in the disturbing conduct, and it was proved that he was arrested with the crowd. There was a verdict of guilty, and judgment thereon, from which both appealed.

S. E. Packwood, for appellants. T. M. Miller, Atty. Gen., for the State.

CAMPBELL, J. Ball was properly denied the benefit of his former conviction for intoxication and profanity, both because *autofelis convict* must be pleaded specially, and the evidence shows clearly that he was guilty of disturbing religious worship at the China Grove Camp-Meeting, by other modes than by being drunk and profane, and therefore there was a want of identity of the two charges.

Badon was rightly convicted with Ball, if he participated in the nocturnal disturbance in which Ball and many others appear to have been engaged; and the jury thought he was, and we are not able to

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say that they did not have sufficient evidence on which to reach this conclusion. He failed to furnish any explanation of his being out at 2 o'clock A. M., and in bad company. The jury, doubtless, concluded that he was one of the crowd, composed of Ball and others, who made night hideous, and terrified men, women, and children by their disgraceful conduct in firing pistols about the camp ground for hours on that Saturday night and Sunday morning.

We agree with the counsel for the appellants in the proposition that two persons cannot be convicted of distinct and independent offenses upon an indictment which charges an offense as committed jointly. In order to convict both, a joint offense must be proved. 1 Bish. Crim. Law, § 802; Reg. v. Dovey, 2 Eng. Law & Eq. 532. It may be that *Strawhern v. State*, 37 Miss. 422, has been misinterpreted as sustaining the right to indict several persons for distinct offenses, and to convict such of them as may be proved severally guilty. It is not authority for a proposition so subversive of the rights of persons accused of crimes as that would be. The correct doctrine on this subject is announced in *Elliott v. State*, 26 Ala. 78, and authorities cited above.

The ground on which we sustain the conviction here is that the evidence warrants a verdict of guilty as to both defendants of a joint disturbance of religious worship, by common participation in the boisterous performance proved.

Affirmed.

WYNN v. STATE ex rel. DISTRICT ATTORNEY.

(Supreme Court of Mississippi. Jan. 20, 1890.)

SCHOOLS—COUNTY SUPERINTENDENTS—CONSTITUTIONAL LAW.

1. Act Miss. March 7, 1888, which provides for the election of county superintendents of education in part only of the counties of the state, does not thereby conflict with Const. Miss. art. 8, § 1, requiring "a uniform system of free public schools."

2. Const. Miss. Art 1, § 18, provides that "no property or educational qualification shall ever be required for any person to become an elector." Article 7, § 2, makes all male inhabitants of the state, with certain exceptions, who are 21 years of age, qualified electors; and section 4 provides that "no person shall be eligible to any office * * * who is not a qualified elector." The constitution prescribes special qualifications for many offices created by it. *Held*, that for other offices no qualifications were required, except that of being a qualified elector; and therefore section 2 of the act of March 7, 1888, which provides that "no person shall be eligible to such office of county superintendent of education who does not hold a first-grade certificate," was unconstitutional.

Appeal from circuit court, Yalobusha county; W. M. ROGERS, Judge.

Quo warranto proceeding instituted in the name of the state, on the relation of the district attorney, to oust W. T. Wynn from the office of superintendent of education for Yalobusha county, to which he had been elected in November, 1889. In 1888 the legislature passed an act for the election of the county superintendents of education in several, but not all, the counties of the state. Yalobusha county among the number. The act prescribed that the

person elected to such office must hold a first-grade teacher's certificate. Wynn did not hold such certificate at the time or for the year in which he was elected. Judgment of ouster against Wynn, from which he appeals.

Howry & Falkner, for appellant. *Sullivan & Whitfield* and *P. A. Rush*, for appellee.

CAMPBELL, J. This case involves the consideration of "An act to provide for the election of county superintendents of education by the people," approved March 7, 1888. The act is assailed as violative of the constitution, because it provides for the election of county superintendents in a large number of counties, and not in all; which, it is said, conflicts with section 1, art. 8, of the constitution, in its requirement of "a uniform system of free public schools." It is not denied that the legislature could make the office elective in all the counties, but the argument is that this power must be exerted as to all the counties or none. We reject this view as unsound. The greater includes the less. The whole embraces all the parts, and power to make the office elective throughout the state, by counties, includes power to apply this rule to any number of counties.

It may be difficult to determine the precise meaning of the expression, "uniform system of free public schools," as used in the constitution; and we are not called on in this case to attempt to define it further than to say we do not think it has any reference to the manner in which county superintendents of education are obtained, any more than it refers to the houses in which schools may be taught. Uniformity in the system is observed by having a county superintendent of education in each county, as provided for, without regard to the circumstance of his appointment or election. The uniformity meant by the constitution has reference to the system of free public schools, and not to the county superintendents; since it is not perceivable how the particular authorized mode of obtaining this official, a different person for each county, could mar the uniformity of the system of free public schools. The source from which he derives his right to his office has no connection with or relation to his duties in office. They are prescribed by law and the uniform system of free public schools is in no way dependent on or affected by how the county superintendent gets into office.

Section 2 of the act provides "that no person shall be eligible to such office of county superintendent of education who does not hold a first-grade certificate." We assume that it means a first-grade license as a teacher, as provided for by "An act in relation to free public schools," approved March 18, 1886, for, if it does not mean that, it has no meaning; and with this assumption it seems clear that the purpose of the act was to require, as a qualification for election to the office, a first grade teacher's license, in force at the time, and therefore that one which had expired as such is insufficient. The certificate which was given the appellant in 1886 was not such as the act requires to make him

eligible to the office, and, if this section of the act is valid, he was properly ousted from the office as being ineligible. Can this requirement be maintained? If it does not conflict with the constitution it must be upheld, however great the practical difficulties in its operation, or the curious complications which may arise under it. Under it every county superintendent of education in the state (not holding a first-grade certificate, and probably not one did) was ineligible at the election in 1889 as his own successor; and hereafter one elected and holding the office cannot be made eligible to succeed himself, unless he can examine himself, and give himself a first-grade certificate. Besides this, it is in the power of a county superintendent of education to preclude anybody from eligibility to the office, for he might refuse a certificate of the kind required to any one, (or he might revoke it, as he has the power,) and thus prevent the office from being filled. There is no way to compel a county superintendent to give a certificate. It is matter of discretion, determinable by him, and not controllable by the courts. He might thus arbitrarily prevent any one from eligibility to succeed him. Such a course is not likely to be pursued, but the bare possibility of its occurrence, together with other considerations, is enough to suggest careful inquiry as to the validity of this section. Under it not only are county superintendents of education rendered ineligible for election to the office, and may they prevent everybody from being eligible, but the most distinguished scholar and educator, or the most eminent divine, possessed of the greatest learning and highest moral and religious character, could not be chosen by the qualified electors as county superintendent of education, unless he had obtained from the county superintendent a first-grade certificate, to obtain which he would have to commit a pious fraud, in applying for a license to teach, when his whole object was to become eligible to the office of county superintendent of education. The possibility of a condition of things by which a vacancy might be created in the office, without the power to fill it until remedial legislation should remove the difficulty, was never contemplated by the legislature, of course; and, if this view of the section under consideration is not sufficient to annul it, it presents an explanation of our have been led to examine the question of its validity under other provisions of the constitution applicable to it.

Section 18, art. 1, of the constitution, is: "No property or educational qualification shall ever be required for any person to become an elector." Section 2, art. 7, makes "all male inhabitants of this state, [with certain exceptions,] twenty-one years old," etc., "qualified electors." Section 4 is: "No person shall be eligible to any office * * * who is not a qualified elector." These provisions make it clear, we think, that every qualified elector is eligible to any office for which other qualifications are not specifically required by the constitution. For many of the offices created by it, qualifications of age or residence are prescribed. For other offices for which it provides there

are no qualifications required, except that contained in section 4, above, viz., to be a qualified elector. This shows that, where other than the general requirement to be a qualified elector was intended, it was prescribed; and, where no special qualification for an office was prescribed, it was intended that the general provision should apply, and to be a qualified elector is sufficient. From the provision, "no person shall be eligible to any office * * * who is not a qualified elector," the implication is very strong that a qualified elector shall be eligible to any office, unless otherwise provided; and, in view of the fact that it is otherwise provided as to certain offices, the implication becomes a necessary one, and decisive against the claim of power in the legislature to add to the constitutional qualifications for office.

It is inconceivable that the framers of the constitution, in providing that the legislature shall have power to make said office of county school superintendent of these several counties elective, as other county officers are, intended to include the power to restrict and limit the range of choice by the qualified electors, so as to exclude all except such as should comply with certain requirements unknown to the constitution, and not in harmony with its spirit and provisions. If the legislature has the power to prescribe qualifications for an office created by the constitution, it may make them what it pleases, in its discretion. Grant the power, and it must be held to be without limit, except by some positive prohibition of the constitution, and there is none, except that "no property qualification for eligibility to office shall ever be required," and that no one but a qualified elector shall be eligible to any office.

Suppose that the legislature, instead of imposing, as it endeavored to do, a just and proper condition of eligibility to the office,—one calculated to secure fitness and efficiency,—had provided that none except colored men should be eligible in certain counties or had made some other requirement equally absurd and ridiculous, would any be found to contend for the validity of such an enactment? It is thus seen that the only safe course is to deny the right of the legislature to add to any office created by the constitution any qualifications for the incumbent not imposed by the constitution itself. As offices were created by it, and the subject of qualification dealt with, and special requirements made for certain offices, and general requirements as to all, it must be assumed that it prescribes all that was intended, and that none can be added, however appropriate they may be.

In *Burnham v. Sumner*, 50 Miss. 517, the requirement of the certificate prescribed by the act of 1873, as a condition of the right to receive an appointment by the state board of education to the office of county superintendent, was held valid, and that an appointment without such certificate was void. This view is a very plausible one, but we are convinced, and have endeavored above to show, that it is not maintainable. Such a requirement by law is unnecessary as to the state board of

education, since it may by its own will make and apply that rule, and, in our opinion, this attempt to control the board created by the constitution, and charged by it with power and duty to appoint county superintendents, by and with the advice and consent of the senate, was extraconstitutional.

It is manifest, from the opinion of the court in the case cited, that the conclusion reached and announced was attempted to be justified by the rule of caution applied by the courts in declaring legislative acts violative of the constitution, and by the salutary character of the requirement sustained; and it is reasonably certain that the condition of public affairs at that date (1874) pressed heavily upon the court to maintain so reasonable a requirement as was contained in the act of 1873. But the reasonableness and excellence of a provision is not the test of its agreeableness with the organic law, and it is never allowable to make expediency a rule by which to interpret the constitution.

Reversed and remanded.

WEIR v. FIELD.

(*Supreme Court of Mississippi*. March 10, 1890.)

FORECLOSURE SALE—BALANCE—LIMITATIONS.

1. Under Code Miss. § 1985, providing that, in foreclosure proceedings, upon report of sale, the court shall give personal judgment for such balance as defendant may be liable for, motion for such judgment need not be made at the term of court when the sale is confirmed, but at any time before the execution of the decree is barred by limitation.

2. On the death of the mortgagor, such personal decree for the balance may be had against his personal representative.

Appeal from chancery court, Adams county; W. R. TRIGG, Chancellor.

On May 4, 1872, Levi B. Field, appellant Weir's testator, made a note for \$4,000 in favor of one Bowen or order, payable 12 months after date, with interest at 10 per centum per annum, and executed a mortgage on land to secure the same. This note was afterwards transferred by Bowen to O. K. Field by indorsement. On February 22, 1879, said Levi B. Field, by indorsement of the note, waived the statute of limitations, and made a new promise. Said Levi B. Field died testate December 11, 1884, and his will was probated, and letters issued to Weir, December 15, 1884; said note being probated and registered January 5, 1885. On July 2, 1885, O. K. Field, the holder of the note and mortgage, filed a bill to foreclose against Weir, the executor, and the heirs of said Levi Field, deceased; and on November 7, 1885, a decree was rendered for the sale of the mortgaged land in default of payment of the note. At the June term, 1887, of the chancery court, the special commissioner appointed to execute the decree of sale made his report, (having made the sale February 7, 1887,) showing that he had realized from said sale the net sum of \$2,349.70, to be credited on the decree and at said same term there was a decree, confirming the sale as reported, but no adjudication of the balance due on said note. O. K. Field having died in the mean time, at the June

term, 1889, his death was suggested, and the cause was revived in the name of his executrix, Virginia H. Field; and at the same term, on motion of complainant, said executrix, a personal decree was rendered against Weir, as executor, for the balance due on the mortgage debt, and from this decree he appeals.

Code Miss. § 1935, provides that, "upon the confirmation of the report of the sale of any property, real or personal, under a decree for sale to satisfy a mortgage, deed of trust, or other lien on such property, if there is a balance due to the complainant, the court, upon his motion, shall give a decree against the defendant for any such balance for which, by the record of the case, he may be personally liable, upon which decree execution may issue."

T. Otis Baker, for appellant. *W. P. & J. B. Harris*, for appellee.

CAMPBELL, J. We fail to discover any good reason for limiting the exercise of the power conferred by section 1935 of the Code to the term of the court at which the sale of property is confirmed; and are of opinion that a decree for the balance may be moved for, as provided, at any time before the statute of limitations bars the execution of a decree. *Person v. Barlow*, 35 Miss. 174. Every such suit as that section relates to is for a decree *in rem*, and *in personam* for any balance, and, where there is a balance shown, may be regarded as a pending suit as to that until a decree for it. Therefore, no statute runs on the claim, except that applicable to a decree; for there is a judicial ascertainment of the sum due, and a decree for it, which may be the basis of a personal decree at any time within the limit already stated. *Person v. Barlow*, *supra*. What we have said disposes of the proposition that there can be no personal judgment for a deficiency, in case the debt is barred by the statute of limitations, as well as of the objection that a decree may not be had under section 1935 of the Code against the personal representative of a decedent.

The object of this section is to enable the chancery court to grant complete redress to the suitor, by subjecting property to his lien, and decreeing for any balance due him after that, so as to give him execution as at law, instead of leaving him to sue in a court of law for such balance; and, as any creditor of a decedent may sue at law, and obtain judgment, and have execution, we are unable to appreciate the force of an objection to a decree by the chancery court in such case.

As stated above, every suit to enforce a lien in the chancery court is for a specific and general remedy, as provided by section 1935, and stops the running of the statute of limitations, as to that suit, from its commencement. If the motion is made for a decree for a balance at the term of confirmation of the sale, the parties, being held as present, would not be entitled to any notice; but, if a motion be not made until a subsequent term, notice would be required, and such motion may be made at any time before the completion of the bar of the statute of limitations operating on a debt of record, which is seven years.

The cases cited by counsel for appellant were decided with reference to a state of the law in the respective states widely different from ours, and do not in any way conflict with our view of our statute. On the same state of law, we would decide as did the courts in the cases cited, and have no doubt they would each decide upon our law as we now do.

Affirmed.

WILKINSON V. TAYLOR MANUF'G CO.
(*Supreme Court of Mississippi*. March 8, 1890.)

STATUTE OF FRAUDS—MEMORANDUM OF SALE.

An order for goods, signed in duplicate by the purchaser on blanks furnished by the seller, specifying in detail what was purchased, by whom, of whom, and on what terms, together with a letter from the seller acknowledging receipt of the order, and promising to ship the goods immediately, constitute a sufficient written memorandum of a contract of sale, within the statute of frauds.

Appeal from circuit court, Amite county; *J. B. CHRISMAN*, Judge.

Action by *S. D. Wilkinson* against the *Taylor Manufacturing Company* for damages for breach of contract in failing to ship some machinery the former had purchased from the latter. *Wilkinson* desired to purchase certain machinery, and signed a contract of purchase presented to him by the agent of the appellee in duplicate; he retaining one, and the other being forwarded by the agent to the company. The company wrote the following letter to *Wilkinson*, on receipt of the contract of purchase signed by *Wilkinson*, (said contract was on blank furnished by said company,) to-wit: "Dr Sir: Your order through *Mr. Weathersby* was received on Sept. 11th, and we will ship to-day, and we will push it through as fast as possible. We returned the notes, for them to be properly made out, as the interest clause had been put in incorrectly. Yours, truly, *TAYLOR MFG. CO.*" On the trial *Wilkinson* proposed to introduce the contract and the above letter, and to prove that they were executed and received, etc.; but the court, on objection of the defendant, ruled out all this proffered testimony of plaintiff, and there was judgment against him, from which he appeals.

Cassedy & Ratcliff, for appellant. *T. McKnight*, for appellee.

CAMPBELL, J. The evidence introduced by the plaintiff should not have been excluded. One paper was a formal contract, with detailed specification of what was purchased, and by whom, and of whom, and on what terms, etc. This was signed by *Wilkinson* only, and directed to the *Taylor Manufacturing Company*, and was in duplicate, and a copy taken by *Taylor Manufacturing Co.'s* agent, and one kept by *Wilkinson*. The other writing is a letter written and signed by the *Taylor Manufacturing Company*, and addressed to *Wilkinson*, in which the receipt of his order was acknowledged, and a promise to ship at once made. The order of *Wilkinson* was on a blank furnished by the company. The statute of frauds does not require that one piece of paper shall contain

the memorandum of the contract, and it may be in several, if the paper signed by the party to be charged makes such reference to the other writing as to enable the court to construe them all together, as constituting all the terms of the bargain, and parol evidence is admissible to identify the paper referred to, and apply the reference. 1 Benj. Sales, §§ 220, 221; Reed, St. Frauds, § 341 et. seq. The letter of the Taylor Manufacturing Company contains internal evidence that it refers to the paper signed by Wilkinson, and the two papers are to be read together, and, thus read, there is a complete written contract signed by both parties.

Reversed and remanded.

RICHTER v. BEAUMONT.

(Supreme Court of Mississippi. March 8, 1890.)

TAXATION—ERRONEOUS DESCRIPTION—SALE.

Where a lot which, under the ancient division of the town, was a part of "lot 6," is assessed and sold for taxes under a different description contained in a new map of the town, which is recognized by the citizens generally, and by the town officials, but which has not been formally adopted by them, the owner thereof is not affected by the sale, if he did not know of the map, but recognized the lot as part of "lot 6," and so described it to the assessor.

Appeal from circuit court, Wilkinson county; RALPH NORTH, Judge.

Ejectment by B. Beaumont against George Richter, the owner of a lot sold for taxes, and bought in by plaintiff. From a judgment for plaintiff, defendant appeals.

A. G. Shannon, for appellant. D. C. Bramlett, for appellee.

CAMPBELL, J. The land sued for as part of lot 7 in a certain square in Woodville, was assessed in 1883, and in 1884 lot 7 was sold for taxes. For several years prior to 1883, a map of Woodville was recognized by the citizens and officials of the town, and the county assessor, as the map of the town; but this map was never adopted by an order of the board of aldermen until 1887. By the ancient division of the town, and designation of lots, lot 6 embraced the parcel of land sued for in this action, which parcel is, by the modern map, a part of lot 7. The defendant (appellant) was in 1883, and prior and subsequent thereto, in the actual possession of lot 6, and he gave the description of his land to the assessor as lot 6, and it was so assessed; he intending and understanding that lot 6 extended eastward according to the ancient order, so as to include what by the new map is part of lot 7. He paid the taxes on lot 6; and lot 7, not being paid on, was sold for taxes. It does not appear that the appellant had ever done anything in recognition of the new map, or that he knew that the new map was conformed to by the assessor in assessing lots in Woodville. It may be inferred from the fact of his residence in the town, and the recognition by citizens and officials of the new map, that he was aware of it, and that the assessor was governed by it in assessing. If so, he should not be allowed to defeat the assessment and sale by his secret understanding

or purpose. A mental reservation of the owner cannot be permitted to defeat assessment. On the other hand, if, until a recent date, lot 6 was understood to embrace what by a new map is part of lot 7, and the owner and occupant was governed by the former description in giving it in to the assessor, and did not know, and should not have known, that the assessor would deal with it as designated by the new map, he should not lose his land. The value of the lot, the manner of its inclosure, the description by which it was acquired by the appellant, and his dealing with it, might remove all uncertainty as to what would be a legal and just result; but, in the absence of such evidence, the question is, should the court have excluded from the jury the evidence for the defendant? (appellant;) and we think it should have left the matter for the jury to determine. A motion to exclude all the evidence of a party should be sustained only where it is plainly and unmistakably insufficient to maintain the issue.

The true test here is this: Had the case been submitted to a jury, and a verdict been rendered for the defendant, would it be set aside as unwarranted by the evidence? While we have a strong suspicion that the defendant is seeking to defeat an assessment and sale of the lot by a secret understanding he now says he had at the time of assessment, and that he must have known of the practical adoption by the citizens and officials of the new map, we are not prepared to say we would set aside a verdict found, by a jury properly instructed, in his favor, and, with this view, the judgment must be reversed, and the cause remanded for a new trial, when we trust all uncertainty will be removed as to the truth of the case.

Reversed and remanded.

McLEMORE et al. v. CARTER.

(Supreme Court of Mississippi. March 8, 1890.)

TRUSTS—EQUITABLE TITLE.

A bill alleging that complainants are the owners of certain land by inheritance; that it was sold for taxes; that, being themselves unable to redeem, they procured defendant to advance the necessary money to the purchaser at the tax-sale, and take the title to himself as security; that they now offer to pay the same, with interest, to defendant, and ask that a conveyance be made to them,—is not demurrable for want of equity.

Appeal from chancery court, Copiah county; WARREN COWAN, Chancellor.

Appellants, McLemore et al., filed their bill to compel the appellee, Carter, to reconvey to them certain land, stating in said bill the following facts: That they were owners of the land by inheritance; that said land was sold for taxes, and bought in at sheriff's sale by one Fugate; that, being unable themselves to redeem, they procured Carter to advance the money necessary to redeem, and take the title to himself as security; that Carter did advance the money, about \$40, and received a conveyance from Fugate; that they have offered to pay the money advanced by Carter, and now offer to pay the same, with interest; and pray that a conveyance be made to them. To this bill a demurrer was in-

terposed, which was sustained, and the bill dismissed, from which the complainants appealed.

Ramsey & Willing, for appellants. *Miller & Conn*, for appellee.

COOPER, J. While complainant's bill is not as full and specific as it should have been touching the facts from which their right is claimed to spring, we think it would be competent, under its averments, to introduce evidence sufficient to support their right to redeem. If complainants, or one of them acting in behalf of all, entered into negotiations with Fugate for the purchase of the land which had formerly been theirs, and which Fugate had bought at tax-sale; if they were the meritorious cause of the conveyance being made to Carter, and he loaned them the money to pay for it, or paid it himself or them and as a loan, and took the title as mere security for the debt due,—they are entitled to relief. *Robinson v. Leflore*, 59 Miss. 148.

Reversed, demurrer overruled, and remanded.

FARMERS' LOAN & TRUST CO. v. AVERA.

(*Supreme Court of Mississippi*. March 3, 1890.)

TRUSTS—POSSESSION OF TRUSTEE.

The possession of a trustee, under a deed of trust, before foreclosure, is insufficient to sustain an action for the conversion of crude turpentine, taken from trees on the land before his possession was acquired, and sold to defendant.

Appeal from circuit court, Greene county; S. H. TERRAL, Judge.

The appellant sued Avera, the appellee, for a conversion of crude turpentine taken from trees on appellant's land. Avera was a dealer in crude turpentine, and bought from parties who were trespassers on the land in this controversy mentioned, but defended the suit on the ground that appellant, the Farmers' Loan & Trust Company, had no right to sue, and had not shown title to the land in question. The facts as to this are that the United States government, in 1853, granted certain lands to the Mobile & Ohio Railroad Company. The railroad company gave a deed of trust on this land to the Farmers' Loan & Trust Company, which deed of trust was introduced in evidence, but no foreclosure was shown, nor an injury after appellant had taken possession of the land in pursuance of the terms of said deed of trust. There was judgment for defendant, from which the Farmers' Loan & Trust Company appealed.

McIntosh & Rich and *Brame & Alexander*, for appellant. *T. A. Wood*, for appellee.

CAMPBELL, J. The verdict is certainly wrong, if the plaintiff showed ownership of the lands on which the turpentine was taken from the trees. Probably the evidence would have been sufficient if a foreclosure of the deed of trust had been shown, or an injury to the possession, after the plaintiff had taken it, to sell the land, in pursuance of the authority conferred by the deed of trust. Until foreclosure, the Mobile & Ohio Railroad Company was

owner, except as to the trustee, after breach of the condition, etc.; and there is no satisfactory evidence here that the right of action was in the plaintiff, and for that reason the judgment is affirmed.

HOFF v. ROGERS.

(*Supreme Court of Mississippi*. March 10, 1890.)

PARTNERSHIP—INDIVIDUAL DEBTS.

Where a trustee, under a deed of trust executed by one partner on partnership property as security for an individual debt, has recovered the property in replevin against the partner executing the deed, who was in possession of the property, the other partner must resort to equity in order to recover it from the trustee, as one part owner cannot maintain an action at law against his co-owner for the joint property.

Appeal from circuit court, Amite county; J. B. CHRISMAN, Judge.

T. H. Rogers, partner of plaintiff, H. C. Rogers, owed Block an individual debt and executed to him, without the knowledge of his partner, a deed of trust to secure payment of same. Default being made in payment of the debt by T. H. Rogers, the trustee, W. W. Hoff, levied on cotton grown on the partnership plantation, and by an action of replevin against T. H. Rogers obtained possession of the cotton, to which H. C. Rogers interposed a claim, and brought an action of replevin for the cotton, and had judgment, from which Hoff, the trustee, appealed.

Cassedy & Ratcliff, for appellant. *C. P. Nelson* and *Robert Lowry*, for appellee.

CAMPBELL, J. A result was reached in this case which a chancery court would approve, but, under our execrable system of separate administration of law and equity, the successful party must be deprived of his victory because obtained in a court of law, when it should have been in a court of chancery. The case made by the evidence is that of a partnership between H. C. Rogers and T. H. Rogers for the planting operations of the year 1888, and a deed of trust by T. H. Rogers to Block for his individual debt. Replevin was brought against T. H. Rogers, who was in possession of the cotton, and a recovery had against him by the trustee in the deed of trust. H. C. Rogers, the injured partner, brought replevin, when he should have resorted to chancery, for one partner or part owner or tenant in common cannot maintain an action at law for the joint property against another co-owner. This is settled law. If the position of H. C. Rogers was merely defensive it would be different, but he is an actor asserting a right to recover the cotton against him who has recovered it from T. H. Rogers, who had possession of it, and as such he has no standing in a court of law.

We regret the impotence of the court in which the cause was pending to redress the wrong and enforce the right of the suitor; but, after exhausting all effort to find some ground on which to maintain the rights of the appellee in a court of law, we are constrained by settled rules regretfully to drive him from the temple of justice, taxed with costs, not because he has not a meritorious case, but because

he mistook that particular apartment in the temple where suitors such as he should apply.

Reversed and remanded.

WOOD et al. v. MEYER et al.

(Supreme Court of Mississippi. March 10, 1890.)

CORPORATE POWERS—MORTGAGE—PRACTION.

1. The execution by a trading corporation of a mortgage of its property as security for money borrowed in the prosecution of its business is not *ultra vires*. The power exists by implication, in the absence of charter limitations.

2. Where the arguments on a demurrer and on motion to strike it from the files are heard together, and the court should properly have overruled the demurrer, an order striking it from the files will not be reversed.

Appeal from chancery court, Claiborne county; L. McLaurin, Chancellor.

Meyer & Co. filed their bill to foreclose a mortgage executed by the Port Gibson Cotton-Mills, a corporation under the laws of the state, which mortgage had been given to secure a note for money loaned and other indebtedness to Meyer & Co. The directors and stockholders of the corporation, as well as the corporation, were made parties defendant to the bill. The corporation, and some of the stockholders, made no defense, and a decree *pro confesso* was taken against such. Some of the stockholders demurred to the bill, among other grounds, alleging that the execution of the contracts and deed of trust to Meyer & Co. was beyond the capacity of the corporation, and was therefore *ultra vires*, and null and void. Complainants moved to strike the demurrer from the files; and by agreement both the demurrer and the motion were heard together, and the motion to strike the demurrer from the files was sustained; and, defendants declining to plead further, a decree was entered against them, from which they appealed.

Thos. Y. Berry, for appellants. E. S. Drake and J. McC. Martin, for appellees.

COOPER, J. The Port Gibson Manufacturing Company was a trading company, and as such had the implied power to borrow money for the prosecution of its business. It was the owner of its property, and as such owner had the right to execute a mortgage to secure its debts. There is no limitation on the power imposed by its charter; and, in the absence thereof, such powers exist by implication.

The chancellor should have overruled the demurrer, instead of striking it from the files; but, as the record shows that the motion to strike from the files, and the hearing of the demurrer, came on at the same time, we will not reverse a right result because reached by an irregular order.

Decree affirmed.

BROWN v. STATE.

(Supreme Court of Mississippi. March 17, 1890.)

MURDER IN THE FIRST DEGREE.

On a trial for murder, it appeared that defendant and his brothers were attending an election; that the affray resulting in the homicide was begun by one of the deceased, who did something improper and unjustifiable to defendant's

brother-in-law; that defendant interfered with offensive words, when the deceased turned on him with a club; that defendant fled, with a brick in one hand and a pistol in the other, warning deceased not to come on him; that deceased, not heeding this warning, sought to come up with defendant; that armed friends of both deceased and defendant joined, as inclination prompted, when the affray became general, and that, after retreating for a considerable distance, estimated at from 30 to 75 yards, defendant and his friends fired, killing several of their pursuers. Held that, though defendant and his brother had previously declared a purpose of killing two of the deceased, the evidence did not warrant a conviction for murder in the first degree.

Appeal from circuit court, Clarke county; S. H. TERRAL, Judge.

Indictment of Allen Brown for murder in the first degree. The killing took place in Lauderdale county, but a change of venue was taken to Clarke county. Defendant was convicted, sentenced to be hanged, and now appeals.

R. F. Cochran and T. A. Wood, for appellant. W. R. Harper, for the State.

CAMPBELL, J. The verdict is manifestly wrong. Tried by the evidence introduced by the state, without reference to that for the defendant, it cannot be permitted to stand. It is therefore not a case of conflicting testimony, in which it is the province of the jury to dispose of the conflict, and where the court would be concluded by its finding, but it is the case of failure by the state to maintain the indictment by sufficient evidence. The theory of the prosecution is that the Brown brothers previously declared a purpose to kill Harvey and Barnett; armed themselves, and went to Marion on election day, and executed that purpose. This theory is supported by the fact that they were at Marion armed, and that Harvey and Barnett were killed. But, if it be accepted as true that the threat was made as testified, there is absolutely nothing intermediate between the threat and the killing to show any connection between them. Brown and his brothers and many others were at Marion on election day, as they had a right to be, and not a word or act or look that was improper on the part of Brown, prior to the commencement of the *melee*, is hinted at by any witness. That the affray, which resulted so disastrously, was begun by Barnett, in doing something improper and unjustifiable to Sam Gillespie, a brother-in-law of Brown, is indisputable. That Brown interfered by offensive words in the affair between Barnett and Gillespie appears, and that Barnett, incensed by the remarks of Brown, turned upon him with his club, and that Brown fled, and Barnett pursued him, and that quite a number of armed men joined in pursuit, and the fray became general, and resulted in the killing of five men, is clearly shown. While it cannot be deduced from the evidence exactly what was done by each participant, and the order of occurrences, it is an incontrovertible fact that Brown retired from the contest, and was pursued by Barnett and a crowd of his friends, and that the killing occurred at a considerable distance, variously estimated as from 30 to 75 yards from where the unpleasant-

ness began. An explanation of this fact, on any theory consistent with Brown's guilt, is impossible, unless it can be believed that he retreated or withdrew for the purpose of enticing Barnett to a point at which he could slay him, but for this there is no support in the evidence. Brown retired, after provoking Barnett, because he shrank from a contest with him; and the only allurements he offered to induce Barnett's pursuit was a brick in one hand and a pistol in the other, as he sought to get away, while he warned Barnett not to come on him. Barnett sought to come up with Brown to punish his insolence, and friends of the pursued and pursuer joined, as inclination prompted. It was truly a lamentable affair, but a verdict of guilty of murder cannot be predicated of a homicide caused by the pursued, under the circumstances shown by the evidence. We might comment at length on the evidence, but deem it unnecessary. Suffice it to say, we have maturely considered it, in all its aspects, under a solemn sense of the great responsibility devolved upon us, and feel no hesitation as to our duty to set aside the verdict.

If any man disposed to be just shall doubt the correctness of this conclusion, let him calmly and dispassionately consider the matter as we have done. Let him reverse the picture, and behold Sam Gillespie rudely offering some indignity to Barnett, and Harvey, the brother-in-law of Barnett, interposing angrily to demand why Gillespie had thus treated his brother-in-law, and that Sam Gillespie, with a club in hand, turned on Harvey to punish his insolent interference, and that Harvey, with pistol in one hand and brick-bat in the other, retired, warning Gillespie not to come on him, or he would kill him, and that Harvey was joined by his friends and Gillespie by his, and Gillespie and friends pressed on Harvey and his friends, who had retreated from 30 to 75 yards, when the pursued fired, and killed the pursuers. Would a conviction of the slayers, under these circumstances, be approved?

Here justice shall be done, though the heavens fall. Elsewhere passion and prejudice may sway, but in the temple of justice there is no distinction as to rights between the rich and poor, the high and low, the noble and mean, the white and colored. Here justice reigns and governs, and knows no distinction between suitors, except to listen, it may be, with more attentive ear to the plaint of wrong done to the poor and humble, because of the knowledge that, among thoughtless or unprincipled men, they are the more likely to be the victims of injustice and wrong. Our constitution and laws and courts know no distinction among classes, in the administration of justice, and our noble Anglo-Saxon race, justly proud of its history and superiority, should be careful to shield from any injustice the inferior and dependent people in their midst, and should be ever ready to accord to them the same immunity from wrong, and the same right of self-defense, which belong to all. Happily, this feeling is general among us, but, in a conflict in which the participants are divided by race lines, it is hard to avoid a nat-

ural leaning to the side on which nature has placed one; and, because of our past history and present circumstances, it is difficult to embrace the idea that one man has the same right as another to be undisturbed in his person and pursuits, and the same right to defend himself, when assailed, as another.

Testing this case by these just and acknowledged principles, divested of all passion or prejudice, and the result we have reached cannot fail to be acceptable to all acquainted with the facts as presented to us by the record before us, and capable of appreciating such high considerations.

Reversed and remanded.

NORTH BIRMINGHAM ST. R. CO. v. CALDERWOOD.

(*Supreme Court of Alabama.* Jan. 31, 1890.)

STREET RAILROADS—INJURIES TO PASSENGER.

1. Where a municipal ordinance prohibits trains of street-cars from stopping on the east side of a street when moving westward, or on the west side when moving eastward, and in an action against the street-car company for negligence the complaint alleges that the negligence was the failure of the train to stop a sufficient length of time on the west side of the street to enable plaintiff to alight, and the evidence shows a failure to stop a train going west on the east side, there is a fatal variance.

2. When plaintiff's evidence to fix negligence on defendant tends to show contributory negligence on the part of plaintiff, it is not error to refuse to charge "that the burden of proof establishing contributory negligence rests on defendant."

3. It is not necessary that the contributory negligence should be the sole cause of the injury in order to bar recovery, but it is sufficient if it be one of two or more concurring efficient causes.

4. It is not error to refuse to charge that the jury should "find for plaintiff for such amount of damages as the proof may show she ought to receive," as the amount of the recovery should be limited to that claimed in the complaint.

5. If the conductor of the street-car was not in his place on the car, and the train stopped anywhere on the street in apparent response to the pulling of the bell-cord by plaintiff, and she, believing reasonably that the stop was made for the purpose of allowing her to alight, was injured in attempting to do so, the question of contributory negligence is one of fact for the jury.

6. The residents of a municipality must be held to know the rule as to the place of stopping of trains of street-cars prescribed by an ordinance of the city.

Appeal from city court of Birmingham, H. A. SHARPE, Judge.

Action by Martha M. Calderwood against the North Birmingham Street Railroad Company. The court, at plaintiff's request, gave the following charges: "(2) I charge you that contributory negligence on the part of the plaintiff, to avail the defendant as a defense to this action, must be the proximate cause of the injury, and, if it is not the proximate cause of the injury, it cannot be invoked as a defense. (3) That the burden of proof establishing contributory negligence rests on the defendant. (4) The court charges the jury that if they believe from the testimony of the witnesses in this case that on the 2d day of October, 1887, the plaintiff was a passenger on the train of the defendant's dummy line, running from North Birmingham to Nineteenth street, in the city of Birmingham,

down First avenue; and if said train stopped on First avenue, near Twentieth street, from the purpose of letting off passengers, among whom was the plaintiff, and said testimony leaves it uncertain on which side of the Twentieth street, east or west, the train stopped,—then, in the absence of proof to the contrary, the jury would have the right to infer and indulge the presumption that the train did stop on that side of Twentieth street, on First avenue, where it was required by the ordinance of the city and the rules of the company to stop, and not on that side of the Twentieth street where it was forbidden to stop. (5) The court charges the jury that if they believe from the evidence that the defendant was, on the 2d day of October, 1887, a passenger on the dummy line of the defendant, running from North Birmingham to the Nineteenth street, in the city of Birmingham, and that the train came to a full stop on First avenue, near Twentieth street, and on the west side thereon, and that this was the place where the said train usually stops for letting off passengers, and that passengers on said train, among whom was the plaintiff, desired to get off, then it was the duty of the defendant to stop its train, at that time and place, a sufficient length of time to allow the passengers to alight or get off of said train; and if the jury believe from the evidence that this plaintiff attempted to get off of said train when it came to a stop, and started immediately to get off of said train, and continued with due and reasonable care to get off after she started, and defendant moved forward its train suddenly, without allowing sufficient time for her to get off, and threw the plaintiff to the ground or on the street with such force as to cause a severe and painful injury to her hip and thigh, without fault or negligence on her part, then this is an act of negligence on the part of the defendant which will sustain an action; and the court further charges the jury that if they further believe from the evidence that, by reason of the negligence of the defendant by thus moving forward its train, and without fault or negligence on her part, the plaintiff received a severe and painful injury in her hip and thigh, and has suffered great mental and physical pain, and that said injury is permanent, and that she has suffered great mental and physical pain as the proximate cause thereof, then they may find for the plaintiff for such amount of damages as the proof may show she ought to receive."

The court refused defendant's request to charge, as follows: "(1) If the jury believe the evidence in this case, they must find for the defendant, the North Birmingham Street Railroad Company. (2) If the jury believe from the evidence in this case that the plaintiff, Mrs. Calderwood, on the 2d October, 1887, on her return from North Birmingham on the defendant's train, attempted to leave said train on the east side of Twentieth street, in the city of Birmingham, without giving notice to the defendant's conductor in charge of said train, then they must find for the defendant, unless the proof further shows that such conductor, or some other employe of the de-

fendant, knew of her purpose to leave said train in time to warn her not to make the attempt, and failed to give such warning. (3) That there is no evidence before the jury showing, or tending to show, any negligence, either in the defendant, or in any of its employes or servants, which caused or contributed to the injuries of which the plaintiff complains; and the jury must therefore find for the defendant in this case, without regard to the hurts, injuries, or sufferings of the plaintiff. (4) That every person of mature years is bound to know the law, and the jury, in the consideration of this case, must consider the plaintiff, Mrs. Calderwood, as having known, on the 2d October, 1887, the laws of the city of Birmingham fixing the stations on street railroads where said railroads were required to receive and deliver passengers, and prohibiting them from stopping elsewhere for that purpose; and if the evidence satisfies the jury that the defendant's train, on which plaintiff was riding on her return from North Birmingham on the 2d October, 1887, was forbidden by law to stop on the east side of Twentieth street to receive or deliver passengers, and that the plaintiff, Mrs. Calderwood, attempted to leave said train on the east side of said Twentieth street, they must find for the defendant in this case, unless the proof further shows to the jury that the plaintiff had, before attempting to leave said train, given notice to the conductor on said train, or some other servant of the defendant on said train, plainly and distinctly, of her purpose to leave said train on the east side of Twentieth street, and that said conductor or other servant of the defendant knew she was about to leave the train at the time she attempted to leave it, in time to prevent her being injured in so attempting to leave said train, and negligently failed to take steps to prevent such injury; and the mere pulling of the conductor's signal bell-cord, or what was supposed by the plaintiff to be such bell-cord, by the plaintiff, or some other passenger, without the knowledge or consent of the conductor on said train, would not be such notice of the plaintiff's purpose to leave said train, either to the conductor or any other servant of the defendant on said train. (5) That the defendant, the North Birmingham Street Railroad Company, had the right, and it was its duty, to make and enforce all reasonable rules and regulations for the safe running of its trains, and the safe transportation of its passengers; and if the jury believe from the evidence that one of these rules and regulations forbade passengers to pull the conductor's signal bell-cord, and that this was a reasonable and proper regulation, and that the defendant and its servants exercised reasonable and proper diligence to bring it to the knowledge of the public, and of passengers on its trains, including the plaintiff; and if the jury believe from the evidence that the plaintiff might, by reasonable care, have known of said regulations either from notices thereof printed on the schedules of the defendant, and circulated among the public, or from placards posted up in the car on which the plaintiff was traveling; and if the jury further be-

believe that the plaintiff, without the knowledge or consent of the conductor of the defendant on said train, disregarded and violated this regulation, and usurping the functions of said conductor by pulling what she supposed was the conductor's signal bell-cord, or if she, in conjunction and agreement with Mrs. Cobb, or any other person, pulled said bell-cord, in the attempt to stop defendant's train, at a point where said train was forbidden by law to stop for receiving or delivering passengers, or for any purpose, except to prevent accidents or in case of necessity, and the plaintiff then attempted to leave said train where it was forbidden to stop by law to discharge or receive passengers, and in such attempt was hurt, as alleged in said complaint,—the jury must find for the defendant.” (7) That if the jury believe from the evidence that the plaintiff, Mrs. Calderwood, while being carried as a passenger on the defendant's train going westward on First avenue, and approaching the east side of Twentieth street, in Birmingham, Ala., she, the plaintiff, without the knowledge or consent of the conductor of said train, pulled the bell-cord of the conductor, in response to which the engineer stopped the train at a place where, by the laws of the city of Birmingham, he was forbidden to stop for receiving and delivering passengers, and that the plaintiff was injured while attempting to get off of said train by the engineer's starting said train again, in obedience to the requirements of the laws of the city of Birmingham, and without notice or knowledge of the purpose or attempt of the plaintiff to get off there, and without any orders from the conductor of said train to start again, then the injuries received by the plaintiff were the result of her own act, and she cannot recover anything therefor in this action. (8) That if the jury believe from the evidence that the damage of which the plaintiff complains was received on the east side of Twentieth street, in the city of Birmingham, Ala., then, under the allegations of the complaint in this cause, the jury must find for the defendant.”

Judgment was rendered for plaintiff, and defendant appealed.

Garrett & Underwood, for appellant. *A. Y. Harper*, for appellee.

SOMERVILLE, J. The action is brought for an injury received by the plaintiff in stepping from the train of the defendant's street railroad, which was operated by a steam dummy engine, in the city of Birmingham. The verdict of the jury was for the plaintiff in the sum of \$5,000 damages. The alleged negligence of the defendant, as averred in the complaint, was the failure of the engineer of the train to stop a sufficient length of time to enable the plaintiff to safely alight on the west side of Twentieth street, where trains were accustomed to stop to deliver passengers.

1. The defendant, in the eighth charge, requested the court to instruct the jury that if they believed from the evidence that the damage complained of was received on the east side of said street, then, under the allegations of the complaint, the jury must find for the defendant; in

other words, that there would be a fatal variance between the allegations and the proof.

We think, under the facts of the case, the place of stopping was material, and that the court erred in not giving the charge. It was shown by the evidence that a municipal ordinance of the city, regulating the running and stopping of street-cars, required each stop to be made just beyond the far crossing from the car or dummy engine, “so as to clear the street or avenue from the sidewalk,” and prohibited a violation of this regulation under a penalty as a misdemeanor. The ordinance thus prohibited trains to stop on the east side of streets when moving westward, or on the west side when moving eastward, either to receive or deliver passengers. They were required to cross the street before coming to a stop; and the evidence shows that this was the custom of the company, except in cases of necessity, to avoid accident, or collision with vehicles or pedestrians. The train, in this case, was moving westward at the time of the accident. The lawful stopping place, therefore, was on the west side of Twentieth street. It was unlawful to stop on the east side for the purpose of allowing a passenger to alight. The contract of the defendant with the plaintiff, as a passenger on its cars, must necessarily imply an agreement to stop on the west, and not on the east, side. The duties, therefore, imposed by law on the defendant's servants were materially different at the two places. At the lawful stopping place they were compelled to stop to deliver the plaintiff on receiving proper notice of her desire to stop, or show some lawful excuse for their failure to do so. This stop was required to be for a time reasonably sufficient to enable her to conveniently alight. *Railroad Co. v. Miles*, 6 South. Rep. 696, 88 Ala. —. And the duty of keeping a diligent lookout rested on the engineer and conductor to see that a premature start of the train, such as might endanger her safety, should not be negligently made. No such duties were required at a place where it was unlawful to stop for the purpose of delivering passengers, unless those in charge of the train elected to stop, in violation of law, and thereby induce the plaintiff to alight. In such case, on being informed of her presence and desire, they would presumptively be chargeable with negligence, if they failed to stop for a time reasonably sufficient to permit a safe exit from the train. The case of *Railway Co. v. Sistrunk*, 85 Ala. 352, 5 South. Rep. 79, is distinguishable from this case on the obvious ground that the alleged variance of place there was immaterial, the duties of the defendant to the plaintiff being precisely identical at each. For the error of refusing this charge the judgment of the city court must be reversed.

2. Contributory negligence is defensive matter, and the burden of establishing it is ordinarily cast on the defendant; but this is not a correct proposition where the plaintiff's own testimony, which seeks to fix negligence on the defendant, inculpates himself also, as it tends to do in this case. *Railroad Co. v. Shearer*, 58 Ala. 672. Or,

to state the proposition otherwise: "When the plaintiff shows negligence on the part of the defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant to show that the plaintiff was guilty of negligence." *Cassidy v. Angell*, 34 Amer. Rep. 690; *Whart. Neg.* §§ 423, 425. The third charge requested by the plaintiff should not have been given.

3. So the second charge would have been less liable to mislead if it had asserted that contributory negligence cannot be invoked as a defense unless it is a proximate cause, instead of the proximate cause, of the injury. It need not be the sole cause, but it is sufficient if it be one of two or more concurring efficient causes. *Sistrunk's Case*, 85 Ala. 352, 5 South. Rep. 79, *supra*.

4. The fourth charge given for the plaintiff was also erroneous. Whether the train stopped on the west or the east side of the street was a material issue on the trial, and it should have been determined by the jury on the evidence, without reference to any presumption supposed to arise from duty to stop on the west side, which was imposed by the city ordinance.

5. There was some evidence from which the jury, in our judgment, were authorized to infer that the stoppage was on the west side of the street; and the objection to the fifth charge requested by plaintiff, based on this ground, is not tenable. If this instruction had limited the amount of recovery to that claimed in the complaint, we see no error.

6. The question of the plaintiff's alleged contributory negligence was properly left to the jury as a question of fact. We would not, under the evidence, be justified in deciding it adversely to her as a matter of law. *Railroad Co. v. Perry*, 87 Ala. 392, 6 South. Rep. 40, and cases cited. If the conductor was not in his place on the car, and the train stopped anywhere on the street in apparent response to the pulling of the bell-cord by the plaintiff, and she, believing reasonably that the stop was made for the purpose of allowing her to alight, attempted to do so, the question of her contributory negligence would be one of fact, to be properly left to the jury. In this view, all of the defendant's charges, from the first to the fifth, inclusive, and also the seventh, were erroneous and properly refused. And the fifth charge was misleading, because it excluded the phase of the case last adverted to by us, involving the duties arising from a stoppage at another than lawful station or place for the delivery of passengers.

7. The plaintiff, in our judgment, must be held to know the rule of stopping on the further side of the street, as prescribed by the city ordinance. "It is well established that the residents within a municipality must take notice of the ordinances, and it is frequently stated that ordinances have the force and effect of laws within the limits of the corporation." *Horr. & B. Mun. Ord.* 158. This principle seems sound, when applied to any person within a municipality who contracts, even by implication, with reference to such ordinances, when operative as police regulations. The

contract here, as we have seen, by necessary intentment was that the delivery of the plaintiff as a passenger was to be at a regular stopping place, such as would not be violative of any existing and lawful police regulation. This devolved on her the responsibility of informing herself of what we may pronounce an every-day incident of street-railway travel. *Mitchell v. Railway Co.*, 51 Mich. 236, 16 N. W. Rep. 388.

The foregoing view is not inconsistent with the principles settled in this state, but denied in many other jurisdictions, that courts will not take judicial notice of municipal by-laws, but require them to be proved as facts, (*Case v. Mayor*, 30 Ala. 538; *Horr. & B. Mun. Ord.* 158;) nor with the rule that such an ordinance will not be permitted to create a civil right in favor of a third person, based on the negligence of one failing to obey it, (*Heeney v. Sprague*, 23 Amer. Rep. 502; *Flynn v. Canton Co.*, 17 Amer. Rep. 608; *Kirby v. Association*, 74 Amer. Dec. 682.) Reversed and remanded.

THORINGTON v. CITY COUNCIL OF MONTGOMERY.

(*Supreme Court of Alabama.* Dec. 18, 1889.)

EQUITY—UNSWORN ANSWER—TAX-TITLES.

1. Complainant, a purchaser at a tax-sale, sought to restrain the sale of the same property for taxes of previous years. The answer of the city averred that complainant was not in fact the purchaser, but that the property was bid in by her father, who was the husband and trustee of the owner, and procured the certificate to be issued in her name, and to be delivered to him; complainant furnishing no money for the purchase. Held that, the answer being unsworn, and therefore (*Code Ala.* 1886, § 3424) not evidence, complainant was not required to prove that the money with which the purchase was made was furnished by her, and not by the tax-payer, or by the husband and trustee of the latter.

2. The fact that the purchaser at a tax-sale is the daughter of the tax-payer, and that the husband and trustee of the latter made the bids, and handed in the money, is not enough to stamp the transaction as fraudulent, nor to shift the burden on the purchaser of showing that the money used in the purchase was hers.

Appeal from chancery court, Montgomery county; JOHN A. FOSTER, Chancellor.

Bill by Sallie C. Thorington against the city council of Montgomery for an injunction against the sale of three lots under a chancery decree rendered in 1884, and affirmed, on appeal, in December, 1885, ordering the sale of these, and three other lots, for the unpaid taxes of 1873 to 1882, inclusive. In October, 1885, the city sold the three lots in question, under the act of February 17, 1885, for the taxes of 1884, leaving the other three unsold, sufficient in value to satisfy the taxes for the previous years. Complainant became the purchaser at the sale in 1885, and the certificate was made out in her name. The answer substantially admitted the material allegations of the bill, but a demurrer on several grounds was also interposed, and a motion made to dismiss the bill for want of equity. The chancellor sustained the demurrer, dissolved the injunction, and dismissed

the bill; but his decision was reversed by the supreme court. 82 Ala. 591, 2 South. Rep. 513.

Arrington & Graham and Winter & Winter, for appellant. *Jones & Falkner*, for appellee.

STONE, C. J. This case was before us at a former term. 82 Ala. 591, 2 South. Rep. 513. We then held the bill contained equity. We ruled, further, that Mrs. Thorington, the purchaser of three of the six lots at the tax-sale of 1885, was entitled, no other equities intervening, to have the three lots not sold at the former sale first sold under the decree for the older taxes, before resorting to the lots purchased by her. The case had been decided in the court below on motion to dismiss the injunction for want of equity, and our ruling was based alone on the case made by the bill. When the case returned to the court below, it was submitted for final decree on the bill, the answer, and the exhibit to each, without other testimony. The chancellor dismissed the bill, holding that complainant had not made a case for relief.

The substance of the case made by the bill will be found in the report on the former hearing, (82 Ala. 591, 2 South. Rep. 513,) and need not be here repeated. The bill remains as it was originally framed. Sworn answer was waived under the statute, and the answer was filed without oath. It "is entitled to no more weight as evidence than the bill." Code 1886, § 3424. Its admissions, however, are evidence against the defendant,—conclusive evidence; for it is not permissible to disprove them. *McGehee v. Lehman*, 65 Ala. 316; *Latham v. Staples*, 46 Ala. 462. Paragraph 6 of the answer contains this language: "Respondent admits that it levied a tax for the year 1885, [1884?] as stated in the sixth paragraph of the bill, and that the assessment was made against the property therein mentioned as the property of Mary E. Winter, and that, the said Mary E. Winter having failed to pay said tax, decrees were rendered by the Hon. E. A. GRAHAM, recorder of the city of Montgomery, as stated in said paragraph; and that said property was advertised for sale, and offered for sale, as stated in said paragraph, and that the same was bid off in the name of complainant at the sale thereof, and that a certificate of purchase was given in the name of the complainant, by the clerk of the city council, for each piece of property so advertised and sold. But respondent avers that complainant did not in fact purchase said property, was not present at said sale, but that said property was bid off by Joseph S. Winter, the husband of Mary E. Winter, and the father of complainant, and that said Joseph S. Winter paid the amount so bid for each piece of property, and at his request the clerk of the city council gave the certificates of purchase in the name of complainant, but delivered the same to Joseph S. Winter. And respondent denies that complainant furnished any money, directly or indirectly, or incurred any liability to any person for the money so used, but avers that complainant only permitted

the use of her name by her father, Joseph S. Winter, in the said transaction."

The certificates of purchase given by the clerk state that "at said sale Mrs. Sallie G. Thorington bid off, and became the purchaser of, said property, at and for the sum of ——— dollars, being the amount of said decree, and the interest thereon to date; which said amount the said Sallie G. Thorington has this day paid to me."

We have said above that this case was heard on the pleadings and exhibits, without further testimony. It is contended before us, and the chancellor so ruled, that the burden of proof was on the complainant, Mrs. Thorington, to prove that the purchase at tax-sale in her name, made in November, 1885, was with money furnished by her, and not with money furnished by Mary E., the tax-payer, or by Joseph S. Winter, her husband and trustee. As part and parcel of this contention, it is claimed that Mrs. Thorington, when the purchase was made, was not present; that the bidding was by her father, Joseph S. Winter, and the money paid by him, and that her name was simply permitted to be used as a means of defrauding the city council of its rightful due; that she (Mrs. Thorington) knew of the pending proceedings to subject the lots to the payment of anterior taxes; and that all this was done to screen the property from such payment, and for the benefit of Mrs. Mary E. Winter. If these facts exist, they are shown only by the unsworn answer of the city council, and in that part of it which is not responsive to any averment of the bill. Such averments are not evidence, even if sworn to. *Barton v. Barton*, 75 Ala. 400. Much less is such averment proved under our statute, which declares that when sworn answer is dispensed with the answer ceases to be evidence.

But, if it be conceded that Mrs. Thorington is the daughter of Joseph S. and Mary E. Winter; that the father made the bids, and handed in the money,—this alone, while it may require less strictness of proof to establish the fraud than if strangers were the parties, is not enough to stamp the transaction as fraudulent, or to shift the burden on Mrs. Thorington to show the money used in the purchase was her money. The sale was a public one, to the highest bidder, made in obedience to a judicial decree ordering the lots to be sold for unpaid taxes; and the public was invited to bid. It is not unusual for female purchasers at such sales to be represented by an agent. The clerk making the sale, in his certificate of the fact, recognized Mrs. Thorington as the purchaser,—as having paid the purchase money; and he so certified. This case is wholly unlike the transactions, frequently brought before us, where failing debtors, on a recited valuable consideration, convey their property to others,—often to near relations. When such conveyances are assailed by creditors as fraudulent, the burden is on the transferee to prove the consideration on which he alleges he became the purchaser; and, if the transferee be a near relation, fuller and more satisfactory proof is required than when strangers are the contracting parties. *Hubbard v. Allen*, 59 Ala. 283; *Ham-*

ilton v. Blackwell, 60 Ala. 545; Harrell v. Mitchell, 61 Ala. 270; Gordon v. Tweedy, 71 Ala. 202; Buchanan v. Buchanan, 72 Ala. 55; Lipscomb v. McClellan, Id. 151; Zelnicker v. Brigham, 74 Ala. 598.

It is contended before us that the manifest facts of this case raise the presumption or implication that the sale and conveyance to Mrs. Thorington was not intended for her benefit, but for that of the tax-payer, and that the burden was thus cast on the complainant of proving that the purchase was by her, and for her benefit. However unusual it may appear that the owner of valuable property will consent to lose or forfeit it absolutely by the non-payment of its city taxes for a single year, and by making no effort to redeem it from such sale, still, as matter of law, and in the absence of all proof of fraud or collusion, we cannot pronounce such sale to be a nullity. The burden was on the city council to prove either that the money was, in effect, furnished by the tax-payer, or her husband, or that there was collusion or secret trust for her benefit. The measure of proof must be graduated by the kinship of the parties, if shown to exist. We say "by making no effort to redeem" from tax sale; for, if the land were redeemed, it would again become liable for the taxes, and Mrs. Thorington would cease to have such interest as would maintain her suit.

Under the decree of the recorder, the three lots claimed by complainant were sold by the city council to her in payment of city taxes accruing in 1884. It is not claimed that the sale was made with any reservation of unpaid taxes for preceding years, or that any notice was given of such unpaid taxes. A sale of land for taxes, under our statutes as they then stood, is a sale of the fee, and not of the tax-payer's interest only. It is thus that a failure to pay taxes by a tennor or life-tenant, or by some one for him, may result in the loss of the entire estate. The tax assessed is a charge and lien on the land itself, as well as a legal liability resting on the tax-payer. Jones v. Randle, 68 Ala. 258; Parker v. Baxter, 2 Gray, 185; Winter v. City Council, 79 Ala. 481. The statute has been since changed. Code, 1886, § 592. After thus selling to Mrs. Thorington, receiving the purchase money and giving her a certificate of purchase, can the city council again sell the same lot away from her for taxes due to it which are older in accrual and assessment than the taxes for the payment of which the first sale was made? "The sale cuts off all liens created by the act of the owner as a mortgage, or resulting from his liability, as owner, created by law, such as taxes for former years." Burrough, Tax'n, 347, 348. "A sale of land for taxes frees it, in the hands of the purchaser, from any and all liens thereon for delinquent taxes for prior years." 2 Desty, Tax'n, 849. "When the state sells land under a judgment, it cannot defeat the purchaser's title by a resale of the land for taxes which were due, and might have been included in the judgment." 1 Black. Tax-Titles, § 516. "It has abandoned such taxes." Id. Law v. People, 116 Ill. 244, 4 N. E. Rep. 845; Preston v. Van Gorder, 31

Iowa, 250; Bowman v. Thompson, 36 Iowa, 505; Shoemaker v. Lacey, 38 Iowa, 277; Same v. Same, 45 Iowa, 422; Jarvis v. Peck, 19 Wis. 74; Sayles v. Davis, 22 Wis. 225.

The principle stated above does not depend solely on the right to include the older assessed taxes in the judgment or decree for the enforcement of the later assessment. It is based on a broader principle.

It would be inequitable and unconscionable in the taxing power to receive the money of a purchaser of property, sold without notice of other claims, and apply it to the payment of later assessed taxes, and then reseize the property, and sell it away from the purchaser, in payment of the older assessment. If the true owner of property, real or personal, stands silently by, and knowingly permits another to dispose of such property as his own, and to receive the consideration money, such owner will thereby estop himself from afterwards claiming the property, although his title may be otherwise perfect. McPherson v. Walters, 16 Ala. 714; Stone v. Britton, 22 Ala. 543; 3 Brick. Dig. p. 448, §§ 30, 31, 37. For a stronger reason, if possible, the city council estopped itself, by the implications of the sale of 1885, and the silence with which it was conducted, from afterwards asserting it had an older, unsatisfied lien on the same property against one who had purchased in good faith.

We confine what we have said to the case made by the record before us. If it had been shown that the money with which the lots were purchased was not, in fact or legal effect, the money of Mrs. Thorington, being used for her benefit, or that there was collusion or secret trust, as implied in the case set up in the answer, the beneficial ownership still remaining in the tax-payer, then the doctrine of estoppel would not apply. The law regards the substance, not the semblance, of things.

Reversed and remanded.

CLOPTON, J., not sitting.

(Jan. 22, 1890.)

STONE, C. J. In response to appellant's application for a rehearing, we have made some modifications in the body of the opinion, but decline to grant the prayer of the application.

McMICHAEL v. ECKMAN et al.

(Supreme Court of Florida. Feb. 11, 1890.)

INJUNCTION—APPEAL—SUPERSEDEAS—BOND.

1. An appeal from an order dissolving an injunction does not of itself reinstate the injunction; but an appeal, and an order by the circuit judge or a justice of the supreme court, under the statute that the appeal shall operate as a *supersedeas* to the order appealed from, and a compliance with the terms of the *supersedeas* order as to giving bond, do restore the injunction.

2. If a person is entitled to an exemption out of personal property which has been levied upon by a sheriff, it is his right to have the exemption set apart in kind; and, if this right can at any time be denied him to the extent of having the entire property levied on sold, and of remitting him to taking the money value of the exemption, if it shall be found at the end of litigation that he is entitled to the exemption, it will at least not be done where it is not shown that the delay in-

cident to setting aside the property claimed as exempt will be fatal to the interests of the parties concerned.

3. Where the sale of goods, wares, and merchandise has been enjoined until \$1,000 worth of personal property shall be set aside for complainant as the exemption of personal property allowed the head of a family by the constitution, the property claimed as exempt to be scheduled immediately in the manner directed by law, and remain in the possession of the sheriff, and subsequently the injunction is dissolved on motion of defendants, and, the complainant having appealed from the dissolving order, an order is made that the appeal shall operate as a *supersedeas* on the filing and approval of a specified bond, the appellate court will not, on petition of the appellees, acting under the assumption that the required bond has been given, vacate or modify the *supersedeas* so as to permit a sale of the entire property, on the ground that it is perishable, and that the sheriff, misunderstanding the scope and meaning of the *supersedeas* order, refuses to sell the property levied on, or any part thereof; particularly where it is not shown that the property is perishable to the extent that would render the delay fatal to the interests of the parties concerned.

4. Where a *supersedeas* order made in a chancery appeal to the supreme court requires that the bond shall be conditioned for the payment of damages and costs, and a bond conditioned for the payment of costs only is taken and approved by the clerk of the circuit court as a compliance with the order, the bond will be held insufficient, and the approval of it vacated, by the supreme court.

5. A *supersedeas* bond which does not identify the decree appealed from will not be accepted or approved by the supreme court.

(Syllabus by the Court.)

Appeal from circuit court, Pasco county; G. A. HANSON, Judge.

R. W. Williams, for appellant. *Sparkman & Sparkman* and *Thomas Palmer*, for appellees.

RANEY, C. J. An injunction was granted by J. G. Wallace, court commissioner of Pasco county, restraining the appellees, including the sheriff, from selling the personal property of appellant until \$1,000 worth of the same should be set aside to appellant, as the head of a family residing in this state, as exempt from forced sale under the constitution and laws.

The following provisions appear in the injunctive order: "This order shall not be construed so as to delay the sale of other goods, wares, and merchandise advertised to be sold on the 6th day of January, A. D. 1890; but, on the contrary, that the said personal property claimed to be exempt by the complainant, John T. McMichael, shall be scheduled by him immediately upon issue of this order to the sheriff. The appraisal thereof shall be had, as the law directs, without delay; and the sale of the goods, wares, and merchandise, with the exception of said exemption, proceed as advertised. It is further ordered that the personal property so selected and appraised as the exemption of the said McMichael remain in the possession of the sheriff until the further order of the circuit court."

Subsequently the cause came on to be heard before the circuit judge on motion of the defendants, appellees here, and he made a decree setting aside the order and dismissing the bill, and from this decree McMichael appealed, and applied for a *supersedeas*; and one of the justices of this

court made an order, in the form usual in our practice, that the appeal should operate as a *supersedeas* to the decree of the circuit judge upon the appellant giving bond with sureties, and of the penalty and condition, and to be approved, as in the order specified.

Appellees have filed a petition before this court which sets forth, in substance, that the goods, wares, and merchandise mentioned in the record, and out of which the appellant claims \$1,000 worth as exempt, have already been held, under the attachments and executions mentioned in the record, for a period of almost 10 months, rapidly perishing and depreciating in value, and should, in justice to all parties, be sold at as early a day as possible, but that the sheriff, misunderstanding the scope and meaning of the *supersedeas*, refuses to sell the goods, which aggregate in value almost \$7,000, or any part thereof; and prays that the *supersedeas* be either vacated, or so modified as to permit the sheriff, under the direction of this court or of the circuit court, to sell all of said goods, wares, and merchandise, and to dispose of the proceeds, or any portion thereof, in such way as will fully protect the parties thereto.

There is nothing in the injunctive order or *supersedeas* that interferes with a sale of the property over and above that which the sheriff may set aside as claimed to be exempt. As soon as it is set aside, the remainder of the property should be sold, as may be proper, either under the executions, or under orders made on the law side of the circuit court, in the attachment causes, for the sale of the property as perishable. The injunction and *supersedeas* operate as a limitation upon the writs of execution and the orders of sale to this extent, but not further. Although an appeal from a decree dissolving an injunction does not of itself, under our practice, operate to reinstate the injunction, yet, where an order is made that the appeal shall operate as a *supersedeas* to such decree, and the terms of the superseding order, as to giving bond, have been complied with, we are satisfied the injunction is thereby reinstated. Authorities of great respectability hold that the allowance of an appeal by the court will reinstate the injunction. *Penrice v. Wallis*, 37 Miss. 172; *Yocum v. Moore*, 4 Bibb, 221; *Turner v. Scott*, 5 Rand. (Va.) 332; *Williams v. Pouns*, 48 Tex. 141.

The \$1,000 worth of goods so set aside for the complainant, as retained in his possession by the sheriff, will stand subject to the proceedings in the chancery cause, which has been transferred to the exclusive jurisdiction of this court through the instrumentality of the appeal and *supersedeas*. *Holland v. State*, 15 Fla. 549.

The purpose of the bond required by the *supersedeas* order is to indemnify the appellees for any damage they may sustain by reason of the appeal and *supersedeas*. It is the right of the complainant, if he is entitled to the exemption, to have \$1,000 worth of the property in kind; and, as long as he can give a sufficient bond to indemnify appellees against loss, we should not, at this stage of the cause, deny him this right. The statements of the petition are not

consistent with the idea that the property is perishable to the extent that would render any delay fatal to the interests of the parties concerned, and the sufficiency of the bond is not questioned in any respect.

Whether it would not, in view of the litigation, be to the advantage of all parties to consent in writing to an order which would permit the sale of the entire property, and a deposit of \$1,000 to abide the result of the litigation, or to some other permissible order that, in their judgment, would subserve the interest of all parties, is a matter for their consideration; but we do not see that there is any reason for vacating the *supersedeas*, or, assuming that we have the jurisdiction to go the extent requested, any necessity to modify it, and hence the motion should be denied. But the denial will be without prejudice to the rights of either party to move for such relief, as, under the nature or circumstances of the case, may seem necessary to the rights, or to the protection of the interests, of the parties, and may be within our jurisdiction.

It will be ordered accordingly.

(February 24, 1890.)

RANEY, C. J. Appellees have filed a petition stating, among other things, they have discovered, since the last order was made in this cause, that the bond given by the appellant under the *supersedeas* order does not comply with its requirements, in that it is not conditioned for the payment of "damages and costs," as provided in that order, but for the payment of costs only, and praying that the *supersedeas*, if regarded by us as being of any force or effect, be vacated and set aside, or for such other relief as petitioners may be entitled to. We find that the bond given is conditioned only for the payment of costs, whereas the plain meaning and effect of the *supersedeas* order is that the bond shall be conditioned for the payment to appellees of all damages and costs which may be sustained or incurred by them in consequence of such appeal and *supersedeas*, in case the order appealed from shall be affirmed. The bond is palpably inadequate, and should not have been approved. It is only necessary to read the *supersedeas* order to know that its intention was that the decree appealed from should remain in full force and operation until and unless a bond in compliance with it should be given.

The appellees are entitled to an order from us declaring the bond to be insufficient, and vacating the approval thereof.

Appellant has tendered, upon the argument of this motion, a new bond, approved by the judge of the sixth circuit, and asked that it be accepted by this court as a compliance with the *supersedeas* order. Without passing upon the right of the circuit judge to authorize the clerk of the circuit court of Pasco county to approve the former bond, or his right to act, pending this motion, on the second bond, after the other one had been approved by the clerk, which bond was also subsequently approved by himself, we find that the new bond does not identify the decree of Janu-

ary 15, 1890, appealed from; and for this reason we withhold our approval of it. *Jackson v. Reif*, 24 Fla. 198, 4 South. Rep. 534.

It will be ordered accordingly.

COLEMAN V. STATE.

(Supreme Court of Florida. March 4, 1890.)

MURDER—CIRCUMSTANTIAL EVIDENCE.

1. It is not error to refuse to give instructions to the jury which had already been substantially given.

2. Where the evidence is circumstantial, but of such a character as to preclude every hypothesis inconsistent with the guilt of the accused, the verdict will not be set aside as being against the evidence.

(Syllabus by the Court.)

Error to circuit court, Polk county; G. A. HANSON, Judge.

Eppes Tucker and *C. C. Wilson*, for plaintiff in error. *William B. Lamar*, Atty. Gen., for the State.

MITCHELL, J. The plaintiff in error was convicted at the fall term of the circuit court, Polk county, of the murder of Miles Burley by shooting, and recommended to the mercy of the court by the jury.

Motion for new trial was made upon the grounds (1) that the verdict was contrary to law; (2) that the verdict was contrary to the evidence; and (3) that the verdict was contrary to the charge of the court. The motion was overruled, and the defendant sentenced to the penitentiary for life; and the case comes before this court upon writ of error to the circuit court of Polk county, and the following errors are assigned: The court below erred in refusing to give the first, second, third, and fourth charges requested by the defendant; that the court erred in overruling defendant's motion to set aside the verdict, and a new trial grant. The court erred in rendering judgment and sentence against the defendant.

Counsel for defendant requested the court to charge: (1) "The party accused is entitled to the legal presumption in favor of innocence, and the guilt of the accused must be fully proved. No weight of preponderant evidence is sufficient for the purpose unless it excludes all reasonable doubt."

(2) "The statement of the defendant is entitled to full weight."

(3) "In order to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conviction sought to be established must be proved by competent evidence beyond a reasonable doubt."

(4) "The commission of an offense implies the presence of the defendant at the necessary time and place. Therefore, evidence in negation of such presence is always competent; nor does the failure to prove it, when attempted, render necessary full proof of the crime on the other side. A perfect *alibi* must cover the whole time when the presence of the prisoner was required. Yet the testimony as produced shall go to the jury, to be considered for what it is worth."

These several instructions were refused

upon the ground that they were, severally, substantially given to the jury in the general charge, except the second instruction, which was marked "Refused," without giving any reason for such refusal.

Where charges requested had already been substantially given by the trial judge, it was not error for the judge to refuse to repeat the charges. *Dixon v. State*, 13 Fla. 636; *Sherman v. State*, 17 Fla. 888; *Carter v. State*, 22 Fla. 553. We have carefully considered the judge's charge in connection with the charges requested by the defendant, and find that the judge had, when the defendant presented his instructions, already charged the jury upon the points sought to be raised by defendant's instructions, and that the judge's said charge, in this respect, was substantially correct, and that it was fair to the accused, and that there was no error in the court refusing to give the instructions presented by the accused.

The charge in regard to the defendant's statement is as follows: "Under the law, the defendant is entitled to make a statement under oath in his defense, and the jury can give it just such weight as they deem proper under the state of other facts proven." This charge is substantially correct.

The charge requested by the defendant in regard to his statement to the jury was so vague and indefinite that it was calculated to mislead and confuse them, and therefore it was properly refused. The judge had, at the time the defendant requested this charge, already charged, substantially, the law applicable to the statement of the defendant; and he was not required to repeat his charge, even if the charge requested by the defendant was correct.

The only remaining question to be considered is, does the evidence in the case sustain the finding of the jury. Burley was shot and killed at the house of one Mose Allen, near Homeland, Polk county, about five miles from Fort Meade, on the night of the 22d of September, 1888. On that night a festival was being held at Allen's house; and the evidence tends to show that the killing occurred some time between 9 and 11 o'clock, and that, when shot, Burley was on the veranda, on the north side of the house, and that the shot which caused his death was fired from about where a small orange tree stood in a cane patch to the east, and about 25 or 30 feet from where Burley was shot; and McLeod, a witness for the state, says that Burley was killed, as he thinks, by a rifle ball. Another witness states that his brains were shot out. McLeod also states that, just before the shot was fired, he saw some person in the cane patch, near where the shot was fired, slipping along, about half bent, with a gun or cane in his hands, and that the person he saw had on dark clothes and white hat; that he took it to be a straw hat; that there were some 30 or 40 people at the festival at Allen's house that night. Witness also states that he saw Nelson Tillis at Allen's that night; that, shortly after Tillis came up, witness asked him who came with him, and that he said no

one; that he asked where Coleman was, and Tillis said he left him at home, sick; that Tillis arrived at Allen's about 9 o'clock, and that witness saw the man slipping along in the cane patch, with a gun or cane, shortly after Tillis arrived at Allen's; that he saw the man in the cane patch twice,—the second time was some 10 or 15 minutes after seeing him first. That Allen lived about five miles from Fort Meade; that witness did not see Coleman on the night of the killing; that he did not mean to say that it was not Coleman that he saw in the cane patch; that he did not know who it was he saw there.

Pink Burley states: That she knew Coleman. That Burley was her husband. That they had been married but a week when he was killed. That she last saw Coleman on Saturday night,—before she was married, on Sunday,—and that she told Coleman at the time that she was going to be married, and that he said: "You going to be married! Who are you going to marry?" That she said, "Miles Burley," and that Coleman then said: "If you marry him, I will take my rifle, and blow his brains out,"—and that witness and Coleman both laughed. That Coleman had not been making love to witness, and that he did not seem to be mad at the time, and said nothing against Burley.

Nelson Tillis, a witness for the state, says: That he knew Coleman, and that he saw him, on the night Burley was shot, in Fort Meade, walking along rather north and west. Mose Allen lives rather north from Fort Meade. And that he and Coleman left Fort Meade, somewhere about 8 o'clock, together, going to the festival at Allen's, and that Coleman had a gun with him, which he carried to within a mile of Allen's, but he did not see the gun after that. That he and Coleman went to within some 50 or 100 yards of Allen's, when Coleman stopped, and witness went on to the festival, and left Coleman standing in the road. That afterwards he saw Coleman sitting on a log, not far from where he had left him, east of Allen's house. That, when witness went back to Coleman, he (witness) was eating something that he had bought at the festival, and that he gave Coleman some of it,—gave him some chicken which had bone in it. That Coleman asked him, when he went back to the house, to see who all were there, and asked if Burley was there. That he told Coleman that he had not seen Burley, but had seen his wife, and that Coleman said he guessed Burley would be there. That Coleman gave as a reason for not going up to Allen's house that he had on his dirty clothes, and that Tillis need not tell any one that he was there. That there was a cane patch on the east side of Allen's house, and that Coleman was about 20 or 30 steps from it when witness gave him the chicken. On cross-examination, this witness acknowledged that he had been under arrest for killing Burley, and that he was induced to make the statement against Coleman by friends who told him that it was the best for him. That he was in irons at the time, but that he only stated what he knew about the case.

Another witness testified to seeing Tillis and Coleman going towards Allen's house on the night of the killing, not far from the house.

Louis Honors, a witness for the state, says: That he knew Coleman and Burley. That he saw Coleman on the night of the killing, about 9 o'clock, a half or three-quarters of an hour before Burley was shot. That Coleman was at the time sitting on a log on the "sunrise" side of Allen's house, on the cane patch, and that Nelson Tillis was going there. That Coleman was somewhere from 50 to 100 yards from Allen's house, and that witness was about 25 or 30 yards from Coleman and Tillis at the time. That he heard Coleman ask Tillis "if he had come," and that Tillis said: "Yes, Miles is come." That Tillis was eating something at the time, and gave Coleman some, and that directly he heard Coleman say that he would "get the gentleman." That they talked on for some time, and Nelson said he seemed friendly, and everything, and that he would not bother him that night, but that, if Coleman would, to be very careful, and not hurt any body else. That this occurred about a half or three-quarters of an hour before Burley was shot. That witness was in the cane patch at the time he heard this conversation.

Isaac Ellerson, for the state, testified: That he knew Coleman, and that he knew Burley. That he heard of the killing of Burley,—remembers the night. That he saw Coleman on that night. That he was living in the house with Coleman. That he saw Coleman that night. He guessed, as near as he could make out,—not having any time-piece,—it was about half-past 11 or 12 o'clock, or something like that. It was at his house. That he owned a rifle at that time, but did not know the name of it. That the gun was at Coleman's that day. That he left it there in the morning. That the gun was somewhat rusty, and needed cleaning up. That he oiled it, and left it there, saying that he would clean it when he returned from his work. That, when he returned from his work, he went to look for the gun, and it was gone. Supposed it was about 3 o'clock, and that no one was with him when the first search was made. That he looked in both rooms for it. That he made a thorough search, and that the gun was not there. That he saw the gun that night soon after Coleman came back,—about three minutes, he reckoned. That, when Coleman came, witness called him, and asked if it was Coleman, and he said, "Yes," and that he then asked Coleman where his gun was, and that he said: "I will tell you, directly." He came in and asked for a lamp, and says: "It is half-past ten." "I says: 'I didn't ask the time.' I says: 'Where's my gun?' He says: 'It is here.' I says: 'No, it ain't; because I have looked in both rooms, and can't find it.' 'I cleaned it up for you,' he says, 'and it's here.'" That, when Coleman told him the gun was there, he went in the room, and it was there, and that he had hunted the gun in that room. That he examined the gun, and it was loaded when he left it in the morning. It had four cartridges in

it. That he did not examine the gun after Coleman returned until after he heard of the shooting. That he heard of the shooting early in the morning, and that Nelson Tillis told him of it. That, as near as he could tell, he examined the gun about 7 o'clock. That he found that the gun had been shot once. One of the cartridges was gone. There were three cartridges in the gun that morning, and four the morning before. That he thoroughly examined the barrel and muzzle of the gun, and that it looked like it had been recently shot. That when a gun has not been shot for some time it looks white,—kind of ashy in the barrel. This gun looked dark in the muzzle,—just as if it had been shot recently. That he saw Coleman when he came in that night. He had on a dark shirt,—striped, some stripes in it,—and jeans pants, and straw hat. That, when Coleman came in the room where witness and Juniors were, Juniors said to him: "Coleman, what in the world is the matter with you?" That Coleman said he was sick. Juniors said, "You look mighty bad," and Coleman said: "Yes, that he was feeling mighty bad,"—and witness asked him where he had been, and Coleman said he had been sick, and that he came by Mr. Scott's and laid down on the piazza, and fell to sleep. That Coleman looked as though he had been sick for a long time, and as if he had run for a distance. He was all sweaty, and looked very warm. He looked bad, and was sweating. That Coleman pulled off his clothes, and that he saw them after they were pulled off, and they were wet and sandy about the legs. That he heard of the shooting of Burley in the morning. Nelson Tillis told him of it. That Coleman asked Tillis what kind of a time they had at the festival, and that he said: "A nice time, only that a man got shot." That he asked Tillis who was shot, and he said, "Burley," and that he said that he (Tillis) talked as if it was somebody that no one knew. That Juniors asked if his wife seemed to take on much, and that Tillis said: "Right smart; that it seemed that no one paid much attention to her,"—and that Coleman said that no one ought to care for her after she said she was not going to marry Burley, and then to go and marry him. On cross-examination, the witness stated: That he did not see the gun, on the day he oiled it after oiling it. That he did not know who had had his gun that day, as he was not there. That he remembered that he used the gun six or seven days before the time he had testified about. That he had shot the gun once about a week before. That he did not often use the gun. That he carried four cartridges in the gun, shot a rabbit, and that left only three. That he ate his supper about 10 o'clock that night and then read. That he and Coleman had trouble about some shoes, but not to amount to anything. That he "put on a pair of Coleman's old shoes, and wore them and in about two or three weeks Coleman said the shoes were his, and he charged me seventy-five cents for them. That he and Coleman had had some words about some clothes that witness' friend Kean had left in his charge. That Coleman claimed

that Kean gave them to him, and that witness told him that he nor nobody else would get them without the authority of the law. That he had no malice towards Coleman. That Coleman said nothing to him about leaving town that he knew of. On redirect-examination, the witness stated: That after he shot the rabbit he put another cartridge in the gun. That he left four in it. That about the 1st of June he attended prayer-meeting at Fort Meade, at Hall's, (a colored gentleman in town,) and that after the meeting was over he returned to his house, and went to bed. That he left some rags burning,—the mosquitoes were bad,—and that he dropped off to sleep, and some one came and hailed. That he had only been to sleep a few minutes. That some one said: "Who lives here?" That hereplied, "Isaac Ellerson," and then the party said, "come out here;" that he wanted to trade with him. That he said he would not go out unless he knew who it was, and that then the party shot at him. That the party saw him across the room by the window, and ranged his bullet just ahead of him. That he did not know where Coleman was at that time.

The evidence of Ellerson is corroborated by that of Jake Juniors, a witness for the state, in almost every particular.

The defendant attempted to prove an *alibi*, but in this he failed completely. His whereabouts during the time in which he could have committed the crime with which he was charged was wholly unaccounted for, except by his own statement. In his statement to the jury, he denied being at Allen's on the night Burley was killed, but said he was at Fort Meade, sick; but the evidence is, we think, conclusive that he was at Allen's place on the night of the homicide, and his denial, under the circumstances, certainly is against him.

There are other circumstances—minor circumstances—shown by the evidence, but the foregoing is the substance of the evidence; and it is, in our opinion, sufficient to sustain the finding of the jury. The evidence is not conclusive as to the defendant's guilt; but the circumstances are so strong—they point so directly to the defendant as the perpetrator of the cowardly assassination—as to preclude every reasonable hypothesis inconsistent with his guilt; and hence we can see no reason for setting aside the verdict as being against the evidence.

It may be difficult to find from the evidence a sufficient motive for the perpetration of so base a crime, but we think that the motive may be found to be that of jealousy and revenge because Burley married the woman he did marry. This was motive sufficient, in so depraved a character as the defendant is shown to be; and we have no doubt but that this was the conclusion arrived at by the jury in their inquiry as to what motive prompted the defendant to commit the crime.

We have most carefully considered the whole case, and, after doing so, can find no sufficient reason for reversal; and therefore the judgment of the court below is affirmed.

STATE *ex rel.* PEELER *et al.* v. ROSE *et al.*
(Supreme Court of Florida. March 31, 1890.)

COUNTY BOARDS OF HEALTH—MANDAMUS—ANSWER.

1. It is the duty of county commissioners, under the act of June 7, 1889, which "provides for the appointment of county boards of health in and for the several counties," etc., to cause a tax to be assessed and levied, not to exceed in any year one mill on the dollar, to defray the expenses of the board of health of the county, when proper request is made for that purpose by said board.

2. A written request made by the president of the board, in its name and signed by him as president, is a sufficient compliance with the statute; and a return of the county commissioners to an alternative writ of *mandamus*, seeking to compel the assessment and levy of the tax, which admits the receipt of such a communication, but denies that it is the action of the board, and does not deny that the writer is president, or that his communication was authorized by the board, when the writ alleged that the request was made by the board, is evasive and insufficient.

(Syllabus by the Court.)

Mandamus.

William B. Lamar, Atty. Gen., and John C. Cooper, for relators. M. L. Mershon, for respondents.

MAXWELL, J. This is an original *mandamus* proceeding in this court. The relators constitute the board of health of Osceola county, and the respondents are the county commissioners of said county. In the alternative writ the complaint is, in substance, that the relators, having duly and fully considered what measures were necessary to protect the health of the county during the year 1889, and the spring and summer months of 1890, and to carry out their duties under chapter 3859 of the Laws of the state, and the regulations of the state board of health, and determined what amount of taxes should be assessed and levied under said law, fixed the one mill tax as that which should be assessed and levied for health purposes in said county, under section 10 of said law. That said county board of health on the 2d day of September, 1889, requested the county commissioners in writing, at a regular meeting of said last board, to cause the one mill tax to be assessed and levied for the year 1889, as provided in the act; but that said commissioners, contrary to their manifest duty, refused to levy and assess said tax, and never have assessed or levied the same, or caused the same to be assessed and levied. The writ commands the assessment and levy, or that cause be shown for the refusal.

The respondents answer that it is not true that the county board of health made a request to them in writing on September 2, 1889, or at any other time, to levy the one mill tax for health purposes. They admit that on the day mentioned a communication was received by them requesting the levy, "signed by James P. Peeler, M. D., chairman of county board of health of Osceola county; but they deny that said communication was the action of the board of health, or that it purported to be by the direction or authority of said board; and they submit that, in the absence of a request from the county board

of health, the county commissioners had no power to make the levy."

The answer presents other objections to the proceeding, but these have been abandoned on the hearing.

Accompanying the answer is a copy of the communication of Dr. Peeler, signed as stated, and addressed "to the chairman and board of county commissioners of Osceola county," which runs thus: "The Osceola county board of health would respectfully request that an assessment of one mill on the dollar be assessed on the property in Osceola county to defray the expenses of the county board of health. See section 10 of an act of the legislature approved June 7, 1889." This section is part of an "Act to provide for the appointment of county boards of health in and for the several counties of the state of Florida, and define their powers," and reads as follows: "The county commissioners of each county in the state in which a board may be constituted may assess and levy, or cause to be levied and assessed, a tax not to exceed in any year one (1) mill on the dollar, at the request of the board of health of the county, to enable such board to defray the expenses of its operation." Another section of the act (4) provides that "every such board shall annually elect from its members a president and secretary, who shall constitute the executive committee of said board," and section 8 constitutes the board a corporation.

It will be seen that respondents do not call in question the duty of the county commissioners to have the tax assessed and levied, when proper request is made by the board of health; and in argument for respondents it is admitted that the law is compulsory on the commissioners upon such request. We think this view is correct, but this admission of counsel renders it unnecessary to set forth the grounds of our conclusion.

A motion in the nature of a demurrer is made by the relators to strike out the return, because it is "evasive, argumentative, uncertain, and insufficient," and for a peremptory writ. The return, not containing any denial, in effect admits the allegations of the writ as to the action of the board of health in determining what amount of tax should be assessed and levied for the use of the board, and that it should be one mill on the dollar. It says it is not true that the board requested respondents to have the tax assessed and levied, as the writ alleges, but admits the receipt of the communication of the president of the board set out above, and denies that this was the action of the board, or that it purported to be by the direction or authority of the board. That the county commissioners could not act to have the tax assessed and levied until requested by the board of health is evident from the terms of the act. How that request should be made is not designated, and it would seem that no very formal or technical mode is required. The return implies that it should be made by the board in the names of its members, or in the name of the board by its prescribed corporate title. We cannot understand the objection to the request, signed by the

president of the board, in any other sense. It is not denied that he is president, and that as such he has authority to make communications of the action of the board; nor denied that, in making the communication he did, he was acting by express authority of the board. This is a clear evasion of the allegation of the writ that the request for the assessment and levy was made by the board. It is not unanalogous on this point to the case of *State v. Mayor, etc.*, 22 Fla. 21, in which the strictness of the rule as to the return to a writ of *mandamus* is held to require definite and certain statements sufficient to meet the allegations of the writ.

But there is denial that the communication was the action of the board, or that it purported to be by the direction or authority of the board, when in fact it does purport in its very language to be the "Osceola county board of health" requesting the assessment and levy of the tax, and it is signed by the president of the board as such, thereby purporting authority of the board. His authority in that capacity naturally makes him the organ of the board. He is its agent for that purpose, and his action therein is its action. Of course, he could not, of his own motion, make the request; but when the board has taken action, as is alleged and not denied, upon which the request is to be founded, it is to be presumed that in making the request in the name of the board he is performing a function pertaining to his office which is duly authorized, and which is shown by this proceeding to be the recognized method of the board for such communication. In this respect, and on the whole, the return is insufficient.

Holding that the return is evasive and insufficient, and counsel for respondents having announced that the return presents their full defense, it results that the relators are entitled to a peremptory writ, and accordingly it will be ordered.

BAEUMEL v. STATE.

(*Supreme Court of Florida. March 17, 1890.*)

INTOXICATING LIQUORS—ILLEGAL SALES—INDICTMENT—JUDGMENT.

1. In a prosecution for carrying on the business of dealer in spirituous liquors without a license, under the act of March 5, 1883, it was not necessary for the indictment to allege that the defendant was not a druggist at the time of the sales of liquor, nor that the liquor was not used by a druggist in compounding medicines, and the preparation of prescriptions made by a regular practicing physician. If it was a fact that the liquor was sold as a component part of medicines upon such prescription, it was a matter of defense that the defendant could have availed himself of.

2. As a general rule, if there is an exception in the enacting clause of a statute, the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause, or a subsequent statute, that is matter of defense, and is to be shown by the other party.

3. A charge that "the fact that the defendant's place of business was a drug-store does not raise any presumption in his favor; and, if the state has proven to your satisfaction that any single sale of spirituous liquors was made by the defendant, and the defendant has not then shown that such sale was justified under the privileges of a druggist,

which he claims, then you should convict,"—held to be correct.

4. The penalty prescribed for the violation of the act under which the defendant was convicted was not less than double the amount of the license required to authorize the selling of liquor, \$800; and a fine of \$900 for the violation of said act was not excessive.

(*Syllabus by the Court.*)

Error to circuit court, Polk county; G. A. HANSON, Judge.

Wilson & Wilson and J. L. Albritton, for plaintiff in error. *William B. Lamar*, Attorney Gen., for the State.

MITCHELL, J. The plaintiff in error was tried and convicted at the fall term of the circuit court, 1889, for carrying on the business of dealer in spirituous, vinous, and malt liquors without a license. Motion was made for new trial, which was overruled; and the case was brought here upon writ of error from the order of the circuit court overruling said motion.

The first error assigned is that the court erred in refusing to quash the indictment. The indictment contains four counts, the first of which charges the defendant with carrying on the business of dealer in spirituous liquors without a license; the second charges him with carrying on the business of dealer in spirituous liquors, to-wit, whisky, rum, and alcohol, without a license; the third charges him with carrying on the business of dealing in malt liquors without a license; and the fourth charges him with carrying on the business of dealer in malt liquors, to-wit, lager-beer, without a license. The defendant moved to quash the indictment (1) because the indictment does not charge any offense against the defendant; (2) because the indictment is founded upon the general law of the state, which law received the signature of the governor on the 5th day of March, 1883, and that the indictment does not allege facts and circumstances sufficient to bring the defendant within the terms of the statute; (3) because the indictment does not allege that the defendant was not a druggist; (4) because the indictment does not allege that the whisky, wines, and beer alleged to have been sold were not sold in the compounding of medicines, and in the preparation of prescriptions made by regular practicing physicians; (5) because the indictment does not allege that the whisky, wines, and beer alleged to have been sold were not such mixtures as are made official in the United States Dispensatory; (6) because the indictment does not allege that the defendant was not a druggist, and that said liquors, wines, and beer were not sold in the manner in which druggists were authorized to sell the same, to-wit, in compounding medicines under a prescription of a regular practicing physician; (7) because of other good and sufficient reasons appearing upon the face of the indictment.

The defendant was indicted under the general revenue law of March 5, 1883, (chapter 3413, Laws Fla.,) entitled "An act for the assessment and collection of revenue." The eleventh section of this act provides that "dealers in spirituous, vinous, or malt liquors shall pay a license tax of three hun-

dred dollars (\$300) in each county for each place of business, and dealers paying the same, and receiving a license therefor, shall be authorized to sell spirituous, vinous, and malt liquors, or any of such liquors, but neither spirituous, vinous, nor malt liquors shall be permitted to be sold unless said license tax is first paid, and a license therefor first taken out;" and that "any person who shall sell spirituous, vinous, or malt liquors, or any preparation composed in whole or in part of such liquors, shall be deemed a dealer in spirituous, vinous, or malt liquors, within the meaning of this act: provided, however, that a druggist shall be allowed to use spirituous, vinous, or malt liquors in compounding medicines, and the preparation of prescriptions made by regular practicing physicians: provided, further, that druggists may sell such mixtures as are made official in the United States Dispensatory without being required to take out a license to sell spirituous, vinous, or malt liquors." And the twelfth section of the same act fixes the penalty for selling spirituous, vinous, and malt liquors at not less than double the amount required for such license.

The contention of plaintiff in error is that the indictment was defective in not alleging that the plaintiff in error was not, at the time of the alleged selling of spirituous, vinous, or malt liquors, a druggist; and he cites the following authorities in support of this proposition: *Humphreys v. State*, 17 Fla. 881; 1 Bish. Crim. Proc. § 519; *Beasley v. State*, 18 Ala. 535; *Sarah v. State*, 25 Miss. 267; *People v. Telford*, 23 N. W. Rep. 218; *Thompson v. State*, 37 Ark. 408; *State v. Abbey*, 29 Vt. 60, 66; *State v. Keen*, 34 Me. 500; *State v. Wade*, 34 N. H. 495; *Thompson v. State*, 54 Miss. 740; *State v. O'Donnell*, 10 R. I. 472; *U. S. v. Cook*, 17 Wall. 188; *Best*, Ev. 1.

An examination of the cases and authorities cited supra shows that not one of them, except that in 37 Ark., fully sustains the doctrine contended for by the plaintiff in error; but, on the contrary, they, with this single exception, show the converse of his proposition.

Mr. Bishop, in his work on Criminal Procedure, (volume 1, § 639,) lays down the doctrine upon this subject as follows: "In a statutory offense, it depends very much, though not exclusively, on the words of the statute, whether a particular matter is one of defense, or whether the negative of the matter enters into the definition of the crime. Therefore, as a general rule, we have what has already been laid down, namely, 'if there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause, or subsequent statute, that is matter of defense, and is to be shown by the other party.'" And in note 3, cited by Mr. Bishop, there are collated a great number of cases supporting this doctrine, which are, in our opinion, conclusive upon the subject. But, if further authorities could be required to sustain Mr. Bishop's view of the subject, see *Brittin v. State*, 10 Ark. 299; *Com. v. Hart*, 11 Cush. 130, 2 Green, Crim. Rep. 247; *Com. v.*

McClanahan, 2 Metc. (Ky.) 8; State v. Cox, 32 Mo. 506; State v. Cassady, 52 N. H. 500; State v. Gurney, 37 Me. 149; State v. Miller, 24 Conn. 522; U. S. v. Cook, 17 Wall. 168.

The enacting clause of the act of March 5, 1883, under which the plaintiff in error was convicted, contains no exception or provisions as to druggists, and therefore it was not necessary for the indictment to allege that the accused was not, at the time of the alleged sales, a druggist; and consequently there was no error in the court overruling the motion to quash the indictment. If the fact existed that the defendant was a druggist at the time of the alleged sales of liquors by him, and that the liquors sold were sold as a component part of medicines, upon the prescription of a regular practicing physician, that fact was a matter of defense that he could have availed himself of.

The second error assigned is that the court erred in allowing the state attorney, over the objection of defendant, to ask the witnesses Miller, Kilpatrick, and Deshong how and in what manner they bought any liquors, wines, and beer from the defendant. These witnesses only stated that they bought whisky from the defendant or his clerk, and how they paid for it; and we can see no objection to their testimony.

The third error assigned is that the court erred in refusing to strike out the evidence of these witnesses upon defendant's motion, but we fail to see the error insisted upon.

The fourth error assigned is that the court erred in charging the jury that "the fact that the defendant's place of business was a drug-store does not raise any presumption in his favor; and, if the state has proven to your satisfaction that any single sale of spirituous liquors was made by the defendant, and the defendant has not then shown that such sale was justified under the privileges of a druggist, which he claims, then you should convict." There is no objection to this part of the charge, unless it be that it is not full enough to show what the privileges of a druggist are under the statute which allows druggists, without taking out a license to sell liquors, to use spirituous, vinous, and malt liquors in compounding medicines, and preparing prescriptions made by physicians. But there is no contention that the liquor sold was used in compounding any medicine, or that it was sold for any preparation of prescriptions made by a regular practicing physician; but the evidence shows that the liquor sold was whisky "straight."

The fifth error assigned is that the court erred in overruling and denying defendant a new trial upon each and every and all of the grounds of his said motion for new trial. There was no error in overruling the motion for new trial, as the indictment, trial, finding of the jury, and sentence of the court conformed to law.

The sixth error assigned is that the court erred in sentencing the defendant to pay a fine of \$900 and all costs; the same being in excess of punishment fixed by statute in such cases. As before stated, the sentence conformed to law. Under the statute, the judge could not fine the ac-

cused less than double the tax required for a license to sell spirituous, vinous, and malt liquors, \$600; but he could impose a fine in excess of that amount, provided the fine imposed did not violate the bill of rights, which prohibits "excessive" fines. In the case of *Frees v. State*, 23 Fla. 287, 2 South. Rep. 1, it is held that a fine of \$900, under the same statute that the plaintiff in error was convicted under, was not excessive; and we so hold in this case.

The judgment of the circuit court is affirmed.

KIMBALL LUMBER CO. v. RUGE.

(*Supreme Court of Florida.* March 4, 1890.)

APPEAL—FAILURE TO FILE TRANSCRIPT.

A motion to dismiss an appeal on account of the failure of the appellant to file the transcript in the supreme court on or before the first day of the term to which the appeal is returnable cannot be based upon the transcript filed by the appellant before the entry of the motion.

(*Syllabus by the Court.*)

Appeal from circuit court, Franklin county; DAVID S. WALKER, Judge.

Fred T. Myers, for appellant. John W. Malone and Blount & Blount, for appellee.

RANEY, C. J. The motion to dismiss this appeal is upon the ground that appellant had not filed the transcript of the proceedings of the circuit court in this court on the first day of the present term. It was not filed till the 30th day of January, which was the seventeenth day of the term. The motion to dismiss was not entered till the 3d day of February.

The statute provides that it shall be the duty of the appellant to demand from the clerk a true copy of all proceedings in the cause in the circuit court, and file such copy with the clerk of the supreme court on or before the first day of the next succeeding term thereof, unless the succeeding term shall commence within 30 days after obtaining such appeal, and then the appeal shall be entered as soon after the first day of [not "after," as printed in *McClellan's Digest*, 842] such succeeding term of the supreme court as will admit of 20 days' notice thereof being given; and if the appellant fail to file the proceedings as aforesaid it shall be the duty of the court, unless good cause be shown, to dismiss the appeal on the adverse party's producing a certificate from the clerk of the court below that "an appeal has been obtained and bond given," as provided by the statute. *Thomp. Dig.* p. 448, § 1; section 1, *Terr. Laws* 1882, p. 98.

No such certificate is produced by the appellee, but he bases his motion on the transcript of the record filed by the appellant. This he cannot do on the record furnished by the appellant. If he wishes the relief authorized by the statute, he must furnish the evidence. *West v. Brashear*, 12 Pet. 101; *Macomb v. Armstead*, 10 Pet. 407. We find no case decided under our statute in which the relief has been granted without the appellee's having furnished the evidence to put this court in motion.

As these motions are, in view of our adjudications that such a dismissal of an appeal does not preclude the taking of a new

appeal or writ of error within the times allowed by law, generally productive only of delay to the extent of the loss of a term by the appellee and the payment of the costs of the motion by the appellant, we feel it proper to state here a view of the above statute which has occurred to us during our consideration of this case, and is found to be supported by authority. It is whether a motion of this kind will be entertained when made at the term to which the appeal is returnable, unless it is entered before the transcript has been filed by the appellant, or, in other words, while the appellant is in default. *Bingham v. Morris*, 7 Cranch, 99; *Pickett v. Legerwood*, 7 Pet. 144; *Sparrow v. Strong*, 3 Wall. 97. In *Town of Enterprise v. State*, 24 Fla. 206, 4 South. Rep. 535, a different view was taken, as supported by *Rain v. Thomas*, 12 Fla. 493. Upon reviewing that case, we find it appears in the latter part of the opinion that the transcript was not filed till after the entry of the motion, a fact which, in the consideration of the *Enterprise* case, escaped the attention of the court, and, I may properly say, in view of any special responsibility that may attach to the justice speaking for it, of myself in writing that opinion. If the ruling there was error, as it seems now it may be, it should be corrected, and will be called to the attention of counsel in the first case that may involve the point.

The motion to dismiss is denied, and it will be so ordered.

SIMS V. STATE.

(Supreme Court of Florida. March 19, 1890.)

INFORMATION FILED IN VACATION—ISSUE OF WARRANT—HABEAS CORPUS.

An information filed by the prosecuting attorney of the criminal court of record of Lake county, in the office of its clerk in vacation, does not authorize the clerk to issue a warrant for the arrest of the person so accused of crime, nor do such proceedings give the judge of that court power to fix the bail for the person arrested on a warrant thus issued; and a person so held by the sheriff is deprived of his liberty without due process of law, and is entitled to be discharged on *habeas corpus*.

(Syllabus by the Court.)

Error to circuit court, Lake county; JOHN D. BROOME, Judge.

A. St. Clair-Abrams, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

RANEY, C. J. This is a writ of error to a judgment rendered by the circuit judge of the sixth circuit in a *habeas corpus* proceeding.

It appears that the county solicitor of Lake county, who is the prosecuting officer in the criminal court of record of that county, filed in the office of the clerk of that court, on the 4th day of the present month, (March,) an information charging the plaintiff in error with having embezzled \$2,100.00, the property of the Florida Central & Peninsular Railroad Company, a corporation under the laws of this state, and on the same day a warrant was issued by the clerk commanding the sheriff to arrest Sims, and have him before the

judge of the above criminal court of record, at the court-house at Tavares, on the 8th day of April of the present year, to answer the state on an information for embezzlement filed against him by the county solicitor. The sheriff arrested Sims on the same day, and indorsed his action on the writ; and it appears from the transcript before us that Judge GAINES, of the criminal court of record, indorsed on the information an order that the prisoner might be admitted to bail in the sum of \$2,500, on giving good and sufficient sureties, to be approved by the sheriff.

Sims, while thus in the custody of the sheriff, presented to the circuit judge, on the next day, a petition for a writ of *habeas corpus*, alleging that he was so detained without lawful authority, and deprived of his liberty without probable cause, and to his right to a preliminary examination; and that the criminal court of record was not in session when the above-mentioned information, upon which the warrant was issued, was filed, nor was it in session at the time of presenting the petition, nor could the term of such criminal court of record, as of which the information is entitled and purports upon its face to be presented, viz., the April term, A. D. 1890, be held for more than a month; that he was innocent of the charge brought against him; that he was until recently agent of the Florida Central & Peninsular Railroad, at Tavares, in Lake county; and that on the 21st of January, 1890, the railroad depot of the company was destroyed by fire, with all its contents, including a large sum of money in the safe belonging to the company, and that because he is unable to replace the money and property so destroyed a charge of embezzlement has been trumped up against him, and he has been arrested and is held in custody as above stated,—there being no evidence to warrant or authorize his arrest, and the same being made for the purpose of terrorizing and intimidating him, and the petitioner being required to give "enormous and excessive" bail, in the sum of \$2,500, which he is unable to do. The petitioner prayed the issuance of the writ, and that the matter of his custody and detention might be inquired into, and he be discharged from custody.

The writ having issued, the sheriff made return to it that he held the petitioner under the warrant described above as issued by the clerk of the criminal court of record of Lake county; and on the 6th day of March the cause came on to be heard upon the above record, and an admission by the county solicitor, upon whom notice of the hearing had been served, that the county criminal court of record of Lake county was not then in session, nor when the information was filed; and the circuit judge refused to permit any evidence of the facts upon which the information was based to be brought before him, and remanded the petitioner "to the custody of the sheriff, as it appears a criminal court of record of Lake county has jurisdiction."

To this judgment a writ of error was granted on the next day by a justice of this court, returnable to the court in term at its present sitting.

It is insisted on behalf of the plaintiff in error that the information was unlawfully filed, as it was filed in vacation and not in open court, and that consequently the warrant was issued without authority of law, and the prosecution is not by due process of law, under the twelfth section of the declaration of rights of our constitution.

The constitution provides for the establishment by the legislature of a criminal court of record in any county upon application of a majority of the registered voters; and that there shall be one judge for each of said courts; and that the said "courts" shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively; and that there shall be six terms of these courts in each year; and there shall be for each of the courts a prosecuting attorney; and that "all offenses triable in said court shall be prosecuted upon information under oath to be filed by the prosecuting attorney; but the grand jury of the circuit court for the county in which said criminal court is held may indict for offenses triable in the criminal court, and upon the finding of such indictment the circuit judge shall commit or bail the accused for trial in the criminal court, which trial shall be upon information." Sections 24-28, art. 5, Const. 1885.

The criminal court of record of Lake county was established by a statute approved May 11, 1889, (Pamph. Laws 1889, p. 169,) which enacts that the court shall have jurisdiction to try and determine all violations of the criminal laws of the state arising in that county, and not punishable by capital punishment; that there shall be held six terms of the court in each year, the same to begin on the second Tuesday in February, April, and the other alternate months; that the said court shall exercise the same power in issuing warrants, attachments, and summonses as is had and exercised by the circuit courts of the state in criminal cases, which processes shall be executed in the same manner and by the same officers as the process of the circuit court is now executed, and the same rules of procedure and practice which now obtain in the trial of criminal cases in the circuit court shall obtain in this court; that its judge shall have the same powers, duties, and obligations in the administration of the criminal laws as are now exercised by and imposed upon the judge of the circuit court; that the powers and duties of the county solicitor, the prosecuting officer of the court, shall be the same as those now exercised by and imposed upon the state attorney, except as afterwards provided in the act. The county solicitor is "allowed" the process of the court "to compel the attendance of witnesses before him, in or out of term, at such convenient times and places as may be designated in the summons, to testify before him as to any violation of the criminal law, upon which they may be interrogated, and writs of attachment or summons for such witnesses shall at any time be issued from said court upon the written order of the county solicitor filed with the clerk;" and such solicitor is au-

thorized to administer oaths to all witnesses summoned by the process of the court. All offenses triable by this court are to be prosecuted upon information filed by the county solicitor under oath, and the same rules of pleading and practice as now obtain in trials by indictment it is declared shall obtain in trials by information.

The jurisdiction given to criminal courts of record by the above provisions of the constitution is a trial jurisdiction, as distinguished from one for mere examination with reference to the discharge, bail, or commitment without bail of the person accused; and the purpose of that instrument in providing that all offenses triable in that court shall be prosecuted upon information under oath, to be filed by the prosecuting attorney, was the regulation of the manner and form in which the accusation should be preferred for trial by the court in term. It must be in that form before the accused can be required to answer there. This is so, even where a grand jury of the circuit court of the same county has found an indictment, and the circuit judge has committed or bailed the accused for trial in the criminal court. The authority thus given to this court to try on information felonies within its jurisdiction is, at least, one of the exceptions referred to in the tenth section of the declaration of rights; where it is provided that in other cases than those of impeachment, and those of the militia in active service in time of war, or which the state, with the consent of congress, may keep in time of peace, no person shall be tried for a capital crime or other felony, unless on presentment by a grand jury, except as is otherwise provided in this constitution. At the common law only misdemeanors were triable in this way, but in this court the information is, even as to felonies, substituted for an indictment.

There is nothing in the constitution as to the exercise in vacation, by the county solicitor, the clerk, or the sheriff, of the powers complained of here, nor is there anything as to the exercise of any functions by the judge out of term. Looking to the statute, whose provisions, in so far as they can be said to relate to the question before us, are substantially set out above, we find no authority given to the county solicitor to file an information in vacation as the basis for the issue of a warrant for the arrest of the accused, nor any conferred upon the clerk for the issue of such a warrant under such circumstances. The grant to the "court" of the same power in issuing warrants, attachments, and summonses as is now had and exercised by the circuit courts in criminal cases does not confer these powers upon either of such officers; nor does the provision that the powers and duties of such solicitor and clerk and sheriff, respectively, shall be the same as those now exercised by and imposed upon state attorneys and clerks of the circuit courts, and the sheriff while acting as the executive officer of the circuit court. An information filed in vacation by a state attorney in the clerk's office of the circuit court, if one has ever been thus filed in this state, is not the legal mode of primarily instituting proceedings against an alleged criminal.

nal, the trial of whose offending is within the jurisdiction of the circuit court. It is true that under the act of February 7, 1877, (section 4, p. 442, McClell. Dig.,) every misdemeanor of which the circuit court has jurisdiction may be tried upon presentment or indictment by a grand jury, or upon information filed by the state attorney, or the duly-authorized prosecuting attorney of the court; but the purpose of that legislation was merely to permit the substitution of an information for an indictment in cases of misdemeanor, and the uniform practice under it has been to file the information in open court; and in *King v. State*, 17 Fla. 183, it was held that it was not necessary that the information should be presented by a grand jury, but it was sufficient if presented by the state attorney, or the duly-authorized prosecuting attorney of the circuit court, entered in the minutes of the court and filed. Should a state attorney file such an information in vacation, the clerk of the circuit court would not be authorized to issue a warrant for the arrest of the person charged in it; and this for the simple reason, to say nothing more, that neither the act of 1877, nor any other statute, has provided for any such proceeding in the circuit court in vacation.

It is true the county solicitor is allowed the process of the court to compel the attendance of witnesses before him in or out of term, at such convenient times and places as may be designated in the summons, to testify before him as to any violation of the criminal law upon which he may be interrogated; and writs of attachment, or summonses for such witnesses, may be issued from the court upon the written order of the county solicitor filed with the clerk; and such solicitor may administer oaths to all witnesses summoned by the process of the court. Whatever else may be the purpose of this provision, it nevertheless is altogether clear that it gives no authority to the clerk to issue any warrant for the arrest of the person whom the witnesses may identify as the probable violator of the criminal law, nor does it allow the solicitor the process of the court for such purpose, either upon filing an information or a written order with the clerk.

That it was not the purpose of this provision to authorize the filing of an information in vacation, to be followed by the issue of a warrant of arrest, becomes more apparent when considered in connection with that mentioned above, to the effect that the court shall exercise the same power as the circuit courts in issuing warrants, attachments, and summonses, and with those clauses which declare that the same rules of procedure and practice which now obtain in the trial of criminal cases in the circuit court shall obtain in this court, (section 5 of the act of 1889,) and the same rules of practice which now obtain in trials by indictment shall obtain in trials by information. If it had been the intention of the legislature to give the power which has been exercised here, it would not have merely given the solicitor the specific powers as to summoning and examination of witnesses, and vested him

with the same power as to his duties and powers, as to the criminal court of record, and offenses cognizable by it, as the state attorney has as to the circuit court, but it would have made express provision for the exercise of a power which is not exercised by the circuit court or state attorney, the clerk and sheriff, in this manner, in vacation.

The result then is that the laws of this state do not authorize the county solicitor of Lake county to file in vacation an information which shall have the effect to set the process of that court in motion for the arrest of the person charged in it with a violation of a criminal law, of the trial of which that court has jurisdiction. There being no such power as has been exercised here, given by the laws applicable to the criminal court, the duty to the public of having the petitioner arrested, and his alleged offending inquired into, for the purpose of securing his personal attendance for trial at the next term of the criminal court of record of Lake county, must be performed through the same judicial instrumentality which would be available if there was no criminal court in the county.

The petitioner was remanded to the custody of the sheriff by the circuit judge because he thought the criminal court of record had jurisdiction of the case. The information, filed as it was, did not give that court jurisdiction. It was a proceeding in the clerk's office wholly unauthorized by law, and it neither gave that court jurisdiction of the case, nor its judge authority to make the order or indorsement as to bail. Such an information, filed in the office of the clerk of the circuit court by the state attorney, would not have given the circuit judge the power, or imposed upon him the duty or obligation, to fix the amount of bail, but his duty would be to treat the proceeding as *coram non jure*.

The law has not given to an *ex parte* examination made in this way by a county solicitor the result of having the person accused of crime arrested upon the filing of an information in the clerk's office, and imprisoned without a preliminary hearing before a magistrate, and forcing him to seek his liberty or an investigation of the alleged offense by becoming an actor in a *habeas corpus* or similar proceeding.

The petitioner is held without due process of law, and the judgment of the circuit judge will be reversed, and the case remanded, with direction to discharge him from custody under those proceedings.

GIBSON V. STATE.

(*Supreme Court of Florida*. March 22, 1890.)

CRIMINAL LAW—NEW TRIAL—FORMER JEOPARDY—INSTRUCTIONS.

1. When there has been trial for an offense, and a verdict of guilty, and on motion of the defendant the court arrests the judgment, or grants a new trial, such defendant has not been in the jeopardy which forbids a second trial, whether upon the same indictment or a new one. The jeopardy ceased upon the arrest, or grant of a new trial; there being no right of appeal for the prosecution in this state.

2. The entry of a *nol. pros.* in such case is not a bar to another indictment for the same offense.

3. An oral charge, being merely a formal requirement, is, as to error, considered as waived, if not excepted to before retirement of the jury; and the statute which authorizes a party to embody in a motion for a new trial mistakes of the court not before excepted to gives that privilege as to substantial matters charged, but not as to formal matters connected with the delivery of the charge.

4. This court cannot assume, as against the presumption in favor of the action of the judge, that a charge of the court in relation to the conduct of a witness is erroneous when there is nothing in the bill of exceptions in regard to the nature of the occurrence.

5. While the court may charge the jury that they "are not to try the case by the arguments of counsel," if by that it be understood as only warning them that they should not be controlled in a decision on the facts by these arguments, as against their own judgment, yet, to charge further that "it is the study of a life-time, that they [counsel] learn how to distort, change, color, and discolor facts, in order that they may use them to the advantage of their clients," is virtually depriving the prisoner of counsel, and also an implied intimation that the facts as stated in the argument of counsel are not those shown by the evidence, and in this latter respect is a violation of the statute which forbids a judge to charge on the facts. Such a charge disparages the profession unjustly, and tends to prejudice the prisoner, and is erroneous.

(Syllabus by the Court.)

Appeal from circuit court, Polk county; G. A. HANSON, Judge.

J. B. Wall and H. C. MacFarlane, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

MAXWELL, J. January 30, 1888, plaintiff in error was convicted of murder in the first degree. A new trial was granted on his motion, and while the case was still pending another indictment was found against him for the same offense. Subsequently a *nol. pros.* was entered as to the first indictment. Thereupon plaintiff in error filed a plea of *autrefois acquit* to the second indictment, alleging that he had been put in jeopardy of his life by the trial under the first. The state attorney demurred to this plea, and the courts sustained the demurrer. A trial was then had on the plea of not guilty, a verdict of guilty with recommendation to mercy rendered by the jury, and motions in arrest of judgment and for a new trial were made by plaintiff in error, which the court overruled.

Before delivering his written charge, the judge addressed the jury orally in these words: "Before proceeding to deliver my charge to the jury, by request of defendant's counsel, I desire to call attention to an unfortunate and very improper circumstance that occurred the other day in the presence of the jury, when one Mrs. Harvey was leaving the witness stand, and made a declaration that should not have been made, and for which she was subject to punishment for contempt, if her remark had been heard by the court; but, she being a woman, and counsel declining to ask any ruling thereon, she was not punished. I instruct you to banish from your mind that circumstance. It has nothing whatever to do with this case. As to the arguments made by counsel, you are not here to try the case by the arguments of counsel. It is the privilege, as well as the

duty, of counsel to argue to the best advantage in the behalf of their clients. It is the study of a life-time, that they learn how to distort, change, color, and discolor facts, in order that they may use them to the advantage of their clients. They are not here as you and I are here, but as partisans. The court and jury come here disabused of every feeling of prejudice, every feeling of injustice, and to perform the solemn duty to ascertain the facts and the law, and nothing more."

The questions presented by the assignment of errors are whether the plea of *autrefois acquit* was rightly overruled, whether it was proper to address the jury orally in the language just quoted, and whether that language was not in itself error. The question on the instruction in regard to immateriality of proof as to the time of the commission of the offense is regarded as abandoned; there being no reference to it in the brief of counsel.

As to the plea, we think the court did not err in holding that it furnished no sufficient defense against the further prosecution of the prisoner. That a party cannot be twice put in jeopardy for the same offense is well established in law; but when there has been a trial for an offense, and a verdict of guilty, and on motion of the party convicted the court arrests the judgment, or grants a new trial, it is uniformly held that such party has not been in the jeopardy which forbids a second trial, whether upon the same indictment or a new one. The arrest of judgment or the new trial being at his instance, and for his benefit, and the prosecution being thereby suspended, the jeopardy ceases, and is, so far as a new indictment after arrest of judgment is concerned, as if it had never existed. 1 Bish. Crim. Law, § 1000. The rule is applicable in this state, because the prosecutor has no right of appeal for the reversal of the judgment of arrest, while in states where such appeal is allowed the jeopardy is considered as still existing. And, so far as a new trial is concerned when granted on motion of the defendant, the jeopardy of the previous trial is waived by him, and is not available for his defense. 1 Bish. Crim. Law, §§ 1001, 1003. See, also, People v. Casbours, 13 Johns. 350; Com. v. Hatton, 3 Grat. 623; State v. Phil, 1 Stew. (Ala.) 31; Joy v. State, 14 Ind. 139; State v. Holley, 1 Brev. 35; Gerard v. People, 3 Scam. 362; and State v. Walters, 16 La. Ann. 400.

Nor does the entry of a *nol. pros.* in the case make any difference. That is not a bar to another indictment for the same offense. Com. v. Wheeler, 2 Mass. 172; Lindsay v. Com., 2 Va. Cas. 345; Wortham v. Com., 5 Rand. (Va.) 639; Walton v. State, 3 Sneed, 687. A new trial having been granted, the case stood as if it had never been tried, and a *nol. pros.* entered then had no different effect in favor of the prisoner than if it had been entered prior to the trial.

In regard to the alleged error of the court in delivering a portion of the charge to the jury orally it does not appear from the record that any exception was taken to this at the time. Under the practice of this court in construing the

statutes in relation to oral and written charges, such error, being as to a merely formal requirement, is considered as waived if not excepted to before retirement of the jury. Even if alleged as error on a motion for a new trial, it comes too late. The statute which authorizes a party to embody in a motion for new trial mistakes of the court not before excepted to, gives that privilege as to substantial matters charged, but not as to formal matters connected with the delivery of the charge; and even where the judge has given oral instructions, and afterwards, before the jury retired, gave written instructions, saying to the jury they were, substantially, the oral instructions he had given, it has been held that this is a compliance with the statute requiring charges to be wholly in writing in cases to which the requirement applies. *Express Co. v. Van Meter*, 17 Fla. 783; *Potsdamer v. State*, Id. 896; *Baker v. Chatfield*, 23 Fla. 540, 2 South. Rep. 822. The rule as to waiver of the error applies alike to civil and criminal cases. *Express Co. v. Van Meter*, supra.

Our conclusion being that the objection to the charge on the ground that it was delivered orally was waived, under the circumstances of the case, the next question to be considered is whether the charge, in its substance, was erroneous. It is given above in full, and two objections are made to it: (1) That the instruction to disregard the improper circumstance of a declaration made by the witness Mrs. Harvey in the presence of the jury for which she was subject to punishment for contempt if her remark had been heard by the court was wrong; and (2) that what was said in reference to argument of counsel was also wrong. As to the first, there is nothing in the bill of exceptions, nor elsewhere, to inform us what occurred or what the remark of the witness was; and we have no data upon which to judge of its character or probable effect. The presumption in that state of the case must be in favor of the propriety of the instruction, especially as it is stated that it was given at the request of the defendant's counsel. It is said here that the instruction denied to the jury their privilege to consider the manner and conduct of the witness in connection with her statements; but, in the absence of anything to enlighten us in regard to the nature of the occurrence, we cannot assume, as against the presumption in favor of the action of the judge, that there was any infringement of the privileges of the jury. We therefore think that the first objection to the charge is not well taken.

A more important question is involved in the second objection, relating to the argument of counsel. If the judge had contented himself with saying to the jury, as he did, that they were not to try the case by the arguments of counsel, and that it is the privilege as well as duty of counsel to argue to the best advantage of their clients, there would be nothing to complain of. He would then have been understood as only warning them that they should not be controlled in a decision of the facts by the argument of counsel, as against

their own judgment. Judge, jury, and counsel have their separate functions and duties, and, in their proper places, are each deemed essential, under our system, to the due administration of justice between litigants. Counsel, as sworn officers of the court, are to be respected and trusted for their integrity and honest performance of duty, as well as other branches of the court; and the constitution, in guarantying to persons accused of crime the right to be heard by counsel, puts its high approval upon the office they fill. Bill of Rights, § 11. It comes, then, as a startling announcement, when a jury is told from the bench, of counsel, that "it is the study of a life-time, that they learn how to distort, change, color, and discolor facts, in order that they may use them to the advantage of their clients." If that properly characterizes the study and purpose of the profession, it is a profession morally degrading to its members, and should not have legal recognition. We have other and higher ideas of it, and cannot better express our estimate than in the language of Judge NISBET, of Georgia, who says in *Garrison v. Wilcoxson*, 11 Ga. 154: "The true view of the position of counsel before the jury is that of aids or helps. They are officers of the court, amenable to its authority, subject to its correction, and restrained by usages of honor and courtesy, which, however in some instances disregarded, are as ancient in their origin, and as potent for good, and as generally respected, as any usages which belong to any class of the highest grade of civilized man. The duties of the advocate are among the most elevated functions of humanity. Whilst he is the representative of his client's cause, yet these considerations insure an honorable advocacy. His business is to comment on the evidence; to sift, compare, and collate the facts; to draw his illustrations from the whole circle of the sciences; to reason with the accuracy and power of the trained logician, and enforce his cause with all the inspirations of genius, and adorn it with all the attributes of eloquence."

The disparagement of counsel in the language we have quoted, besides its injustice to a highly honorable profession, in an indirect way closely trenches upon the right of a prisoner to be heard by counsel,—in fact, practically nullifies the benefit of that right. Spoken in the case then on trial, it, in effect, says: "Pay no attention to what counsel have said, for all their lives it has been their study to distort, change, and discolor facts." It virtually eliminated counsel from the case, with the added mischief of stimulating prejudice against their arguments. This was an injury to the prisoner in its tendency to interfere with a fair and unbiased consideration of the facts of his case. Further than this, there is an implied intimation that the facts as stated in argument of counsel are not those shown by the evidence, and this is a violation of the statute which forbids a judge to charge on the facts. It is to be supposed that, in the moment of unguarded oral utterance, the judge did not have in contemplation the full import of his language; but we must take it as we

find it, with the patent meaning it bears, unpruned of any of its force. In so substantial a matter, that is due to the prisoner; and where the judge, in addition to virtually depriving the prisoner of the benefit of counsel, has also invaded the province of the jury as to the facts, it cannot be held not to have prejudiced the prisoner, when the bill of exceptions contains none of the evidence adduced at the trial. *Baker v. Chatfield*, supra. Under these views, we think there was error in this charge of the court, and that the case should be remanded for a new trial.

The Honorable JOHN F. WHITE, judge of the third judicial circuit, sat in the place of Mr. Justice MITCHELL, who was disqualified.

WESTERN ASSUR. CO. v. STODDARD et ux.
(*Supreme Court of Alabama*. Nov. 26, 1889.)

INSURANCE—CONDITIONS OF POLICY—TITLE.

1. Where an application for insurance states that the insured is the owner in fee of the property, and the policy issued thereon makes the application a warranty upon whose breach the policy shall be void, the insurer cannot avoid the policy on the ground that the insured was in fact only a life-tenant, when that fact was made known to the insurer's agent at the time the policy was issued, notice to him being constructive notice to the insurer.

2. A policy previously issued on the same property, through the same agent, but from a different company, is not admissible in evidence to show such knowledge as to the state of the title on the part of the agent; it not being shown that he was at that time in any way connected with the defendant company.

3. In an action on the policy issued on such an application, plaintiff cannot recover the loss upon the property as to which there was the breach of warranty, where there is no evidence that the agent was informed of the true state of the title.

4. If the agent, with knowledge or notice that the title of the insured is only a life-estate, places the insurance and receives the amount of the premium as upon an absolute title, the insured is entitled to the same compensation for loss as if she held the fee.

5. Where a policy of insurance upon a gin-house, and the machinery therein, is avoided as to the building by reason of a breach of warranty of the title as contained in the application made a part of the policy, it is likewise avoided as to the machinery, though there was no such breach as to that, its destruction being a necessary consequence of the destruction of the gin-house.

6. A suit to recover possession of a dwelling-house on a tract of land assigned to a widow as dower is not such litigation as will cause the forfeiture of a policy of insurance on a gin-house situate on the same tract, which is conditioned to be void if the premises were involved in litigation.

7. A condition in an insurance policy that it might be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium, confers no authority to reduce the amount insured.

8. In an action on an insurance policy the testimony of the insured that he had no knowledge of the reduction in the amount of the insurance till it became necessary to examine the policy, while trying to adjust the loss, is admissible, but not testimony as to what he then said.

Appeal from city court of Selma; J. HARALSON, Judge.

Action by W. J. Stoddard and E. R. Stoddard, his wife, against the Western Assurance Company, to recover the amount of a policy of insurance against fire taken

out by the said W. J. Stoddard for his wife on a gin-house and certain personal property contained therein. In support of its defense that the warranty contained in the application, that the property was not in litigation, had been broken, defendant offered a transcript of the record in a suit to recover the dwelling-house on the tract on which the gin-house was located. There was judgment for plaintiffs, and defendant appeals.

Pettus & Pettus, for appellant. *White & Mallory*, for appellees.

STONE, C. J. Mrs. Stoddard, the female plaintiff in the court below, had a life-estate in the land on which the gin-house stood which was the subject of insurance in this case. The land had been allotted to her as dower in the estate of Steele, her deceased former husband. It is not denied that the land had been so allotted to her, that the gin-house stood upon the land, and that it was destroyed by fire during the term covered by the insurance. To this extent there is no controversy.

The defense took four forms: First, it was and is contended that Mrs. Stoddard, in her application for insurance, represented herself as sole and absolute owner of the gin-house, when in fact she owned but a life-estate in it. This, it is claimed, was a breach of warranty, which, under the provisions of the policy, worked a forfeiture of the insurance. In the second place, it is contended that in her said application it was represented that the said premises were not involved in litigation, whereas there was a suit then pending which disputed her right to the same. The application for insurance was made through the husband of Mrs. Stoddard, and in said application are found the following questions, and answers thereto: "Is there any interest in the property other than your own? Answer. None other [than] my wife and self. * * * In litigation or dispute? A. None." In issuing the insurance policy, the insurance company was represented by Franklin, its agent. It is replied to the two lines of defense stated above that while the negotiation for insurance was pending, and before the policy was issued, Franklin, the agent, was notified of the true state of the title, and of the litigation, which, it is asserted, was in progress, and, as is claimed, assailed Mrs. Stoddard's title to the property. If it be true, as asserted, that Franklin, the agent, knew or was notified, pending the negotiation, of the nature and extent of Mrs. Stoddard's ownership, and of the alleged litigation, this was constructive notice to the insurance company; and, receiving the premium and issuing the policy after such notice, the insurance company will not be heard to complain of the false representation or breach of warranty. To allow it to do so would be to sanction bad faith on its part. *Insurance Co. v. Young*, 58 Ala. 476; *Insurance Co. v. Copeland*, 86 Ala. 551, 6 South. Rep. 148; *Insurance Co. v. Allen*, 80 Ala. 571, 1 South. Rep. 202; 1 Wood, Ins. § 152, and note 1; *Insurance Co. v. Olmstead*, 21 Mich. 246; and authorities on brief of counsel. We fail to perceive, however, that there was any suit in prog-

ness which did or could question her ownership of the gin-house. The transcript from the circuit court, made a part of the bill of exceptions, certainly falls short of making this contention good. That was a possessory suit, and sought to recover only the dwelling-house. The testimony which it is claimed shows the title to the land on which the gin-house stood was in dispute, does not, in our opinion, tend to show the character of disputed title, which would avoid the policy.

The third ground of defense rests on the alleged reduction on the amount of insurance on the gin-house. This defense is limited to the amount of recovery, and does not question the right. Nine days after the policy was issued to Mr. and Mrs. Stoddard they, "for value received," transferred, assigned, and set over unto H. C. Keeble & Co. all their right, title, and interest in said policy of insurance, and all benefit and advantage to be derived therefrom. This was done with the knowledge and authority of the insurance company, evidenced by indorsement on the policy, made and signed by Franklin, the company's agent; and the policy was placed in the hands of Keeble & Co. Franklin knew Keeble & Co. held the policy. On the 7th day of September, 1885,—17 days after the transfer of the policy to Keeble & Co.,—Franklin, the agent, called on them, and notified them that his company refused to carry so much insurance on the gin-house. He asked for the policy, and, receiving it, he made the following indorsement upon it: "The amount of \$800, covering gin-house, is reduced from this date to \$400, and \$18.50 returned assured, receipt of which is acknowledged." Franklin then paid to Keeble & Co. the \$18.50 return, part premium, and they received it.

The policy, on its face, provides that "this insurance may be terminated at any time, at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of this policy, to any person named in this policy, whether owner, mortgagee, or otherwise." The policy contains no provision authorizing the insurance company to reduce the amount of insurance. Authority to terminate the insurance is not an authority to reduce the amount of the risk. Such provision in favor of insurance companies cannot be enlarged by interpretation. There is neither proof nor claim that Stoddard and wife, or either of them, was present when this reduction was made, nor that they had notice that it would be made. There is proof tending to show that notice was carried home to them within a month after the reduction, and other proof that they were not informed of it until after the gin-house was destroyed by fire in December. The rulings of the trial court, as to the authority to make the reduction, and its legal effect on the rights of Stoddard and wife, are free from error prejudicial to appellant, unless there was error in the rulings considered further on.

The fourth and last defense relied on in this case is partial, and claims only a reduction in the amount of damages. The

substance of it is that, inasmuch as Mrs. Stoddard had only a life-estate in the gin-house, she should not be allowed to recover the entire value, but only the value of her life-estate. The general rule certainly is that the owner of a qualified or partial interest in property can only insure to the extent of that interest; and, in case of loss or destruction of the property, his recovery must be limited to the value of his interest. *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320.

It will be borne in mind that one of the indispensable conditions of plaintiffs' right of recovery in this case is that the jury must be convinced from the testimony that Franklin, while he was negotiating the insurance, had knowledge or notice that Mrs. Stoddard's title was only a life-estate. If, having such knowledge or notice, he placed the insurance as upon an absolute title, and he demanded and received the amount of premium which would be due and demandable for insurance of the entire ownership of the property, both reason and authority demand that the loss shall be compensated, as if the assured had held a title in fee. *Insurance Co. v. Drake*, 2 B. Mon. 47; *Merrett v. Insurance Co.*, 42 Iowa, 11; 1 Wood, Ins. § 303; *Strong v. Insurance Co.*, 10 Pick. 40; Ang. Ins. § 66; *Insurance Co. v. Deale*, 18 Md. 26; *Insurance Co. v. Barraclof*, 45 N. J. Law, 543; 1 Phil. Ins. § 1044.

The court charged the jury that if Franklin, while transacting the business of placing the insurance, acquired the information that the assured had only a life-estate in the property, and was informed of the claim and suit by McCall, "the plaintiff is entitled to recover." The two inquiries hypothesized in this charge would seem to have been the chief questions of dispute bearing on this aspect of the case. There were other questions of fact, however, which depended on parol testimony, on which the jury were required to pass in arriving at a verdict. This charge is subject to criticism, but we need not comment further upon it.

While Stoddard and the adjuster were trying to adjust the amount of the loss claimed by plaintiffs, it became necessary that they should examine the policy. When the adjuster discovered the reduction of the amount of the risk which Franklin had indorsed on the policy, it had the effect of breaking up the adjustment, and of preventing a settlement. It was clearly competent for Stoddard to testify on the trial that, before the occasion referred to, he had neither knowledge nor information that the reduction had been made. It bore materially on the inquiry whether he had ratified Franklin's act in attempting to reduce the risk. It was not competent, however, to prove by him, or by any one else, as was permitted to be done in this case, what he said when he testified he first learned the indorsement was on the policy. The permissible inquiry was what had he previously known of such indorsement, not what he had previously said about a want of such knowledge. The only effect such testimony could have was to corroborate the evidence of Stoddard given on the trial, by proving that he had previously stated

the same thing. The rule is that previous statements made by a witness cannot be proved to corroborate the testimony he may give. *Adams v. Thornton*, 82 Ala. 260, 3 South. Rep. 20; *McKelton v. State*, 86 Ala. 594, 6 South. Rep. 301. There is a limited exception to the rule, but the present case does not fall within the exception. The trial court erred in receiving this evidence.

The plaintiffs were allowed, against the objection of the defendant, to read in evidence a policy issued the year before, insuring the identical gin-house which is in controversy in the present suit. That former policy was issued in the name of Stoddard and wife, and was obtained from Franklin as agent, but from a different insurance company, of which Franklin was, at the time, the agent. It was not shown that when the former policy was obtained Franklin was in any way connected with the insurance company, defendant in this suit, either as agent or otherwise. In connection with this testimony, it was testified by Stoddard that, when he applied to Franklin for the first or former policy, he referred the latter, Franklin, to Nelson, his attorney, for a statement of the condition and title of the property. Nelson was examined, and testified that he had an interview with Franklin, had answered his questions, but could not state what information he had given him. Had simply answered questions, and had not told him all he knew in reference to the property. Did not remember he had told Franklin anything about the title. We think the policy issued a year before had no legal bearing on any question raised in the present suit, and that any influence it could have exerted was injurious to the defendant below, appellant here.

The appellant requested the general charge that, if the jury believed the evidence, they must find for the defendant. It is urged before us that the trial court erred in refusing that charge, and the grounds taken in support of this contention are the following:

First. That the application for insurance is referred to in the policy, is made a part of the contract of insurance, and is made a warranty that its statements are true, with a stipulation that, if untrue, the policy shall be void. It cannot be denied that, as matter of evidence, the writings fully sustain this contention.

Second. That the application states that the entire ownership of the property insured—the title in fee—was in Stoddard and wife, when in fact there was only a life-estate or dower right in Mrs. Stoddard in the gin-house, which was the chief subject of the insurance. We must also concede this to be not only true, but undisputed. To this proposition it was replied by plaintiff that, before and at the time the policy was issued, the insurance company, through Franklin, its agent, was notified of the extent of the assured's title, and that with that knowledge he accepted the premium and issued the policy, as upon an absolute title in fee. As matter of law, we have seen that this replication is sufficient. There is no proof, however, that Franklin had such notice, and hence there

was nothing on which to submit that inquiry to the jury. The burden of proving it was on the plaintiffs, and, failing to prove it, there should be no recovery for the destruction of the gin-house, as the facts appear in the present record. This, because of the warranty as to title.

Third. On these premises it is contended that, because the insurance of the gin-house is avoided by reason of the breach of warranty, the entire insurance must be declared void, because all are embraced in one and the same application, and in one and the same policy. The authorities relied on in support of this proposition will be found in the brief of counsel. We do not think they support the contention as made. The application and policy, although each of them in a single paper, nevertheless value and insure each article of property separately. *Day v. Insurance Co.*, 51 Me. 91, does seem to support appellant's contention, but we cannot follow it.

There are other authorities which, at first glance, appear to favor the doctrine contended for. *Friesmuth v. Insurance Co.*, 10 Cush. 587; *Brown v. Insurance Co.*, 11 Cush. 230. In the Massachusetts cases, however, the policies were issued by mutual insurance corporations, and it was a law of their organization that property insured by them stood pledged for the liabilities of the assured. A breach of warranty as to a part of the property lessened the security, and for that reason it was held the policies were thereby avoided. We do not think these cases should be held as supporting the doctrine contended for in this case.

There is, however, another aspect of this question which deserves consideration. The articles of property, other than the gin-house, which were the subject of insurance, and which were destroyed by the fire, were more or less attached to the gin-house, were in the gin-house, and rightfully belonged there. They stood to the gin-house as machinery does to the factory building, or as merchandise does to the store-house in which it is kept for sale. A destruction of the gin-house would almost necessarily involve a destruction of these other insured articles. Now, while we would be unwilling to annul the entire insurance on the mere fact that several subjects, separately valued, are found embraced in one application and in one policy, on account of the breach of warranty as to one of the subjects, yet, in a case like the present, there is reason for the application of a different principle. In *Smith v. Insurance Co.*, 25 Barb. 497, the principle is correctly stated in the head-note, as follows: "Where an insurance is upon furniture as well as buildings, and the policy is held to be void as to the buildings, by reason of false warranty as to incumbrances thereon, it will be deemed void as to the furniture also, although there be no incumbrance on such furniture." We adopt this principle as applicable to cases like the present, whenever the policy is avoided as to the realty by reason of the false warranty, and the personal property is in the house or building in reference to which the false warranty was made. The reason of the rule is alike applicable to the property

falsely warranted, and to all other property whose loss is the natural consequence of the destruction of the former. *Lovejoy v. Insurance Co.*, 45 Me. 472.

In the state of the proof found in this record, the general charge in favor of the defendant ought to have been given.

Reversed and remanded.

GEORGIA PAC. RY. CO. V. GAINES.

(Supreme Court of Alabama. Dec. 9, 1889.)

RAILROAD COMPANIES—CONSOLIDATION—JUDICIAL NOTICE.

1. The power of a railroad company to acquire land in aid of the construction of its road will not pass to a consolidated corporation of which it forms a part, unless its line, when completed according to its charter, will form a continuous track with those of the other constituents of the consolidated corporation, so as to admit of the passage of trains without break or interruption; Code Ala. 1886, § 1588, providing that railroad companies whose tracks, when completed, admit the continuous passage of cars, without break or interruption, may consolidate themselves into one corporation, which shall possess all the powers, rights, and franchises of its constituent members. *Railway Co. v. Wilks*, 6 South. Rep. 34, followed.

2. The principle that courts will take judicial notice of all matters of a public nature, or of facts that are commonly known by well-informed persons, does not authorize the court to assume that the lines of the constituent members of a consolidated railroad company, when completed according to their charters, will be so located as to admit the passage of trains from one to the other continuously, without break or interruption.

Appeal from chancery court, Walker county; THOMAS COBBS, Chancellor.

The bill in this case was filed on June 9, 1884, by the Georgia Pacific Railway Company against George S. Gaines, and sought to enforce the specific performance of an agreement, by which the defendant bound himself to convey to A. H. Colquit, E. C. Gordon, and W. S. Gordon, "their associates and successors," all the coal and iron on and in a certain tract of land, particularly described, containing 80 acres; "together with the right to enter upon the said lands, and prospect for coal and iron, and to mine the same, if they should desire, and also the right of way for roads and railroads across our lands." This agreement was dated August 19, 1880, and was signed by the defendant and his wife; and it was in the same words, *mutatis mutandis*, as the contract involved in the case of *Wilks v. Railway Co.*, 79 Ala. 180, which is there set out in full. It recited that said Colquit and Gordon, and their associates, "propose to build a railroad from some point on the Tombigbee river, at or near Columbus or Aberdeen, Miss., or from some point on the South & North Railroad of Alabama, or from some point on the Alabama Great Southern Railroad, or from some point on the Memphis & Charleston Railroad, and running into and through the county of Fayette or the county of Walker, state of Alabama, or both;" bound them to begin the work of surveying, building, or grading such railroad within four months from the date of the instrument, and to extend it to the county of Fayette or the county of Walker, or both, "within three years from this date;" and it further recited, as the con-

sideration moving to Gaines and wife, the advantages and benefits supposed to accrue to them in the future from the building of the contemplated railroad; and contained another clause, in these words: "It is further especially and expressly understood that no such deeds to the coal and iron we own shall be made to the parties named in this instrument, unless they shall build the railroad as specified in this instrument; nor, on the other hand, shall the parties who now propose to build this railroad be liable for any damages should they fail to build the same." The original bill alleged that "said Colquit et al., in strict pursuance of the terms and stipulations of said agreement on their part, within less than four months from said 19th day of August, 1880, did begin, or cause to begin, the work of surveying, building, or grading said railroad, and did also, within three years from said date, extend said railroad, under the name of the 'Georgia Pacific Railway,' from Columbus, Miss., on the Tombigbee river, so as to reach said Walker county, Ala.; and said railroad was completed, equipped, and operated from said city of Columbus into said county of Walker, by said Colquit et al., and their successors, before the expiration of three years from the date of said contract, and has continuously, since its completion, and is now, in constant and running condition." It was alleged, also, that on the 4th day of May, 1882, Colquit and his associates sold and transferred said written contract, with all rights accruing under it, for valuable consideration, to the Richmond & Danville Extension Company, a corporation chartered under the laws of Mississippi; and that said last corporation, on 20th December, 1883, sold and transferred it for valuable consideration to complainant. An amendment of the bill was added April 6, 1887, alleging that "said contract was so acquired by complainant as property taken by it for subscription to the capital stock of said Georgia Pacific Railway Company by said R. & D. Extension Company;" and a further amendment, October 20, 1887, alleging that complainant "had the authority and power, under the laws of Alabama, to acquire said covenant as aforesaid, and now has the authority and power to hold and own the same, and the real estate therein described." A copy of the complainant's charter, as it was called, was made an exhibit to the original bill, being the proceeding which showed its formation by the "consolidation of the Georgia Pacific Railroad Company, of Georgia, the Georgia Pacific Railroad, of Alabama, the Elyton & Aberdeen Railroad Company, the Columbus, Fayette & Decatur Railroad Company, and the Greenville, Columbus & Birmingham Railroad Company;" the agreement of the consolidation reciting that it was proposed "to form a new consolidated company, for the purpose of constructing, owning, and operating a continuous line of railroad from Atlanta, in the state of Georgia, through the states of Alabama and Mississippi, to some point on the Mississippi river." On the 26th April, 1888, a further amendment of the bill was made, which stated the incorporation of three of the Alabama companies

abovenamed,—namely, the Elyton & Aberdeen Railroad Company, the Columbus, Fayette & Decatur Railroad Company, and the Georgia Pacific Railroad Company,—referring to the Session Acts, where the charters were set out in full; and the amendment added: "Your orator further avers that said three railroad companies, chartered as aforesaid, contemplated the building of three several railroads under their respective charters, as indicated in said incorporation proceedings, whose lines, when completed, would have admitted the passage of burden or passenger cars over their said contemplated roads continuously, without break or interruption, from the city of Birmingham or Elyton, in Jefferson county, Ala., at a point on the Alabama Great Southern Railroad, where the same crosses the Louisville & Nashville (formerly known as the South & North Alabama) Railroad, to Columbus, on the Tombigbee river, in Mississippi." The several acts incorporating these companies, and other facts connected with their organization, are stated in the opinion of the court in the case of *Wilks v. Railway Co.*, 79 Ala. 180; *Railroad Co. v. Wilks*, 86 Ala. 478, 6 South. Rep. 34,—and it is not necessary to repeat them here.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, and his decree is here assigned as error. The record does not show when the cause was submitted, except by inference; the note of testimony being dated October 25, 1888, and the decree, which is dated November 22d, reciting that "this cause, coming on to be heard, was submitted for decree in vacation on pleadings and proof."

McQuire & Collier, for appellant. *Hewitt, Walker & Porter*, for appellee.

SOMERVILLE, J. The main principle of law which is to govern this case is fully discussed and settled in the case of *Railway Co. v. Wilks*, 86 Ala. 478, 6 South. Rep. 34. We had held on a former appeal that a railroad corporation cannot, without an express grant of power, acquire or recover an interest in lands, unless it is made to appear that such property is necessary or proper for carrying out the purposes for which the corporation was organized. *Wilks v. Railway Co.*, 79 Ala. 180. On the last appeal (86 Ala. 478, 6 South. Rep. 34, supra) we decided that the appellant corporation might legally assert the right claimed to the land in controversy as the corporate successor of the Elyton & Aberdeen Railroad Company,—one of the several roads consolidated under the name of the "Georgia Pacific Railroad Company,"—provided the case should be brought within the terms of section 1583 of the present Code of Alabama, (1886,) which constituted section 2008 of the Code of 1876. The Elyton & Aberdeen road had the power to acquire, by purchase or gift, lands in the vicinity of said road, or through which its route passed, "such as may be granted to aid in the construction of said road." The lands in controversy are alleged to belong to that class. It is not, however, every consolidation of railroads that will confer on the new corporation in which the old ones are merged the

sum of their chartered powers. The statute provides on this subject as follows: "Whenever the lines of any two or more railroads, or contemplated railroads, chartered under the laws of this or any other state, which, when completed, may admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption, such companies are authorized, before or after completion, to consolidate themselves into a single corporation;" and the prescribed mode of consolidation is fully set out in the statute. Code 1886, § 1583. It is only where the consolidated companies are shown to be of the class specified, and the provisions of the statute as to such merger are substantially complied with, that the new corporation is authorized to "possess all the powers, rights, and franchises" of its corporate predecessors merged in it. Section 1583; *Railway Co. v. Wilks*, 86 Ala. 478, 6 South. Rep. 34.

The amendment of the bill, so far as its mere allegations are concerned, perhaps brings this case within the statute. But there is no proof to sustain these allegations. We cannot know judicially that the original roads, if completed according to their charters, would have been so located as "to admit the passage of burden or passenger cars" from the one to the other "continuously, without break, or interruption." Some evidence is necessary to enlighten the mind of the court on this subject. There is a growing disposition, it is true, for the courts to extend the area of judicial knowledge, so as to keep proper pace with the rapid advance of art, science, and general knowledge. But there is a prudent limitation to be put upon this principle, so as to confine it to matters of a general and public nature, or such as do not concern individuals or local communities. The facts must be of such age or duration as to have become established as a part of the common knowledge of well-informed persons, at least. The failure of proof on this point authorized the dismissal of the bill aside from other questions raised.

The case was submitted in term-time on pleadings and proof, and the chancellor had full authority to decide it in vacation by final decree on the merits; either party aggrieved having the power to apply to the chancellor for a rehearing by the second day of the next ensuing term of his court following the vacation. Rule of Practice No. 80, (Code 1886, p. 825.) It is not a case where the proof is sufficient and the allegations insufficient, but the reverse. No amendment of the pleadings is needed, and it is too late to correct the deficiency of proof. *Hooper v. Strahan*, 71 Ala. 75; *Gilmer v. Morris*, 80 Ala. 78, 88; *Gilmer v. Wallace*, 75 Ala. 220.

The decree of the chancellor is free from error, and must be affirmed.

MONTGOMERY & E. RY. CO. v. PERRYMAN.

(Supreme Court of Alabama. April 8, 1890.)

BILL OF EXCEPTIONS—SIGNING.

Under Code Ala. 1886, § 2762, which provides that, on the failure or refusal of the presiding judge

to sign a bill of exceptions, "the supreme court must receive such evidence of the facts as may be deemed by it satisfactory, and proceed to hear the cause as if the bill had been signed by the court." evidence which shows without conflict that a bill of exceptions truly states both the facts as they appeared in evidence and the rulings of the court sought to be reviewed, that the bill was tendered to the judge before the adjournment of the term, and that he failed or refused to sign it, warrants the supreme court in declaring the bill of exceptions to be established as if signed.

Appeal from circuit court, Barbour county.

Roquemore, White & McKensie, for appellant. *D. D. Clayton, W. C. Swanson*, and *A. H. Merrill*, for appellee.

SOMERVILLE, J. The motion is one made by the appellant to establish a bill of exceptions which the presiding judge failed or refused to sign. The statute provides for the establishment of such bills by this court, declaring that "the supreme court must receive such evidence of the facts as may be deemed by it satisfactory, and proceed to hear the cause as if the bill had been signed by the court." Code 1886, § 2762; Code 1876, § 8111. Rule of practice No. 89 in this court provides the mode of taking and certifying the requisite testimony in such a proceeding. Code 1886, p. 806. The requirements of that rule seem in the present case to have been followed with scrupulous exactness. The only testimony offered is that of the appellant's counsel, which shows the following facts satisfactorily: (1) That the bill of exceptions, which is fully set out in the record, is a correct one, stating the facts as they appeared in evidence truly, so far as necessary to present for review the exceptions taken to the rulings of the court, and stating correctly the rulings of the court sought to be reviewed; (2) that the bill was prepared, and during the term at which the trial occurred was tendered to the trial judge before adjournment for his signature; (3) that the judge failed or refused to sign the bill as thus presented.

On this state of facts the evidence shows without conflict every prerequisite required by the statute for the establishment of the bill. The motion is therefore granted, and the appellant's bill declared to be established as if it had been signed in due form by the presiding judge.

RUSE *et al.* v. BROMBERG.

(Supreme Court of Alabama. Dec. 17, 1889.)

ACTION BY ASSIGNEE—FRAUDULENT CONVEYANCES—DEED TO WIFE.

1. The assignee of two creditors of a common debtor may unite both claims in one bill under Code Ala. § 3544, permitting simple contract creditors to proceed in equity to subject property of the debtor, fraudulently conveyed, to their claims.

2. Where a subscriber to the capital stock of a corporation gives in payment his demand notes, a call by the directors for the unpaid subscription is not necessary to enable the assignee of the corporation to sue on the notes, or to file a bill to subject to their payment property fraudulently conveyed by the subscriber.

3. Where a purchaser of land causes a half interest therein to be conveyed to his wife as a gift, the wife's interest is liable for his existing debts; a voluntary conveyance being fraudulent in Ala-

bama as to the existing creditors of the donor, without reference to the intent of the parties, the financial condition of the donor, or the kind and value of the property donated.

4. Though at law an absolute deed intended to operate merely as a mortgage is absolutely void as to the existing creditors of the grantor, yet in equity, where no actual fraud is proven, the grantee, who assumed the payment of the grantor's unpaid purchase-money notes, will be permitted to hold his deed as a means of reimbursement for freeing the land from the purchase-money lien.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Chancellor.

Action by Fred C. Bromberg, assignee of the Alabama Insurance Company and the Citizens' Insurance Company, against John C. Ruse and others, to set aside an alleged fraudulent conveyance. From a decree in complainant's favor, defendants appeal.

Code Ala. 1886, § 3544, provides: "A creditor without a lien may file a bill in chancery to discover, or to subject to the payment of his debt, any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed, by his debtor."

Overall & Bestor, for appellants. *G. L. & H. T. Smith* and *F. G. Bromberg*, for appellee.

CLOPTON, J. Appellants complain that the chancellor refused to allow an amendment of the answer to the amended bill, and on this ground ask a reversal of the decree. The amendment, though not formal, may be regarded in the nature of a demurrer, and will so be treated. Under the statute authorizing the incorporation of a demurrer in the answer, and the liberal construction placed upon the statute of amendments, a defendant has the right to amend his answer, at any time before final decree, by incorporating a demurrer therein. *Shaw v. Lindsey*, 60 Ala. 344. But a denial of the right will not reverse the decree, if it appears that defendants were not prejudiced thereby.

The bill is filed by appellee in the capacity of assignee of two distinct and insolvent corporations, the Alabama Insurance Company and the Citizens' Insurance Company, and assails for fraud certain conveyances of a lot of land in Mobile. Appellee was appointed by separate assignments. The first question raised by the proposed amendment relates to the right of complainant to unite distinct claims, assigned separately by the companies, in a bill attacking for fraud a conveyance of his property by a common debtor, without having first obtained judgments at law, on which executions have issued, and been returned "No property." The contention is that the statute which authorizes a creditor, without a lien, to file a bill in chancery to subject to the payment of his debt property fraudulently conveyed by his debtor, does not extend to such creditors the general rule which permits separate judgment creditors to join as complainants in a bill having such object. The statute has been in operation nearly 30 years. From the time of its enactment it has been the common practice to unite in such bills two or more creditors, without a lien, seeking to enforce separate and distinct demands.

Many cases have been reviewed in this court without the propriety of the practice being questioned. The statute has been generally considered as operating to place simple contract and judgment creditors, as to the remedy, on the same footing. Were it difficult to perceive any sound principle of equity pleading on which to justify it, we would long hesitate to disturb a practice so general and continuous, especially as its tendency and effect are to promote convenience, and to prevent multiplicity of suits.

In *Railway Co. v. McKenzie*, 85 Ala. 546, 5 South. Rep. 322, the bill was for discovery, and was filed under section 3545, Code 1886. The section was construed as creating a right in both judgment and simple contract creditors, and, in connection with the succeeding section, (3546,) as providing the remedy for the enforcement of the right. The latter section provides that any number of judgment creditors upon whose judgments executions have been issued, and returned "No property found," may join as complainants in such bill. On this express and limited provision, and the omission thereof of creditors without a lien, it was held that the statute does not allow the latter class of creditors to become common suitors. Section 3544, under which the present bill is filed, does not create, but only extends to simple contract creditors, without restriction or qualification, express or implied, a right and remedy which judgment creditors possessed independent of statutory provisions. But whether separate creditors, without a lien, may join in such bill, is not the precise question presented by the amendment. The claims of both companies are assigned and unite in complainant, by which he acquires a common interest in them. They are of the same standing and dignity. The purpose of the bill is to subject to their payment a common estate, and all the defendants are interested in the subject-matter of the suit. By joining the claims in one bill, expense is diminished, unnecessary and multiplied litigation avoided, and the defendants are not prejudiced. We can see no difficulty that can arise from allowing complainant to assert in one bill his title as assignee to a common relief in respect to the several claims. On the coming in of the report of the register the decree may be so moulded as to properly adjust the rights and equities of the respective parties.

The amendment further controverts the right of complainant to proceed to subject property alienated by the debtor to the payment of notes given for the unpaid capital stock subscribed for or purchased by him until, by proper proceedings against all the shareholders, the amount of the outstanding liabilities of the corporation is ascertained, the *pro rata* proportion of each assessed, and a call therefor made. When the liability is upon a subscription to the capital stock, and the charter or contract of subscription provides that the shares shall be paid in as required by the board of directors, the general rule is, that the stockholder's liability does not mature, and he cannot be sued by the company, until a call is made. If the charter and

contract of subscription are silent as to the time of payment, a call or assessment is an implied condition precedent to a matured liability. The rule is otherwise when, by the provisions of the charter or of the contract, the subscription is payable at specified times, and in specified amounts. In such case the liability matures, and the subscriber is bound to pay, in all events, on the day stated. A call is not requisite. 1 Mor. Priv. Corp. § 144; Cook, Stocks, § 106. The grantor in two of the conveyances attacked gave notes for the unpaid capital stock of the companies payable on demand. Without regard to a call or assessment upon all the shareholders, the company could have instituted, at any time after the dates of the respective notes, a suit at law upon the notes or have filed a bill to subject to their payment property fraudulently conveyed by the debtor; such suit being a sufficient demand. Complainant, as assignee appointed by the board of directors, is clothed with all the rights and powers of the board essential to make the corporate assets available, and for this purpose may maintain any suit at law or in equity which the corporation could have brought. *Chamberlain v. Bromberg*, 83 Ala. 579, 3 South. Rep. 434; *Woodbridge v. Holmes*, 78 Ala. 568. The disallowance of the proposed amendment does not affect the propriety of the decree, so far as the questions raised thereby are concerned.

Complainant seeks by the bill to set aside for fraud two conveyances made by Ruse and his wife to Hermann W. Leinkauff,—one on September 22, 1886, and the other on March 20, 1887. The first may be disregarded, as it was superseded by the second, which recites that it was executed to express the true consideration of the first. The deeds are absolute in form, but the answers admit that they were a security for the repayment of the amount expressed as the consideration, and were intended to operate as mortgages. It is well settled that such conveyances are fraudulent and void as to existing creditors, because they operate a reservation of a secret benefit to the grantor. Neither the *bona fides* of the debt, nor the absence of fraudulent intent, nor ignorance of the legal consequence, will relieve the infirmity. Their condemnation rests on the inevitable tendency and effect to hinder, delay, and defraud creditors. *Sims v. Gaines*, 64 Ala. 392; *Hill v. Rutledge*, (Ala.) 4 South. Rep. 135.

The premises in question were purchased by Ruse from W. G. Little, who conveyed them March 20, 1885, to him and his wife. Mrs. Ruse has not paid, nor was it intended that she should pay, with her own means, one-half or any part of the purchase money. By an unbroken line of decisions, it is the settled law in this state that a voluntary conveyance is fraudulent as to the existing creditors of the grantor, without reference to the intent of the parties, the financial condition of the donor, or the kind and value of the property donated. *Seals v. Robinson*, 75 Ala. 363. Ruse having purchased the property, and having caused a half interest to be conveyed to Mrs. Ruse as a gift, the convey-

ance, so far as respects the liability of that interest to his existing debts, is the same in its nature and consequence as a voluntary conveyance by him to his wife; and the property may be subjected by his existing creditors, unless Leinkauff is a *bona fide* purchaser without notice, which he cannot be, when claiming under a deed denounced fraudulent by the law.

It appears, however, that Ruse paid only a small part of the purchase money in cash, and for the deferred payments two notes, for \$1,250 each, were given, signed by himself and wife. Leinkauff, by the deed to him, and as part of its consideration, assumed to pay these notes. At law a deed constructively fraudulent is absolutely void, but in equity the rule is more tolerant. There is a clearly-defined distinction between the consequences of a conveyance fraudulent in fact, and of one only constructively fraudulent. A deed tainted with actual fraud, conceived and executed with intent to hinder, delay, or defraud creditors, will not be permitted to stand for the purpose of reimbursing the grantor any advances he may have made in consequence of it. He will not be allowed to receive benefit from his fraudulent act. The rule is otherwise when the deed is only fraudulent by operation of law, or the circumstances attending its execution are merely suspicious. A conveyance partly voluntary, because of the inadequacy of its consideration, if not made with fraudulent intent, may stand as security for the consideration actually paid, and, when only constructively fraudulent, will be upheld for the purpose of repaying the grantees any advances made by him in removing incumbrances from the property, as subservient to the equity of the case. *Potter v. Gracie*, 58 Ala. 303; *Gordon v. Tweedy*, 71 Ala. 202; *Caldwell v. King*, 76 Ala. 149; *Gilkey v. Pollock*, 82 Ala. 503, 3 South. Rep. 99.

Whether or not Ruse procured the conveyance of one-half interest to his wife, or withheld it from record, with a fraudulent intent, is immaterial. If conceded, the equities of Leinkauff are not affected thereby. He had no connection with its execution, no notice of such intent, and did not participate therein. His right to reimbursement depends on the character of the deed made by Ruse and wife to him. The debt, as security for which it was executed, is shown to be *bona fide*. A deed was taken instead of a mortgage as a matter of convenience, and was suggested by a third party as the proper mode, on the erroneous idea that, though a married woman had no capacity to make a mortgage, she might make an absolute conveyance of her statutory separate estate to secure or pay the debts of her husband. Fraud must be proved, not presumed. Some of the surrounding circumstances seem suspicious, but are not sufficient, the *onus* of proof being on complainant, to justify the conclusion of actual fraud. The inference that a deed absolute in form was taken in order to obtain a conveyance supposed to be valid as to Mrs. Ruse, and not with intent to defraud creditors, is more reasonable and consistent with honesty of purpose. The notes for the unpaid purchase money

constituted a vendor's lien, subordinate to which was complainant's right to subject the premises to the debts of Ruse. To make his title effectual, Leinkauff assumed to pay the purchase-money notes to the vendor. Complainant obtains full equity, when he subjects the premises in the same condition in which they were when alienated by Ruse. He does not render equity, if allowed to avail himself of their freedom from the incumbrance effected by the grantee. Leinkauff's equity is to be substituted to the rights of Ruse's vendor. This can now be accomplished only by permitting his deed to stand for the purpose of reimbursing the amount paid or advanced by him to free the premises from the superior incumbrance, in consideration of either or both of the deeds made by Ruse and wife to Leinkauff. Whether any, and what portion, of the purchase money due by Ruse to Little, his vendor, was so paid or advanced, can be ascertained by a reference to the register.

The decree declares that complainant is entitled to have the property sold to satisfy his claims, and omits to provide for the reimbursement of the grantees. In this respect, it is erroneous. As the chancellor reserved the power to modify the decree on the final hearing, the other questions presented by counsel can be more properly and satisfactorily determined after the register's report shall come in.

Reversed and remanded.

Application for rehearing overruled April 24, 1890.

MAYOR, ETC., OF BIRMINGHAM v. KLEIN.
(*Supreme Court of Alabama. April 29, 1890.*)

TAXATION—ASSESSMENT FOR PUBLIC IMPROVEMENTS—CONSTITUTIONAL LAW.

Assessments under Laws Ala. 1884-85, pp. 620-622, authorizing the city of Birmingham to assess abutting owners for paving streets and like improvements in proportion to the benefit, and make such assessments a lien, are not a tax, within Const. Ala. art. 11, § 1, which requires that all taxes shall be assessed in exact proportion to the value of the property levied on, and section 7, which provides that no city shall levy a larger rate of taxation, in any one year, than one-half of one per centum of the value of the property as assessed for state taxation during the preceding year, and the act of 1884-85 is constitutional.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

This suit was brought by the mayor and aldermen of the city of Birmingham against John Klein, and sought to recover a certain amount assessed against him and his property to pay for curbing and grading a sidewalk in front of his property. The assessment was made under the act approved February 16, 1885, and referred to in the opinion. To the complaint as filed by the plaintiff the defendant demurred on the ground that the act was unconstitutional as infringing upon the taxing power as given by the constitution, and that by the act it was sought to tax the property otherwise than "in exact proportion to the value of the property." The demurrer was sustained by the lower court, and the act held to be unconstitutional; and it is now from this ruling of the city court that

the present appeal is prosecuted, and the same is assigned as error.

Cabaniss & Weakley and *Roquemore, White & McKenzie*, for appellant. *Jackson E. Long*, for appellee.

MCCLELLAN, J. This appeal involves the constitutionality of an act "to authorize and empower the mayor and aldermen of Birmingham to improve the sidewalks of the city of Birmingham, Alabama, at the cost of parties whose property abuts such sidewalks," approved February 16, 1885, (Sess. Acts 1884-85, pp. 620-622.)

Those sections of the act which are necessary to an understanding of the point under consideration are the following: "Section 1. Be it enacted by the general assembly of Alabama that the mayor and aldermen of Birmingham shall have full power and authority to cause and procure all sidewalks along the streets, avenues, and alleys now established, or hereafter to be established, in said city, to be graded, leveled, curbed, graveled, slagged, cindered, paved, or macadamized, or to be regraded, releveled, recurbed, regreveled, reslagged, recindered, repaved, or remacadamized, in such manner and by such methods and with such material as they may deem best and proper. Sec. 2. Be it further enacted that the said mayor and aldermen of Birmingham shall have the power to have such work done, or cause the same to be done, and the expense thereof shall, after the completion thereof, be by said mayor and aldermen of Birmingham assessed upon the abutting owners of lands or lots lying along and adjacent to the streets or alleys along which such work is done, in proportion to the amount of the benefit accruing to such abutting owner; and all such assessments shall be and constitute a lien upon the lands and lots, respectively, upon which they shall be so assessed."

It thus appears that the purpose of the act, and its effect, if valid, is to authorize local assessments against property to pay for pavements constructed along its front; the cost, as between different owners, to be apportioned with reference to the benefits which are assumed to accrue to them, severally, from the betterment. However the relative benefits are to be determined in a given case, and the sum to be charged on a particular lot ascertained,—whether by reference to the superficial area of the property, or the length of its abutment on the sidewalk, or the uses to which it is devoted, as being to a greater or less extent facilitated by the improvement, or the enhancement thereby of its value compared with other property subject to the gross assessment,—one thing is assured: that the assessment is not made with reference to the value of the property, nor with reference to the limitations on the rate of municipal taxation. It is manifest, therefore, that if the assessment is a "tax," within the meaning of the constitution of Alabama, the statute authorizing it is repugnant to section 1 of article 11 of that instrument, which requires that "all taxes levied on property in this state shall be assessed in exact proportion to the value of such property," and also to section 7 of that article, which provides that "no city,

town, or other municipal corporation * * * shall levy or collect a larger rate of taxation in any one year, on the property thereof, than one-half of one per centum of the value of such property as assessed for state taxation during the preceding year." There is no longer any doubt but that organic limitations on the taxing power, though expressed in general terms, apply as well to the exercise of that power through the medium of municipal corporations and for municipal purposes as to its exercise directly by the legislature for state purposes; and hence the requirement that all taxes levied on property in this state shall be assessed *ad valorem* would obtain, with respect to municipal taxation, even in the absence of the other provision quoted, requiring such taxation to be based on the value of property as assessed for state taxation. *Mobile v. Insurance Co.*, 53 Ala. 570. Both the sections noted, therefore, bear upon assessments for municipal purposes; and, if either covers the local assessment under consideration, the law authorizing it must fail. It is a fair, if not necessary, inference that the terms "taxes" and "taxation" have, respectively, the same meaning, wherever found in article 11 of the constitution. The "taxes" which must be laid on a basis of value in section 1 constitute the "taxation" referred to for state purposes in section 4, for county purposes in section 5, and for municipal purposes in section 7; and therefore the only municipal taxation which the constitution requires to be assessed in exact proportion to the value of property is that embraced in the terms of section 7. The most liberal construction of which the language of that section is susceptible will not admit of its application to local assessment to provide for local improvements of sidewalks. By the very terms employed throughout the article, the taxes and taxation, whether state, county, or municipal, are those which make up the general revenues of the one or the other political division, as the case may be,—revenues which come from all the property in the territory, and go to defray general governmental expenditures, as distinguished from special outlays to provide for purely local exigencies. With respect to section 7, this is made to appear with great clearness by its reference to the property to which the limitation it imposes is made to apply, and by its requirement as to the assessment upon which the municipal levy must be predicated. Not only is the levy by any city to be made "on the property thereof," i. e., the whole taxable property thereof, but it must be made on "such property as assessed for state taxation during the preceding year." No such thing is known, or was known when the constitution of 1875 was adopted, or had ever been known, as local assessments of property for state taxation. The state assessment upon which the only municipal levy treated of in the organic law is required to be based is a general assessment of all property within the corporate limits, and is intended, as the provisos to section 7 show, to provide a fund for the general expenses of the city government. The city's levy there limited must be put upon

the whole property taxed by the state, at the valuation fixed by the state's agents. This necessarily and wholly excludes any idea of a local assessment of particular property for any purpose, or to be laid in any manner, under the constitution. Nothing in that instrument refers, or can be made applicable, to such a local charge. If this species of taxation—for it is taxation, and referable to the taxing power, though differing, as we shall see, from the "taxes" and "taxation" regulated in state constitutions—is to be upheld, it must be referred to the sovereign power of the general assembly, which has been curtailed only to the extent of express constitutional limitations. If article 11 contains no inhibition upon the power of the legislature in respect to local assessments by cities and towns, the act under consideration is valid, and the assessment involved here was well laid; for no proposition is now better established in the law than that constitutions are not in the nature of enabling acts, but are limitations upon the otherwise boundless powers of legislatures, or, in other words, that the general assembly is not to look to the organic law to ascertain what is permitted it to do, but only to find what inhibitions are thereby put on its action. *Cooley, Const. Lim.* 479; *Burroughs, Tax'n*, § 145; 2 *Dill. Mun. Corp.* § 737; *Irwin v. Mobile*, 57 Ala. 6; *Dorman v. State*, 34 Ala. 231; *Hare v. Kennerly*, 83 Ala. 608, 3 *South. Rep.* 688.

Having attempted to demonstrate that the assessment here could not have been made, under the provisions of the constitution, either, as it was made, on a basis of benefits, or even on a basis of the value of the particular property, it next becomes necessary to determine whether the organic law is exclusive of all other assessments against property than those of which it treats, in such sort as to amount to a prohibition upon the legislature in respect to an assessment of the class under consideration. It is not questioned but that the power which this statute undertakes to delegate to the municipality of Birmingham is a part of the taxing power inherent in all government, and without limitations other than those expressed in the organic law. It is equally free from doubt that the power of taxation is never to be taken to be surrendered by intendment or implication, and that, without an expressed surrender, clear and explicit in its terms, it must be held to reside undiminished in the legislature. *Glasgow v. Rowse*, 43 Mo. 479-489; *Baltimore v. Railroad Co.*, 48 *Amer. Dec.* 531; *Battle v. Mobile*, 9 Ala. 234, 44 *Amer. Dec.* 438, note 441; 2 *Dill. Mun. Corp.* § 752. Are the provisions of article 11, referring, as we have seen, to general taxes and taxation, and to such only, expressed limitations on the power of the legislature with respect to local assessments on property to pay for local improvements which benefit that particular property? We think not. The overwhelming weight of authority is against such a construction, and in favor of the validity of such assessments. In considering the question, jurists and judges have proceeded on the theory that such charges were not taxes, in the ordinary sense, or within the meaning and intent of

constitutional provisions similar to those of Alabama, but that they are in the nature of compensation for a benefit peculiar to the owner of the abutting property, and traceable to him; that such assessments are not exacted for the general public welfare, and do not go to the support of governmental agencies, from the existence and maintenance of which each citizen derives a like benefit, but that they are demandable because the government has expended an equivalent sum in improving the property against which they are laid, and thereby, not the public, but the individual owner of the property improved, has been to that extent the gainer. A tax, it is said, is a contribution to the general fund. The amount of it is taken from the individual, and nothing which benefits him individually, as distinguished from the mass of citizens, is given in the place of it. He pays, and by the amount he pays is poorer than he was before. Not so with an assessment of the class we are considering. The property owner pays it, but, in legal contemplation, he loses nothing. He receives the value of his money in the betterment of his property; and, in addition to this, he is benefited to the same extent that all other citizens are, in that a thoroughfare of the city in which his property is situated, and he probably lives, is improved. The authorities almost universally take such an imposition, though confessedly laid under the taxing power, out of the category of "taxes" and "taxation," as those terms are employed in organic limitations on legislative power to levy or authorize the levying of taxes, and in general statutes. *Cooley, Tax'n*, 626-637; *Burroughs, Tax'n*, 460-463; 2 *Dill. Mun. Corp.* §§ 752, 753, 761, et seq.; *People v. Brooklyn*, 4 N. Y. 420; *Sheehan v. Hospital*, 50 Mo. 155; *Dorgan v. Boston*, 12 Allen, 223; *Nichols v. Bridgeport*, 23 Conn. 189; *Garrett v. St. Louis*, 25 Mo. 505; *Cain v. Commissioners*, 86 N. C. 8; *Shuford v. Commissioners*, Id. 552; *Hill v. Higdon*, 5 Ohio St. 243; *King v. Portland*, 2 Or. 146; *Norfolk v. Ellis*, 26 Grat. 227; *Roundtree v. Galveston*, 42 Tex. 612; *Baltimore v. Cemetery Co.*, 7 Md. 517; *Chambers v. Satterlee*, 40 Cal. 497; *Edgerton v. Green Cove Springs*, 19 Fla. 140; *Goodrich v. Turnpike Co.*, 26 Ind. 119; *Hines v. Leavenworth*, 8 Kan. 186; *Municipality v. Dunn*, 10 La. Ann. 57; *Motz v. Detroit*, 13 Mich. 495; *Williams v. Cammack*, 27 Miss. 209; *Macon v. Patty*, 57 Miss. 378; *People v. Austin*, 47 Cal. 353; *Bridgeport v. Railroad Co.*, 36 Conn. 255; *Hayden v. Atlanta*, 70 Ga. 817; *Paving Co. v. Gogreve*, 5 *South. Rep.* 848; *Manufacturing Co. v. Tax Collector*, 39 La. Ann. 467, 1 *South. Rep.* 878.

On the other hand, the decisions in three or four states are to the effect that local assessments of this character cannot be made under constitutional provisions requiring equality and uniformity of taxation, and assessments in proportion to the value of property. The leading case maintaining this view is that of *Chicago v. Larned*, 34 Ill. 208. The conclusion in that case may, perhaps, find some justification in the peculiar phraseology of the constitutional provisions supposed to bear on the question, though an opposite con-

clusion was reached by the Virginia court on substantially the same provisions. *Norfolk v. Ellis*, *supra*. The effect of this Illinois decision was subsequently remedied by an amendment of the constitution. The supreme court of Arkansas, in *Peay v. Little Rock*, 32 Ark. 31, followed this Illinois decision, and another by the Wisconsin court, (*Weeks v. Milwaukee*, 10 Wis. 242,)—which is, perhaps, also referable to peculiar terms of the constitution, and which, at most, only imports doubt as to whether the requirement for uniformity of taxation applied to and defeated local assessments,—and held such local assessments could not be authorized under a constitution which required property to be taxed uniformly and according to value. This Arkansas decision is not reconcilable with the earlier case of *McGehee v. Mathis*, 21 Ark. 40, on substantially the same point. A like conclusion has been reached in Tennessee and Colorado; but, as in the Illinois case, the terms of the organic law which were supposed to enforce the result were something more than general requirements for uniformity and equality of taxation, and assessments on the basis of value. *Palmer v. Way*, 6 Colo. 110; *McLean v. Chandler*, 9 Helsk. 349. When to these cases are added those of *Mobile v. Dargan*, and *Mobile v. Railroad Co.*, decided by this court, which will be presently considered more particularly, it is believed that the full array of adjudications against the constitutionality of laws like that involved here is presented. After marshaling the authorities *pro* and *con* on this question, Judge Cooley concludes: "The fact very clearly appears that, while there is not such a concurrence of judicial opinion as would be desirable, the overwhelming weight of authority is in favor of the position that all such provisions for equality and uniformity in taxation, and for taxation by value, have no application to these special assessments" against abutting property to pay for the construction of sidewalks. *Cooley, Tax'n*, 634.

We now recur to the two cases decided by the supreme court of this state, and noted above. They each involve the validity of the same statute, and were decided at the same term; the one being cited as the authority to support the other, and the one thus cited itself being, on this point, unsupported by reference to any authority. Not only is this true, but the opinion essays no argument in support of the conclusion reached, nor enters upon any consideration, which it might be supposed a question so important—decided, for aught that appears, as upon first impression—would have elicited. In the opinion in *Mobile v. Railroad Co.*, moreover, there is an intimation that, had the assessment been by benefits instead of by frontage, the act authorizing it would not have been open to the objection of unconstitutionality. Very clearly, if the constitution applied at all, it would have been equally fatal whether the assessment were by frontage or by benefits, since neither mode would meet the organic requirement of assessment in exact proportion to the value of property. *Mobile v. Dargan*, 45

Ala. 310; *Mobile v. Railroad Co.*, Id. 322.

Not only are these cases opposed to the great weight of judicial opinion in other states and to all authoritative texts, but they are in conflict with a later adjudication of this court. In the case of *Irwin v. Mobile*, 57 Ala. 6, the act declared in *Mobile v. Dargan* to have been repealed by the constitution of 1868 again came under review with reference to an assessment which had been made before that constitution became the supreme law of the state. This court intimated such doubt of the correctness of the decision in *Dargan's Case* as is implied by citing a preponderating run of authorities holding the opposite view, and by declining to again decide the point, because it was not necessary to the case in hand. The court then proceeds to pass on the validity of the law authorizing the levy of local assessments against lands to pay for improvements upon which they abut, as brought to the touch of constitutional provisions of force before the constitution of 1868. The conclusion was that such a law was not repugnant to the provisions of the organic law theretofore in force. Inasmuch as the constitutions of 1819, 1861, and 1865 each contained a clause requiring that "all lands liable to taxation in this state shall be taxed in proportion to their value," we are unable to escape the conclusion that the court took the view held by nearly all other courts, that general organic provisions for taxation by valuation have no application to local assessments for local street improvement; otherwise, it could not have reached the conclusion announced. That conclusion, therefore, is in irreconcilable conflict with the opinion in *Dargan's Case*, and is no more or less, in effect, than a later adjudication by this court that the former decision is unsound.

But, aside from this, the cases of *Mobile v. Dargan* and *Mobile v. Railroad Co.* are unsound in principle, and opposed to the great weight of authority. It is true the clause of the constitution involved in those cases was reordained after that decision was made; and ordinarily the re-enactment of a law after it has been judicially interpreted will be held to impress the judicial construction upon it. But this is not a universal canon of construction, even where identically the same language has been employed; and in this case, while section 1 of article 11 of the constitution of 1875 is identical with section 1 of article 9 of the constitution of 1868, yet the presumption that the convention of 1875 intended that section should bear the construction put on it in *Dargan's Case* is rebutted by the succeeding sections of that article, which are new to the constitution of 1875, and which demonstrate that the framers of the present organic law had in mind, and intended to provide for, regulate, and limit, in and by the ordination of article 11, only general taxation for general governmental purposes,—state, county, and municipal. The rule of construction referred to, it thus appears, rests upon a presumption of intention which is rebutted by the language employed by the makers of the present constitution. We cannot

give it any operation in this case; and we cannot follow the cases relied on, and would not, even had their soundness not been already drawn in question in the case of *Irwin v. Mobile*, supra.

The sounder view is that taken in the very numerous cases cited above,—and, though very numerous, they are by no means all that so hold,—to the effect that provisions, whether in statutes or constitutions, relating to general taxation for state, county, and municipal purposes, or either, have no application to special assessments laid against abutting property to pay for street improvements which have benefited and enhanced the value of the property so assessed. The statute authorizing such assessments in the city of Birmingham is a valid enactment. The judgment of the city court, involving a contrary ruling, is reversed, and the cause remanded.

WEISS *et al.* v. LOUISVILLE, N. O. & T. RY. CO.

(*Supreme Court of Mississippi*. April 21, 1890.)
COSTS—APPEAL.

No appeal lies from a decree awarding costs, unless there is an abuse of the judicial discretion of the chancellor.

Appeal from chancery court, Washington county; W. R. TRIGG, Chancellor.

The question involved in this case is a matter of costs which grew out of the case of *Wilzinsky v. Railway Co.*, reported in 6 South. Rep. 709, in which Wilzinsky filed a bill to enjoin the railway company and Weiss & Goldstein from building a seed house on land donated by him for railway purposes, etc. When that case went back, and the matter of costs came up to be settled, the chancery court taxed Weiss & Goldstein with the costs, from which they appealed.

Phelps & Skinner, for appellants. *Yerger & Percy*, for appellees.

COOPER, J. An appeal does not lie from the decree of a chancellor awarding costs, unless it appears that there has been an arbitrary and clearly erroneous exercise of that judicial discretion by which in such matters he is alone controlled. *Sledge v. Obenchain*, 59 Miss. 619.

Decree affirmed.

BOARD OF SUPERVISORS v. JOHNSTON *et ux.*
(*Supreme Court of Mississippi*. April 21, 1890.)

TAXATION—SUIT FOR COLLECTION.

In Mississippi taxes cannot be collected by suit.

Appeal from chancery court, Hinds county; WARREN COWAN, Chancellor.

Appellant brought this action, by bill in chancery, to recover from Johnston and wife taxes alleged to be due the county of Hinds for several years on certain Hinds county bonds and certain articles of jewelry. There was a decree dismissing the bill as to the taxes claimed on the Hinds county bonds, but giving decree for the sum claimed as due on the jewelry, etc.,

from which the board of supervisors appealed; but no appeal was prosecuted by Johnston and wife.

J. & J. M. Shelton, for appellant. *Jas. R. Yerger*, for appellees.

COOPER, J. Since there is no appeal by the defendants from the decree of the court below, the decree must stand, in so far as relief was afforded to complainant. But it is now settled in this state, by a recent decision, that no suit can be maintained for the collection of taxes. *State v. Piazza*, 66 Miss. 426, 6 South. Rep. 316.

The appellants cannot complain of a decree which has given them less than they claim, under circumstances in which they were not entitled to recover anything.

Decree affirmed.

BOLLIS v. STATE.

(*Supreme Court of Mississippi*. April 21, 1890.)

SALE OF INTOXICATING LIQUORS—EVIDENCE.

On indictment for unlawfully retailing spirituous liquors, the evidence showed that defendant built a lemonade stand, and sold lemonade, in front of a tent which he had hauled to a place where there was a public gathering. A stranger owned the tent, and sold whisky in it. Defendant kept his ice in the tent, but was not connected with the sale of the whisky. Held, that it was error to charge the jury that if they believed that defendant was owner of the whisky, or in any way participated in its sale, or encouraged the sale, as agent, servant, or clerk, he was guilty.

Appeal from circuit court, Winston county; S. H. TERRAL, Judge.

Appellant, Bollis, was indicted for unlawfully retailing spirituous liquors. On the 4th day of July, 1889, he hauled a tent to a place where there was a public gathering, and put himself up a stand for selling lemonade in front of the tent, which had been pitched. It appears that the tent belonged to a stranger, and during the day a bottle of whisky is shown to have been sold in it by him. Bollis was not connected with the sale, but he kept his ice in the tent, and went in and out for the purpose of getting ice as needed at his lemonade stand. He is not shown to have sold, or known of the sale of, the whisky. The court below gave the following instruction for the state: "The court instructs the jury that if they believe, from all the facts and circumstances in evidence, that the defendant was the owner of the whisky, or if he, either directly or indirectly, participated in the sale, or encouraged it, as servant or agent or clerk, in any manner whatever, then he is as guilty of retailing as if he had sold the whisky himself or owned the whisky; for all parties who are either directly or indirectly interested in the unlawful sale of liquor are equally guilty whether they are present in person, selling it, or not." There was verdict and judgment against Bollis, from which he appeals.

Sykes & Richardson, for appellant. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. The court erred in giving the first instruction for the state. We do

not know, and cannot conceive, how the appellant is supposed to have "encouraged, as servant, agent, or clerk," the sale of the whisky alleged to have been sold, unless it was by transporting the tent in which it was sold, and the owner and his whisky, to the place of the sale. We know of no statute which would render one thus acting liable to indictment for a sale made by the owner.

The judgment is reversed, and cause remanded.

KENT v. LOUISVILLE, N. O. & T. RY. CO.
(Supreme Court of Mississippi. April 21, 1890.)

RAILROAD COMPANIES—STOCK KILLING—EVIDENCE.

In an action against a railroad company for negligently killing plaintiff's mare, there was evidence that the accident occurred on a clear, starlit night, and that before she was killed the mare ran for 300 yards down the track in front of defendant's train. The engineer testified that he was on the lookout, but only saw the mare when within 30 yards of her, and that it was then impossible to stop the train. Held, that the negligence of the engineer in failing to see the mare was a question for the jury.

Appeal from circuit court, Sharkey county; GEORGE WINSTON, Judge.

This was an action by B. Kent to recover damages for the killing of a mare by the appellee railway company. The court charged the jury to find a verdict for the defendant, which was done, and judgment was entered thereon. Kent appeals.

Frank Johnston, for appellant. W. P. & J. B. Harris, for appellee.

WOODS, C. J. The issue of fact is, as conceded by appellant's counsel, a very narrow one; but we are constrained to agree that it really exists. We cannot say, looking at the whole case on its undisputed facts, that there is nothing proving negligence, or tending to prove it. The injury occurred on a clear, starlit night, on a straight track, and in open fields. The animal ran rapidly for 300 yards down the track in front of the locomotive. The engineer testifies that he was at his post, and on the lookout, but that he only saw the animal when within 20 or 30 yards of her, and that it was impossible then to stop the train in time to prevent the accident. Whether there was negligence in the engineer's failing to see the animal for 270 or 280 yards, under the circumstances, was a question proper to be submitted to a jury; for, admitting the engineer did not see the animal, the question remains, could he and ought he to have done so?

Reversed.

PERSON v. LEATHERS.
(Supreme Court of Mississippi. April 21, 1890.)

AUTHORITY OF ATTORNEY.

An attorney retained to defend a suit to sell land under a deed of trust has no authority, after rendition of a decree of sale, to bind defendant by consenting to a certain manner of sale.

Appeal from chancery court, Bolivar county; W. R. TRIGG, Chancellor.

Appellant, Person, and his mother, exe-

cuted a deed of trust on a large body of land to secure notes due to appellee, Leathers. Said deed of trust conferred power of sale on the trustee named therein; but the trustee refused to act when default was made, and Leathers filed his bill in the chancery court to have the lands sold under said deed of trust. There was a decree ordering sale and appointing the chancery clerk as special commissioner to make the sale. The sale was made of the lands *in solido*; the special commissioner reporting the sale to the court, and stating that the lands were so sold by consent of the attorney of Person. Person filed exceptions to the report, and made application to file a bill of review. The exceptions were overruled, and a decree of confirmation of the sale made. Person appeals.

J. McC. Martin and Brame & Alexander, for appellant. A. M. Lea, for appellee.

WOODS, C. J. The authority of an attorney of record, for all general purposes, ends with the termination of the litigation which has been committed to his charge. In the conduct of the litigation, he may take such action as may appear to him advisable to bring the controversy to a favorable conclusion; but when once the litigation has been ended the attorney can do nothing further, in which his discretion is to be exercised, without re-employment, or without express instructions. The rendition of judgment puts an end to the authority of a plaintiff's attorney, except as to receiving the fruits of the judgment. The rendition of final judgment must be held, likewise, to put an end to the authority of defendant's attorney, without fresh employment or without express instructions. The decisions of this court are all in harmony with this general rule. If, then, we concede that the gentleman who consented to the sale of the lands *in solido* was the attorney of record of Person, still the case is in no way relieved of this ineradicable taint of illegality. No attorney of record, months after the rendition of a final decree, can be held to possess authority to waive the substantial right of the judgment debtor to have her lands sold in tracts not exceeding 160 acres.

Reversed and remanded.

COOGLER et al. v. ROGERS.

(Supreme Court of Florida. Dec. 14, 1890.)

ADVERSE POSSESSION—TENANTS IN COMMON—EJECTMENT—PARTIES—MARRIED WOMEN—DESCENT.

1. A deed conveying lands which are at the time of its execution held adversely by a person, not a party to the deed, is void as to such person, but not as between the parties to the deed.

2. Where a conveyance is made of lands which at the time are in the adverse possession of one not a party to the deed, ejectment will not lie in the name of the grantee to such deed, but only in the name of the grantor.

3. If the grantee in a deed conveying land held adversely by another institute an action of ejectment in the name of the grantor, against the person holding adversely, the action will not be dismissed at the instance of the defendant, on the ground that it was brought without the knowledge

or consent of the grantor, or that he neither has nor claims any interest in the land.

4. The act of March 6, 1845, providing that, if a married woman die in this state without children surviving her, the husband shall be entitled to administration, and to all her property, both real and personal, applies as well where the wife is under 21 years of age, as where she has attained that age; and, where a wife under 21 years of age dies, this act, and not the statute of November 17, 1829, (section 2, p. 469, McClel. Dig.) controls the descent of her property.

5. If lands are held adversely, and another person who is estopped to claim them as against the one in adverse possession convey them to a third person, the estoppel will extend to the last-named person, and those claiming under him.

6. Possession under an executory contract of purchase is adverse, except as to the party contracting to convey, and under whom the possession is held.

7. The possession of successive occupants between whom there is privity may be united to make up the period of adverse possession necessary to constitute a defense against an action of ejectment founded on the true title.

8. The possession of one co-tenant is *prima facie* that of the other, and there must be something amounting, in law, to an ouster, before ejectment will lie, or the statute of limitations begin to run between them.

9. The statute of limitations will begin to run in favor of a co-tenant in possession against the co-tenant out of possession from the time that there is an ouster of the latter by the former.

10. Where the testimony clearly shows an estoppel of the plaintiff, and an adverse possession for the period of seven years, under the statute of limitations, as against the true title upon which the plaintiff claims, the verdict will be set aside as contrary to the evidence.

(*Syllabus by the Court.*)

Appeal from circuit court, Hernando county; G. A. HANSON, Judge.

Angus Paterson, for appellants. Wall & Wall and Shackelford & Palmer, for appellee.

WHITE, J.¹ Plaintiff below recovered a judgment for the lands in dispute, from which defendants appealed. Appellants assign nine errors in the trial of the case below, and rely for a reversal on those several grounds. We propose to notice only such of these as in our opinion are decisive of the case.

The first error assigned is that the court erred in refusing to dismiss said cause on his motion, because brought in the name of Rogers, the nominal plaintiff, by Smith, the real plaintiff, without the knowledge of Rogers.

Was the action properly brought in the name of C. P. Rogers? The record does not show that suit was commenced in the name of Rogers against his consent, or that he at any time interposed objections to its being so entered or continued in his name. He only disclaims any interest in the land, or knowledge of the action on the trial of the case. It is well settled that a deed made to land by a person out of possession, when the lands are held adversely by another, though good as between the grantee and grantor, and as to all other persons, except as to the party in adverse possession, yet as to him, and to those that afterwards come in under him, it is entirely void, and as a conveyance a mere nullity, and cannot be read in

evidence against him. In such case the attempt to convey, at least as between the grantor, grantee, and the person in possession, fails to accomplish its purpose or object.

In such case, in contemplation of law, as between the grantor, grantee, and the person in adverse possession, the title remains in the grantor or original proprietor, and he may sue to recover the land, but the deed to lands thus held in adverse possession, being good as against the grantor, his heirs and strangers, and void as to the party in possession, an action will lie against him in the name of the grantor, notwithstanding such deed, but not in the name of the grantee; and such recovery, when had by the grantor, will inure to the benefit of the grantee. *Hamilton v. Wright*, 37 N. Y. 502; *Wade v. Lindsey*, 6 Metc. 413, 414; *Betsey v. Torrance*, 34 Miss. 138; *Wilson v. Nance*, 11 Humph. 191; *Edwards v. Parkhurst*, 21 Vt. 472.

So it has been held in Pennsylvania that ejectment will lie and be maintained in the name of the warrantor, although he might have no beneficial interest in the land, and might not have known of the action. *Campbell v. Galbreath*, 1 Watts, 70.

As before remarked, Rogers does not seem to have interposed objection or opposition to the use of his name as nominal plaintiff; and if he conveyed or attempted to convey to Smith, and received a valuable consideration therefor, inasmuch as the action could have been maintained successfully in his name, he would be estopped to refuse the use of his name in an action to promote and secure the ends of justice, in the event he attempted so to do. Entertaining these views, we see no error in the action of the court below in overruling appellants' motion; and this disposes of several of the other errors assigned by appellants, especially the second, fourth, and others of like character.

It being evident that the action must stand or fall upon the strength of the title of Rogers alone, and his recovery, if recovery be had, inuring to the benefit of Smith, the real plaintiff, it follows that, if the recovery cannot be had upon the strength of the title of Rogers, then the action cannot be maintained, nor a recovery had upon the title of both combined.

The fifth error assigned by appellants is the court below erred in charging the jury "that, if Annie Rogers received land from her father, John L. May, and died without issue, the land descended to her husband, whether she was of age or not."

It is earnestly contended by counsel for appellants that, inasmuch as Annie Rogers died without issue, and before she arrived at the age of 21 years, that such real estate descended to the paternal kindred or to the kindred of her father, John L. May, deceased, under our statute of descent of 1829. McClel. Dig. p. 469, § 2. While we consider the statute of 1829 as the law governing the descent of real and personal property of unmarried minors, where the same is derived from the father or mother, without expressing an opinion as to the statute of 1829 on estates

¹ Sitting in place of MITCHELL, J., disqualified.

of married persons who died without issue, and who were minors at the time of their death, prior to the act of March 6, 1845, we think it was the intention of the legislature, in passing the twelfth section of that act, (McCl. Dig. 471,) to make a distinction between the descent of property of deceased unmarried minors, and that of deceased married minors, without regard to the source from which the latter class derived such property, and we are persuaded that the descent of property owned by married persons who died under the age of 21 is governed and controlled by the act of 1845, directing the disposition and descent of property of married persons dying intestate, whether with or without issue born, and that it is not now controlled by the act of 1829.

The legislature of 1845 no doubt wisely intended in passing said act to more clearly define and fix the rights of a surviving husband or wife on the death of the other, as to the property owned by either, when dying intestate. It was reasonable and right, just and proper, that the old law of 1829 should be made more intelligible and just, and conform more to the liberality of our age and institutions. The rights of the surviving husband, and his interest in the estate of his deceased wife as tenant by the curtesy, secured to him by section 2, Acts 1829, in estates there referred to, were hedged in by the embarrassing subtleties growing out of the doctrine of tenancy by the curtesy at common law. These intricacies and subtleties were a fruitful source of litigation, for to create a tenancy by the curtesy at common law four things had to occur and combine: (1) Marriage; (2) actual seisin of the land by the wife during coverture; (3) issue born alive of her which might inherit the same estate as heir of the wife; and (4) the death of the wife. This often worked a great hardship to the surviving husband, who, though he might have lived with his wife from early youth to hoary age, and though there was actual seisin of the wife for the whole period of coverture, and though he might have expended his energies in improving and embellishing the estate of the wife, yet, if there were no issue born of the wife capable of inheriting the estate as heir of the wife, on her death the surviving husband was left without any estate whatever in her property, and was liable to be ousted from his home in his old age, as he took nothing as tenant by the curtesy. This unjust and inequitable appendage of the common law being contrary to our institutions, and to the liberality of the age in which we live, no doubt led to the passage of the act of 1845, the provisions of which are more in accord and harmony with modern notions of right and justice, and which clearly and squarely, and without any contingency, declares and defines the estate of the surviving husband dying intestate, with or without issue born, dead or alive.

It is insisted by counsel for the appellants that the act of 1845 can only be construed to refer to, and be applicable to, "adult married women," and to their property; that a "female cannot be considered a woman in law until she is twen-

ty-one years of age." To this it may be replied that while it is true she is disqualified by minority from making certain contracts, such as the making of deeds of conveyance and relinquishment of dower, yet this disability does not attach to the contract of marriage, nor its incidents, for, as to this contract at common law, she could assent to it at the age of 12 years; and for the purpose of marriage, including and involving all the rights and responsibilities consequent upon the consummation of this contract, she is considered in law a "woman," though she may not have arrived at the age of 21 years. "Marriage," in a legal sense, is defined to be a contract, made in due form of law, by a man and woman, reciprocally engaging to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife; and all persons are able to contract marriage, unless they are under the legal age or other disabilities. 2 Bouv. Law Dict. tit. "Marriage."

By the provision of the twelfth section, of the act of March 6, 1845, it is provided: "If a married woman die in this state possessed of real and personal property, or of either species of property, the husband shall take the same interest in her said property, and no other, which a child would take and inherit; and, if the wife should die without children, then the surviving husband shall be entitled to administration, and to all her property, both real and personal." See McCl. Dig. § 12, p. 471. The language of the statute is so plain, giving to the husband the same interest, and no other than therein provided for, that we are constrained to believe that it repeals the act of 1829 as to the estates of married minors, if said act was ever intended to apply and control the descent of married minors' estates, and the court below committed no error in giving the charge, as claimed by appellants in the fifth error assigned.

It is further insisted by the appellants that the appellee, Rogers, (plaintiff below,) was estopped from setting up a claim to the land in the controversy against Coogler and Higgins, the appellants. From what has already been said, we do not deem it important to inquire what effect the estoppel of Rogers, the nominal plaintiff, would have and work upon the right of Smith, the real plaintiff; but, inasmuch as there will have to be another trial had in this cause from what follows hereafter, we deem it proper to dispose of any disputed point that may arise on this question hereafter. We inquire, does the estoppel of the nominal plaintiff in ejectment reach to and substantially affect the real plaintiff, and whether or not he is also estopped from maintaining an action for the recovery of land conveyed to him by the nominal plaintiff, where the nominal plaintiff is estopped from bringing such action.

From the fact already stated,—that the deed from Rogers to Smith was void as to Coogler, because executed by Rogers out of possession, and while Coogler was holding the land adversely, and because, as between Rogers, Smith, and Coogler, in a

contest over the lands in dispute, the law deems the title, if any exists, to be in Rogers, whose recovery will inure to the benefit of Smith.—we are of the opinion that, if the doctrine of estoppel applies to Rogers in this case, then Smith is likewise estopped to claim the lands, or maintain an action against Coogler, or those holding lawfully under him. It has been repeatedly affirmed and decided that one claiming title under a party who himself is estopped to deny the title of another is likewise estopped, and bound by such estoppel to deny the title of such other person. *Phelps v. Blount*, 2 Dev. 177; 3 Washb. Real Prop. 94; *Scott v. Douglass*, 7 Ohio, pt. 1, page 227; *Carver v. Jackson*, 4 Pet. 85.

Estoppel is defined to be "the preclusion of a person from asserting a fact by previous conduct inconsistent therewith, on his own part, or the part of those under whom he claims." *Bouv. Law Dict. tit. "Estoppel."*

But was Rogers estopped from bringing an action against Coogler, either in his own right or for another, for the lands in controversy? Stephen, in his Pleading, defines "estoppel" to be "a preclusion in law which prevents a man alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor." *Steph. Pl. 239*. And it has been repeatedly decided that the principle of estoppel is applicable to all cases where one, by word, act, or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induced him to act on this belief injuriously to himself, or to alter his own previous condition to his injury. *Corning v. Gould*, 16 Wend. 581; *Copeland v. Copeland*, 28 Me. 525; *Pelletreau v. Jackson*, 11 Wend. 117; *Jones v. Sasser*, 1 Dev. & B. 464; *Blake v. Tucker*, 12 Vt. 44; *Keyser v. Simmons*, 16 Fla. 268; *Camp v. Moseley*, 2 Fla. 171; *Hollingsworth v. Handcock*, 7 Fla. 338; *Levy v. Cox*, 22 Fla. 552.

This court in an early day, and in a well-considered case, used the following language: "The technicalities incident to estoppels [especially *in pais*] are gradually giving way to considerations of reason and practical utility; and the courts of the present day seem disposed to give force and efficacy to a doctrine which is based upon principles of justice and the purest morality." *Camp v. Moseley*, 2 Fla. 197, text. From cases cited above, and numerous others adjudicated, the law of estoppel may be briefly laid down as follows: (1) Words and admissions, or conduct, acts, and acquiescence, or all combined, causing another person to believe in the existence of a certain state of things. (2) In which the person so speaking, admitting, acting, and acquiescing did so willfully, culpably, or negligently. (3) By which such other person is or may be induced to act so as to change his own previous position injuriously. Referring to the evidence as shown by the record in this cause: (1) As to the prior conduct of Rogers in regard to the lands in controversy, it is clear that he never actually entered into the possession of any part of the lands personally or by tenant; and there is no evidence that he ever at-

tempted to do so, or that he ever claimed to own an interest in the same, while it is evident that Barnes and wife, Coogler's grantors, did enter and claim to be the owners of the land. (2) When the title was assailed by creditors of Matilda H. May, Rogers refused to join in the defense, or to contribute anything to protect the title, and refused to allow his name to be connected therewith. He could not have been ignorant of those suits carried on in the name of Barnes and wife alone, nor of his interest therein, if he claimed or had any, for he had actual knowledge of the same brought home to him by Barnes and by Coogler. His acquiescence therein, and his acts and acquiescence in and before said suit, are circumstances to be considered in connection with his subsequent declaration to Barnes that he had no interest in the litigation, which was certainly tantamount to saying that he had no interest in the land, and to Coogler when he declared, as Coogler testifies, that he claimed no interest in the lands. "The acts or admissions of the party * * * operate * * * in the nature of estoppel, * * * where, in good conscience and honest dealing, he ought not to be permitted to gain-say them." *Canal Co. v. Hathaway*, 8 Wend. 483, cited and approved in *Camp v. Moseley*, 2 Fla. 197, text. "Admissions arising from demeanor and conduct are conclusive against the party where he has received a benefit therefrom, or prejudiced another." 2 Saund. Pl. & Ev. 1. Mr. Starkie, in his valuable work on Evidence, says, as to admissions: "In general, admissions may be presumed, not only from the declarations of a party, but even from his acquiescence or silence, as, for instance, when the existence of a debt or a particular right has been asserted in the presence of a party, and he has not contradicted it, such acquiescence and silence will amount *prima facie* to an admission of a debt or right. So an acquiescence and endurance, where acts are done by another which if wrongfully done are encroachments and call for resistance and opposition, are evidence of a tacit admission that such acts could not be legally resisted." 2 Starkie, Ev. 37, cited and approved in 2 Fla. 198, text. The evidence shows that Rogers said to Barnes, when told of the prospective or pending litigation, and when told by Barnes that if he, Rogers, made any claim to the land, they would have to fight for it: "Well, he didn't intend to have anything to do with it; if I wanted it, I would have to fight for it." Coogler swears: "In January, 1879, lands were levied on under an execution against Matilda H. May. I was employed by Barnes to enjoin the sale. I endeavored to get Rogers to unite in the suit, if he claimed any interest in the land. Rogers refused either to let me use his name, or contribute to the prosecution of the suit, stating to me the fact that he claimed no interest in the land. I therefore filed a bill in the names of John D. Barnes and wife against Mayo, administrator of Edrington." The positive denial of any interest in the lands to Coogler, his utter refusal to aid in the suits to protect the title, coupled with his assertion that he had no interest in the liti-

gation concerning them, his refusal to allow his name to be connected with said suit in any way, are all circumstances to be considered in determining this question.

We ask, was the conduct and declarations of Rogers "willful, negligent, or culpable?" If the denial of interest in the land to Coogler, and denial of interest in the litigation concerning the lands to Barnes, were made by Rogers, with a knowledge of his right in the lands, as the husband of the deceased wife, and we believe that it was, then it was willful; and, if not made with such knowledge, then his utterances and conduct showed culpable negligence.

Were those utterances, acts, and admissions, coupled with the conduct of Rogers throughout, calculated to induce Coogler to believe that, if he purchased the lands from Barnes and wife, that, as to Rogers, he would get a good title, and peaceable possession of the same? Taking the statements as proven in connection with the surrounding circumstances, we think that Coogler was justified in believing, and did believe, when he bought the lands from Barnes and wife, that he would have no litigation with Rogers, directly or indirectly, in regard to the same, and could not have expected that Rogers could be capable of assailing his title directly or indirectly. The very fact that Rogers attempts to convey the land without warranty, except against himself, is a potent circumstance going to show his want of confidence in his title to said lands; and, after his denial of interest in the lands, after his tacit admission that the lands belonged alone to Barnes and wife, after throwing upon them the entire expense and loss of time incident to protracted litigation, in protecting and enforcing their sole claim to it, in morals and in conscience, as well as in law, Rogers is estopped to claim the same, and cannot maintain an action to recover it, either for himself or another. "The law imposes silence on him, and prevents his setting up a claim against a purchaser who had been influenced by his conduct," or against those holding under him. *Levy v. Cox*, 22 Fla. 552; *Camp v. Moseley*, 2 Fla. 197, text; *Hollingsworth v. Hancock*, 7 Fla. 338; *Canal Co. v. Hathaway*, 8 Wend. 483; *Corning v. Gould*, 16 Wend. 581; *Jones v. Sasser*, 1 Dev. & B. 464.

Entertaining the above views, we are of opinion that the verdict as rendered in the court below should not be allowed to stand, and that the judgment rendered thereon should be reversed.

It is further insisted by the appellants that the proofs showed in the court below that they had held the land adversely to the appellee for more than seven years before the commencement of this suit by the plaintiff, and that the action was barred by the statute of limitations, and that it was error to refuse a new trial, as the verdict of the jury was contrary to the evidence and the law.

This brings up for consideration the very difficult question of what constitutes adverse possession, under the statutes of our state. For obvious reasons, growing out of the shortness of limit of our statute,—

being only seven years,—our sparse population and extensive domain, we think the doctrine of adverse possession is to be taken strictly, and should not be allowed to be made out by inferences, but by clear and positive proof. Every presumption should be in favor of possession in subordination to the title of the true owner; for to allow a different construction, says Chief Justice MARSHALL, "would be to make the statute of limitations a statute for the encouragement of fraud,—a statute to enable one man to steal the title of another by professing to hold under it." *Kirk v. Smith*, 9 Wheat. 241.

The possession, to be adverse, must be (1) hostile to the true title; (2) it must be open; (3) it must be continuous; (4) it must be notorious, so as to prevent all doubt as to the character of the holding or want of knowledge on the part of the owner. *Hart v. Bostwick*, 14 Fla. 178, 179, text.

Measured by these rules, was the possession of the appellants adverse? It has been decided that, where one enters upon land under a deed duly acknowledged and recorded, he acquires a freehold either by right or wrong. If by wrong, it is an actual disseisin of all claiming the land under a different title. *Higbee v. Rice*, 5 Mass. 344; *Little v. Megquier*, 2 Greenl. 176. When a party enters upon land upon the strength of a deed from another person than the owner, it seems that the possession from the time of such entry is adverse; and, if continued for the statutory period, it will bar his entry. *Hart v. Bostwick*, 14 Fla. 179, text, citing *Jackson v. Camp*, 1 Cow. 605; *Woods v. Dille*, 11 Ohio, 455. The records show that Barnes and wife conveyed the lands to Coogler on the 10th day of February, 1882; that the deed was duly recorded; and that he went into possession openly, and cultivated part of the land, and made improvements thereon. And the evidence of Barnes and of Coogler show that Coogler contracted for and bought the lands in dispute from Barnes and wife in March, 1880, paying part of the price down, and taking from Barnes a bond for title, which bond was destroyed when the balance of the price of the land was paid, and when the deed of Barnes and wife was executed, on the 10th day of February, 1882. Coogler and Barnes both swear that, up to the purchase and execution of the bond for title, Coogler acted as agent for Barnes after Barnes moved to Texas; and Coogler swears most positively that from the date of the purchase and delivery to him of the bond for title, in March, 1880, he has been in actual adverse possession of the premises in his own right, except the few acres held by defendant Higgins, improving and cultivating the same up to the commencement of plaintiff's suit, in December, 1887.

This court, in *Hart v. Bostwick*, 14 Fla. 179, held, and we think correctly, that a possession and claim of land under an executory contract of purchase is in no sense adverse as to the one with whom the contract is made, but that one entering under an executory contract of purchase may always hold adversely as against all persons but his vendor; citing *Whitney v.*

Wright, 15 Wend. 171; Adams v. Guerard, 29 Ga. 651; La Frombois v. Jackson, 8 Cow. 589; Mumford v. Whitney, 15 Wend. 381; Clapp v. Bromagham, 9 Cow. 550; Jackson v. Johnson, 5 Cow. 74; Briggs v. Prosser, 14 Wend. 228; Jackson v. Camp, 1 Cow. 605.

His (Coogler's) possession seems to have been open, and his claim notorious and undisputed, and such as to prevent all doubt as to the character of his entry and of his holding; and the fact of his deed being of record, coupled with his claim to the land, and with acts of possession by himself and tenant, precluded the idea of the want of knowledge on the part of Rogers as to the character of his possession; and from the date of the entry, and under this executory contract of March, 1880, adverse possession commenced, as to Coogler in person, against appellee, and it is clear that over seven years had expired before appellee commenced his action, in December, 1887; and, in order to establish the defense of adverse possession for seven years, appellants are not compelled to rely upon the adverse possession on the part of their grantors, Barnes and wife. We might here rest the case; but, if this were not so, then, if the evidence shows that Barnes and wife held adversely to Rogers prior to and at the time of the sale to Coogler, then Coogler may avail himself of such adverse possession of his grantors, and connect the same with his own, and thus avail himself of the benefits of the statute. Brandt v. Ogden, 1 Johns. 156; Wade v. Doyle, 17 Fla. 527, 528; Tyler, Eject. 908. But here we are confronted with the further question as to what constitutes adverse possession between tenants in common, or co-tenants; and, if it is proven to exist, then to inquire when it commenced, how it commenced, and to what time it continued. It seems to be conceded that on the death of John L. May the lands in controversy descended to his two daughters, the wives of Barnes and Rogers, respectively, as tenants in common. If this be true, and Barnes and wife went into possession of the lands in controversy, then their possession was *prima facie* the possession of Rogers and wife, and, after the death of the wife of Rogers, of Rogers himself; and, before the possession of Barnes and wife could be adverse as to Rogers, an actual ouster of Rogers must be proved. For, in all cases where a party is in possession of lands in privity with another, or with the rightful owner, nothing short of an open and explicit disavowal and disclaimer of holding under that title, and of an assertion of title in himself, brought home to the knowledge of the owner, will satisfy the law; and, as between co-tenants, there must be an ouster by one of the other before an action of ejectment will lie. Williams v. Cash, 27 Ga. 507; Kirk v. Smith, 9 Wheat. 241; Jackson v. Berner, 48 Ill. 203; Tyler, Eject. 476. Do the facts and circumstances, as proven in this case, show an ouster in law of Rogers by Barnes and wife?

"Every ouster is an actual ouster, whether it be the result of positive expulsion, or whether it results from exclusive possession accompanied by such acts or facts as amount to a denial of the right

of the co-tenant out of possession." Gale v. Hines, 17 Fla. 774, text; Kearnes v. Hill, 21 Fla. 185. But this ouster must be proved, and even when the fictitious proceedings under the common law prevailing in ejectment by other means than by the "consent" rule, as by showing that the defendant held adversely, or that he denied the title of his co-tenant, or that he claimed all of the premises for himself, or denied possession to the other, or had held the sole and undisputed possession for a long course of years without payment of rent, and without any claim of any part of the profit by the other co-tenant during the whole time. Frederick v. Gray, 10 Serg. & R. 182; Lodge v. Patterson, 8 Watts, 77; Law v. Patterson, 1 Watts & S. 191; Doe v. Prosser, Cowp. 217; Tyler, Eject. 476.

It has been repeatedly held that exclusive possession connected with some act amounting to a denial of the rights of a co-tenant out of possession constitutes an ouster. Gale v. Hines, 17 Fla. 774, citing Siglar v. Van Riper, 10 Wend. 419; Ewald v. Corbett, 32 Cal. 499; Story v. Saunders, 8 Humph. 668; Higbee v. Rice, 5 Mass. 351; Cutts v. King, 5 Greenl. 482; Cross v. Robinson, 21 Conn. 385; Kearnes v. Hill, 21 Fla. 187. There can be no doubt of the fact that Barnes and wife held possession of the land from the death of the ancestor; but, as before remarked, this possession was the possession of Rogers and wife until the death of Mrs. Rogers, and then of Rogers, as their co-tenants at least, until this possession became exclusive, and was shown to be exclusive by some act of Barnes and wife, brought home to the knowledge of Rogers. While it is admitted that Rogers never entered the land in person or by tenant, nor received or demanded any of the rents or profits of the lands, yet, until the commencement of litigation between the creditors of Matilda H. May and Barnes and wife, which occurred in June, 1879, there appears no act on the part of Barnes and wife inconsistent with their holding as tenants in common with Rogers. But, when this litigation commenced in regard to the title to said land, Barnes and wife openly asserted their title to the whole of the land. This was public and notorious. It was matter of record. It was with the full knowledge of Rogers. It was connected with the possession of the entire lands, and was continued to the date of conveyance and sale to Coogler. This open and notorious claim to the whole of the land, coupled with the entire possession by Barnes and wife, was such an act as amounted to, and was, a denial of the rights of Rogers to any part thereof, and constituted an ouster which would have justified Rogers, if so disposed, to bring an action of ejectment against Barnes and wife for the recovery of his undivided interest, under ordinary circumstances. Gale v. Hines, 17 Fla. 774, and the authorities there cited; Kearnes v. Hill, 21 Fla. 187. And, in the absence of evidence to show collusion between Barnes and wife and Rogers as to this litigation, the admission of Rogers, made then and there, that he had no interest in the lands, is conclusive of adverse possession on the part of Barnes and wife as to him from that date.

We have already seen the effects in law of the entry by Coogler into the lands under the deed from Barnes and wife. We inquire, was this possession continuous from its inception for the period of seven years? What constitutes a continuity of possession is not always easy to determine, and the question has been attended with much litigation. When the adverse possession has commenced and continued by the same person, the question may be settled without much difficulty: but when continuity is held by different persons in possession, or under different rights, it is often complicated, and sometimes difficult. It is well settled that the possession need not be by the same person, and under the same rights. The claim of possession may continue unbroken by successive tenants in possession, and when this appears the adverse possession may be just as effectual as though the premises were held by the same person for the whole period. There must be a privity and continuity of possession, under a claim of title, during the whole statutory period, in order to make adverse possession effective to bar the entry, or to ripen the possession into title to the premises enjoyed. *Brandt v. Ogden*, 1 Johns. 156; *Doe v. Campbell*, 10 Johns. 477; *Wade v. Doyle*, 17 Fla. 527, 528, text; *Tyler, Ej.* 908.

Says this court in *Doyle v. Wade*: As to what is continuous possession "must necessarily depend largely upon the circumstances of each case as it may arise. The use to which property is adapted, the actual manner of its use, the circumstances and situation of the possessor, and partly his intention, must be considered in determining it." *Doyle v. Wade*, 23 Fla. 90, 1 South. Rep. 516. To constitute adverse possession in its incipency, the owner must be ousted, and the possession must continue adversely and uninterruptedly for the statutory period of time, which in this state is seven years. This is the fact which creates the bar, and it cannot exist if the person having the title takes actual possession in pursuance of his right, if but for a moment of time, or if the adverse possession is at any time abandoned by the disseisor; for in so doing his adverse possession is at an end. But, when a party is once ousted, it is not every entry upon the premises without permission that will disturb the adverse possession. A man may tread upon his own soil, and still be as much out of possession of it as though he were elsewhere; but to regain possession, when thus ousted, he must assert his claim to the land. He must perform some act that will re-instate him in possession before he can regain what he lost. No entry by stealth, nor for other purposes than those connected with the right to enter, will be sufficient to break the continuity of exclusive possession in another. There cannot be at the same time two legal possessions, adverse to each other, of the same premises. As to adverse possession like the case at bar, our statute of 1872, c. 1869, (McCl. Dig. 732,) provides: "Whenever * * * the occupant, or those under whom he claims, entered upon the possession of the premises under claim of title

exclusive of any other rights, founding such claim upon a written instrument, as being a conveyance of the premises in question, * * * the land shall be deemed to have been possessed and occupied in the following cases: *First*, where it has usually been cultivated or improved; or, *second*, where it has been protected by substantial inclosure; or, *third*, where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, for the purpose of husbandry, or for the ordinary use of the occupant; *fourth*, where a known lot or single farm has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining country shall be deemed to have been occupied for the same length of time as the part improved or cultivated."

The testimony shows that Barnes and wife occupied the premises, a part of which were inclosed and improved, and that Coogler, in person and by tenants, improved the property by setting out orange trees, cultivating a part of the same, and repairing the fencing of that part inclosed. Barnes swears he took possession under a deed given to him by his wife in the name of her father, John L. May. "I went to work on the land in controversy, fenced about seven acres, plowed it, and planted it in corn. This was in the spring of 1878. Held possession right along until December, 1879, then went to Texas, leaving Coogler in possession as agent until March, 1880, when I sold to Coogler, and gave bond for title. Coogler finished paying for it in 1882, in February, and wife and I made deed. Rogers made no claim to the land." Coogler swears Barnes and wife were in possession of the land from 1878 until December, 1879. "Barnes moved to Texas in 1879. I was made his agent for the 160 acres. I took immediate possession. He (Barnes) delivered me the possession. This was a verbal understanding we had talked over between Barnes and myself,—that I should become the purchaser of this land in controversy. A written agreement was then made, which was destroyed, because I had no further use for it after I had paid up. I destroyed the contract, and took the deed. This paper or agreement was from Barnes to me. Deed from Barnes and wife to Coogler bearing date February 10, 1882. From December, 1879, I recognized myself as the agent of Barnes, and holding, as agent, under and in subordination to Barnes, until March 20, 1880, when I assumed that I was owner of the land. And I have been in the possession of it, and claiming it as my own property, from that day until now, adversely to Rogers and everybody else. Have appropriated the rents, issues, and profits of that land since March 20, 1880, to the present time, to my personal use. Have cleared, fenced, and improved, built a dwelling and other houses," etc.

There is no intimation that the appellants or their grantors, after the litigation between the creditors of Matilda H. May and Barnes and wife, ever abandoned or intended to abandon the premises, in a legal sense; and the conclusion is evident that

the contrary was their purpose. It does not appear that the appellee ever demanded or received any rents or profits from the appellants or their grantors, or that he ever claimed any part of the same, or that he ever attempted to make a legal entry on the land in dispute, personally or by tenant, from the date of the entry, in 1878, of Barnes and wife, appellants' grantors, to the commencement of this suit; but, on the contrary, disclaimed all interest in the same. And all the evidence goes to show that after the ouster of Rogers by Barnes and wife on the — day of June, 1879, when the litigation referred to commenced, and when Barnes and wife openly averred and claimed title to the whole of the said premises, the possession was adverse to the appellee. It is evident that appellants' claim of adverse possession to the lands described in the pleadings should have prevailed, and it was error to refuse a new trial in the court below.

The judgment should be reversed, and the case remanded for a new trial; and it will be so ordered.

TUTWILER V. TUSCALOOSA COAL, IRON & LAND CO. *et al.*

(*Supreme Court of Alabama.* April 10, 1890.)

CORPORATIONS—LIABILITY OF STOCK FOR UNPAID SUBSCRIPTION—CONSTITUTIONAL LAW.

1. Where a corporation, at the time its stock is subscribed for, has by law (Code Ala. 1876, § 1816) a lien on the stock for unpaid subscription, to enforce which a suit in equity may be maintained, and is also authorized to sue its stockholders at law for such subscription, a statute (Code Ala. 1886, § 1674) giving such corporation a lien on the shares of its stockholders for any debt or liability due from them, and authorizing it to sell such shares on notice to the stockholder, merely enlarges the remedy for legal rights already existing, so far as the sale of stock for unpaid subscription is concerned, and is not unconstitutional when applied to subscriptions made before its passage.

2. In a suit against a corporation to enjoin it from selling complainant's stock to pay the balance due on his subscription, and to dissolve the corporation because of a fraudulent sale of land to it by a director, the president of the corporation, against whom no fraud is charged nor relief prayed, cannot be made a party for purposes of discovery.

3. In such suit the director alleged to have made the fraudulent sale to the corporation is a necessary party.

4. A suit in equity, against a corporation by one of its stockholders, to dissolve the corporation because of a fraudulent sale of land made to it by a director after the incorporation, cannot be maintained. The proper remedy is a suit by the corporation, through its lawful agents, or, on their refusal to act, by one then a stockholder to set the sale aside.

Appeal from chancery court, Tuscaloosa county; THOMAS COBBS, Chancellor.

P. A. Tutwiler, for appellant. *Cochrane & Fitts, Hargrove & Van de Graff*, and *Wood & Wood*, for appellee.

STONE, C. J. On January 15, 1887, the Tuscaloosa Coal, Iron & Land Company was incorporated in Tuscaloosa county under the general statute then in force, providing for the incorporation of business corporations. Code 1876, pt. 2, tit. 1, c. 1, art. 1, commencing with section 1803; Sess.

Acts 1882-83, p. 5. On February 26, 1887, the act of the Alabama legislature was approved, "To confirm the incorporation and organization of the Tuscaloosa Coal, Iron & Land Company, and to define and declare the powers of said company." Sess. Acts, 482. This act defines the powers and declares the purposes of said corporation. P. A. Tutwiler, complainant in the chancery court and appellant here, became the original subscriber for 90 shares of the capital stock of said corporation, of the par value of \$100 each; and during the month of March, 1887, pursuant to calls made, he paid 30 per cent. of his subscription, amounting to \$2,700. Calls were subsequently made for the entire stock subscription, but Tutwiler made no further payment. Being put in apparent default by demand made for payment, the stock subscribed for by Tutwiler, together with that of many others in like condition, was by the corporation advertised to be sold publicly, for cash, on March 13, 1889, the proceeds to be applied to the unpaid balance of said stock subscription. This advertisement and proposed sale were had and proposed to be had, under section 1674 of the Code of 1886.¹ The power of sale contained in that section is not found in the law as it existed before that Code went into operation, December 25, 1887. When Tutwiler subscribed, the mode of enforcing payment of delinquent stock subscriptions to corporations like the present one will be found in section 1816, Code 1876. The corporation was not proposing to sell under the older statute, but under the power conferred by the Code of 1886, § 1674, enacted after Tutwiler became a subscriber.

On March 13, 1889, the present bill was filed. It has two objects, and prays relief as to each. It first seeks to prevent a sale of the stock under section 1674 of the Code of 1886, under which it had been advertised to be sold. The position taken on which this relief is claimed is that the statute giving this remedy, having been enacted at a date subsequent to the contract by which complainant subscribed for his stock, cannot be construed as retroactive, and that hence no valid sale can be made under the corporation's advertisement. We are not considering the merit of this contention. If it have any merit, the grievance is personal, and individual to the stockholder thus circumstanced, and no stockholder has any interest in the matter of Tutwiler's stock. A bill claiming such relief is a bill against the corporation as the only necessary and proper party. The contention is between the stockholder and the corporation, and any relief obtained will necessarily be against the corporation.

The other feature of the bill relates to an alleged purchase by the corporation of a large body of land from Friedman, in which it is charged that Friedman, who was a stockholder and director of the company, defrauded the corporation. Pri-

¹ Code Ala. § 1674, provides that "all private corporations have a lien on the shares of its stockholders for any debt or liability incurred to it by a stockholder; * * * and, if necessary for the payment of such debt, * * * the corporation may sell the shares after notice."

marily, relief of this kind must be sought by the corporation as complainant; for it only, in its corporate capacity, is the legal sufferer. For such an injury the stockholder, as such, has not, *prima facie*, any legal cause of action, because he has suffered no individual grievance. In one category a stockholder, or any number of stockholders, may become actors, and file a bill for relief in his or their own names, namely, when the governing body, being thereto requested, refuses to institute proceedings to redress an alleged wrong to the corporation. *Manufacturing Co. v. Cox*, 68 Ala. 71; *Planters' Line v. Waganer*, 71 Ala. 581; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. Rep. 747; *Moses v. Tompkins*, 84 Ala. 613, 4 South. Rep. 763; *Dodge v. Woolsey*, 18 How. 331; *Hawes v. Oakland*, 104 U. S. 450; 1 Mor. Priv. Corp. § 277. In such case, although the suit is by stockholders, the relief is, to all intents, in favor of the corporation, and against some outside party. To a suit thus brought, for the wrongs complained of in this case, Friedman was a necessary party defendant, being the person against whom relief, if any, would be granted. The corporation, it is true, was a necessary party; and, refusing to appear as complainant, there was no recourse left but to make it a defendant. The several and variant reliefs prayed in the two features of the bill, if there be nothing in the question to be next considered, render the bill multifarious. 3 Brick. Dig. 388, §§ 338, 342, 343; *Clay v. Gurley*, 62 Ala. 14; *Adams v. Jones*, 68 Ala. 117; *Seals v. Pfeiffer*, 77 Ala. 278.

It is contended for appellant that the first feature of his bill, that in which he seeks to prevent the sale of his stock under the advertisement, is but a stepping-stone or condition precedent to his right to maintain the suit in its second feature; that only a stockholder can maintain such a bill, and, unless he first succeeds in preventing a sale of his stock, or in having the sale, if made, set aside, he will be left without a standing in court, and his bill must fail on that account. The principle invoked is sound, in a proper case. An equitable right, one which can be asserted in a court of equity, generally carries with it all the powers that are necessary to make it effective. *Wedgworth v. Wedgworth*, 84 Ala. 274, 4 South. Rep. 149. We will show further on that that principle cannot be made to benefit this case. The demurrer for multifariousness need not be further considered, as the ruling on it did no harm.

The bill makes W. C. Jemison, president of the corporation, a party defendant. It makes no charge of misconduct against him. At least, it makes no charge of bad faith, or of conduct *ultra vires*, or of anything else, with sufficient particularity to justify making him a party defendant; and it prays no relief against him. True, it is claimed here that he is made a party for purposes of discovery. That, if true, would be no sufficient ground for making him a party. *Norwood v. Railroad Co.*, 72 Ala. 563. But the bill expressly dispenses with a sworn answer from him. It is of the essence of a bill for discovery that it require a sworn answer. A bill like the present

one can in no sense be classed as a bill for discovery. *Zelnicker v. Brigham*, 74 Ala. 598; *Watts v. Bank*, 76 Ala. 474; 1 Pom. Eq. Jur. § 144. The demurrer by W. C. Jemison was rightly sustained.

We cannot agree with counsel for appellant as to the proper interpretation of section 1816 of the Code of 1876. That section first declared a lien upon the stock of the shareholder in a corporation such as this for all amounts which may be due upon the subscription for stock. If the statute had proceeded no further, the lien could have been enforced by bill in chancery as other liens are. *Westmoreland v. Foster*, 60 Ala. 448. But the statute proceeded further, and gave to the corporation the option of pursuing one of two courses. The one was, if there had been partial payment on the stock, to proceed, after giving certain notice pointed out by the statute, "to consolidate into as many parshares as the money paid by such defaulting subscriber will amount to, and issue to him a certificate therefor." The other optional course which the statute authorized was to "proceed to collect what may remain unpaid of the original subscription by suit." Electing to pursue the latter course, the corporation could have maintained an ordinary suit at law for the collection of the money, or it could have maintained a suit in chancery for the enforcement of the lien. *Cook, Stocks*, § 121. And this option or right of election was vested in the corporation, and in its exercise the stockholder had no voice or right of control. We have, then, the case before us of a contract entered into at a time when the law, as then in force, gave a lien, leaving the licensee to common remedies for its enforcement, and a change of the law after the making of the contract, providing another remedy, under which last statute the corporation is proceeding to make its lien available. Is this a legitimate function of legislation? "Statutes which relate alone to the remedy, without creating, enlarging, or destroying the right, operate generally on existing causes of action as well as those which afterwards accrue." *Steam-Boat Co. v. Barclay*, 30 Ala. 120. "The legislature may alter, enlarge, modify, or confer a remedy for existing legal rights without infringing any principle of the constitution." *Id.* The case from which we have quoted seems to be precisely in point with the present one, and this doctrine is supported by the great current of authority. *Trust Co. v. Boykin*, 38 Ala. 510; *Ex parte Pollard*, 40 Ala. 77; *Ogden v. Saunders*, 12 Wheat. 213; *Cooley, Const. Lim.* (5th Ed.) top pp. 348, 443, 444. The advertisement for the sale was dated March 2, 1889. Section 10 of the Code of 1886, as amended by act approved February 28, 1889, (Sess. Acts, 104,) does not affect this question.

The bill, so far as it seeks to prevent or to vacate the threatened sale of the stock, is without equity. This renders the question of multifariousness immaterial. As we understand the argument of counsel, it seeks to make the alleged fraud in the sale and purchase of the Friedman land a vitiating factor in the very inception and organization of the corporation, and on that

account to dissolve the corporation, hold the perpetrators to personal account, and administer the assets of the attempted incorporation for the benefit of the sufferers. If the projectors of a business corporation were by fraudulent or covinous prearrangement to get up a scheme, and procure its incorporation, upon an agreement that property of one or more of its promoters should constitute the capital of the corporation in whole or in part, and at an appraisement palpably in excess of its value, and if such scheme be so far consummated as to mislead and deceive strangers who purchase stock in ignorance of such prearrangement and of such excessive valuation, we will not say such deluded stockholder would be without redress. Nor will we say that stock issued to the seller of such overvalued property, as the consideration or part consideration of its purchase, conforms to the letter or spirit of the constitution, art. 14, § 6, which declares that "no corporation shall issue stock or bonds except for money, labor done, or money or property actually received." *Fitzpatrick v. Publishing Co.*, 2 South. Rep. 727, 83 Ala. 604; *Williams v. Evans*, 87 Ala. 725, 6 South. Rep. 702. And we will not say that a stranger who has been thus deluded into the purchase of stock and the payment of his money in ignorance of the fraud, may not file a bill, and have the transaction canceled, even if the disruption of the corporation itself be the consequence. Nor will we say, if such stockholder has paid money under such circumstances, the fact of the sale of his stock for unpaid calls will destroy his *status* as a complainant; and it would seem to follow that in such case no previous attempt need be made to obtain redress through the governing body of the corporation, if any relief can be obtained. Such suit would be an attack on the rightful existence of the corporation itself. These questions we do not and need not decide, for the bill makes no such case.

The bill in this case, as we have stated, was filed March 13, 1889. It does not state when the purchase from Friedman was made. The plain implication from the averments is that the contract of purchase was entered into after the corporation was organized, for it charges that Friedman was a director when he made the sale. There could be no directors before incorporation, and the election of directors is one of the necessary steps taken in organization. The bill charges a very glaring fraud, but it charges it as perpetrated after incorporation and after organization. Such is *per se* no ground for dissolving the corporation. The vacation of such a transaction for the fraud is a proceeding by the corporation, or if it, on proper request, refuse to take steps to procure a rescission of the contract, then by some one or more of the stockholders. Brought in either form, the suit is for the benefit of the corporation as an existing artificial person, not for its dissolution. Only a stockholder or stockholders can maintain such a suit, the corporation refusing to sue; and to this end it was and is essential that Tutwiler maintain his *status* as a stockholder. Ceasing to be

such, his suit, on the case made by his bill, must fail. The rule is settled in this state, in accordance with the general doctrine on the subject, that, before a stockholder or any number of stockholders can maintain a suit like the present one, every reasonable effort must be made to have suit instituted by the governing body of the corporation. The bill does not inform us how many directors constituted the board of the defendant corporation. The law permitted organization with not less than three nor more than nine directors. If the averments of the bill be true, two of the directors, Friedman and another, were concerned in the fraud, and benefited by its perpetration, while, as the result of the transaction, Friedman became the owner of \$109,000 of the capital stock. The bill charges that complainant "has applied to the said company, through its president, to institute proper proceedings to set aside and annul said purchase; but it has failed and refused to do so." Under the averments of the present bill, we hold a sufficient excuse is shown to authorize stockholders to institute the suit. Framed as the present bill is, to continue its prosecution, Tutwiler must continue to be a stockholder. If relief is obtained under it, that relief will be for the benefit of the corporation, and will in no sense dissolve it, or tend to do so. Should an amendment of the bill be attempted, it would be well to inquire if the proposed amendment would not seek relief so incompatible with any that could be obtained under the present bill as to make it a new case.

There is no error in any of the rulings prejudicial to appellant, and the decretal order of the chancellor is affirmed.

In re WALTER et al.

(Supreme Court of Alabama. April 8, 1890.)

APPEAL—REVERSAL—RESTITUTION—MANDAMUS.

1. One who pays money on a decree which is afterwards reversed on appeal is entitled to restitution of the amount paid.

2. It is no answer to a petition for such restitution that petitioner will be decreed to pay the same amount on the next hearing.

3. The chancellor before whom the cause is pending has the power to make an order for restitution, when the parties are before him, and there is shown to have been a decree, payment thereunder, and a reversal thereof.

4. *Mandamus* is the proper remedy to compel the chancellor to make such order.

Application for *mandamus*.

In September, 1886, one May filed his bill against petitioners to enforce a vendor's lien, which was evidenced by two promissory notes held by May and executed by petitioners for the purchase of certain lands described in the bill. Pending the suit, petitioners filed their bill to compel said May and one D. S. Troy to interplead, and have adjudicated to which one of them petitioners should pay the amount due on the notes; the said Troy having bought the land in controversy at an execution sale. Upon submission of the cause to the chancellor, he decreed that May had a superior lien on the land, and a better claim to the purchase money than Troy. On rendition of this decree, petitioners

paid the sum due on the notes to May. Subsequently Troy appealed the case to the supreme court, where the decree of the chancellor was reversed, and the cause remanded. 6 South. Rep. 54. Petitioners filed their petition to the chancellor praying him to order May to make restitution to them of the amount paid to him under his decree. The chancellor refused to grant the order, and petitioners now apply for a writ of *mandamus* to compel him to do so.

Roquemore, White & McKenzie, for petitioners. *Bruckel, Semple & Gunter*, for respondent.

MCCLELLAN, J. We are unable to concur with counsel who appear against the application, that money paid on and in obedience to a decree of the chancery court can, in any case, be said to be paid voluntarily, in such sort as to preclude its recovery in the event of a reversal of the decree. We understand the law to be settled to the contrary. *Cahaba v. Burnett*, 34 Ala. 400, 407; *Knox v. Abercrombie*, 11 Ala. 997; *Insurance Co. v. Stewart*, 95 Ind. 588; *Wright v. Aldrich*, 60 N. H. 161; *Hollingsworth v. Stone*, 90 Ind. 244; *Scholey v. Halsey*, 72 N. Y. 578; *Hiler v. Hiler*, 35 Ohio St. 645.

We can conceive of no case in which a party, who pays money on a decree which is subsequently reversed, is not entitled to have restitution of what he has paid, and to be thus reinstated in the position, and to all the rights he had prior to the rendition of the erroneous decree. It is not material what those rights were, or would probably, or even certainly and necessarily, be determined to be in the further progress of the litigation. He is entitled to have his final equities adjudicated while he yet occupies whatever vantage ground was his in the inception of the contest and from that standpoint to invoke the judgment of the law on the issues he presents.

When he asks, after the reversal of a decree, which has erroneously adjudged his rights and disturbed his relations in the case, to have his original *status* restored, it is no answer to his petition to say that, on a final hearing of the cause, it will again be decreed that he pay that of which he now seeks restitution. To so hold would be to prejudice the case; to decide in advance of the submission of the issues on pleading and proof that the party who has been put at a disadvantage by the execution of a wrongful decree, though properly before the court, is not entitled to any relief in the cause. On the other hand, we are unable to see any predicate for the claim of the other party to retain what, confessedly, he has wrongfully received. He had no right to the money involved in the litigation, in contemplation of law, until there should be a correct determination of the matters in dispute, however clear his rights may have been in point of fact. He, therefore, proceeds with the cause, having an undue advantage of his adversary, and is in fact in the attitude of having gained what he claimed before his right to it had or could have been determined. We entertain no doubt, therefore, of the absolute right to have restitution made on the one hand, and the absolute correlative

duty to make restitution on the other, wholly regardless of considerations looking to the final equities of the parties. *Freem. Judgm. § 482; Freem. Ex'ns, § 347; Bank of U. S. v. Bank of Washington*, 6 Pet. 16, 17; *Marks v. Cowles*, 61 Ala. 303.

This case is clearly distinguishable from *McCreeliss v. Hinkle*, 17 Ala. 459, and *Tarleton v. Goldthwaite*, 23 Ala. 346, in which the question arose on a motion to dismiss the appeals taken by the parties, who had received satisfaction of decrees in their favor from which the appeals were taken. There had been no ascertainment that the decrees were erroneous. They had not been reversed. It did not appear but that, under those decrees, the parties would be entitled to all they had received; and hence the court declined to dismiss the appeals, and proceeded to hear them on their merits. Here there is no decree. The judgment of reversal has expunged it; and the right of the parties are similar to those passed on in the cases of *Hall v. Hrabrowski*, 9 Ala. 278, and *Bradford v. Bush*, 10 Ala. 274.

That the chancellor before whom the cause is pending has the power to make an order for restitution in such case is not controverted. The parties are before him, and in and about and in the conduct of that cause they are subject to his control. The facts which constitute the only predicate for such an order—a decree, payment under it, and its reversal—are a part of the cause itself. There can be no dispute or mistake about them. On them the order for restitution goes as a matter of course. It does not involve the exercise of judicial functions. There is no remedy for the refusal to grant the order except *mandamus*. Our opinion is that *mandamus* is the proper remedy; and the writ will be awarded in this case, to be issued only on the further application of petitioners' counsel, if restitution, or an order therefor, is not made in the court below upon advice of our conclusion.

McMURTRAY v. LOUISVILLE, N. O. & T. RY. CO.
(*Supreme Court of Mississippi*, April 21, 1890.)

RAILROAD COMPANIES—INJURY TO PERSON BOARDING TRAIN.

1. In an action against a railroad company for personal injuries, the evidence showed that plaintiff, a man of 65, on a dark and cold night, after waiting in the snow and becoming benumbed, attempted to board a moving train; that, with a valise in one hand, he seized the railing with the other, and attempted to leap upon the platform, but missed his footing, and was dragged 150 yards, during which time he held onto the valise. Held, that plaintiff was guilty of such contributory negligence that he could not recover.

2. In such case the fact that defendant's train did not stop a reasonable time, so as to allow plaintiff to get on, does not render defendant liable.

3. Where the contributory negligence of plaintiff is shown by his own proof, it is no ground of objection that defendant did not specially plead and prove it.

Appeal from circuit court, Warren county; RALPH NORTH, Judge.

Action by William McMurtray against the Louisville, New Orleans & Texas Railway Company for personal injuries. The court directed a verdict for defendant, and

from a judgment entered thereon plaintiff appeals.

Dabney, McCabe & Anderson, for appellant. *Murray F. Smith*, for appellee.

WOODS, C. J. To the declaration filed by plaintiff in the court below the plea of the general issue was interposed. After plaintiff had introduced all his evidence and rested, the defendant corporation moved to exclude all the evidence from the consideration of the jury because the evidence neither proved nor tended to prove liability on the part of defendant, and asked the court to instruct the jury to find for defendant, which was thereupon done. This action of the court was based upon the idea that all the evidence, taken together, showed conclusively that there had been such contributory negligence upon the part of plaintiff as to demonstrate that defendant was not liable; that there were no facts either proving or tending to prove liability, (*i. e.*, that the injuries complained of were clearly shown by the facts—the undisputed facts—to have been the result of plaintiff's negligence;) and that hence there was nothing to submit to the determination of a jury, but only a question of law to be settled by the court.

Negligence is a mixed question of law and fact. The court declares what is negligence, and the jury find the facts in the particular case, and report to the court what such facts show upon the question of negligence, viewed in the light of what the court has declared negligence to be. Now in this, as in suits for malicious prosecution and the like cases, where the question is a mixed one of law and fact, it is not only permissible, but in proper cases it is the duty of the court, to assume the responsibility of withdrawing the case from the jury, and of deciding it purely as a legal question. When the evidence neither proves nor tends to prove liability on the part of a defendant, or where the facts shown in evidence, and all the inferences from those facts, make it clear that plaintiff's own negligence produced, or contributed, as the proximate cause, to produce, the injury for which recovery in damages is sought, then and in every such case the question is for the court alone. Says Beach in his work on Contributory Negligence, (page 451,) under the title "Contributory Negligence as Matter of Law:" "What amounts to negligence is, as we have already seen, a question of law. It is for the court to say, in a majority of instances, what is and what is not negligence, as an abstract proposition. When, therefore, the facts of a given case are undisputed, and the inferences or conclusions to be drawn from the facts indisputable; when the standard of duty is fixed and defined, so that a failure to attain it is negligence, beyond cavil,—then contributory negligence is matter of law." Tested by this rule, was the learned judge below warranted in his action in taking the case from the jury, and determining it alone? A proper answer will require an examination of the salient points in the evidence.

We find this state of facts on looking into the record: Appellant was at Hollon-

dale, a station on appellee's line of railway in Washington county, and was desirous of embarking on the first train for Vicksburg. Hollondale was, for all the purposes of this case, a flag station, where tickets were not sold, nor any accommodations furnished intending passengers. The train which appellant desired to take passage on was due to pass Hollondale after nightfall on the 27th day of January, 1889, and was actually flagged down at that station at 11 o'clock that night, and after long waiting by appellant in the cold and darkness of a winter's night; the train being delayed. That while the train was moving, either after having been stopped and again put in motion, or without ever having stopped at all, appellant endeavored to get upon the train under these circumstances. *viz.*: The night was cold, very dark, and snow was falling rapidly. While the train was in motion, appellant made an effort to enter one of the cars by seizing with what he denominates "a death grip" one of the iron railings inclosing the steps to the car platform, with his left hand; his right hand being incumbered with a valise, and occupied with the valise for some time after seizing the railing with his left. That a sudden jerk of the train caused appellant to miss the platform step, and lose his balance. That he clung to the railing with his left hand, holding his valise in his right, and was jerked and dragged on his feet and legs over the ends of the projecting cross-ties with constantly increasing rapidity, by reason of the constantly accelerated speed of the moving train. That, after being dragged thus some distance, appellant gave his valise to a porter, and endeavored, by then seizing the railings with both hands, to raise himself up, and plant himself upon the steps, but was unable to do so; and finally, despairing of getting aboard the train, he pushed himself off, and fell on the cross-ties of an adjacent switch, and so received the injuries complained of. The distance over which appellant was dragged was 150 yards; and from first to last appellant was directed by the porter to turn loose his grip, and that he only did so at the end of 150 yards.

We have, thus it appears, the case of a man advanced in life,—65 years of age,—and no longer young and active, benumbed with cold by his long waiting without fire on this freezing night, incumbered by a valise carried in his right hand, on a dark night, in the midst of rapidly falling snow, and fully aware of the peril to which he was about to expose himself, undertaking, without known necessity, the always hazardous feat of boarding a moving train. Nay, more, it was the rash effort to make this dangerous attempt by a man thoroughly conscious of the peril he exposed himself to, and yet continuing to incumber himself and deny himself invaluable aid from his right hand by continuing to hold his valise to the last. We have said appellant took, knowingly, the foreseen perils of an ill-advised and extremely dangerous freak of attempting to board a moving train under such circumstances as have just been detailed;

for he says he "laid hold of the hand-rails of the coach with a death grip, as I thought and knew that if I fell there I would be crushed to death in an instant." Shall this appellant, who seized this railing to board a moving train under the most unfavorable circumstances that marked his effort, knowing that a failure to execute his purpose meant instant and horrible death,—shall this appellant be heard to complain that he was improperly treated, and his complaint erroneously disposed of, by the able and accomplished judge who withdrew the case from the jury's consideration, and determined that, as a question of law, the defendant was not liable for an injury directly attributable to the recklessness of the impatient traveler? The conscience and judgment of every enlightened jurist will answer: "No." If impatient travelers will persist in "making leaps at flying trains," and knowingly taking the chances of frightful hurt, or death itself in one of its most horrible forms,—that of being ground into quivering pieces under the wheels of a rushing train,—and disaster befalls, they must understand that the consequences of their madness must be visited upon their own heads.

Indisputably, the train should have been stopped a reasonable time, and for a failure to do so the defendant corporation was guilty of a breach of duty. But that no way affects the legal aspects of this case, as appellant's own evidence presents it. See *Banking Co. v. Letcher*, 69 Ala. 106; *Solomon v. Railroad Co.*, 103 N. Y. 437, 9 N. E. Rep. 430. In the line and in the spirit of the cases of *Bardwell v. Railroad Co.*, 63 Miss. 574, and *Dowell v. Railroad Co.*, 61 Miss. 519, are the views we have herein advanced. The doctrine is not new, and should not be surprising.

The counsel for appellant insists with much earnestness and skill that, for a preliminary error of the court below, which we will now notice, the judgment must be reversed. The contention of counsel is that the defense of contributory negligence is an affirmative one, and was not available for defendant in this case, as it was not set up in a special plea. We think counsel misapprehend. If plaintiff's pleadings and proofs had left the case blank as to his contributory negligence, and it had become necessary for defendant to take the affirmative, and show as a defense plaintiff's contributory negligence, then we suppose it would be the practice to require such defense to be set up under a special plea. But when, as in this case, the contributory negligence is palpably made to appear by all the plaintiff's evidence, we are aware of no rule, nor can we see the reason for any rule, requiring a defendant to either plead or prove such contributory negligence.

Affirmed.

THOMPSON *et al.* v. STATE.

(*Supreme Court of Mississippi*. March 3, 1890.)

FORFEITED RAIL-BOND—JUDGMENT—APPEAL.

1. An absolute judgment may be taken against the sureties alone on a forfeited bail-bond, under Code Miss. § 8043, which provides that judgment

final may be rendered on a forfeited bail-bond on a return of "Not found" to two writs of *scire facias* thereon.

2. Failure to dismiss the suit against the principal before taking final judgment against the sureties cannot be assigned for error on appeal by the latter, under Code Miss. § 1440, which provides that no appellant shall be entitled to a reversal because of an error in the judgment against another not affecting his rights.

Appeal from circuit court, Pike county; J. B. CHRISMAN, Judge.

M. J. Thompson and others were sureties on the bond of one Dr. Thompson to appear to answer an indictment for a misdemeanor. The defendant failing to appear, a forfeiture of his bond was taken, judgment *nisi* entered, and *scire facias* ordered. The writ of *scire facias* was served on the sureties only; and, without dismissing the suit as to the principal, judgment final was entered against the sureties for the penalty of the bond, from which they appeal.

Code Miss. § 1440, cited in opinion, provides: "In no case shall one of several appellants be entitled to a judgment of reversal because of an error in the judgment or decree against another, not affecting his rights." Section 3043 provides that on failure to comply with a bail-bond the court may enter judgment *nisi* against the obligor and his sureties, and issue *scire facias* thereon, and on the return of two writs of *scire facias* "Not found," judgment may be made absolute.

S. E. Packwood, for appellant. T. M. Miller, Atty. Gen., for the State.

COOPER, J. Counsel is mistaken as to the purpose of that clause of section 3043 of the Code which provides that judgment final may be rendered upon a forfeited bail-bond on the return of two writs of *scire facias* "Not found." The provision was not made in tenderness to the sureties, but for the protection of the state, and judgment may be taken against the surety alone. *Saffold v. State*, 60 Miss. 929.

The failure by the district attorney to dismiss the suit against the principal before proceeding to final judgment against the sureties, is not an injury to appellants, and cannot be assigned for error by them. Code, § 1440.

Affirmed.

NEWMAN *et al.* v. BANK OF GREENVILLE *et al.*

(*Supreme Court of Mississippi*. April 21, 1890.)

PLEDGE—RIGHTS OF PLEDGEE—LANDLORD'S LIEN—PRESUMPTION.

1. Where a person, to secure a debt and further advances, pledges and assigns, among other collateral, the note of a third person, secured by a deed of trust, and the note is afterwards satisfied, the pledgee cannot apply the security of the trust-deed to satisfy any part of the pledgee's indebtedness.

2. Where a merchant has in his possession, and sells, cotton on which there is a landlord's lien, and a writ enjoining the sale has been served on him, and it is shown that, a few days before the writ was served, he had notice of the lien, and had possession of the cotton until the day of such service, it will be presumed, in the absence of proof of the exact time of such sale, that it was made after service of the writ.

Appeal and cross-appeal from chancery court, Washington county; W. R. TRIGG, Chancellor.

This cause was in the supreme court at the April term, 1889, and was sent back for a decree in accordance with the opinion then rendered. An account was restated, and a decree rendered, from which this appeal and cross-appeal are prosecuted. A statement of the case appears in the former report, 5 South. Rep. 753.

Phelps & Skinner, for appellants. *Yerger & Percy*, for appellees.

WOODS, C. J. The consideration and determination of the three substantial questions presented by the appeal and cross-appeal herein will finally settle the rights and liabilities of the several parties to this proceeding.

1. Did the court below err in refusing to charge the defendants with the proceeds of 9 bales of cotton, and \$270 in money, received from and on account of Satterwhite? The evidence shows that Moyses, in order to secure certain advances from appellants, in the year 1887 agreed to and did actually deposit certain collaterals with appellants, among which was a note given by Satterwhite for \$250, which note was indorsed by Moyses in blank at or before its deposit with appellants. It appears to us quite satisfactorily, from all the pleadings of appellants and the proofs submitted, that the deposit of Satterwhite's deed of trust with appellants, by which the \$250 note was secured, as well as other sums to be advanced thereafter by Moyses to Satterwhite, was designed only as security for the payment of the note. Collaterals to the amount of \$2,000 were to be deposited by Moyses with appellants, and were in fact so deposited; and this Satterwhite note was one of the collaterals going to make up the \$2,000. Satterwhite's deed of trust secured to appellants the sum named in the note, to-wit, \$250; and to that extent appellants were entitled to assert all the rights of the beneficiary in the deed of trust, but no further. Appellants cannot be heard to maintain that, Satterwhite's note having been fully paid off, the security of his trust-deed shall be used to satisfy any part of the \$2,000, agreed to be secured by collaterals, remaining unpaid, or any other balance due from Moyses to appellants. The action of the chancery court in refusing to charge defendants below with Satterwhite's 9 bales of cotton, and the \$250 in money derived from Satterwhite, meets our approbation.

2. Was the court below correct in decreeing payment by the Goldsmith Cotton & Provision Company of the value of the 3 bales of cotton marked "Sam D. W.," amounting to \$117? The evidence raises a suspicion as to these 3 bales, but it is not, in our opinion, sufficient to enable the court to say that defendants should be charged with this sum; especially in view of the fact that, under the agreement signed by the respective solicitors, this cotton was not embraced in the agreed list, whereby defendants appear to have been absolved from the duty of making any proof on this point. While it is true

that the evidence tends to show that this was Silgo cotton, and subject to complainants' demands, yet we are of opinion that, under the agreement just referred to, the decree in this particular was erroneous.

3. Was the refusal of the court below to charge the Goldsmith Cotton & Provision Company with \$277.96, the proceeds of the 7 bales of cotton sold by said company on January 5, 1887, erroneous? This cotton was in the hands of said company on December 29th, when one of complainants' solicitors gave notice of complainants' lien upon all Silgo cotton. It remained in said company's possession until the 5th day of January following, on which day the writ of injunction sued out by complainants was executed on said company. Whether said 7 bales of cotton were in the hands of said company at the time of the execution of the injunction writ appears to be left in doubt. Goldsmith, the president or manager of the company, testifies to his inability to say whether this cotton was sold before the injunction writ was executed or afterwards, and there is no other evidence on this point. This branch of the case is readily resolvable by a well-known elementary rule of evidence, viz., the legal presumption of the continuance of a state of things, once established by proof, as at first, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question. Manifestly, the rule may be easily pressed beyond reasonable limits, and the presumption of such continuance will depend largely upon the nature of the subject and circumstances to which it may be desired to be applied. In this case the 7 bales of cotton were in this defendant's possession on December 29th, when he had notice given of complainants' lien; and they so continued until January 5th following, on which day the injunction writ was served. In the absence of any evidence from the Goldsmith Company as to when this cotton was sold, whether before or after service of the writ, (a most important fact, peculiarly, not to say wholly, within said company's knowledge,) this seems to us an appropriate subject, under appropriate circumstances, to which to apply the rule that the possession must be presumed to have continued up to the hour of the execution of the writ; and, applying this rule in this case, we conclude that the decree of the court below should have charged the Goldsmith Company with \$277.96, the proceeds of said 7 bales of cotton thus presumptively shown to have been in its possession at the time the writ was executed. Decree of court below reversed, and final decree here, in accordance with this opinion.

HODGES *et ux.* v. HICKEY.

(*Supreme Court of Mississippi*. April 21, 1890.)

FRAUDULENT CONVEYANCES — HOMESTEAD — MARSHALING SECURITIES.

1. A decree was rendered enforcing a vendor's lien on a house and lot belonging to defendant's wife, and defendant, acting for her, borrowed money from B., P. & Co. to pay the debt, having the

decree assigned to them as security. Being himself indebted to them, and to secure further advances, he also caused his brother-in-law to execute to them a quitclaim deed of land belonging to himself, which he had mortgaged to his brother-in-law for a fictitious debt of \$4,000. Afterwards, on settlement with B., P. & Co., defendant's wife conveyed to them her house and lot, in consideration of all indebtedness of herself and defendant, but the latter then owed them nothing. To reimburse his wife, defendant had B., P. & Co. execute to her a quitclaim deed of his land, and afterwards, learning that the legal title was still in him, executed a deed to his wife, reciting, as consideration therefor, that he had been indebted to his brother-in-law in \$4,000; that B., P. & Co. had taken an assignment of the debt, and that it had been satisfied by the conveyance of his wife to them of her land. *Held*, that defendant's deed to his wife was without consideration, and was fraudulent as against his existing creditors.

2. After the conveyance from B., P. & Co. to defendant's wife, she and defendant moved upon the land and resided there. A creditor of defendant recovered judgment against him, and afterwards the wife, who under the conveyances acquired title to part of the land which was exempt as a homestead, mortgaged the whole tract to secure a debt contracted by her. *Held*, that the judgment creditor of defendant was entitled to have the exempt portion of the land first subjected to satisfaction of the mortgage.

Appeal and cross-appeal from chancery court, Noxubee county; S. EVANS, Chancellor.

A. C. Bogle and W. H. Bogle, for appellants. *Rives & Rives*, for appellee.

COOPER, J. The facts of this case, about which there is practically no controversy, are that, in the year 1872, John D. Hodges was the owner of the lands in controversy. Suit was instituted against him by a creditor, and, fearing the result of the judgment in the cause, he executed a mortgage to his brother-in-law, one Randolph, to secure a large sum of money, (\$4,000,) which he falsely recited to be due him. There was some small amount due Randolph, but he never demanded the execution of the mortgage, and it seems he accepted \$125 in full payment of the debt against Hodges. In 1875 a decree had been rendered in favor of one Phillips, enforcing a vendor's lien against Mrs. Hodges upon a house and lot which he had sold to her for about the sum of \$1,362 of principal, interest, and costs of court. Phillips was pressing for payment, and Hodges, acting for his wife, applied to Bush, Patty & Co. to pay off the debt to Phillips, and to take as security a transfer of the decree against Mrs. Hodges. Hodges was at the same time indebted to Bush, Patty & Co., and desired to secure further advances from them. It was thereupon agreed between the parties that Bush, Patty & Co. should pay Phillips, and take an assignment of his decree; that Hodges should procure a transfer to them of the mortgage held by Randolph, (not of the debt it secured,) which should stand as security for the sum then due, and for such other sums as they should advance to Hodges. In conformity with this contract, Hodges procured Randolph to execute a quitclaim deed to Bush, Patty & Co. of the lands in controversy. On the credit of the security thus supposed to be afforded, Bush, Patty & Co. advanced money from time to time to Hodges, and Hodges

made payments from time to time. The rate of interest charged by Bush, Patty & Co. was from 1½ to 2½ per cent. per month. All payments made to Bush, Patty & Co. were made by Hodges, and nothing seems to have been paid by Mrs. Hodges, either of principal or interest, on account of her debt to them. In December, 1879, a settlement was agreed on by the parties, whereby Mrs. Hodges was to convey to Bush, Patty & Co. her house and lot in full discharge of their debt against herself and Hodges, and Hodges was to cause title to the lands in controversy to be vested in her. Accordingly, Mrs. Hodges conveyed her lot to Bush, Patty & Co., and they, for the purpose of vesting title in her of the lands in controversy, executed a quitclaim conveyance thereof to her. The mortgage to Randolph, the quitclaim from him to Bush, Patty & Co., and their quitclaim to Mrs. Hodges, were each severally recorded soon after execution. After this settlement, and the conveyance executed under it, Mr. and Mrs. Hodges removed upon the lands in controversy, where they have since resided. In 1885, Hickey, in faith of the ownership by Mr. Hodges of the lands in controversy, loaned to him the sum of \$500, taking no other security therefor than Hodges' note. This note was not paid at maturity, and in the year 1887 Hickey instituted suit upon it. A few days before the rendition of the judgment in that suit Hodges consulted an attorney, and was advised that the legal title to the lands in controversy had never passed from him; whereupon he executed a conveyance to Mrs. Hodges, which was recorded before the rendition of the judgment in favor of Hickey. After Hickey had recovered his judgment, Mrs. Hodges executed a mortgage upon a part of the lands to secure a debt of \$400 contracted by her with J. W. Patty. It is conceded by Hickey that Patty is a mortgagee for value without notice, and is entitled to priority of payment. The consideration recited in the conveyance from Randolph to Bush, Patty & Co. is \$4,000, paid by them to him. The consideration recited in the conveyance from Bush, Patty & Co. to Mrs. Hodges is the payment by her of the Phillips decree and costs, by the transfer of her house and lot in satisfaction thereof. The conveyance from Mr. Hodges to his wife recites that he was in the year 1872 indebted to Randolph in the sum of \$4,000, which indebtedness Randolph transferred to Bush, Patty & Co., and that Mrs. Hodges had by agreement between the parties paid and satisfied this indebtedness to Bush, Patty & Co., upon their agreement and that of Hodges to convey to her said lands; that Bush, Patty & Co. made conveyance thereof, but that Hodges had inadvertently omitted so to do, and executed the deed then made in pursuance of the former contract.

The court below held the conveyance from Hodges to his wife fraudulent as against Hickey, and she appeals, and assigns such finding for error. Her contention is that she was a purchaser for value of the lands in controversy at a time when her husband was not indebted; that there is no evidence tending to show that Hodges

then intended to defraud subsequent creditors, or, if there is, that nothing is shown from which knowledge of such intent can be imputed to her; that she relied upon Hodges to cause proper conveyance of the land to be made to her, and supposed that the deed from Bush, Patty & Co. vested title in her; that Hodges is estopped to deny the sufficiency of that conveyance to vest title in her, and, because he is estopped, so also should be his creditors who claim through his rights to the land; that a court of equity would have compelled Hodges to make a deed vesting his title in her, and, since he was under this equitable duty, and she had the equitable right to a deed, the conveyance he did make is valid, even though he was impelled to execute it by the suit of Hickey, and even though his purpose was to prevent Hickey from subjecting the land to the satisfaction of his debt.

The argument of appellants' counsel commands our admiration, but, unfortunately for his client, her case does not disclose the essential fact necessary for its support, viz., that she was a purchaser for value. The conveyance executed to her by her husband recites as its consideration the payment by her of the debt secured to Randolph by the mortgage of 1872. The testimony shows beyond doubt that the debt to Randolph was, except to a small sum, fictitious; that on settlement between the parties Randolph received from Hodges \$125 in full discharge of all demands; and afterwards, at Hodges instance, executed a quitclaim deed to Bush, Patty & Co. Going a step back, to the deed executed by Bush, Patty & Co. to her, we find the consideration stated to be the payment of her debt to them. There is nothing in either deed suggesting that Hodges owed Bush, Patty & Co. anything except the debt of \$4,000 originally pretended to be owing to Randolph, and transferred to them, but which it is conclusively shown by extraneous evidence was never paid by them, or intended to be transferred to them. Hodges testifies that he never contracted to cause said debt to be assigned by Randolph; that he would not have been willing that such transfer should be made, since he would have feared to put himself in the power of Bush, Patty & Co. There is nothing in the record tending to show that the parties, or any one of them, ever contemplated or relied upon a transfer of this simulated debt. The extent of their purpose and understanding was that Randolph should convey the legal title to the land to Bush, Patty & Co. as a mortgage to secure to them the payment of the debt then due them by Hodges, or such as he should thereafter owe them.

The consideration recited in the conveyance from Hodges having been shown to be false, Mrs. Hodges is permitted to show some other valuable consideration for the conveyance made to her. *Leach v. Shelby*, 58 Miss. 681. The consideration of one of the deeds is shown to be false, and that of the other (the one from Bush, Patty & Co.) is denied to be true by Mrs. Hodges. Conceding to her, for the purposes of this investigation, the right to attack the consideration expressed in the deed from

Hodges, the burden of establishing the existence of the real consideration clearly rested upon her, and this burden she has failed to meet. Viewing the testimony most strongly for her, it only suggests the possibility that, at the date of the settlement with Bush, Patty & Co., Hodges owed them some small sum. The evidence of the persons who should have known the facts (Mr. Hodges, the members of the firm, and their book-keeper) is exceedingly indefinite and inconclusive. But Hodges produced an account rendered to him in January, 1879, by Bush, Patty & Co., (and no transactions are shown to have been had after that date,) and it appears in evidence that the rate of interest charged by that firm was from 2½ per cent. per month on short loans, and 1½ per cent. on loans running through long time. We have gone through this account, and charged Hodges with all the items of debits, (except the sum advanced to pay off the Phillips decree,) and with interest thereon at 2½ per cent. per month, and credit him with all payments made. Thus examining the account, it appears that Hodges had overpaid his part of the account in January, 1879 by something over \$40. The balance claimed by Bush, Patty & Co. as then due them evidently consisted alone of the debt against Mrs. Hodges and interest thereon. Whether interest be calculated on her debt at 2½ per cent., or at the lower rate of 1½ per cent., per month, she owed, according to the course of business, more than the sum claimed. The account thus examined not only fails to show that Mrs. Hodges paid to Bush, Patty & Co. any sum due by her husband to them, but it is made to appear that his debt had been overpaid, and that she owed the entire balance of account. It is needless to observe that payment of her own debt with her own property could not furnish a consideration for the conveyance to her by her husband of his estate. These facts being found, it follows as a consequence that Mrs. Hodges occupied the position of a mere volunteer, to whom her husband had promised to cause his land to be transferred, which he attempted to do by procuring Bush, Patty & Co., who had no title thereto, to execute a conveyance to her. No court would have decreed the specific performance of this promise, and no obligation, legal or equitable, rested upon Hodges to perform it. The conveyance executed by him is therefore to be treated as voluntary, and as such it is *prima facie* fraudulent as to his then existing creditors. *Cock v. Oakley*, 50 Miss. 628; *Willis v. Gattman*, 53 Miss. 721. The decree of the court below, in so far as it declared the conveyance to Mrs. Hodges to be fraudulent, is correct, and must be affirmed.

The cross-appeal of Hickey is taken to the action of the chancellor in holding that the homestead exemption in the lands sought to be subjected was first to be set off, the remainder sold, and from the proceeds of such sale that Patty was to be first paid, and the remainder, if any, applied to the payment of complainant's debt. In other words, because the court failed to marshal the securities, and exclude Patty from participation in the proceeds of the

lands other than the homestead, until he should first have exhausted the security of the lands constituting the homestead. It is first to be observed that the complainant does not by his bill specifically ask the court for the relief the refusal to grant which is the ground of his cross-appeal. The bill seeks a sale of the entire tract of land, and, recognizing the priority of Patty's right, asks that his debt be first paid out of the proceeds of sale, and then that the remaining fund be applied to complainant's debt. But it is also to be observed that the answer of the defendants does not set up a claim to the homestead exemption. The possession of Mrs. Hodges is averred in the answer, but the purpose of the averment was to show possession by her under an equitable claim at the time when Hodges borrowed the money from Hickey, and not for the purpose of founding on it a claim that it was when the conveyance was made to her the homestead of Hodges, and therefore not the subject of a fraudulent conveyance. The parties and the court seem to have dealt with the case as made by the evidence, regardless of the issues presented by the pleadings. Ordinarily the cross-appellant could not assign for error the refusal of the court to grant relief he did not ask, but since in this case relief according to the prayer of the bill would have included, or have rendered unnecessary the special relief now claimed, and since the defendant has secured a diminution of the general relief prayed on her testimony alone, and not upon her pleadings, we will examine the question presented, and determine it without regard to the defect of the pleadings. If the decree is erroneous in this respect, the defendant has secured an exemption from some portion of the relief asked by complainant, and to which he is entitled, and, though it may not be the specific error assigned by cross-appellant, it amounts to the same thing. "The rules by which courts of equity adjust the rights of parties in cases like this are variant, and seem to depend on the peculiar circumstances of each case, the principle being that justice shall be done according to the view taken of the relative positions and rights of the parties." CAMPBELL, J., in *Hester v. Thomson*, 58 Miss. 119. Relief not expressly prayed may be granted, where rendered necessary by the course of litigation, resulting from a claim asserted and secured by the defendant.

We have found the conveyance from Hodges to his wife to be fraudulent and void as against Hickey. But it appears in evidence that a part of the land conveyed was at the time the homestead of Hodges, and because it was the creditor had no right to subject it to his debt; and because he could not subject it he cannot attack the conveyance thereto as fraudulent. As to this land, Mrs. Hodges is the owner, and her title cannot be assailed by the complainant. It is a mistake to suppose, as has been sometimes suggested, that a court of equity, in proceedings to subject property fraudulently conveyed, cancels the fraudulent conveyance so as to revest title in the fraudulent grantor. This it does not do, but leaves the title where it has

been placed by the parties, except in so far as the superior right of the creditor requires that it should be vacated. As to the exempt property the creditor has no right, and, however corrupt may have been the intent of the grantor, the conveyance is not fraudulent in law, for the law deals only with those frauds by which the rights of others are affected. The conveyance from Hodges to his wife conferred upon her an unimpeachable title to the homestead exemption, but the land other than the homestead she held as trustee *ex maleficio* for the creditors of her grantor, to the extent that they might be necessary for the payment of claims against him. If the conveyance were to be absolutely canceled and annulled, we could not assent to the right of the creditor to compel the mortgages of the whole to subject, first, the homestead exemption to the payment of the mortgage debt, in order that the non-exempt portion might be exonerated in favor of other creditors. To do this would be to extend a mortgage given by the exemptionist upon the exempt property, as security for other debts for which he did not intend to bind it. The rule of marshaling securities is never enforced by courts of equity where to do so would be unjust to the debtor. *Dickson v. Chorn*, 6 Iowa, 19. But, since the court does not cancel the conveyance, nor revest title in the grantor, but leaves the title as fixed by the parties, except in so far as the right of the creditor requires it to be impressed with the trust in his favor, we are of opinion that the complainant was entitled to require a sale of that portion of the lands which, when owned by Hodges, constituted his homestead for the payment of debt due to Patty, to the end that the remainder may be applied to his debt. The fact that it was exempt, and therefore not liable to be subjected to his creditors, gave validity to the voluntary transfer of it to his wife; but the influence of this fact terminated with the sale, and neither extended nor limited the power which Mrs. Hodges as owner could thereafter exercise over it. It was her property, absolutely and unconditionally, just as though it had never come to her from her husband. The nature of her right to the exempt and non-exempt portions is not influenced by the fact that both passed by the same conveyance, or that both were conveyed by her husband. As to one, she was owner; as to the other, she was trustee for the creditors of her husband. Holding a part of the land as such trustee, she has for purposes of her own incumbered the whole, and by the decree she has secured has exonerated that part which she owned and had a right to incumber, and by operating that with which, as against the complainant, she had no right to deal, and has therefore secured a benefit from her own wrong, at the expense of complainant. If we look at the land as the debtor to Patty, it becomes clear that, as between the two tracts, the exempt and non-exempt, the first is, in the view of a court of equity, the principal debtor, and the other a mere surety. The money raised by the mortgage was borrowed by the owner of the exempt portion, and she committed a fraud upon those hav-

ing a right to resort to the remainder for the payment of their debts by including it in the mortgage. We recognize the rule that a court of equity will only marshal securities where the creditors are creditors of the same debtor, but it is subject to the exception that, where independent equities exist, from which there arises a duty on the part of one to pay in exoneration of another, the court will enforce it by subjecting the fund of the principal debtor. *Ex parte Kendall*, 17 Ves. 520; *Dorr v. Shaw*, 4 Johns. Ch. 17.

The decree is reversed on the cross-appeal of Hickey, and cause remanded.

MARKS *et al.* v. McELROY.

(*Supreme Court of Mississippi*, April 21, 1890.)

INFANCY—DISABILITIES—JURISDICTION.

The power conferred by the Code of Mississippi on courts of chancery to remove the disabilities of minors is a special statutory power, not judicial; and a decree removing such disability is not admissible in evidence, in a suit against a minor for goods furnished her, until it is shown that the court acquired jurisdiction to render it.

Appeal from circuit court, Lauderdale county; S. H. TERRAL, Judge.

J. S. Hamm and R. F. Cochran, for appellants. Witherspoon & Witherspoon, for appellee.

COOPER, J. Appellants sued Mrs. McElroy to recover on an account for goods sold to her before her marriage. She pleaded infancy, to which the plaintiffs replied that, before the purchase by her of the goods for the price of which suit was brought, her disabilities of infancy had been removed by a decree of the chancery court of Hinds county. To this the defendant rejoined by a general denial. On the trial the plaintiffs offered in evidence the decree alone of the chancery court, to which the defendant objected because it was not shown by said decree, or otherwise, that the chancery court of Hinds county had acquired jurisdiction of defendant to make said decree. The objection was sustained, and the decree excluded. The assignment of error raises no other question than the action of the court in this ruling.

The evidence was properly excluded. The rules of presumption which are applied in reference to judgments or decrees of courts brought collaterally into review, are: (1) Where a court of general jurisdiction,—a court of record,—acting within the scope of its ordinary power, renders judgments or decrees, such judgments or decrees will be presumed to be in accordance with its jurisdiction; (2) courts of limited jurisdiction—courts not of record—are presumed to have no jurisdiction other than that shown to exist; (3) courts of record exercising special powers conferred by statute in derogation of the common law, and proceeding according to the statute and not according to the course of the common law, are, as to their judgments or decrees in such matters, upon the footing of courts not of record. *Freem. Judgm.* §§ 122-124, 132, 517, 521, 525; *Williamson v. Berry*, 8 How. 495; *Thatcher v. Powell*, 6

Wheat, 119; *Pulaski Co. v. Stuart*, 28 Grat. 872; *Skinner v. Moore*, 2 Dev. & B. 138; *Byrd v. State*, 1 How. (Miss.) 163; *Starke v. Gildart*, 4 How. (Miss.) 267; *Carson v. Huntington*, 6 Smedes & M. 111; *Cockerel v. Wynn*, 12 Smedes & M. 117; *Root v. McFerrin*, 37 Miss. 1. The power conferred by our Code upon the chancery court to remove the disabilities of minors is not judicial in its character. It may be exercised by the legislature without the intervention of other authority, or committed to an officer or commission having no judicial authority. The relief sought is private in its character, affecting no right of others. The privilege, and the method of availing of it, are created and defined by the statute; and the proceedings are valid only when in conformity to its regulations. Under such circumstances, the court but exercises a statutory power, and it is incumbent upon one relying upon the decree to show that the court had acquired jurisdiction under the law. No presumption of jurisdiction arises from the mere fact of its exercise. *Lawrence's Case*, 18 Abb. Pr. 347.

The judgment is affirmed.

BAIN v. STATE.

(*Supreme Court of Mississippi*, April 21, 1890.)

PERJURY—COMMITTED UNDER DURESS.

On indictment for perjury on the trial of a criminal case, it is no defense that defendant was induced to testify falsely by threats against his life, made out of court, and some time before the trial.

Appeal from circuit court, Attala county; C. H. CAMPBELL, Judge.

Allen & McCool, for appellant. T. M. Miller, Atty. Gen., for the State.

COOPER, J. The appellant has been indicted and convicted of the offense of perjury. The sole defense attempted to be proved was that appellant's life had been threatened by one Veto Dodds unless he should go into court and testify so as to criminate himself and certain other persons who were suspected of having murdered a negro man and his wife, tenants upon the farm of Dodds. The court below excluded the evidence tendered to show the threats, upon the ground that it was not proposed to be shown that the threats were made at the instant of delivery of the testimony, nor in the presence of the court in which the appellant was testifying. This ruling of the court is the foundation of the errors assigned. The assignments of error other than the first present the same question in different forms.

Counsel for appellant presses upon our attention, with apparent confidence, that numerous class of cases in which the credibility of confessions or of testimony has been assailed and impeached by the circumstances under which the confessing person or witness spoke. We fail to perceive their application to the case at bar, in which the single question is whether a man may justify or excuse deliberate perjury against the life and liberty of others on the ground that he was coerced to the perjury by fears engendered by the threats of others. We are not aware that a sim-

ilar question has ever been presented for decision. We can conceive of cases in which an act criminal in its nature may be committed by one under such circumstances of coercion as to free him from criminality. The impelling danger, however, should be present, imminent, and impending, and not to be avoided. Such was not the character of the duress here; and the appellant was not only possessed of the power and right of protecting himself, but he also could have appealed to the law to shield him from the threatened danger. If Dodds, by whom the threats were made, should attempt to carry them into execution, the appellant might lawfully oppose force to force, and, if necessary, might, in the defense of his person, lawfully slay his assailant; but, if appellant feared the superior strength or courage of Dodds, he might have invoked the protection of the court. The law has made ample provision for the protection of persons and property under precisely the circumstances named by appellant. By section 3126 of the Code it is provided that "whenever complaint is made under oath by a credible person to any justice of the peace that any person has threatened to commit any offense punishable by the laws of this state against the person or property of another, and such justice is satisfied that there is good reason to fear the commission of such offense, he may issue a warrant to arrest and bring the person complained of before him, or some other justice of the peace; and the justice of the peace before whom such person may be brought shall examine into said charge, and, if there be just reason to apprehend that such person will commit the offense, he shall be required by such justice to enter into bond or recognizance in such sum, and with such sureties, and for such time not exceeding twelve months, as said justice may prescribe, conditioned to keep the peace towards the person against whom or whose property there is reason to fear the offense may be committed." If default be made in giving the bond required by the justice, it is provided by section 3128 that the person so failing shall be by the officer committed to jail until the bond be given, or until the expiration of the time for which he was required to furnish such security. The social system would be subverted, and there would be no protection for persons or property, if the fear of man, needlessly and cravenly entertained, should be held to justify or excuse breaches of the criminal laws of the state, and to excuse or justify the crime of perjury. The judgment is affirmed.

GREENVILLE WATER-WORKS CO. v. CITY OF GREENVILLE *et al.*

(*Supreme Court of Mississippi*. April 21, 1890.)

MUNICIPAL CORPORATIONS—SPECIAL CONTRACTS.

In the absence of express statutory authority, a municipal corporation cannot make a permanent and exclusive contract with a water company to build water-works and supply it with water. Such authority cannot be implied from the general power conferred by its charter to contract for the needs of the municipality.

Appeal from chancery court, Washington county; W. R. TRIGG, Chancellor.

The city of Greenville made a contract with the Greenville Water-Works Company to build a system of water-works by a certain time, but the water-works company failed to comply with the contract by the time specified. The city then extended the time allowed by the contract to another date, when the company again made default. The city thereupon canceled the contract, and made a new one with the Delta Water-Works Company. The Greenville Water-Works Company filed its bill to enjoin the other company and the city from carrying out the contract, and prayed for specific performance of its contract by the city. The city's demurrer to the bill was sustained, and the bill dismissed. The Greenville Water-Works Company appeals, and asks the supreme court, in any event, to reverse the decree, and dismiss the bill, without prejudice to any right it may have under the contract. Under its charter the city had the usual powers to contract for the needs of the municipality.

Phelps & Skinner, for appellant. *Campbell & Starling*, for appellees.

COOPER, J. The demurrer was rightly sustained, and complainant's bill dismissed. There is no power given by the charter of the city of Greenville under which the municipal authorities were authorized to enter into a contract by which a monopoly for a long series of years should be given to complainant in supplying water to the municipality and its inhabitants. The complainant does not pretend that there was any express power conferred by the charter, but seeks to infer its existence from the general powers over the subject-matter of the contract. It is not admissible to deduce implied authority of this character from the mere general delegation of the usual power over the subject. Dill. Mun. Corp. §§ 692-697, and authorities there cited. If the refusal of a court of chancery to decree specific performance of the contract relied on is *res adjudicata*, and will preclude complainant from suit at law to recover damages for breach of other stipulations of the contract, (a point we do not decide,) we are unable to perceive any reason for directing a dismissal of the bill without prejudice.

Decree affirmed.

CHIPMAN *et al.* v. STERN *et al.*

(*Supreme Court of Alabama*. April 8, 1890.)

SALE BY INSOLVENT DEBTOR—PREFERRED CREDITOR—FRAUD.

1. A sale by an insolvent debtor to one of his creditors in consideration of his debt, and of the payment by him of debts due some of the other creditors, is valid, if the entire consideration amounts to the fair value of the goods sold, and no benefit is reserved to the debtor.

2. Where the property sold consists of several kinds, the fact that some of it is sold at less than its value does not render the sale fraudulent, if the valuation placed on the other property exceeds its real value, so that the whole market value of all the property together does not exceed the consideration.

8. The fact that the leasehold was not included in the original bill of sale, but was made to appear therein, after its execution and registration, by an alteration by a person other than the purchaser, does not make the sale fraudulent, since such alteration can only affect the validity of the sale as between the parties to it.

Appeal from chancery court, Mobile county: THOMAS W. COLEMAN, Chancellor.

Suit in equity by Stern & Co. against Chipman, Calley & Co. to set aside a sale of goods by A. Curtis & Co. to defendants for fraud. On submission of the cause for final decree on the pleadings and proof, the chancellor decreed that complainants were entitled to the relief prayed, and set aside the sale as fraudulent. Defendants appeal.

M. D. Wickersham and R. P. Deshon, for appellants. Pillans, Torrey & Hanaw, for appellees.

CLOPTON, J. On November 30, 1837, Adam Curtis, a merchant engaged in the retail boot and shoe business in Mobile under the name of "A. Curtis & Co.," sold and transferred his entire property, not claimed as exempt, to Chipman, Calley & Co. Appellees, who were, prior to and at the time of the sale, creditors of A. Curtis & Co., by the bill assail the transaction as fraudulent. The consideration paid was the payment and satisfaction of an indebtedness due by Curtis & Co. to Chipman, Calley & Co., and their promise and agreement to pay debts due by him to other named persons, amounting in the aggregate to \$6,445.43. The transaction was evidenced by three different written instruments,—a bill of sale to the stock of goods, book-accounts, and store fixtures and equipments; an assignment of the leasehold interest in the store-house then occupied by Curtis; and an agreement for the satisfaction and payment of the specified debts. Complainants do not controvert the rule, well settled by repeated decisions of this court, that an insolvent debtor may prefer one or more of his creditors to the exclusion of others, and that an absolute sale of the whole of his property in payment of an antecedent *bona fide* debt, at a reasonably fair price, not reserving or securing to himself any benefit or trust by which he may be benefited, is valid, and will be sustained, whatever may have been his intentions, and whatever notice the preferred creditor may have of such intentions. Neither is the transaction rendered fraudulent by reason of an express stipulation that the purchasing creditor will pay debts due to other specified creditors, and such debts are in fact paid. *Hodges v. Coleman*, 76 Ala. 103; *Levy v. Williams*, 79 Ala. 171; *Rankin v. Vandiver*, 78 Ala. 562.

In the original bill the main attack was made on the alleged grounds that the value of the stock of goods, accounts, and fixtures was greatly in excess of the amount of the indebtedness to Chipman, Calley & Co., and of the debts assumed to be paid, and that a secret understanding existed whereby a benefit was reserved to Curtis. The amendment to the bill specifically charges that the transfer of the leasehold interest was upon a secret consideration to be paid to Curtis, or was without consideration,

and operated to secure a benefit to him, and to put the leasehold beyond the reach of his creditors. The amount and *bona fides* of the debts, the payment of which constituted the consideration price of the property, are not controverted. The amended bill alleges that at the time of, and contemporaneously with, the making of the bill of sale, Curtis, in addition to the goods and other property mentioned therein, sold or transferred to Chipman, Calley & Co. the leasehold interest in the store-house; and the evidence shows that all the written instruments were executed on the same day, and constituted one and the same transaction, and that the property mentioned in the bill of sale and the leasehold were included in the sale. In the trade the stock of goods was estimated at 75 cents on the dollar of the invoice or cost price, the book-accounts at \$250, and the store fixtures and equipments at \$388.08, making an aggregate of \$5,907.43.

Having carefully considered the evidence relating to the value of the property, we are forced to differ with the chancellor as to his conclusion in this regard. The weight to be given to the opinion of witnesses of the value of property depends on their experience in dealing in such property, and their knowledge of its condition. All the witnesses, with one exception, examined on part of complainants as to value, and several examined by defendants, were unacquainted with the stock of goods or its condition. It therefore becomes material to ascertain as nearly as practicable the real condition of the stock at the time of the sale. The evidence shows that part of the stock on hand consisted of goods recovered by Curtis after being burned out, in 1836; that the goods which he purchased prior to March, 1837, had been on hand from 8 to 14 months, sales having been made therefrom which were not replenished, and a portion shop-worn, and the amount of the goods purchased from the 1st of August to the time of the sale was about \$2,000. From the fact that the part of the stock taken by Curtis as exempt was valued by him at 5 per cent. less than the original cost, it is evident that they were selected from the new goods. From the testimony of the witnesses who knew the stock, and of those who examined the portion shipped to Boston, it sufficiently appears that the stock of boots and shoes, at the time of the sale, consisted of several hundred dollars' worth,—about \$900,—which were greatly damaged by fire and water; some worthless. One-half or more of the balance was broken stock, which had not been replenished, and some shop-worn; the remainder being new goods, in the original condition, from which some sales had been made. The hypothesis on which the witnesses who testified that the depreciation in value at the expiration of 14 months' business would not exceed 10 or 15 per cent. was that the stock of boots and shoes had been bought and kept in store in the usual course of trade, with the usual replenishing of the same in consequence of sales; and the hypothesis on which defendants' witnesses based their opinion of the value was the condition of the stock, sub-

stantially as we find it to have been. Generally, the controlling determination of the value of property is what it would sell for in the market; not the depreciation in value, the business being continued. When the witnesses on both sides were asked for what sum the stock would have sold if sold in bulk for cash, they generally agreed that it would not have brought more than 75 cents on the dollar of the original cost.

Also, there were other articles of property included in the sales,—the book-accounts, store fixtures, and leasehold. The sale was an entirety, each kind of property being an integral part. In such case it should not be declared fraudulent because the parties may have placed on one kind of property a valuation materially less than its real value, if the valuation placed on the other kinds of property exceed their real value to such extent that the market value of the entire property does not exceed the consideration paid. The inquiry is, was all the property sold at a reasonably fair price, taken as a whole? It is evident that the store fixtures and equipments were estimated greatly in excess of their value at least \$300. Calley testifies that he estimated, if the loss on the lease did not exceed \$300, his firm would come out fairly well, but that he regarded the value of the leasehold as merely nominal, because the chance of reletting the store for the balance of the year was so unfavorable. This accords with the testimony of the real-estate dealers, who testified that, the time for renting having passed, the leasehold possessed no fixed value, from the fact that whether or not the store could have been rented depended upon contingencies which might or might not arise. On account of the happening of unforeseen contingencies,—a fire, and the change of location of a merchant,—they did realize \$377.50 in addition to two months' occupancy. If the amount thus realized, and its rental value for the time occupied, be estimated as the value of the leasehold, the aggregate value of the whole property sold does not exceed the consideration paid. This conclusion is sustained by the amount of the proceeds realized from the subsequent sales of the property, including the portion of the stock sold by the sheriff.

The inference of reservation of a secret benefit to the debtor is founded mainly on the facts that the leasehold is not mentioned in the bill of sale, or in the agreement as recorded, and in its alleged suppression, both in the pleadings and testimony until the bill was amended. It is insisted that this was done for the purpose of deceiving the other creditors of Curtis, and that the debts agreed to be paid were used to cover and hide out the leasehold interest. Allusion may here be made to the controversy which arose during the progress of the cause respecting the time when an alteration was made, by the erasure of the word "in," substituting "and," so that it reads, "the fixtures and equipments of every kind belonging to him, and said store," instead of "in said store," as it was originally written and recorded. If

admitted that the alteration was made after the agreement was signed and recorded, the rights of Chipman, Calley & Co. do not necessarily depend upon the ascertainment of the time of the alteration. It could affect the validity of the agreement only as between the parties to it; and, as Chipman, Calley & Co. did not know and had nothing to do with it, it cannot operate to taint with fraud a previous transaction free therefrom when made. It may, however, be regarded a circumstance bearing on the *bona fides* of the transaction, to be considered in connection with other circumstances proved. Did the record sustain the contention of counsel that, up to the time of the amendment of the original bill, nothing in the testimony or papers filed in the cause indicated that the transfer of the leasehold interest was included in the agreement to sell, or that such transfer was contemplated, and that Calley and Curtis are silent in their depositions first taken on the subject of the leasehold, or any transaction in reference to the lease, this would authorize the inference of intentional concealment. But this contention is founded in a misapprehension of the pleadings and the testimony, unless it is intended to be confined to the written agreement. On examination of the original bill, we find that it alleges that Johnson claimed to be in possession of the stock of goods and the store as the agent of Chipman, Calley & Co., and was carrying on the business; and the agreement attached to the answer of Curtis shows that the notes given by him for the rent of the store, amounting to \$750, constituted a part of the debts agreed to be paid by them. Possession and continued occupation, in connection with an agreement to pay the rent for the entire year, only one month of which had then expired, would seem to indicate the acquisition of the lease. The bill was amended on April 28, 1888. On the day preceding, the deposition of Calley first taken was published. In this deposition he states that his firm occupied the store after the purchase until they discontinued business,—about two months,—and made every possible effort to relet it, which they eventually succeeded in doing. Also, in answer to an interrogatory propounded on his cross-examination, he states that they took a lease of the store November 30, 1887, from Curtis. In Curtis' first deposition, taken on oral examination, March 13, 1888, after giving a general statement of the transaction, and after saying that Chipman, Calley & Co. assumed the payment of the rent, he states that he transferred the lease to them. From the examination of these witnesses it appears that the parties considered the lease of the store to be an issue. At least the witnesses were not silent in reference to it. We shall not decide at what time the alteration of the agreement was made, but simply remark that it does not appear to have been made for any purpose other than to make the agreement conform to the real transaction. The recitals of the bill of sale and agreement, as we construe them, are not untrue. They speak the truth so far as they go, but not the whole

truth; for the evidence leaves no room for doubt, that the leasehold was included in the sale, and the amended bill so avers. The arrangement by which the lease was assigned by indorsement thereon, a bill of sale to the store and fixtures executed, and an agreement between the parties specifying the debts which Chipman, Calley & Co. were to pay, seems simple and natural.

In *Carter v. Coleman*, 84 Ala. 256, 4 South. Rep. 151, it is said: "So long as the law allows a falling debtor to prefer some of his creditors at the expense of others, it permits, if it does not invite, a race of diligence. The points of inquiry in such transaction are the *bona fides* and sufficiency of the consideration, and the question of benefit, open or secret, reserved or secured to the paying debtor. If the contract be unassailable at these points of attack, it is impregnable." We have shown that the value of the whole property, whether determined by the evidence or the actual proceeds realized subsequently, did not exceed the consideration paid. Chipman, Calley & Co. have either paid the debts agreed to be paid by them, or have given their obligations to pay them, and Curtis has been discharged; and, unless we totally disregard the testimony of the witnesses, no benefit was reserved to the debtor. The transaction is unassailable at the points of attack suggested in *Carter v. Coleman*, *supra*.

Reversed and remanded.

WORD V. WORD.

(*Supreme Court of Alabama*. April 14, 1890.)

SURVIVING PARTNER—ADMINISTRATION.

1. A suit against the surviving partner and administrator of his deceased partner for a settlement of the partnership accounts, brought within six months after the grant of administration, cannot be maintained under Code Ala. 1886, § 2263, which provides that "no suit must be commenced against an executor or administrator as such until six months, and no judgment rendered against him as such until eighteen months, after the grant of letters testamentary or of administration."

2. A demurrer to a bill to settle the estate of a person who died without descendants, on the ground that it does not state whether there are other collateral relations than the one sued, will be sustained, since all collateral relations are necessary parties to such proceeding, under Code Ala. 1886, §§ 1915, 1917, 1919, 1924, relating to the distribution of estates among collateral relations.

3. It is the duty of a surviving partner to take an account of stock, and keep a record of all sales of the partnership effects, and if he fails to do so, and there is danger of loss to the estate of the deceased, a receiver may be appointed.

Appeal from chancery court, Cherokee county; THOMAS COBBS, Chancellor.

Suit in equity by Belle Word against Charles P. Word, administrator and surviving partner of Samuel P. Word, for a settlement of the estate. Code Ala. 1886, § 2263, provides that "no suit must be commenced against an executor or administrator, as such, until six months, and no judgment rendered against him as such until eighteen months, after the grant of letters testamentary or of administration.

Matthews & Daniel, for appellant.

STONE, C. J. Word Bros., composed of Samuel P. and Charles P. Word, were mer-

chants, copartners. The firm was dissolved by the death, intestate, of Samuel P., in November, 1888. After 40 days, Charles P. Word was appointed administrator of Samuel P.'s estate. Belle Word is the surviving widow of Samuel P., but he left no descendants. If he left brothers and sisters or their descendants, other than the said Charles P., the record does not inform us of it. It is silent on the subject of such collateral relations.

The present bill was filed by Belle Word, March 15, 1889, about four months after the death of her husband, and it makes Charles P. sole defendant, suing him both as an individual and as administrator of Samuel P. It avers that the firm owed no debts, and its purpose, as shown by the prayer, is to obtain a settlement of the partnership accounts between the partners, and to have Charles P. account for and pay over the share of Samuel P., his deceased copartner. There is no other specific prayer for relief, and no prayer for injunction or other restraining order. The defendant demurred to the bill, assigning many grounds, and pleaded that the suit was prematurely brought, being instituted within less than six months after the grant of administration. Code 1886, § 2263. The chancellor overruled most of the grounds of demurrer to the bill, and sustained a demurrer to the plea. From those rulings the present appeal is prosecuted.

Framed, as the present bill is, for a settlement of the partnership, suit was prematurely brought, and the plea ought to have been sustained. There is an additional phase of this question. Mrs. Belle Word claims as surviving widow and distributee of her deceased husband, and she cannot compel the administrator, against his consent, to settle and distribute that estate, until the expiration of 18 months after his appointment. Carroll v. Richardson, 87 Ala. 605, 6 South. Rep. 342.

The second ground of the demurrer to the bill ought to have been sustained. All the collateral relations entitled to share in the distribution of Samuel P.'s estate were proper and necessary parties; and, if there were none other than complainant and defendant, that fact ought to have been averred. Code 1886, §§ 1915, 1917, 1919, 1924.

The seventh and ninth grounds of demurrer ought to have been sustained. The averments of the bill, in several particulars are not specific enough. If the partnership, interests were equal, (the law presumes they were unless the contrary is averred,) the eighth ground of demurrer is not well taken. If there were any peculiar, exceptional provisions in the agreement of partnership, on which exceptional relief is prayed, they ought to be stated. If the livery stable, its stock and vehicles, were the individual property of Samuel P., then Charles P. had no right to interfere with them as surviving partner. As administrator, however, he could exercise such powers as the statutes confer upon him. And the same remark is applicable to the household and kitchen furniture. The widow's right of exemptions, however, may be asserted in these individual properties, and, if necessary to their comple-

ment, in Samuel P.'s share of the partnership effects, after the debts of the firm are paid. These individual properties, if owned entirely by Samuel P., have nothing to do with the settlement of the partnership account between the partners, unless, after exhausting all the partnership effects, a balance is found due from the estate of Samuel P. to the survivor.

The purpose of the bill is to charge Charles P. Word, as surviving partner, with the partnership effects, to the control of which he succeeded on the death of Samuel P. In this phase of the bill it is only with effects he acquired control of by virtue of his survivorship that he can be held to account. Beyond the security found in any partnership effects that may remain unconverted, the relief, if any be obtained for his maladministration, will be only a decree against him personally. There is nothing in the third ground of demurrer.

The bill charges the defendant with conduct that cannot be justified. Although the law, on the death of his copartner, clothed him with the legal title to the partnership effects, they did not become his in individual right. He took them in trust, and subject to a lien, for the purpose—*First*, of paying all debts of the partnership; and, *second*, of accounting to the estate of his deceased copartner for the share to which it was entitled. *Lindl. Partn. (Amer. Ed.)* bottom pp. 597, 598, 600, 601, 993, 1007. If the survivor neglected to take an account of stock, and fails to keep an account of sales, he does not properly execute the trust the law has cast upon him. And if he is acting thus negligently or faithlessly, and there is danger that the estate of his deceased copartner will suffer by reason of his inability to make good his default,—or, rather, that there is danger that he cannot be compelled to make it good,—then, upon a proper bill, with proper averments and proper prayer for relief, we will not say the effects should not be placed in the hands of a receiver, or the said Charles P. placed under a bond to faithfully account, as the chancellor may deem expedient and necessary. *High, Rec. (2d Ed.)* §§ 476, 477, 489, 490, 493, 531, 532.

In seeking the appointment of a receiver, the rules we have heretofore declared should be carefully conformed to. *Briarfield Iron-Works Co. v. Foster*, 54 Ala. 622; *Hughes v. Hatchett*, 55 Ala. 631; *Weis v. Goetter*, 72 Ala. 259; *Moritz v. Miller*, 87 Ala. 331, 6 South. Rep. 269; *Thompson v. Manufacturing Co.*, 87 Ala. 733, 6 South. Rep. 928; *Dollins v. Lindsey*, ante, 234. Proceedings, such as herein last indicated, may be instituted at any time after the trust is entered upon, provided the conditions exist which authorize the court to interfere with the possession of the surviving partner. Reversed and remanded.

KEMP v. STATE.

(*Supreme Court of Alabama.* April 9, 1890.)

GRAND JURY—IMPANELING—LARCENY—EVIDENCE.

1. Since Acts Ala. 1886-87, pp. 151-153, § 17, providing for the organization of juries, leaves in force all former laws not in conflict therewith, and

makes no provision for the organization of juries on failure of the proper officers to draw and summon them, a special grand jury, in case of such failure, may be summoned by order of the court, under Code Ala. § 4316, which provides that if, through neglect of the proper officers, no grand jury is returned to serve at any term of the court, the court may by a special order direct the sheriff to summon one forthwith.

2. On indictment for the larceny of hogs, there was evidence that the owner of the hogs, hearing two reports of a gun and the squeal of a hog, hurried in the direction of the noise, and on reaching the place heard some one running; that he found two of his hogs dead, one with its throat cut; that defendant was on that morning in the neighborhood, with a gun, on the pretense of duck shooting; that he hastily left the vicinity; that in the evening defendant told the owner he would tell him on Monday who did the shooting; and that on Monday he fled from the county. *Held*, that the evidence was sufficient to go to the jury.

3. Such evidence sufficiently established the *corpus delicti*.

4. Shooting the hogs, and cutting the throat of one of them, was sufficient asportation.

5. Evidence that a third person, who was suspected of the crime, fled from the county soon after it was committed, is inadmissible.

Appeal from circuit court, Sumter county; S. H. SPURR, Judge.

The defendant in this case was indicted for grand larceny in feloniously taking and carrying away a hog, the property of another. In the organization of the grand jury which found the indictment, it appeared to the court that the jury commissioners had not drawn grand and petit juries to serve at that term of the court; and thereupon the court ordered the sheriff to forthwith "summon eighteen persons qualified to serve as grand jurors for this term of the court." Upon such an order the sheriff summoned the number required, and the grand jury was then duly organized as required by law.

The evidence on the part of the state tended to show that the hogs of one White were near Beaver pond, near said White's house; that on the day the hogs were killed the said White was at the house of one Knox, when he heard two reports of a gun, and then heard a hog squeal; that he went in the direction of where the gun was fired with his dogs; that on coming up to the place he heard some one running, but could not see him; that he found two of his hogs dead, and one of them had its throat cut; that defendant was seen that morning with a gun, and was at Beaver pond under the pretense of duck hunting; that he ran out of the swamp of Beaver pond; that his hat was found somewhere near where the hogs were killed; that on the evening of the same day defendant told White that if he would wait until Monday morning, he would then put him on the track of who killed the hogs; and that defendant left the neighborhood, and was arrested in an adjoining county. The evidence in behalf of defendant tended to show that one Lee Jackson, who was with defendant the morning the hogs were killed, was the one who killed them; that, when the gun was fired by Jackson, defendant ran, and dropped his hat, but was afraid to stop and pick it up; and that the reason he ran was that he was afraid some one would think he killed the hogs. On the cross-examination of one of the state's

witnesses, defendant asked where Lee Jackson was. The state objected to this question, and the court sustained the objection; and defendant excepted. The witness was then asked whether said Lee Jackson did not, soon after the killing of the hogs, flee the county. But on objection by the state the court refused to allow this question, whereupon defendant excepted. The good character of defendant was proved.

At the close of the testimony, defendant asked the court to give the following charge: "If the jury believe the evidence, they must find the defendant not guilty." The court refused to give this charge, and defendant excepted.

Altman & Patton, for appellant. *W. L. Martin*, Atty. Gen., for the State.

McCLELLAN, J. By section 17 of an act "to more effectually secure competent and well-qualified jurors in the several counties of this state," (Acts 1886-87, pp. 151-158,) all laws then in force in relation to jurors, their drawing, selecting, or qualification, not in conflict with the provisions of the act, are continued in full force and effect. The act contains no provision for the organization of juries in the event the officers charged with the duty of drawing and selection should fail to perform it, and hence no juries be provided for any term of the circuit court; nor does it contain any provision at all in conflict with section 4316¹ of the Code, which was then in force, and which provides for the organization of special juries by the court itself in the contingency referred to. That section was therefore not repealed by the act of 1887; and under it—no juries having been drawn and summoned by the commissioners, upon whom the duty devolved—the circuit court properly drew, summoned, and organized the grand jury which returned the indictment against the appellant.

The evidence in this case sufficiently establishes the *corpus delicti*. The asportation shown was sufficient. *Croom v. State*, 71 Ala. 14; *Edmonds v. State*, 70 Ala. 8.

There was evidence tending to connect the defendant with the commission of the offense charged. His presence sufficiently near the scene of the crime to have been the author of it, and the fact that he was provided with the means or instrument of the kind with which the act was done, appears in evidence. It further appears that he hastily left the immediate vicinity, impliedly admitted knowledge of the guilty agent, by promising to tell who it was two days afterwards, and that in the mean time he fled the neighborhood and county. This was certainly proper to go to the jury as a basis for an inference of guilt. *Griffin v. State*, 76 Ala. 29. The effect of giving the general charge requested by the defendant would have been to exclude this evidence from the jury, and to deny to them the right to pass on its suf-

ficiency to support conviction. This charge can never be properly given when there is a conflict in the testimony, or when any inference against the party in whose favor it is asked may be legitimately drawn from it. There was no error in refusing the charge. *Paden v. Bellenger*, 87 Ala. 575, 6 South. Rep. 351; *Tabler v. Coal Co.*, 87 Ala. 305, 6 South. Rep. 196.

There was no error in the exclusion of evidence which tended to show that Lee Jackson, a third person, on whom suspicion rested in connection with the offense charged, fled the country soon after the crime was committed. *Smith v. State*, 9 Ala. 990; *Owensby v. State*, 82 Ala. 63, 2 South. Rep. 764.

The judgment of the circuit court is affirmed.

BARNETT V. STATE.

(*Supreme Court of Alabama*. April 9, 1890.)

PERJURY—INDICTMENT.

1. An indictment for perjury which states the substance of the proceeding in which the false testimony was given, the materiality of the testimony, the name of the officer by whom the oath was administered, and that he was authorized to administer it, the fact testified to on which perjury is assigned, and that the testimony was willfully and corruptly false, is sufficient, under Code Ala. 1886, § 3908, prescribing the requisites of an indictment for perjury.

2. On indictment for perjury in testifying falsely before the grand jury during the investigation of a charge against a person for obtaining defendant's signature to a bill of sale under false pretenses, evidence of defendant's testimony in regard to the bill of sale is admissible without producing the instrument.

3. Where a person has testified to his friendship for a witness whose character he is called to impeach, it is competent, on cross-examination, to ask him if he did not once go to arrest the witness with a gun, on a warrant sworn out by himself, since the evidence sought to be elicited tends to contradict his previous testimony.

4. Where the perjury assigned was in defendant's falsely testifying before the grand jury that a person against whom a charge was being investigated had induced him to sign a due-bill by false pretense that it was another paper, and that his signature was wanted only as a witness, defendant cannot justify his testimony on the ground that he gave it under advice of counsel, since the matter involved presented no question of law.

5. Where a person is indicted for perjury in falsely testifying that another person, by false pretenses, obtained his signature to a paper, it is no defense that defendant's signature consisted in making his mark only.

Appeal from city court of Montgomery; *THOMAS M. ARRINGTON*, Judge.

The defendant, Ben Barnett, was indicted, tried, and convicted for perjury. The indictment was in the following words: "The grand jury charge * * * that Ben Barnett, on his examination as a witness before the grand jury of said county, at the February term, 1889, of the city court of Montgomery, duly sworn to testify by Tennent Lomax, solicitor for the county of Montgomery, who had authority to administer such oath, in a case before said grand jury of the state of Alabama against Berry Johnson, for the criminal offense of obtaining the signature of said Ben Barnett by false pretenses, falsely swore that said Berry Johnson obtained his (said Barnett's) signature to a certain

¹ Code Ala. § 4316, provides that if, through neglect of the proper officers, no grand jury is returned to serve at any term of the court, the court may, by a special order, "direct the sheriff forthwith to summon 18 persons qualified to serve as grand jurors; * * * and a jury thus organized is in all respects legal."

bill of sale of two yearlings belonging to said Ben Barnett, by stating to said Barnett that he was signing as a witness to another bill of sale from some person, unknown to said grand jury, to said Berry Johnson, and that he knew nothing of having made a bill of sale of said yearlings to said Johnson; the matter so sworn to being material, and the testimony of said Ben Barnett in relation thereto being willfully and corruptly false, against the peace," etc.

The defendant demurred to this indictment on the following grounds: "(1) Because the indictment fails to state the substance of the proceedings with which the alleged false oath was connected. (2) Because said indictment shows that the testimony alleged to be false was given in a case before the grand jury where no offense was charged. (3) Because said indictment shows that the oath under which the alleged perjury was committed was an extrajudicial oath. (4) Because said indictment does not follow the form prescribed in the Code. (5) Because said indictment fails to show whether the alleged perjury was committed on a trial for a felony or on other proceedings." The court overruled these demurrers, and the defendant thereupon excepted.

On the trial of the case, the state introduced Tennent Lomax as a witness, and he testified that he was solicitor for Montgomery county; that at the February term, 1889, of the city court of Montgomery, he administered an oath to the defendant, as a witness, in a case then being investigated before said grand jury against Berry Johnson, for obtaining the signature of said defendant to a bill of sale by false pretenses. The defendant objected to the introduction of this testimony, on the ground that it was shown that the bill of sale was not produced, or its absence accounted for, before the grand jury, at the time the defendant was examined before said grand jury. The court overruled the objection of the defendant to the introduction of this testimony, and the defendant thereupon excepted. On further examination, the said witness Lomax testified substantially to the facts as alleged in the indictment. The defendant moved to exclude all the testimony of this witness, on the ground that it was not shown that the grand jury had jurisdiction to inquire into said offense. The court overruled his motion, and defendant excepted. The defendant objected, and reserved an exception to the question asked the witness, as shown by the opinion. The defendant undertook to justify his testimony before the grand jury on the advice of counsel, offering to prove that after his attorney had heard the testimony in reference to obtaining his signature to said bill of sale, as produced on a trial before a magistrate, he advised the defendant to prosecute said Johnson. The court refused to allow this testimony to be offered, and the defendant thereupon duly excepted.

Moore & Finley, for appellant. *W. L. Martin*, Atty. Gen., for the State.

McCLELLAN, J. The indictment in this case sufficiently alleges every ingredient of

the crime of perjury. It states the substance of the proceeding in which the false testimony was given; the materiality of the testimony; the name of the officer by whom the oath was administered; and that he was authorized by law to administer the oath; the fact testified to on which perjury is assigned; and that the defendant's testimony in that behalf was willfully and corruptly false. The demurrer was properly overruled. Code 1876, § 4513, Code 1886, § 3908;¹ *Hicks v. State*, 86 Ala. 30, 5 South. Rep. 425; *Williams v. State*, 68 Ala. 551; *Peterson v. State*, 74 Ala. 34; *Davis v. State*, 79 Ala. 20.

The bill of sale about which the defendant testified before the grand jury was presumably in the hands of Johnson, who was being prosecuted for having, by undue means, obtained Barnett's signature to it. It would scarcely be reasonable to require the prosecution to inform Johnson that the paper was needed before the grand jury in order to get an indictment against him, and to require him to produce it, or to expect that he would produce it, for such a purpose. The objections to the testimony of Mr. Lomax, the solicitor, as to what occurred before the grand jury in reference to the paper, on the grounds that it was not produced or its loss accounted for, and that the witness had never seen it, were patently without merit.

Morrill, a witness called to impeach the character of Johnson, a witness for the state, having, on cross-examination, testified that he and Johnson were friendly, it was entirely competent for the prosecution to ask him the further question: If he did not go to arrest Johnson with a shotgun, upon a warrant sworn out by himself? The evidence thus sought to be elicited tended directly to contradict the friendliness deposed to by the witness, and to taint his testimony, as to Johnson's bad character, with the element of personal ill-will, and hence to lessen its weight with the jury. And Morrill having replied that, while he did not swear out the warrant, he did go to arrest Johnson with a gun, along with a special officer, who had the warrant, we see no error in permitting the state to further ask him who this special officer was.

The general rule unquestionably is that the advice of counsel can afford no protection against the punitive consequences of criminal acts. Whatever the rights of a defendant are in respect to the doing of the act charged, they are available to him in defense, whether he was advised of them or not; and no amount of assurance, even from those learned in the law, of the existence of rights in the premises, which in point of fact do not exist, can justify or excuse an act otherwise criminal. The giving of such assurance or advice neither increases nor diminishes criminality in any degree, and evidence of it is

¹ Code Ala. 1886, § 3908, declares that, in an indictment for perjury, it is sufficient to state the substance of the proceedings with which the false oath is connected, the name of the officer before whom the oath was taken, and that he had authority to administer it, with the necessary allegations of the falsity of the matter on which the perjury is assigned.

therefore irrelevant. *Weston v. Com.*, 111 Pa. St. 251, 2 Atl. Rep. 191.

One of the exceptions to the general doctrine is found in those cases of alleged perjury in which the truth or falsity of the matter charged as being willfully and corruptly false is a mixed question of law and fact. If, in such case, the facts are fully and in good faith laid before counsel, and upon them he advises, as a matter of law, that a certain statement may be made which will be the truth, and, acting on this advice, the client swears to the statement believing he has been correctly advised, it cannot be said that his oath is willfully and corruptly false, and hence a charge of perjury cannot be predicated upon it. Instances of this kind usually occur with respect to affidavits the truth of which depend upon some question of law, —as for attachment, where the question is fraud *vel non* in the disposition of property by the debtor, or in a bankrupt's schedule,—and he is wrongly advised that certain property may be omitted, etc. *U. S. v. Conner*, 3 McLean, 573; *Hood v. State*, 44 Ala. 81; *State v. McKinney*, 42 Iowa, 205; *U. S. v. Stanley*, 6 McLean, 409. We do not think the advice offered in evidence in the case at bar comes within the doctrine of the cases cited. The matter testified about was purely one of fact; it involved no question of law. Whether Johnson had induced the defendant to sign the due-bill by the false pretense that it was another paper, and that his signature was wanted only as an attestation to the subscription of the party bound thereby, was a matter affording no room for professional advice. Barnett knew better than the attorney could have known what the real fact was, and no sort of advice based on the assumption of fact, which he knew to be false, could justify or excuse anything he did under it. Moreover, it does not appear in the statement accompanying the offer of this evidence that he ever laid the facts before the attorney, but left him to draw the conclusion upon which the advice proceeded from other sources. A proper showing was not made, and could not, in the nature of things, be made, for the admission of this evidence. It was properly excluded.

The indictment charges that the defendant swore before the grand jury that one Johnson had obtained his signature to a certain bill of sale by false pretenses, and that this statement was false. We are unable to see how Barnett could defend against this prosecution for perjury in respect to that statement by showing that Johnson had not obtained his signature, in that his subscription to the paper was not a "signature," within the terms of the statute. He might as well attempt to rest his defense on the fact that he had not put his hand to the paper at all, or, in other words, that Johnson had not obtained his signature, either by false pretense or otherwise; and in either case he would be in the very anomalous attitude of defending against a charge of perjury by showing that his alleged false statement was false in fact. So that it is wholly immaterial whether the subscription by mark, shown in the testimony, was a

"signature," within the meaning of section 4813 of the Code. Whether it was or not, the defendant is equally guilty. That inquiry would be pertinent if Johnson were on trial for obtaining Barnett's signature by false pretenses, but it is wholly foreign to any issue presented by this record. In response to the arguments of counsel on either hand, it would perhaps be as well to say that we do not doubt but that the offense denounced by section 4813 would be committed by obtaining an unattested signature by mark to a bill of sale by false pretenses, since forgery might be predicated of a bill of sale so signed, and by the terms of that section it is made to extend to all "written instruments the false making of which is forgery." *Bickley v. Keenan*, 60 Ala. 293.

Affirmed.

DUNCAN et al. v. WILLIAMS et al.

(*Supreme Court of Alabama. April 9, 1890.*)

**LIMITATION OF ACTIONS—FRAUDULENT DECREE—
SUIT TO SET ASIDE SALE—PLEADING.**

1. Where the bar of the statute of limitations is completed after the enrollment of a decree and sale of land under it, a bill to set the sale aside on the ground of fraud in the procurement of the decree must allege with precision when and how complainant came to a knowledge of the fraud, and that such a fraud was discovered within one year prior to the filing of the bill, within Code Ala. § 2680.

2. A sale under a decree of foreclosure cannot, after a lapse of 40 years, be attacked for error apparent on the records of the foreclosure proceedings, however flagrant.

Appeal from chancery court, Mobile county; THOMAS W. COLEMAN, Judge.

The bill in this case was filed by the appellants against the appellees, and sought to set aside, and have declared void, several conveyances of land. The facts are set forth at length in the opinion. The bill was demurred to, and respondents moved to dismiss it for want of equity. On submission to the chancellor, he sustained the demurrers, and made a decree dismissing the bill. This decree is appealed from, and assigned as error.

Overall & Bestor, for appellants. *Fielding Vaughan and Pillans, Torrey & Hanaw*, for appellees.

MCCLELLAN, J. There are, apparently, two decrees of the chancery court which stand in the way of the relief sought by the present bill. Each of these decrees was rendered in the year 1841. Each of them purported to foreclose a mortgage on the lands in controversy. Each ordered a sale. Under each a sale was had and confirmed, and a deed executed; and whatever title passed under either of them is now held by the defendants below, appellees here. The bill in this case, which was filed July 6, 1888, more than 46 years after the enrollment of said decrees and the sales under them, can, of course, be maintained at this late day only upon the grounds of fraud in the procurement and rendition of the decrees, and that the facts constituting the fraud have been discovered within one year next before the insti-

tution of the suit. Code, § 2630. It may be admitted, for all the purposes of this appeal, that the bill sufficiently charges fraud, and knowledge of it, on the part of the respondents, to have entitled the complainant to the relief prayed, had the cause of action not passed under the ban of the statute of limitations; and, proceeding upon the case presented with that concession, the pivotal inquiry is whether the cause of action is brought, by appropriate allegation, within the exception to the statute above referred to, which, notwithstanding the bar has been perfected, considered apart from the concealment of fraud, allows one year after the discovery of the fraud in which suit may be brought. Does the bill charge, with the precision and directness which the law requires, that the facts relied on as constituting the fraud were discovered only within one year prior to July 6, 1888. The bill is a very voluminous paper. It alleges transactions which are spread out over nearly a half century. It charges the connection with these transactions, at various points along the line of their development, of a great number of people, many of whom are long since dead. It involves all of these people in the fraudulent purposes and practices, the first tangible result of which was the rendition of the decrees in question, in 1841, and the last development of which was the effort, in 1887, to continue the concealment of the fraud from the complainant. All along throughout these years, covinous intent, resulting in fraudulent acts, is laid against complainant's mother, her step-father, her half-brother and sister, disconnected third persons, with apparently no interests to subserve in defrauding complainant, and against the persons who now claim the property. Yet when the effort is made by the pleader to bring her case within the saving exception to the statute, when it was upon her to aver with precision that the facts constituting the fraud had been discovered within the year, the requirement is attempted to be met by the averment that one single fact, and this a fact which, at most, only tended to show fraud, from among the manifold substantive charges made by the bill. To state the case more concretely, the bill alleges that John J. Springsteel, the father of the complainant, owned the land in controversy as far back as 1838 or 1839, and up to his death, which occurred in February, 1840; that at the time of his death one Earle held a mortgage on the land to secure the payment of \$1,000; that on April 25, 1840, complainant's mother, the widow of Springsteel, paid off this mortgage with money belonging to the estate, and took a paper from Earle evidencing the fact of payment and satisfaction; that, soon after Springsteel's death, one Mudge and Mrs. Springsteel agreed to intermarry, and thereupon they entered into a conspiracy to defraud the complainant, then an infant of tender years, of her patrimony, and, in execution of their fraudulent design, said Mudge, with knowledge of the fact that the Earle mortgage had been satisfied, procured from Earle, who was a brother of Mrs. Springsteel, a power of

attorney to prosecute a bill to foreclose the satisfied mortgage; that this bill was filed in October, 1840, and prosecuted to decree against Mrs. Springsteel and complainant and her brother; that Mudge, while acting for Earle under the power of attorney in prosecuting the suit, was appointed by the court and acted as guardian *ad litem* for the infant defendants; that at the foreclosure sale Mudge became the purchaser, and soon after married Mrs. Springsteel, and lived with her on the land up to his death, which occurred five or six years afterwards; that said foreclosure suit proceeded "almost side by side with another bill, filed by the Planters' & Merchants' Bank and Hunt," to foreclose a mortgage on the land executed in 1835; that said Mudge had arranged with complainants in this latter suit to acquire any title they should get out of that proceeding; that a decree of foreclosure passed in that case, the land was sold under said decree, and bought by Hunt, who subsequently conveyed by quitclaim to Mudge; that Mudge paid nothing, or a nominal sum, for this conveyance, and that whatever he did pay was of funds belonging to the Springsteel estate; that this sale and conveyance passed no title as against complainant, because neither she, nor any one else in possession of the land, was made a party to the proceeding; that Mudge devised the land to complainant's mother for life, with remainder over to her children by Springsteel, of whom only complainant was living, and by himself, of whom there were two; that Mudge and his wife fraudulently concealed from complainant the evidence of the satisfaction of the Earle mortgage, and of a reconveyance of the land to Springsteel by one Fash, to whom it had been conveyed in 1839, by deed absolute in form, to secure the payment of \$1,000, and which original conveyance still stood upon the records; that after Mudge's death this fraudulent concealment was continued by his widow, (complainant's mother) and after her death, in 1881, it was in like manner continued by the son and daughter of Mudge, (half brother and sister to complainant,) until in June, 1888, when complainant broke open a heavy and heavily locked express trunk belonging to her half-brother, and then for the first time discovered and came to a knowledge of these long-concealed papers, and to a knowledge of the facts constituting the frauds by which the two foreclosure suits had been prosecuted to successful issues, and her land had been sold and acquired by said Mudge; that prior to this, however, Price Williams, Sr., through whom the defendants claim, had, with full knowledge of the frauds which had been practiced upon her, by undue means, induced her to sell a one-third undivided interest in the land to him, he inducing her to believe that she had no title except to that extent, and that under the Mudge will; and he also bought the interest of the Mudge children. There are very many other allegations in the bill as to irregularities and errors apparent on the records of the two foreclosure suits, etc.; but the averments we have stated are sufficient for a determination

as to whether "the facts constituting the fraud" are shown to have been discovered within the year of the bill filed.

It appears from the foregoing outline that this discovery made by complainant embraced two papers, and nothing more. One of these was the Fash deed. This was wholly unimportant, in any aspect, for two reasons: *First*, neither the complainant, nor any other party to the cause, claims through or under Fash; and, *second*, he, it is alleged, was a party to the Earle foreclosure suit, made no defense,—being without interest,—and the decree in that case, whether fraudulent or not, was notice to the complainant that he had no title to the land superior to that of her father, which was thereby subjected to sale and passed into Mudge, and hence the fact shown by this deed was a fact which must, in legal contemplation, have been known to complainant long before. The other paper found was the receipt of Earle as of April, 1840, evidencing the payment at that time of the mortgage, which was afterwards foreclosed. This receipt is only *prima facie* evidence of the payment. The payment itself, if conclusively shown, would be only a fact tending to show fraud. The receipt is open to explanation and falsification. But, even if shown to speak the real fact, that fact may be so explained as to deprive it of all probative force in the establishment of the alleged fraud. It is open to proof, notwithstanding the receipt, that the mortgage was not paid, or that the receipt was really intended to evidence the satisfaction of the mortgage by the foreclosure sale of the land, and was incorrectly dated; and, taking the paper as genuine and correct, and conceding the fact to be that the mortgage was then satisfied, it by no means follows that the subsequent foreclosure of the satisfied mortgage by Mudge as attorney for Earle, and Mudge's purchase of the land, was fraudulent. It may well be that Mudge knew nothing of the alleged satisfaction. Indeed, the presumption of law which obtains under the circumstances shown here is against the imputation of fraudulent knowledge, intent, and conduct on his part. *Prevost v. Gratz*, 6 Wheat. 481. In any view of the paper discovered, therefore, it is merely evidence which *prima facie* is sufficient to establish a fact, which fact, when established, tends to show fraud on the part of Mrs. Springsteel and Mudge in the foreclosure proceeding. To hold that the recent discovery of mere evidence like this authorizes the destruction of repose and security with which the statute of limitations envelopes long-past transactions would be the opening up of the most solemn and ancient judgments and decrees upon the discovery of any badge of fraud or suspicious circumstance connected with them; and this, though the very element of suspicion and fraud may be the result of long lapse of time, and derive all its power of impeachment from the death of the parties who knew the facts. We cannot accede to such a doctrine.

The bill should have gone further, and alleged with accuracy and precision when and how the complainant came to acknowledge of the various facts averred as

constituting the fraud of which she complains. To a recovery, it was essential to show not only that the mortgage had been paid, but that Mudge, knowing this fact, had fraudulently conspired and colluded with Mrs. Springsteel to cut off complainant's inheritance. It was also necessary to the relief sought that knowledge of the fraud, and participation in it, on the part of the respondents should be shown. In one aspect of the case, it was also necessary to aver facts constituting the fraud which is charged against the Hunt decree; and admitting, for the sake of argument, that all these facts are alleged, it is nowhere stated in the bill when or how a knowledge of them came to the complainant, and it does not appear but that all these facts, excepting only the *prima facie* evidence of the payment of Earle's mortgage, were known to the complainant more than one year before bill filed. On this state of averment, the chancellor properly held that the case presented was without equity as upon a bill praying relief on the ground of fraud, the facts constituting which had been discovered within the period of the exception quoted. *Gordon v. Ross*, 68 Ala. 363; *James v. James*, 55 Ala. 525.

The bill cannot be maintained at this late day for the irregularities and errors, however flagrant and fatal if seasonably attacked, apparent on the records of the foreclosure proceedings. In support of the regularity and validity of the decrees, and of the title acquired thereby, almost any fact essential to that end, and certainly any fact necessary to supply the defects pointed out here, whether consistent with or contradictory of the record, will, after the lapse of 20 years, be presumed to sustain the validity of the proceeding. *Barnett v. Tarrence*, 23 Ala. 463; *Gantt v. Phillips*, Id. 275; *McArthur v. Carrie*, 32 Ala. 75; *Matthews v. McDade*, 72 Ala. 377.

So far as the relief prayed, or any collateral advantage, as, for instance, the imputation of notice to respondents, is claimed on the theory that the complainant had adverse possession of the land up to the time of the alleged ouster after the death of her mother, the position of appellant is untenable. While it is roundly alleged that complainant has been in adverse possession since the death of her father, the facts stated in the bill very clearly negative such possession. It is shown that Mudge entered in 1842, claiming as a purchaser under two foreclosure decrees, one of which, at least, was rendered in a proceeding directly adverse to the complainant; that he remained in possession till his death; that by his will a life-estate in the land passed into his widow, who held until her death, when complainant and two others took as tenants in common in remainder, as provided in the will. Under these facts, the occupancy or possession of the complainant with the holder of the legal title could not be adverse and hostile to that title. The possession, on the contrary, is referred to the title; and any right or advantage springing from the possession inured to the benefit of Mudge, and those who claim under him. *Scruggs v. Land Co.*, 86 Ala. 173, 5 South. Rep. 440.

The bill was without equity, in any aspect of its averments; and the decree of the chancellor is affirmed.

**CAPITAL CITY WATER CO. v. NATIONAL ME-
TER CO.**

(*Supreme Court of Alabama.* April 16, 1890.)

VERDICT—CURE OF ERRORS.

Plaintiff sued for the price of certain water-meters, and defendant counter-claimed, alleging a breach of warranty and special damages. A demurrer thereto was sustained, but the questions as to warranty and breach thereof were tried under other issues, and a verdict rendered against defendant for the full amount claimed. *Held* conclusive that there was no breach of warranty, and sustaining the demurrer was harmless error.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Jones & Falkner, for appellant. *Brickell, Semple & Gunter*, for appellee.

SOMERVILLE, J. The suit is by the appellee, as plaintiff in the court below, for the price of a number of water-meters sold and delivered to the defendant. One of the counts in the complaint is for a stated account. The only error assigned is the sustaining of the plaintiff's demurrers to the third and fourth pleas filed by the defendant. These pleas each aver a warranty by the vendor that the meters were accurate, durable, and not liable to corrosion. They seek to set off or recoup against the plaintiff's claim special damages, which are averred to have been sustained by the defendant as the proximate result of the breach of said warranty. These damages embrace the alleged value of a large quantity of water which was lost by inaccurate measurement, and the expense incurred in taking these defective meters out and putting other suitable ones in the defendant's water-works. Whether, upon the facts averred in the pleas, the damages claimed are the proximate and natural result of the alleged breach of warranty, we need not decide. It disposes of the case to say that the damages claimed are special; that the record shows, without doubt, that the jury found for the plaintiff the full amount claimed, including both principal and interest; and therefore the judgment is conclusive of the fact that there was no breach of warranty of any kind, as alleged in the pleas. This is obvious in view of the fact that the questions of a warranty or no warranty, and the alleged breach of warranty, were tried under other issues made by the pleadings. And the defendant, having gotten the benefit of such issues, cannot claim to be prejudiced by the court's rulings on the demurrer, however erroneous. *Gilman v. Jones*, 87 Ala. 704, 5 South. Rep. 785, 7 South. Rep. 48; *Calhoun v. Hannan*, 87 Ala. 277, 6 South. Rep. 291. If there were no breach of warranty which would justify the recovery either of nominal or general damages, there could not be any recovery for special damages. The case of *Lunsford v. Dietrich*, 85 Ala. 496, 5 South. Rep. 355, is conclusive of this case on this point, and requires an affirmance of the judgment.

Affirmed.

WESTERN UNION TEL. CO. v. HENDERSON.

(*Supreme Court of Alabama.* April 8, 1890.)

**TELEGRAPH COMPANIES—FAILURE TO DELIVER
MESSAGE—CONDITIONS—EVIDENCE.**

1. In case of a claim for damages against a telegraph company for failure to deliver a message, which is required to be presented in writing within 60 days, the bringing of suit therefor, and service of process, within the time, is equivalent to such presentation.

2. A regulation of a telegraph company, printed on blanks, prescribing limits within which a message will be delivered free, and requiring a deposit to cover delivery charges if the message is to be delivered outside of the limits, is reasonable; and where the person to whom a message is addressed lives outside the prescribed limits, it is incumbent on the sender of the message, who knows of the regulations, to ascertain the fact, and make the required deposit.

3. The illiteracy of the sender is no excuse for his failure to comply with such regulation.

4. In an action for failure to deliver a message within a reasonable time, where the defense is that the person to whom it was addressed lived outside of the free-delivery limits, and that plaintiff (the sender) failed to comply with the regulation of the company requiring a deposit to pay for delivery in such case, the burden is on plaintiff to prove that such person lived within the limits.

5. When the sender of a message has the right to sue a telegraph company for breach of contract in failing to deliver the message, he can also recover damages for mental anguish of which such failure was the proximate cause.

6. In a suit against a telegraph company for failure to deliver a message which, though not repeated, was correctly and without delay transmitted to the office from which it was to be delivered, a regulation of the company limiting its liability for failure to deliver to repeated messages only, has no application.

7. The fact that the business of a telegraph office is insufficient to justify the employment of a separate operator or messenger to deliver messages does not excuse the company from liability for failure to deliver from that office a message which it has elsewhere received for transmission.

8. In an action for failure to deliver a telegram within a reasonable time, where the message was to a doctor, summoning him professionally, evidence on behalf of the telegraph company that the doctor's charges had not been paid, and that it was not his custom to make such visits without prepayment, is inadmissible.

9. In a suit against a telegraph company to recover damages for mental suffering caused by failure to deliver a message, natural utterances or expressions indicative of pain or suffering caused by such failure are competent original evidence.

10. In such suit, evidence as to the financial condition of the telegraph company is inadmissible.

Appeal from circuit court, Mobile county.

Action by Louis Henderson, against the Western Union Telegraph Company, to recover damages for defendant's failure to deliver a telegram within a reasonable time after its receipt. The first plea was the general issue, and the second and fifth pleaded, in bar of the action, that the message was an unrepeatable message.

The general charge given by the court of its own motion, recites the varied contentions of the parties, and is in the following language: "This is an action, brought by the plaintiff against the defendant, to recover damages for not delivering a message which he (the plaintiff) says he sent from St. Elmo to Grand Bay, to Dr. Rohmer, requesting him to come and attend his wife, who was very low. The message is before you. The plaintiff says that the defendant received that message, but failed

to deliver it. If he has proved to your satisfaction that he sent a message to Dr. Rohmer from St. Elmo to Grand Bay, and that it was received at that office, it was the duty of the defendant to deliver it, if Dr. Rohmer was within the delivery limits of that place. The defendant would have to show that he was not within the limits. The burden of proof is on it. It pleads that the law requires the plaintiff to make out a *prima facie* case. If the plaintiff has shown that he sent the message mentioned, and it was received at Grand Bay, (and there is no dispute about that, for it is conceded that he sent the message, and that the message was received at Grand Bay,) it was the duty of the defendant to deliver that message; and, if the plaintiff has proved that it was not delivered within a reasonable time, he has made out a *prima facie* case, and, unless the defendant shows something that would prevent a recovery, the plaintiff is entitled to recover. The defendant says that under this rule the plaintiff cannot recover. The rule reads as follows: "A message to be delivered, specially, beyond the free-delivery limits of the terminal office, and for which the delivery charge is not given in the tariff-book, will be accepted upon the payment or guaranty of an amount sufficient to cover the message tolls and the probable cost of delivery. The words 'report delivery charges,' when the charges are to be paid by the sender, or the words 'delivery charges guaranteed,' when they are to be paid by the addressee, will be inserted in the check of such message, and will be counted and charged for," etc. The defendant says that the plaintiff ought not to recover, because Dr. Rohmer lived more than half a mile from the telegraph office where the telegram was received. The court charges you that this rule is a reasonable one, that the company had a right to make this rule, but it is their duty to make it known. People must have notice of those rules, even if they are reasonable. The defendant must show that the plaintiff, at the time he sent this message, knew of that rule, and that he failed to comply with it. He has to prove this to your satisfaction. * * * The plaintiff has introduced evidence about the distance between Dr. Rohmer's house and this telegraph office, and the defendant has introduced evidence on the same subject. It is for you to say what is true. If you find, now, that it was within a half mile, you need not go further on that question, because it was the duty of the telegraph company to have delivered it. If he was within the limits, it was their duty to deliver it, and the plaintiff was not required to do anything more than he did. If, however, you find that it was not within a half mile, but it was more than a half mile, then, gentlemen, the company must show you that the plaintiff in the case knew of the existence of this rule, and that he did not comply with it. The defendant says that the plaintiff employed the telegraph agent there to write this for him, thereby making him his agent for that time. Well, if he did get him to write it, he did make him his agent for that time, and if the telegraph operator knew of these rules the plaintiff knew of these rules, because, if he got an

agent to perform a duty, whatever the agent knew in connection with that duty the plaintiff himself knew. * * * Now, if you find that the plaintiff has a right to recover, the next question for your consideration, and a very important one, is, what damages is he entitled to? He is entitled to what the law calls 'compensatory damages,' or actual damages that he has sustained. Whatever he paid out for the telegram, if he paid anything, would be an item of compensatory damages. He has to prove to you what his damages are. Whatever he paid out would be actual damages, if they failed to comply with the agreement. He says he got a horse and buggy, and went for the doctor; but I do not recollect whether he proved he paid anything for the horse and buggy, or became liable to pay anything. If he did not pay, or become liable to pay, anything, he could not recover for that. If he did, he would be entitled to recover what he proved he paid out for it, or became liable to pay. The law includes whatever money he paid out, or became liable for, on account of the failure of the company to do its duty. But the law goes further. The law says the plaintiff may recover for wounded feelings,—for the pain, either mental or physical, that he suffered. The plaintiff says that the evidence shows to you that, while his wife was in agony,—it is for you to say what the proof is,—he remained with her from the time the doctor could have gotten there that same evening if the telegram had been delivered, and had to witness her anguish and pains, which the doctor could have relieved if he had gotten there. It is not what she suffered, but he suffered, by witnessing his wife's condition; and it is confined to the suffering he experienced during the life of his wife, and does not include his anguish after her death. You cannot give any damages on account of her death or of her sufferings, but for his suffering in witnessing the condition of his wife would be a portion of the actual damages, if you believe from the evidence the doctor could have gotten there. From the time the doctor could have gotten there, and could have assuaged or lessened her pain, and the plaintiff's mind could have been relieved by the sufferings of his wife being lessened, then whatever damages he has sustained arising from that cause you have the right to give him as actual damages. * * * Those are the damages you will give, if you find for the plaintiff. The plaintiff claims vindictive damages. * * * Vindictive damages are given where the party is guilty of malicious conduct, the evidence showing that he was actuated by an evil motive. I am requested to charge you on that. I am requested to charge you that, if you believe the evidence, you cannot find vindictive damages in this case, and I give you that charge. I could not give the charge unless I was requested to do so. You cannot find vindictive damages. You may find actual damages, and actual damages are such as I have stated."

The defendant requested the court to give, among others, the following charge: "(9) The court charges the jury that a rule or regulation requiring extra compen-

sation for the delivery of a message beyond the limit of a half mile was a reasonable rule and regulation, which the defendant had a right to demand that the plaintiff should comply with, and that, if the plaintiff failed to comply with such reasonable rules and regulations, said company was not bound to deliver said message to the person to whom the same was sent, beyond said half-mile limit." The court refused to give this charge, and defendant excepted.

Gaylor B. Clark and F. B. Clark, Jr., for appellant. *G. L. & H. T. Smith*, for appellee.

STONE, C. J. St. Elmo and Grand Bay are two stations on the line of roads operated by the Louisville & Nashville Railroad Company. They are five miles apart, and are small villages. Louis Henderson resided near St. Elmo station, and Dr. Rohmer, his family physician, resided near Grand Bay station. At noon, June 26, 1887, Henderson procured to be dispatched at St. Elmo, to Dr. Rohmer at Grand Bay, a telegraphic message in the following language: "Come, first train, to see my wife. Very low." This message was marked: "Prepaid, 25 cents." In addition, both the sender and the telegraphic operator testified that that sum was prepaid. The operator testified that Henderson inquired what the charge was, and, on being informed it was 25 cents, paid it to him. The message, though not repeated, reached the operator at Grand Bay without mistake and without delay. Dr. Rohmer testified that he received this telegram about 9 o'clock A. M., June 27th, the day after its transmission; that it was handed to him at his residence,—but he did not state by whom. He testified, further, that, if he had received the message on the 26th, he would have obeyed it, traveling either by train or by private conveyance. He reached the patient about noon on 27th, and relieved the intensity of her suffering; but she died about six hours afterwards. He did not know whether, if he had reached her the day before, her life could have been saved. Plaintiff testified that when the telegram was sent his wife was suffering acutely, and that her suffering increased until the arrival of the doctor, when he alleviated it.

The present action was brought to recover damages for the non-delivery of said telegram within a reasonable time. The defendant interposed five pleas in bar, but at present we propose to consider only those on which issues of fact were formed. These are pleas 3 and 4. A demurrer was interposed by plaintiff to each of these pleas, 3 and 4, and the demurrers were overruled. There was no error in this.

In the printed caption of all messages sent by the telegraph company are certain conditions on which the company receives and transmits messages, and no message is received or sent unless it is written on the company's blank, preceded by the conditions. The message in this case was written on the company's blank, and was preceded by the printed conditions. One of the conditions is that "the company will not be liable for damages in any case where the claim is not presented, in writ-

ing, within sixty days after sending the message." Plea No. 3 set up this condition, and averred that the claim here sued on was not presented to the company within 60 days after sending the message. To this plea plaintiff filed a replication averring that in less than 60 days after the message was sent the present suit was brought, a complaint filed setting forth the claim of damages for non-delivery of the message, and service of a copy of the complaint on the defendant corporation,—all within 60 days. To this replication the defendant demurred, and the court overruled its demurrer. There are decisions which hold that a suit, setting forth the ground of complaint, instituted, and process upon it served, within the 60 days, is not a compliance with this regulation. *Wolf v. Telegraph Co.*, 62 Pa. St. 83; *Telegraph Co. v. McKinney*, 8 Amer. & Eng. Corp. Cas. 123. Such regulation is generally held to be valid and binding. *Grinnell v. Telegraph Co.*, 113 Mass. 299; *Young v. Same*, 65 N. Y. 163; *Telegraph Co. v. Rains*, 63 Tex. 27; *Insurance Cos. v. Felrath*, 77 Ala. 194. Our own rulings on a question not distinguishable from this in principle have been different. *Railroad Co. v. Bayliss*, 74 Ala. 150; *Railroad Co. v. Morris*, 65 Ala. 193; *Same v. Bees*, 82 Ala. 340, 2 South. Rep. 752. The circuit court did not err in overruling the demurrer to the replication to the defendant's third plea. The averments of that replication being unquestionably true as shown by the record, that line of defense will receive no further consideration.

On the trial of this cause the real controversy, both in fact and law, so far as the mere right of recovery was concerned, arose on the issue raised by the fourth plea. That plea sets up as a defense to the whole action that the defendant corporation had established a limit within which it undertook to make free delivery of messages sent over its wires, which limit was a half mile, or within a radius of a half mile, from its office, at places having the population that Grand Bay had; that in the said printed heading, which accompanied and formed part and condition of every written message it received for transmission, including the one received in this case, was and is the following clause: "Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance a special charge will be made, to cover the cost of such delivery," and that Dr. Rohmer, to whom said message was sent, did not live within the said free-delivery limits of said office. The plea then avers that no consideration was paid or tendered by plaintiff for the delivery beyond the free-delivery limits, and no notice was given by the sender, nor did the telegraphic operator know, that Dr. Rohmer was not living within said limits. This plea was followed by much pleading and many rulings of the court. We will not set out the various steps taken, but will declare the rules by which the relative duties of the parties must be determined.

Telegraphy is a quick-moving substitute for mail service, which, by contrast, has become tardy. Celerity is its boast, and

when rapid communication is desired its instrumentality is invoked. It cannot be presumed that the operator at the initial or receiving office will know every one to whom a message is proposed to be sent through his office, or will know that such person will be found within the free delivery limits of the terminal office. The sendee may live just without the limits, or he may live miles away. Placing the duty on the sender of ascertaining whether the person to whom the message is addressed resides within the free limits is a reasonable rule. It is reasonable, because in most cases the sender will know where the sendee resides, and can inform the operator. In the event the sender does not know the residence or business office of the sendee, it is but reasonable to require him to inform himself, or to make provision for delivery beyond the limits, should it be found that the residence is beyond them. This is placing the duty where it is both reasonable and bearable, instead of imposing an intolerable burden on the operator or company. The reasons will suggest themselves, without being stated. The rule is reasonable, and law is, or should be, reasonable. When Henderson applied to have his message sent, if Dr. Rohmer lived more than a half mile from the terminal office, he should have so informed the operator, if he knew it or could learn it; and, if he was in doubt whether the doctor lived within the limits, he should have informed the operator and made provision for delivery beyond the limits, if he desired and expected prompt delivery. When a message is handed in for transmission, the presumption must be and is that the sendee lives within the limits of free delivery, or that the sender takes the risk of delivery, unless he makes arrangements for delivery at a greater distance; and handing in such message without explanation casts no duty on the transmitting operator other than to forward the message accurately and with proper diligence, and it casts no duty on the terminal employee or operator other than to copy the message correctly, and deliver it, with all convenient speed, if the sendee resides within the free delivery limits. What we have said is intended for the government of the senders of all telegrams, whether intelligent or non-intelligent. All men are conclusively presumed to know the law, and no discrimination between classes can be maintained, either by the law or by sound reasoning. The principle rests on juridical necessity.

It may as well be stated here as anywhere else that the plaintiff, when testifying as a witness for himself, stated that he knew the rule of the telegraph company which guaranteed free delivery if the sendee lived within a half mile of the terminal office, and no further; and the testimony of the sending operator tended to show that, before sending the message, he inquired of the plaintiff how near to the terminal station or office Dr. Rohmer lived, and he answered: "Close by." Henderson gave no testimony in regard to this. No testimony was introduced tending to prove that anything was said, either by Henderson or by the operator,

having any reference to delivery beyond a half mile. And we may here state, as proven and uncontroverted facts, that the charge, 25 cents, was prepaid for sending the message, and that the plaintiff, Henderson, knew of the half mile limit to free delivery.

The contested question of fact was whether Dr. Rohmer's residence was within a half mile of the terminal office. Witnesses testified that there was a travelable and traveled road which cut off an angle, and brought the distance within a half mile. Other witnesses controverted the existence of any road which cut off the angle and shortened the distance. According to their testimony, Dr. Rohmer's residence was not within a half mile of the terminal office. This was a question for the jury, and, with a single exception, the circuit court submitted this question fairly to the jury. That question is the burden of proof. Free delivery within a half mile is not a restriction of a right, but a qualified privilege granted. It is not an inherent right; for if it were, in the absence of restriction, it would have no limits. To show to what absurd results this would lead, let us suppose the contract to transmit a message is silent about free delivery. If we held the clause in controversy to be restrictive of a right, then, in the case supposed, the telegraph company would be bound to deliver to the sendee, no matter how great the distance to his residence. Free delivery is a conditional obligation, contingent on the sendee's residence being within the area of free delivery; and until that condition is shown the telegraph company is not put in default. The *onus* of proving that Dr. Rohmer's residence was within a half mile was on the plaintiff. 3 Brick. Dig. 433.

Whether, in such a suit as this, damages can be recovered for mental anxiety or mental distress caused by the non-delivery of the message, through the negligence of the telegraph company, is a question upon which the authorities are in palpable conflict. They are not alone in conflict. They are widely variant. Some rulings reject such evidence in all cases which are based on breach of contract. Others reject it when there is no element of recovery other than mental suffering, but receive it in aggravation when there is another independent cause of action. On this last principle, a distinction is taken in some cases between suits in which the sender is plaintiff and those in which the sendee complains. In the one case the suit is by a party to the contract, who can maintain an action for its breach even though he may be able to recover only nominal damages. In the other, there is no privity of contract, and there can be no recovery except for actual damages proved. There is, therefore, in this case, if the rule be sound, an independent right of recovery, to which distress of feeling can become an aggravating incident. There are still other authorities which hold that such evidence is admissible on general principles, and as an independent ground of recovery. We cite many authorities, but will not attempt to reconcile them. Nor will we comment on them further. Wadsworth's

Case, (Tenn.) 6 Amer. St. Rep. 864 and 88. W. Rep. 574; Railroad Co. v. Levy, 59 Tex. 542, 563; Stuart's Case, 66 Tex. 580; So. Relle's Case, 55 Tex. 308; Hays v. Railroad Co., 46 Tex. 272; Simpson's Case, 11 S. W. Rep. 385; West's Case, 17 Pac. Rep. 807, 7 Amer. St. Rep. 534, 535 note; Shear. & R. Neg. § 756; 5 Amer. & Eng. Cyclop. Law, 42, note; Logan's Case, 84 Ill. 468; Turnpike Road v. Boone, 45 Md. 344; Walsh v. Railway Co., 42 Wis. 23; West's Case, 39 Kan. 93, 17 Pac. Rep. 807; Russell's Case, 3 Dak. 315, 19 N. W. Rep. 408. The case of Telegraph Co. v. Cooper, 9 S. W. Rep. 598, is a very peculiar one.

As to the element of mental anguish claimed to have been suffered by the plaintiff, we think it the proximate consequence of the failure to deliver the message, and that the perusal of the message would naturally suggest such consequence as likely to ensue from the non-delivery. The right of the plaintiff to sue for the breach of the contract to deliver, if within the free-delivery distance, takes this case out of the rule, if a sound one, that mental distress will not maintain the suit when there is no other element of recoverable damage. We find no error in the rulings as to the proper elements of damage, and we agree with the circuit court in holding that there was no proof which authorized exemplary or vindictive damages.

In the light of the principles declared above, some portions of the general charge which we have not referred to specially, and the charge given at the instance of the plaintiff are subject to criticism; but we deem it unnecessary to comment further upon them. What we have said will furnish the proper correction.

The ninth charge asked by defendant ought to have been given.

The message, for the failure to deliver which the present suit was brought, was not a repeated message. Pleas were interposed, and charges were asked, based on stipulations in regard to non-repeated messages, as set forth in the printed caption attached to the form or blank on which the message was written. The message, though not repeated, was correctly, and without delay, transmitted to the terminal office, and was there understood and copied accurately. This answered all ends repeating could have accomplished, and leaves that clause without practical operation in this case. None of the provisions intended to be restrictive of liability on non-repeated messages, and none of the stipulations for exemption from the consequences of negligence, have any proper consideration in the determination of this case. Telegraph Co. v. Way, 83 Ala. 542, 4 South. Rep. 844; White's Case, 14 Fed. Rep. 710; Tyler's Case, 74 Ill. 168; 3 Suth. Dam. 296, 297. The demurrers to pleas 2 and 5 were properly sustained, and all charges seeking to raise the questions presented in those pleas, were properly refused.

The attempt was made in the trial court to excuse the telegraph company from liability for non-delivery of the message on the ground that the business and emoluments of the office at Grand Bay were insufficient to justify the employment of a

separate telegraphic operator, or a messenger boy to deliver messages. Belun's Case, 8 Cent. Law J. 445, is relied on in support of this position. This may furnish a very good reason for withholding telegraphic service, or, perhaps, for different regulations in regard to delivery, at places thus circumstanced. It affords no excuse for violating the terms of a contract. We cannot follow Belun's Case.

The defendant offered to prove in defense that it was not the custom of Dr. Rohmer to make professional calls at a distance without prepayment, or guaranteed payment, of his charges. This testimony, on objection, was ruled out. There was no error in this. If the doctor lived within the area of free delivery, it was not for the telegraphic operator to speculate on the chances that the summons would or would not be obeyed. If it had been shown that Dr. Rohmer would not have obeyed if he had received it, this, it would seem, would have proved that the plaintiff suffered no real injury from the failure to deliver the message. So far from this being proved, Dr. Rohmer testified that, if he had received the message, he would have obeyed the call.

The natural utterances and expressions indicative of pleasure, displeasure, pain, or suffering are competent original evidence that may be received in proof of the physical or mental state they indicate, whenever that state is a pertinent inquiry. Wood, Pr. Ev. § 147.

Two parts of the testimony received at the instance of plaintiff should have been rejected: *First*, the answer of the operator at Grand Bay, made on 27th, in reply to plaintiff's inquiry why the message had not been delivered; and, *second*, that the Western Union Telegraph Company was a wealthy corporation.

We have now noticed every material question raised by the record.

Reversed and remanded.

STIX et al. v. KEITH.

(Supreme Court of Alabama. April 14, 1890.)

REMOVAL OF CAUSES—APPLICATION.

1. On filing of a petition for removal of a cause from a state to a federal court, which on its face shows that the cause is within the statutes of the United States, by which alone the right of removal is governed, the state court loses jurisdiction *eo instanti*, without the necessity of a formal order of removal.

2. On filing of such petition, an issue of fact arising thereon can only be tried in the federal court, on motion made there to remand the cause to the state court.

3. A party failing to obtain a removal loses none of his rights by defending the action in the state courts when forced into a trial.

4. In such case, an order of removal may be made after reversal of a judgment against the petitioner by the supreme court of the state.

Appeal from circuit court, Jackson county; JOHN TALLY, Judge.

Action of trespass by Pope W. Keith against Louis Stix & Co., to recover damages for the wrongful taking of a stock of goods by levy of an execution thereon. Defendants sought to have the cause removed from the state circuit court to the United States circuit court. The state

court, after the application, proceeded to judgment. Defendants appeal.

Humes, Walker & Sheffey, for appellants. *J. E. Brown* and *E. C. Brickell*, for appellee.

SOMERVILLE, J. The most tenable point of contention urged on us is the one involved in the two separate motions made by the appellants to remove this suit from the state to the federal court. The first petition for this purpose was filed May 26, 1886, being the first term of the circuit court of Jackson county after the commencement of the action, which was January 19, 1885. The ground of the removal was the citizenship of the petitioners, who were defendants in the state court, and the petition averred their residence in the state of Ohio at the time of filing the petition for removal as well as when the suit was brought. The requisite bond was filed as demanded by the act of congress of March 3, 1875, and other prior acts of which that legislation was amendatory. This application was refused June 9, 1886. The second petition was filed February 15, 1889, after the act of March 3, 1887, went into effect. It alleged the non-residence of the petitioners, and their residence in other named states, and was based on the existence of prejudice and local influence against the petitioners, as provided for under the act of March 2, 1867, and other statutes amendatory and advisory of that act. The petition seems to be in due form, and was accompanied by a proper bond. It is made to appear that the appellee appeared by counsel in the circuit court of the United States October 23, 1886, after the overruling of the first application in the state court, and moved to remand the cause to the state court, and this motion was overruled by the federal court.

The following principles, touching the subject of the removal of causes from state to federal courts, have been authoritatively settled by the supreme court of the United States, which must be considered the ultimate arbiter of all such questions: (1) The right of removal of a suit of this kind is governed exclusively by the acts of congress bearing on the subject, and the terms and conditions of removal are there fully prescribed. A party seeking removal must therefore show, upon the face of his petition, that his cause comes within the statute. *Insurance Co. v. Pechner*, 95 U. S. 183; *Removal Cases*, 100 U. S. 457. (2) When such a case is presented in due form on the face of the petition, showing a legal right to the transfer, the state court has jurisdiction to decide but a single point, and that is whether, admitting as true the facts alleged, the petitioner is entitled to removal. The question is one purely of law, in the nature of a demurrer to the sufficiency of the petition. *Railroad Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. Rep. 1262; *Ex parte State of Alabama*, 71 Ala. 364. (3) If the petition is sufficient, showing on its face a case within the statute, the state court is bound to surrender its jurisdiction. That tribunal can proceed no further in the suit. It has no power to try any issue of fact on the petition.

All such issues must be tried in the federal court, on motion made there to remand the cause to the state court. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. Rep. 799; *Railroad Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. Rep. 1262. (4) (a) Upon such a petition being filed, the cause being one that is removable, the state court has no lawful power to refuse a removal. Its rightful jurisdiction ceases *eo instanti*, and no formal order of removal is necessary, but only a suspension of further proceedings. Any subsequent attempt of the state court to assert its jurisdiction, or any judgment afterwards rendered by such tribunal in the case, unless the case is remanded by the federal court, is erroneous, and therefore ground for reversal in this court. *Kern v. Huldekoper*, 103 U. S. 485; *Dill. Rem. Causes*, § 75b, note 2; *Foundry Co. v. Howland*, 5 S. E. Rep. 745. (b) If the cause, as shown on the facts of the petition, is one not removable, under the laws of congress, the mere filing of such insufficient petition does not work a transfer, or otherwise oust the jurisdiction of the state court. *Railroad Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. Rep. 1262. (5) And if this court fails or refuses, in a proper case for removal, to reverse the judgment of the lower court, upon error assigned for the refusal to decline further jurisdiction, a federal question is raised which will become the subject of review by the supreme court of the United States, on writ of error to that court. *Railroad Co. v. White*, 111 U. S. 184, 4 Sup. Ct. Rep. 353. (6) A party failing in his efforts to obtain the removal of a suit loses none of his rights by defending the action in the state court when he is forced into a trial. *Removal Cases*, 100 U. S. 457; *Railroad Co. v. Mississippi*, 102 U. S. 135; *Insurance Co. v. Dunn*, 19 Wall. 214. And, upon a reversal of the judgment on appeal to this court, it is not too late to make an order for the allowance of the removal. *Railroad Co. v. Koontz*, 104 U. S. 5; *Dill. Rem. Causes*, § 60. (7) Under the act of March 3, 1875, (13 U. S. St. 470,) the right of removal, on the ground of citizenship, was required to be asserted by filing a petition in the state court "before or at the term at which said cause could be first tried, and before the trial thereof." *Insurance Co. v. Walrath*, 117 U. S. 365, 6 Sup. Ct. Rep. 768; *Car Co. v. Speck*, 113 U. S. 84, 5 Sup. Ct. Rep. 374; *Holland v. Chambers*, 110 U. S. 59, 3 Sup. Ct. Rep. 427. (8) The act of March 2, 1867, (Rev. St. U. S. § 639, cl. 3,) which authorized removals, in certain causes, on the ground of prejudice or local influence, at any time before the trial or final hearing of the suit, has been held not to be repealed by the act of 1875. *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. Rep. 377; *Bible Society v. Grove*, 101 U. S. 610; *Manufacturing Co. v. Packer*, 129 U. S. 688, 9 Sup. Ct. Rep. 385. This clause is superseded, but not materially changed, by the act of March 3, 1887, so far as this particular point is concerned, by providing for the removal of a cause "at any time before a trial thereof," on the same ground of prejudice or local influence, the petition being required to be verified by the proper affidavit of the petitioner, the truth of which

can be contested only in the federal court. 120 U. S. 790, 791.

The appellee's petitions in the present case each seem to have been prepared in conformity to the requirements of the statute, following, in substance, the approved forms. Dill. Rem. Causes, 141-147; Removal Cases, 100 U. S. 457. No objection appears to have been taken to the sufficiency of the bond, and we must presume, on this appeal, that it was sufficient. *Mix v. Insurance Co.*, 74 N. Y. 53; *Ayers v. Watson*, 113 U. S. 594, 5 Sup. Ct. Rep. 641. And none, likewise, was interposed to the regularity of the other proceedings. The order for removal was apparently refused on the sole ground that the circuit court of the United States, which had held no term since the last petition was made,—the one filed February 14, 1889,—had taken no action, or made any order looking to a removal, based on prejudice or local influence. No such action by the federal court was necessary in order to prevent further proceedings by the state court. That the petitions, one or both, disclosed a case for removal, seems to us free from serious doubt.

The circuit court erred, therefore, under the principles above announced, in not making the requisite order. The other question raised becomes immaterial on the present appeal.

The judgment is reversed, and the cause remanded, with instructions to the circuit court to vacate all orders and judgments made or entered subsequently to the filing of the appellants' petitions for removal and the approval of the bonds, and said court will proceed no further in said cause unless its jurisdiction be restored by the action of the circuit court of the United States. *Railroad Co. v. Kootz*, 104 U. S. 5, 18.

DOLAN et al. v. DOLAN et al.

(*Supreme Court of Alabama*. April 9, 1890.)

WITNESS—TRANSACTIONS WITH DECEDENT.

1. Code Ala. § 2765, provides that neither party shall be allowed to testify against the other as to transactions with any deceased person whose estate is interested in the result of the suit or proceeding unless called to testify thereto by the opposite party. Held that, in a proceeding in the probate court, by the administratrix and widow of an intestate, to declare his estate insolvent, where the heirs appear and deny the insolvency, a creditor who joins in the issue with the heirs, and denies the insolvency, but whose claim is resisted by the heirs as unjust, cannot, to establish his claim, testify as to transactions with the intestate.

2. Nor is his testimony made competent by his being called by the administratrix, where it appears that it is to her interest, as widow, to have the claim established. In such case, not being actually opposed to the witness in interest, she is not the "opposite party" within the meaning of the statute.

Appeal from probate court, Mobile county; PRICE WILLIAMS, JR., Judge.

W. E. Richardson and J. Little Smith, for appellants. *Harris Taylor*, for appellees.

CLOPTON, J. This proceeding is an application to the probate court by appellee, as administratrix, to declare the estate of Thomas Dolan insolvent. The heirs appeared and made an issue by denying in

writing the fact of insolvency. Among the claims mentioned in the statement of claims against the estate filed with the report of insolvency is one in favor of James Dolan for \$2,844. He came in as a creditor, and, denying the insolvency, joined in the issue made by the heirs. A special issue was made by the heirs as to the justness and correctness of this claim. On the trial of this issue, James Dolan was called by the administratrix to prove his claim, and she was called by him for the same purpose. The court allowed each to testify as to transactions with the deceased, against the objections of the heirs.

In a proceeding to declare an estate insolvent, the inquiry relates to the *status* of the estate, and the declaration of insolvency is not a final adjudication as to the validity of the claims presented or reported. Hence, as counsel contend, the same measure of proof as to the justness of the claim is not required as if they were being finally adjudged. A *prima facie* case only is requisite. The general rule, invoked by counsel for appellee, that, the disputed question being authorized by law to be tried, and having been tried by the court without a jury, the finding will not be reversed unless it is manifestly against the evidence, has no application when it appears that the conclusion and judgment of the court are based upon illegal and incompetent evidence, without the consideration of which the finding cannot be supported. There was evidence as to the value of the real estate, and also tending to show that the administratrix had received assets which she had not inventoried nor reported. We do not deem it important to consider this aspect of the case, as the evidence may vary on another trial; for it is manifest that the insolvency of the estate depends upon the allowance of the claim in favor of James Dolan, and it is equally apparent that without his testimony the evidence is not *prima facie* sufficient to show its existence and validity. The testimony of the administratrix as to James Dolan having given his salary to decedent is mere hearsay, and the evidence of Mrs. Marion is too vague and indefinite to found a conclusion upon.

We shall, therefore, confine our consideration mainly to the question raised by the objection to the competency of James Dolan to testify to transactions with the intestate with respect to his claim, as against the heirs. In this consideration, we shall not regard the contention, based on the relation between the parties,—the administratrix being the widow of the deceased, and James Dolan being her son born of a former marriage,—and other facts, that there is a combination and scheme between mother and son to assume antagonistic positions to the record, in order to cheat and defraud the heirs, who are the brothers and sisters of the intestate. This consideration goes rather to their credibility than competency.

Section 2765 of the Code provides that in civil suits and proceedings there shall be no exclusion of any witness because he is a party, or interested in the issue tried, "except that neither party shall be allowed to testify against the other as to any trans-

action with or statement by any deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the opposite party." We need not refer to or comment on the previous interpretation of the statute, as to its purpose and policy. It is not controverted that the purpose is the protection of the dead against the assertion of fraudulent claims and false defenses by the living, and that this protection extends not only to the deceased, but also to the rights of his heirs and others claiming in succession or privity. The competency of James Dolan is founded on the last clause of the statutory exception: "Unless called to testify thereto by the opposite party." The contention is that the administratrix, who called him to testify thereto, is the "opposite party," in the meaning of the statute. It may be admitted that, in a proceeding to declare an estate insolvent, the personal representative is the actor, with whom the contesting heirs or creditors make the issue. They are adversary parties as to the general issue of insolvency. But this position to the record does not necessarily constitute them "opposite parties," in the meaning of the statutory exception, as to special issues which may be made and tried, so as to authorize either to call the other to testify to any transaction with or statement by the intestate. This depends upon the relation they sustain to the issue.

In *Bank v. McDonnell*, 87 Ala. 736, 6 South. Rep. 703, which is the latest interpretation, the statute was construed to preserve, as to the class of statutory exceptions, the common-law rule, which makes parties to the record incompetent witnesses, except in certain cases, unless the immunity of incompetency is waived by the opposite party; and it was held that the court would not ingraft on the statutory provisions the common-law exceptions, when repugnant to the obvious policy of the statute. In that case a bill was filed by a creditor to set aside as fraudulent a deed of trust made by an insolvent debtor for the benefit of the Mobile Savings Bank. The debtor and the bank were made defendants. It was held that the debtor could not be allowed to testify to an agreement between him and the cashier of the bank, who was dead, that the deed of trust should be kept off the record, though he was called to testify thereto by the complainant, and his interest was balanced. In defining who is meant by the "opposite party," it is said: "The concluding clause of the statute, 'unless called to testify thereto by the opposite party,' is only declaratory of the law rule which permitted the immunity of incompetency to be waived by the opposite party, by which is meant the party to the transaction whose rights would be affected by the testimony offered." Let this test be applied. Appellee, not as widow, but as personal representative, has no rights in the estate which could be dimin-

ished or affected by the testimony. As widow, a declaration of insolvency would enlarge her rights, by vesting in her the homestead absolutely, and relieving her from liability to account on final settlement for the personal property exempted. How will the rights of the heirs be affected? A decree of insolvency conclusively ascertains and determines the status of the estate. The report of insolvency being based upon the insufficiency of both the real and personal property to pay the debts, the court acts upon both in respect to the amount of indebtedness. The declaration that the estate is insolvent adjudicates the necessity to sell both for the payment of the debts, dispensing with other or further proof; and this is conclusive on the heirs. Code, § 2111. They are thereby placed in a position to be deprived of the descended lands without other opportunity to show there is no necessity for their sale. The declaration of insolvency divests them of their reversionary interest in the homestead, and takes away the right to have credited, on final settlement and distribution, the exempt personal property on the distributive shares of those to whom it was exempted. They are, manifestly, the parties whose rights would be injuriously affected by the testimony offered.

It is argued that in an action at law against the administratrix, by James Dolan, to enforce the collection of his claim, she could waive the protection of the statute, and call him to testify as to a transaction with the deceased, and, if capable to call him in such case, she is capable to call him in a proceeding like the present, in the probate court; that the statute makes no distinction between forums. In such suit at law, they would be the only parties to the record. The administratrix does not represent the heirs as to the real property, and a judgment rendered in such suit would not bind, or be evidence against, them, so far as respects its liability to the debt. *Scott v. Ware*, 64 Ala. 174. In the present proceeding the parties are different. The administratrix had paid all the other claims against the estate in full, and they were admitted. The special issue, on the trial of which he was called to testify, related solely to the justness of his claim. In respect to this claim, their interests were identical. Both were seeking to sustain it. As to this issue, it is clear that James Dolan and the administratrix, though nominally opposite parties, were really the parties on the one side, and the heirs the adversary parties. The statute regards the substance, the reality. To allow him, under such circumstances, to testify to a transaction with the deceased, for the sole purpose of establishing his claim, without being called, or without the consent of the heirs, would be against the spirit of the statute, and repugnant to its obvious policy. The "opposite party," in the meaning of the statute, is the party adverse in interest. It may be that if James Dolan had not been a party to the record the administratrix could have called him to testify. This we do not decide. But, being a party, his competency falls within the rule declared in *Bank v. McDonnell*, supra. The same ob-

servations and principles are applicable to the competency of the administratrix on being called by him.

Reversed and remanded.

CHRISTIAN *et al.* v. AMERICAN FREEHOLD LAND & MORTGAGE Co.

(*Supreme Court of Alabama.* April 10, 1890.)

FOREIGN CORPORATIONS—AGENT IN STATE—PLEADING.

1. A bill in equity by a foreign corporation, to have a loan evidenced by notes secured by a mortgage declared a lien on land, which shows on its face that the loan was made by complainant in the state, is demurrable, unless it alleges that, when the loan was made, complainants had complied with Const. Ala. art. 14, § 4, embodied in Act Ala. Feb. 28, 1887, requiring a foreign corporation, before doing business in the state, to file in the office of the secretary of state an instrument in writing designating at least one known place of business in the state, and an authorized agent or agents thereat.

2. The prosecution or defense of an action is not the doing of business in the state, within the meaning of such acts.

Appeal from chancery court, Perry county; THOMAS W. COLEMAN, Chancellor.

Bill in equity by the American Freehold Land & Mortgage Company against J. B. Christian and others to have a lien declared on certain described lands in payment of several promissory notes made by defendants to complainant, and secured by a mortgage. The notes were given for money loaned to defendants by complainant. Defendants demurred on the ground that the bill did not show by averment that complainant had complied with the constitutional and statutory requirements, and upon other grounds sufficiently shown by the opinion. The court overruled these demurrers, and defendants appeal.

John F. Vary and H. C. Semple, for appellants. Pettus & Pettus, for appellee.

MCCLELLAN, J. The questions which the demurrers in this case seek to raise are those which were passed on in the case of *Farrior v. Security Co.*, ante, 200, (at this term.) It was there held that a corporation foreign to the state of Alabama could not transact any business in this state unless and until it had complied with the provisions of section 4, art. 14, of the constitution, now also embodied in the act of February 28, 1887, giving force and effect thereto, and filed in the office of the secretary of state an instrument in writing, etc., "designating at least one known place of business in this state, and an authorized agent or agents thereat," and that a mortgage executed in this state to a non-resident corporation, which had not complied with the constitution and statute, on land situated here, to secure a loan made here, was absolutely void. This case was followed and reaffirmed in that of *Mullens v. Mortgage Co.*, ante, 201; and in each of those cases the facts, going to show that the transaction involved took place in Alabama, and was the doing of business here, within the constitutional and statutory provisions referred to, were substantially the same as those presented by the present bill and exhibit. We adhere

to and reaffirm the opinions in those cases, and hold that the bill in this case is without equity, if it can be construed as showing, either by averment or the absence of necessary averment, that the complainant, at the time of the transaction in question, had not complied with the law in the matter of designating "a known place of business in this state, and an authorized agent or agents residing thereat."

This presents a question of pleading, which does not appear to have been adjudged in either of the cases referred to. The bill shows that the complainant is a foreign corporation, and that the transaction upon which relief is sought was business done in this state; but it is silent as to whether it had at the time of this transaction, or at any other time, complied with our laws as to the designation of a place of business and an agent here. Was it essential that the fact of compliance should have been averred, in such sort that a failure to allege it must be taken as the equivalent of an admission that it does not exist? It is a fundamental rule of equity pleading that every fact essential to complainant's title to maintain the bill and obtain the relief prayed must be stated. Story, Eq. Pl. § 257; 1 Daniell, Ch. Pr. 319. And where it appears, from the face of the bill, that the complainant's right to the relief he seeks depends upon some preliminary act by him, the performance of such preliminary act must be averred, or a demurrer will lie. Thus, where the plaintiff claimed as a purchaser of certain shares in a joint-stock company, and it appeared by the bill that, by the rules of the association, no transfer of shares could be valid unless the transaction was approved by the directors of the company, etc., the bill was held bad on demurrer because it failed to allege the approval which its averments showed to be essential to complainant's title, and the relief he sought. *Walburn v. Ingilby*, 1 Mylne & K. 61, 77. This is the precise point involved here. The bill presents a case for relief on which it is essential that complainants should have complied with the laws of the state as to the designation of a place of business, and an agent thereat. It appears from the bill itself that without such compliance the right to that relief does not exist. We entertain no doubt but that the failure to allege the fact of compliance is fatal on demurrer, especially as that fact is peculiarly within the knowledge of the complainant. The averment is a part of "plaintiff's title to maintain the bill and obtain the relief" sought. If the bill had not shown that it prayed relief on a transaction which took place in Alabama, the objection could be taken only by answer or plea. It would then have been a matter of defense. But here the materiality of the fact omitted appears from the facts alleged, and the omission will be taken—construing the bill most strongly against the complainant—as an admission that the fact does not exist. The demurrer, based on the failure of the bill to allege that the complainant, at the time of making the loan, had designated a known place of business in this state, and an agent residing thereat, should have

been sustained. *Cockrell v. Gurley*, 26 Ala. 405; *Reel v. Overall*, 39 Ala. 138.

Those assignments of demurrer which are predicated on the theory that foreign corporations cannot litigate in the courts of this state unless they have complied with the constitutional and statutory provisions referred to are untenable, and were properly overruled. The prosecution or defense of an action in the courts of this state is not the doing of business here, within the meaning of the requirement in question. 2 Mor. Priv. Corp. § 662. And the objection which denies the capacity of a foreign corporation, *i. e.*, an alien corporation, to own land or to take a mortgage on land in this state, even when it has designated a place of business and an agent here, is equally untenable. Mor. Priv. Corp. §§ 360, 361; Code, § 1914.

For the error in overruling the assignment of demurrer predicated on the failure of the bill to allege compliance with our laws as to the designation of a place of business and an agent, the decree is reversed, and the cause remanded.

KROU v. VERKENTOREN.

(*Supreme Court of Alabama*. April 10, 1890.)

NEGLIGENCE—EVIDENCE.

In a suit for work and labor done under a contract to milk defendant's cows and care for his stock, where defendant pleads as set-off damages for loss of stock through plaintiff's neglect, testimony of defendant and other witnesses that, in their opinion, the cattle died because of plaintiff's neglect, without stating particular acts of neglect, is not sufficient to sustain the plea.

Appeal from city court of Decatur; W. H. SIMPSON, Judge.

Action by J. Leonard Krou against John Verkentoren to recover on a count for work and labor done under a contract made with the defendant in March, 1888. The term of employment, as alleged by plaintiff, was for one year; and defendant discharged him in December, 1888. Defendant pleaded the general issue and set-off. Judgment for plaintiff, and defendant appeals.

Wert & Speake, for appellant. *S. H. Gruber*, for appellee.

CLOPTON, J. Whether or not the contract of employment was for one year, or only for the balance of the year in which it was made, are immaterial questions. Plaintiff does not sue for the breach of a special contract, but for work and labor done, using the common counts. The suit was instituted before the expiration of a year from the time the contract was made, and the court gave plaintiff judgment only for the balance due for the actual time he worked for defendant. That defendant agreed to pay plaintiff \$30 per month, payable monthly, to milk his cows and care for his stock, and that he worked until December 29, 1888, when he was discharged, are undisputed facts. This entitles plaintiff to recover, unless defendant sustains his plea of set-off, which consists of damages in the loss of cattle alleged to have been occasioned by plaintiff's neglect. By the contract, plaintiff impliedly stipulated that he was qualified to do the work

which he agreed to do, and that he would take reasonable care of the property confided to his charge. If he failed in any essential particular, and defendant suffered damage thereby, it may be conceded that he is entitled to set-off such damage against plaintiff's claim for wages. *Railway Co. v. Clanton*, 59 Ala. 392. The burden, however, is on defendant to prove neglect or want of care on the part of plaintiff. The defendant, and other witnesses on his part, testify that in their opinion, or according to their judgment, defendant's cattle died because of the neglect of plaintiff, but state no act of neglect upon which their opinion is based. The evidence fails to sustain the plea of set-off.

Affirmed.

THORN et al. v. ROMAN.

(*Supreme Court of Alabama*. April 15, 1890.)

ASSUMPSIT—IMPLIED CONTRACT.

A lessee agreed to tear down and reconstruct certain buildings at his own expense. Plaintiffs contracted with him to do the work, and the specifications provided for the insertion of certain joists in a wall left standing. The lessor objected to this as unsafe, and at his suggestion an architect proposed a different plan, which was adopted by the lessee's superintendent. The lessor, being notified, made no objection. The suit was brought to recover for the extra work as done at his request. Held no evidence of a request, and a verdict was properly directed for defendant.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

A. A. Wiley, for appellants. *Tompkins & Troy*, for appellee.

SOMERVILLE, J. The suit is for work and labor alleged to have been done by plaintiffs, at the defendant's request, in building an extra foundation wall, and putting up a stud partition to strengthen an old wall, of a store-house, in the city of Montgomery, owned by the defendant. There is no controversy as to the fact that the work was done by the plaintiffs, nor that it was worth the amount charged. The only issue is whether it was done at the request of the defendant, expressed or implied. If there was no evidence from which a jury could infer such a request or implied promise by defendant to pay for the work, the charge of the trial court instructing the jury to find for the defendant is free from error.

The whole case is this: The defendant owned two store-houses. He leased them to one Pollak for a term of five years, who, as lessee, agreed to pull down and reconstruct the buildings at his own expense, by way of part compensation for rent. Pollak made a contract with the plaintiffs to do this work, and it was reduced to writing. According to the plan and specifications of the architect, it was necessary to put certain joists in the wall left standing on the south side. The defendant, Roman, being advised by an architect that this would render the wall unsafe, by weakening it, objected to the insertion of these joists on this ground, and stopped the prosecution of the work. The defendant thereupon suggested to one Clapp, who was superintending the work for Pollak, to see that it was properly done; that the

matter be referred to one Anderson, an architect, "to say what would be a safe way to have the work done." The referee suggested the extra foundation and stud partition, which was afterwards adopted by the plaintiffs. Clapp agreed to this in behalf of Pollak, who was absent at the time from the city, but he testifies that he was without authority to bind him. The defendant, being advised, made no objection to the adoption of this change.

We see nothing in these facts which would authorize the inference by a jury of any promise by Roman to pay for this work. The premises for the period of the lease belonged to Pollak, not to him. The plaintiffs made their contract to build with Pollak. They credited him for the agreed price of the stores. They neither contracted with nor had any right to expect anything from the defendant as pay for such work. No promise to pay for the extra work, certainly, can be inferred from the objection interposed by defendant to the insertion of the joists in the wall. If this injured the wall or weakened it, he had a right to object. The only matter referred to Anderson for arbitration was whether this objection was well founded, and, if so, what would be a safe way to have the work done. This necessarily implied that Pollak, not the defendant, Roman, was to be looked to as responsible for the work; and the evidence shows that Pollak or his agent, Clapp, did pay as much as \$130 of the amount, for which the plaintiffs give credit.

The charge of the court was free from error, and the judgment is affirmed.

ANDERSON v. STATE.

(*Supreme Court of Alabama.* April 15, 1890.)

CRIMINAL LAW—EVIDENCE—DEPOSITIONS.

Code Ala. §§ 4465, 4466, provide that in certain cases depositions may be taken in behalf of one accused of crime. Section 4467 permits them, in like cases, to be taken in behalf of the state, "when the defendant files his written consent thereto." *Held*, that where depositions taken for defendant, but not offered by him, were offered for the state, it was error to admit them against his objection, under Const. Ala. art. 1, § 7, which guarantees to every one charged with an indictable offense the right "to be confronted by the witnesses against him."

Appeal from city court of Mobile; O. J. SEMMES, Judge.

The defendant was indicted, tried, and convicted of grand larceny for stealing \$200 in gold.

Henry Mickle, for appellant. W. J. Martin, Atty. Gen., for the State.

STONE, C. J. The constitution (article 1, § 7) guarantees to every one charged with an indictable offense the right "to be confronted by the witnesses against him." Our statute (Code 1886, §§ 4465, 4466) provides that the defendant in a criminal case "may take the deposition of any witness who from age, infirmity, or sickness is unable to attend court." The statute contains other grounds, also, which authorize the defendant to take and use the depositions of witnesses. Section 4467 of the Code provides that "the deposition of any

witness on the part of the state may be taken in like manner and for similar causes, when defendant files his written consent thereto." Under the statute, (sections 4465, 4466,) the defendant made the necessary affidavit and filed interrogatories to take the deposition of an aged and infirm witness who was unable to attend court. The interrogatories were not crossed, but, after waiting the required time, a commission was issued, and the deposition was taken and returned into court. Entering upon the trial, it was announced for defendant that the deposition would not be offered for the defense. The deposition was then offered by the state, objected to, the objection overruled, the deposition read, and the defendant excepted. We think that, in permitting the deposition to be read in evidence by the state, the city court erred. The right of every one accused of crime to be confronted by the witnesses against him is deeply imbedded in English jurisprudence, and dates back to *Magna Charta*, if not beyond it. It is classed as one of the bulwarks of liberty, whenever common-law principles obtain. So sacred has it been esteemed that incapacity to waive it has sometimes been contended for. We will not go to this extreme length, but we hold that nothing short of an express consent, given as the statute prescribes, will let in such testimony. *Rosenbaum v. State*, 33 Ala. 354; *Green v. State*, 66 Ala. 40; *Wills v. State*, 73 Ala. 362; *State v. Buckley*, 54 Ala. 599, and authorities on page 620; *Martin v. King*, 72 Ala. 354.

Reversed and remanded.

MILLER *et al.* v. BOARD OF SUPERVISORS OF TUNICA COUNTY.

(*Supreme Court of Mississippi.* May 5, 1890.)

DEEDS—INCONSISTENT RECITALS—DEFEASANCE.

1. The preamble in a deed recited that the grantor had previously donated to a county certain lands for a county-site, on which the court-house was situated; but the granting clause conveyed it to the president of the board of police and his successors, "for the use of the county of T. and town of A." There was no former deed. *Held*, that the recital in the preamble was controlled by the granting clause, and did not impose a condition that the land should be used for a county-site.

2. The mere removal of the court-house to another site is not sufficient evidence of an intention to abandon the land, or devote it to other than town and county purposes, to entitle the heirs of the grantor to recover the land for condition broken.

Appeal from chancery court, Tunica county; W. R. TRIGG, Chancellor.

A. S. Buchanan, for appellants. F. A. Montgomery, Jr., for appellee.

WOODS, C. J. The appellants exhibited their bill in the chancery court of Tunica county, praying the cancellation of the deed made by their ancestor, one Austin Miller, to the board of police of said county, whereby he conveyed the public square and lot 10 in the plat of the town of Austin, the then county-seat of said county, alleging that the estate of the county in said property had been determined by the abandonment thereof by the county authorities for the uses and purposes for

which it was specifically granted, and by the removal of the county-site to another town in the county. The board of supervisors interposed their demurrer to the bill, which was the chancellor sustained, and, appellants' counsel declining to amend, the bill was dismissed, and from this action of the court below an appeal was taken.

Whether the estate granted is a defeasible one, and whether, if so, the complainants are entitled to relief prayed for because of condition broken, are questions determinable by reference to the deed of the ancestor. In a preamble to the deed of conveyance the ancestor of complainants, the original grantor, recites that he had therefore "donated to the county of Tunica a certain piece of ground in section 15, T. 5, R. 12, for a county-site, upon which the court-house at Austin is situated, and having made titles to several purchasers to all the lots sold, and there yet remaining in me the title in the public square and lot No. 10, on which the court-house is situated, on west side of public square," and then proceeds: "Now, know ye, that for the consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I do bargain, sell, and convey to James Irwin, president of the board of police for the county of Tunica, and his successors in office, for the use of the county of Tunica and town of Austin, the following piece of land, to-wit, [describing the public square in the town of Austin,] also said lot number 10, on which the court-house is situated." It is inferable from the recitals of the preamble to the deed that it was the original purpose of the grantor to convey the parcels of land for a specific purpose, and to impose that as a limitation upon the grant. It is clear that such was the antecedent purpose; but in the operative part of the deed itself, when the maker actually makes the grant, no such limitation for a specific purpose is found. The conveyance, in its operative part, is declared to be "for the use of the county of Tunica and the town of Austin." Take it most favorably to the complainants, and we have the recitals of the preamble not in agreement with the granting clauses in the body of the deed. The recitals declare that the former donation was for a county-site. The operative part of the deed itself conveys the property for the use of Tunica county and the town of Austin. Which shall prevail in the construction of the deed,—the recitals or the operative clauses? Shall the merely prefatory recitals, made by way of inducement, be blindly followed, even to the extent of defeating the clear and definite purpose disclosed in the operative part of the deed itself? We think not. The rule is said to be this, viz.: "Where there is a discrepancy between the recitals and the operative part of a deed, the operative part, if clear and unambiguous, must be followed." *Elph. Interp. Deeds*, 129.

Furthermore, there being no pretense that there was ever any other deed made by the original grantor than the one now under consideration, this recital in the preamble may very properly be held to be merely an expression of the grantor's mo-

tive for making the deed to the president of the board of police "for the use of the county of Tunica and town of Austin." We must infer from the records before us that there had been a parcel gift some time prior to the execution of the deed we are construing, and that there had been a sale by the grantor in this deed of all the town lots in the plat of Austin to the various citizens of that place and others, except the public square and lot 10, on which the county had erected its court-house, and that now the grantor recites these facts as showing his motive in making the deed in hand. Regarded in this aspect, the recitals of the preamble are merely the expression of the motive inducing the execution of the deed, and do not create a condition, and therefore cannot control the granting clauses of the deed. 2 Devlin, *Deeds*, § 838.

Having conveyed the land to the board of police "for the use of the county of Tunica and town of Austin," the fact of the removal of the court-house to a new site, elsewhere, no way affects the title vested in the board of supervisors, nor the right of the county of Tunica and the town of Austin to continue to use the property for any legitimate purpose. The mere removal of the county-site is not sufficient evidence of an intention of the county of Tunica and the town of Austin to abandon the property, or to devote it to any other than county and town purposes, as was said in *Poitvent v. Board*, 58 Miss. 810.

We see no error in the action of the court below, and its decree is, accordingly, affirmed.

SEMMEs et al. v. WHEATLEY.

(*Supreme Court of Mississippi. April 21, 1890.*)

HOMESTEAD—SALE UNDER EXECUTION.

1. Complainants owned a lot intersected by a public road, on one side of which was the residence, and other buildings, inclosed by a fence. On the other portion were stores rented out by complainants and occupied by tenants. Held, that the latter portion of the lot was no part of complainants' homestead. Following *Rhyné v. Guevara*, 6 South. Rep. 736.

2. In such case, where the whole lot is sold and conveyed by the sheriff under execution, the deed may be canceled as to the homestead, and maintained as to the other portion.

Appeal from chancery court, Washington county; W. R. TRIGG, Chancellor.

Appellants, Semmes & Co., had judgment in the circuit court against appellee, Mrs. Wheatley. Execution was issued under this judgment, and a lot in the town of Arcola was levied on and sold by the sheriff, at which sale Semmes & Co. became the purchasers, receiving from the sheriff a deed therefor. Appellee, Mrs. Wheatley, thereupon filed the bill in this case in the chancery court, seeking to have the conveyance from the sheriff to Semmes & Co. canceled as a cloud upon her title, alleging that the property belongs to herself and husband, (her husband not joining in the bill,) and is occupied by them as a homestead. The facts are as follows: The lot in question comprises about one acre situated in the town of Arcola, owned jointly by appellee, Mrs. Wheatley, and

her husband. The lot is intersected by a public road. On one side of the public road, on this lot, is situated the dwelling, in which the family reside and keep a boarding-house. Around the dwelling is a fence. On the same side with the dwelling is a store, formerly rented, but now vacant. On the opposite side of the road are two stores rented and occupied, and near these stores is a stable. Appellants concede that the dwelling is exempt, but insist that the deed from the sheriff to them is good as to the stores across the road from the dwelling, since they are rented to and occupied by tenants. The chancery court rendered a decree, in accordance with the prayer of the bill, canceling the conveyance, from which Semmes & Co. appealed.

Yerger & Percy, for appellants. *Jayne & Watson*, for appellee.

WOODS, C. J. It was said by this court in *Rhyné v. Guevara*, (not yet officially reported,) 6 South. Rep. 736, that "it is true that the sheriff may not lawfully seize and sell part of a homestead, and must proceed as directed by the statute in such case; but lot 148 had been so treated and dealt with by the owner as to justify the conclusion that it was not part of his homestead, but distinct from it." Adhering to this safe and salutary rule, we are of opinion that the action of the court below was erroneous. The contention of appellants' counsel, that appellants' deed to the two store-houses separated from the home by the street, and used for purposes of profit, by renting the same to tenants, should have been protected, is in complete harmony with the opinion of this court in the case cited.

To these store-houses, and the ground actually occupied by them, appellants' deed should have been restricted, and then maintained, and cancellation directed as to the remainder of the homestead. That proper steps may be taken to this end in the court below, the decree is reversed, and the cause remanded.

LEVY v. HOLBERG.

(*Supreme Court of Mississippi*. April 21, 1890.)

POSSESSION OF TENANT—NOTICE TO VENDOR.

The possession of land by a tenant is sufficient notice of the landlord's title under an unrecorded deed to put a purchaser on inquiry.

Appeal from chancery court, Noxubee county; S. EVANS, Chancellor.

John E. Madison, for appellant. *F. A. Critz*, for appellee.

WOODS, C. J. The agreed statement of facts on which this case was submitted discloses its character fully. In 1868, one Moses Holberg conveyed by proper deed an undivided half interest in a certain lot in the town of Macon to appellee, and appellee, by her several tenants, has been continuously and openly in possession of said property from that time until the time of the filing of the bill in the case. Appellee was assessed with the property, and paid the taxes thereon, during that whole period. She had the policies of in-

surance on the building on said lot in her own name, and paid the premiums on such policies. She collected the rents due from the tenants on her half interest; and, on the occasion of the destruction by fire of the house on said lot, several years ago, she joined her co-tenant in rebuilding on the lot, and paid \$2,000 as her proportionate expense of such rebuilding. In 1876 Moses Holberg by his deed conveyed the other undivided half interest in said property to one Jacob Holberg, and said Jacob Holberg and the appellee, Anna Holberg, have remained co-tenants in equal parts of said lot ever since; and before appellant recovered judgment or levied execution Moses Holberg, the grantor, removed from the premises, and his possession was wholly abandoned. It likewise is agreed that the deed from Moses Holberg to appellee, of date October 1, 1868, was not filed for record until the 24th day of January, 1883, and was only recorded on the 2d day of February, 1883. It is agreed that appellant recovered judgment in Noxubee circuit court against Moses Holberg, in a large amount, on the 21st day of February, 1882, and that an execution upon said judgment was levied upon the undivided half interest of appellee in said lot in the year 1888. We find it necessary to consider this question only, viz., is the possession of the tenant notice of the unrecorded title of the landlord? Was Levy, the appellant, affected with notice of appellee's title by possession,—appellee not being in occupancy of the premises in person, but by tenant? While there is some contrariety of judicial opinion touching this point, in the light of reason it would seem that the tenant's possession should be notice, ordinarily, of his landlord's title. The possession of the tenant is the possession of the landlord; and possession of the holder of an unrecorded deed, open and notorious, being notice of such occupant's title, it is difficult to see why the occupancy and possession of a tenant, under a landlord having an unregistered conveyance, shall not be held notice also. The possession of an owner, holding under an unrecorded deed, suggests to the would-be purchaser inquiry into the circumstances of such holding without record title, and puts him upon search as to the real state of the title. Such possession, therefore, is properly held notice to the subsequent purchaser of the rights vested in such occupant, though not disclosed by record. Can any one see why the possession of a tenant of a real owner, under an unrecorded deed, will not likewise suggest rights in some one not disclosed by any record, and put the would-be purchaser upon inquiry as to the nature of the tenant's possession, with the reasonable certainty of ascertaining the true condition of the title, equally as if the owner himself were in possession, and inquiry had been made as to the nature of his occupancy? In either case, the would-be purchaser has sufficient evidence to put him upon inquiry, and the presumption is that such inquiry will disclose the real state of the title. Of course, it may be added, such presumption may be destroyed by evidence of the inutility and fruitlessness of such inquiry. This doc-

trine was intimated by this court in *Loughridge v. Bowland*, 52 Miss. 548, and distinctly announced in *Bratton v. Rogers*, 62 Miss. 281, and is clearly correct. Affirmed.

FULLWOOD V. STATE.

(*Supreme Court of Mississippi*. April 21, 1890.)

INTOXICATING LIQUORS—SALE BY AGENT—LOCAL OPTION ELECTION RETURNS.

1. Where intoxicating liquors are sold at a bar, contrary to law, by a person apparently in charge as clerk, the sale is, in the absence of evidence to the contrary, a sale by the owner of the bar.

2. The certification of the returns of a local option election by a majority of the commissioners is sufficient.

Appeal from circuit court, Yazoo county; J. B. CHRISMAN, Judge.

Appellant, Fullwood, was indicted for selling whisky in the county of Yazoo contrary to the local option act. Fullwood was owner of the bars of the Katie Robins and other boats of the P. Line, which navigated the waters running through Yazoo and other counties. The local option law had been put into operation in Yazoo county; but, in making the returns of the election, only two of the commissioners of the election certified to the returns. After the law was put into operation a witness for the state bought whisky from the bar of the Katie Robins, but the appellant, Fullwood, did not personally sell it. It was sold by some one, on the boat, in charge of the bar. The court instructed the jury that, if it believed from the evidence that the defendant, Fullwood, was the owner of the bar at the time named, and that whisky was sold in Yazoo county from said bar, then defendant was guilty. There was judgment against Fullwood, from which he appeals.

D. E. Barnett and R. Bowman, for appellant. T. M. Miller, Atty. Gen., for the State.

COOPER, J. We find no error in the record. It is uniformly held that mere irregularities of officers of elections, not affecting the purity of the election nor the right of the voter, and not in reference to matters made mandatory by the law, do not affect the validity of the election. *McCrary, Elect.* §§ 192-204; *Pradat v. Ramsey*, 47 Miss. 29. The certification of the returns of the local option election by a majority of the commissioners was sufficient. Opinion of the Justices, 68 Me. 587.

If appellant was the owner of the bar on the steamer Katie Robins, and intoxicating liquor was sold by a person apparently in charge thereof, as clerk or agent, the sale was, in the absence of any countervailing testimony, to be taken as a sale by the defendant; and, since there was no such countervailing evidence, the instruction given in behalf of the state was not error.

The judgment is affirmed.

LAGRONE V. MOBILE & O. R. Co.

(*Supreme Court of Mississippi*. April 21, 1890.)

MASTER AND SERVANT—FELLOW-SERVANTS.

A section master employed by a railroad company, and a section hand working under him, both

of whom are engaged at the same manual labor, are fellow-servants.

Appeal from circuit court, Noxubee county; S. H. TERRAL, Judge.

Action by W. T. Lagrone, a section hand, against the Mobile & Ohio Railroad Company, to recover damages for personal injuries. Verdict and judgment for defendant. Plaintiff appeals.

Rives & Rives, for appellant. McIntosh, Williams & Russell, for appellee.

WOODS, C. J. The earnestness with which counsel for appellant presses for a reversal has led us to give the controlling question involved a thorough re-examination. We find that the determination of a single proposition will prove conclusive of the whole case; and we shall, therefore, confine ourselves to that.

On the case presented by appellant's pleadings, were the section master and appellant fellow-servants? If this question is answered affirmatively, there is at once an end to the contention; for it is apparent, in each count of the declaration, that the injury complained of resulted from the negligence of the section master. It follows, therefore, that, if the section master and the appellant were fellow-servants, there can be no recovery in the case. We might, with safety and propriety, decline to say more than that appellant's declaration shows by unequivocal statement that the injury complained of was the result of the negligence of the section master at a time and when he was simply engaged in manual labor with appellant. Both were engaged at that time in the ordinary work of simple day-laborers, in track repairing. The appellant was holding, and the section master was striking, a bent fish-bar, with a view to straightening and fitting it for its purposed use. It seems to us that this plain and brief recital, by every rule of law, is ample to demonstrate that appellant's injury was the effect produced by the negligent act of a fellow-servant.

That the question under consideration is in apparent incertitude, owing to conflicting opinions entertained by many courts of last resort in the United States, is certainly and lamentably true. But we think it may be confidently affirmed that this incertitude arises, not from any disagreement as to the reason and right of the general rule first declared in this country by the supreme court of South Carolina in the case of *Murray v. Railroad Co.*, 1 McMul. 885, and adopted in this state in the case of *Railroad Co. v. Hughes*, 49 Miss. 258, when the subject was first considered by this court, but from a vacillating spirit which has striven to bend the rule in its application to the exigencies of particular cases. This incertitude, too, we make no doubt, arises in part from the vague and indeterminate definition originally employed in declaring the significance of the word "fellow-servants." To be sure, the most consummate use of language will fail in giving a definition which may meet at a glance every possible case that may arise in actual life. But, to continue to say that "all who are co-working in the same common enterprise, under

the same common master, and receiving compensation from him," are fellow-servants, is to leave the standard so uncertain itself as to invite every variety of contention under it. To attempt to reduce the rule to greater clearness and exactness by adding, as is often done, that "difference in compensation or in departments or in rank" does not have any determining effect in seeking to ascertain who are fellow-servants, in any particular case, improves the force and weight of the original definition, but still leaves the field of contention open to every rash and adventurous litigant.

In all the cases determined by this court for nearly 20 years past, what element has entered into, and exercised controlling influence upon, the judgment of the court, in declaring who are fellow-servants? The element of co-operation, actively and personally exercised, to the accomplishment of one common end. If we shall say, then, in addition to the definitions already given, that "all employees of the common master, engaged in merely operative service connected with the carrying on of the business of running trains," are fellow-servants, we will have made a definition and created a test by which nearly every case involving the doctrine under discussion that has ever been in this court was readily determinable,—a definition and a test so clear and simple as to make nine-tenths of all the cases constantly occurring in railroad life and service practically self-determining.

The leading case in this state, that of *Railroad Co. v. Hughes*, and one uniformly and unbendingly adhered to in all subsequent cases before this court, while not resting upon the language herein employed, yet, nevertheless, does rest upon the sound principle that employees engaged in the operative department of a railroad (in that case the relationship between a section master and a locomotive engineer was the question) were fellow-servants in such sense as that an injury to one resulting from the negligence of the other would not impose liability upon the common master. From this wise, just, and well-established rule, this court has never departed, nor in its application swerved.

It is only a few weeks since Mr. Justice CAMPBELL, as the organ of this court, in the case of *Railway Co. v. Petty*, ante, 351, (not yet officially reported,) employed the very language we have used in supplementing the usual definitions of the word "fellow-servants," and, as we had fondly—it appears vainly—hoped, had made the rule so plain in Mississippi that a "wayfaring man," though a super-sanguine suitor, "need not err therein."

Appellant and the section master were co-working in the same common employment, under the same common master, and receiving compensation from him, and were engaged in merely operative service connected with the carrying on of the business of running trains, though the section master was superior in rank to appellant, and appellant was actually under his direction and control, and were, not only under our decisions, but by the best authorities elsewhere, and by every rule of

right and reason, fellow-servants in such sense as to preclude any recovery from the common master for the negligence of either towards the other. The case at bar is thoroughly covered by, and in perfect harmony with, the judgment of this court in the case of *Sykes v. Railway Co.*, (determined at the April term, 1889, of this court.) In *Sykes' Case* the allegations of the declaration were that Sykes was employed by one Caton as a laborer in a track-laying gang; that Caton was the representative of the company at the time of Sykes' employment, and so remained up to the time of Sykes' receiving the injuries complained of; that Caton had power and authority to hire Sykes and the other laborers employed in that work, and to discharge them, at his discretion; that Caton had control, likewise, of the construction train employed in hauling timbers, etc., to be used in the construction of the road; that Sykes and the other laborers were bound to obey Caton's orders; that Caton ordered him to get on the train and unload cross-ties at such places as he (Caton) designated; that, after complying with this order of Caton, he was further ordered by Caton, as the representative of the company, to go with the train and get and bring back a pile-driver, and, generally, to do in that behalf whatever the engineer in charge of the train might require him to do; that the train had no conductor, but was wholly under the direction of said engineer; that the engineer ordered Sykes to uncouple two cars, and that, in endeavoring to obey this order and uncouple the cars, they were suddenly jammed together, catching Sykes' leg, and so producing the injuries complained of; that Sykes was ordered into a place of greater danger than that to which his contract of service exposed him by the representative of the company; but that he was not acquainted with the dangers to which he was additionally exposed, but was bound to obey the company's orders, etc. On consideration, this court held that the parties were fellow-servants, and the company not liable for the injury. The rule on this subject, it would seem, was thought to be so well established and understood in this state that Chief Justice ARNOLD, who spoke for the court, delivered no written opinion; and, because of this omission to deliver a written opinion in that case, we have thought it incumbent on us to present our views with some fullness.

Affirmed.

CITY COUNCIL OF MONTGOMERY v. MADDOX.
(*Supreme Court of Alabama*. May 7, 1890.)

CHANGE OF STREET GRADE—DAMAGES.

1. Under Const. Ala. 1875, art. 14, § 7, requiring a corporation invested with the right of eminent domain to "make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements," a city is liable in damages to the value of a house and lot caused by a change in the grade of the adjacent sidewalk to the street level, though there was no actual taking of complainant's property.

2. The measure of damages is the decrease in the value of premises arising from the change in the grade.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

Jones & Falkner and W. S. Thorington, for appellant. *T. H. Watts, Sr.*, for appellee.

SOMERVILLE, J. The action is one entirely analogous to that presented in *City Council of Montgomery v. Townsend*, 80 Ala. 489, 2 South. Rep. 155; 84 Ala. 478, 4 South. Rep. 780,—which was before this court twice on appeal. The plaintiff in the suit claims damages for the injury done his property on Herron street, in the city of Montgomery, by reason of the grading and cutting down of the street and sidewalk contiguous to the property, which is alleged and proved to have been done by authority of the city council. The sidewalk was from 10 to 15 feet above the altitude of the street, and was cut down to the level of the street grade, but no excavation was made beyond the width of the highway as originally dedicated, more than 50 years ago. The defendant justified under its alleged power to grade the street and sidewalks, and its duty to keep them in repair, so as to make them safe for the passage of pedestrians and vehicles. It can scarcely be denied that the plaintiff's property has been injured or damaged by the change of the street grade, rendering it less accessible, less desirable as a place of residence, and appreciably diminishing its market value. The verdict of the jury in favor of the plaintiff, for something over the sum of \$630, is conclusive on this point.

The only inquiry, as it seems to me, is whether the defendant municipality is to bear this loss; or, if not, to what extent it is to be relieved of the burden, necessarily at the expense of the plaintiff. This question has been ably considered in the opinions of Chief Justice STONE and of Mr. Justice CLOPTON in the case of *Townsend*, to which I have above alluded. With much in those opinions I fully agree, but, upon a more mature consideration of the authorities, I feel impelled to hold a modified view as to one or more of the conclusions there announced.

We are all agreed as to the old or common-law rule which prevailed in this state prior to the constitution of 1875, as to the liability of municipalities for grading and improving streets. Where they were invested with the authority to make such improvements, and did not exceed such authority, and there was no actual taking of the plaintiff's property in the exercise of the right of eminent domain, cities and towns were not liable for what are termed "consequential" damages, unless there was some negligence or want of skill in the execution of the work. Or, as stated by Mr. Freeman in his note to the case of *Perry v. City of Worcester*, 66 Amer. Dec. 437: "Where an act is done by a city under authority of valid statute or charter, it is not liable for consequential damages to persons or property necessarily incidental to the work performed, unless the action is given by the statute, even when the same act, if done without legislative authority, would have been actionable. But the act must be performed with reasonable care, and without want of reasonable

skill." This view is announced in *Case of Townsend*, 80 Ala. 491, 2 South. Rep. 155, and is well supported by the authorities. The reason is that the owner of the property must ordinarily be presumed to hold it subject to the paramount public right, and to the contingency of a diminution in value resulting from the exercise of the municipal right to improve the streets for the public good, "in any manner which shall not deprive him of property, nor disturb him in the lawful use of anything which should of right be his." As said by ROBERTSON, C. J., (*Keasy v. City of Louisville*, 4 Dana, 154:) "It would have been *dammum absque injuria*,—loss, not injury; inconvenience, not wrong,—to which every citizen must submit, and to something like which every citizen does submit, for the public good." The state held its highways in trust for the public use. It had the right to improve them, or to authorize their improvement through the agency of its municipalities, although such action for the public benefit might result in injury to the private property of the citizen. The prerogative of the state was to exempt itself from such for damages consequential to the injury inflicted, and it was conceived proper, in the light of former experiences, that the same prerogative should be extended to its municipal agents employed to accomplish the same end. *Transportation Co. v. Chicago*, 99 U. S. 635.

This was a severe rule, full of hardships and injustice,—that an act done under lawful authority, if done in a proper manner, would not subject the party doing it to an action, whatever the consequences might be, in the absence of any actual taking of the property of the injured party. It opened wide the door for the most monstrous invasions of the rights of the private property of the citizen under the authority conferred by legislature on corporations, especially municipal and railroad. The jurisprudence of every state in the Union furnishes unrighteous illustrations of private property injured by the construction of railroads, and damaged by municipal improvements made at the expense of the citizen for the public good. *Radcliff v. Mayor*, etc., 4 N. Y. 195; *Murphy v. Chicago*, 29 Ill. 279; *Nevins v. City of Peoria*, 41 Ill. 502; *Mayor, etc., v. Omberg*, 28 Ga. 46; *Mills, Em. Dom.* (2d Ed.) §§ 204, 204a; 2 Beach, Ry. Law, § 825; *Railroad Co. v. Marchant*, 119 Pa. St. 641, 13 Atl. Rep. 690; *Transportation Co. v. Chicago*, 99 U. S. 635.

There are two notable cases in the state of Pennsylvania which well illustrate the common-law rule above announced. As it seems to be conceded that the hardship of these cases—the want of a remedy for an admitted mischief—led to the incorporation in the Pennsylvania constitution of 1874 of a provision of which section 7, art. 14, of our present constitution, (of 1875,) hereafter quoted, is an exact copy, I deem a particular reference to the decisions to be appropriate. In *O'Connor v. Pittsburgh*, 18 Pa. St. 187, (decided in 1851,) the cutting down by the city of Pittsburgh of the grade of a street rendered entirely useless a church building, which was shown to have cost about \$25,000, and practical-

ly destroyed its value as a place of worship. "The loss to the congregation," said the court, "is a total one, while the gain to holders of property in the neighborhood is immense. The legislature that incorporated the city never dreamt that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable." It was stated by Chief Justice GIBSON, that the case was reargued "in order to discover, if possible, some way to relieve the plaintiff consistently with law; but," he added, "I grieve to say we have discovered none." So in *Navigation Co. v. Coons*, 6 Watts & S. 101, where the defendant corporation constructed a dam in the Monongahela river under legislative license, which caused back-water for several miles in a tributary of that river and resulted in great damage to the plaintiff's mill, the court held the injury to be remediless because no portion of the plaintiff's property had been taken by the offending corporation, the damage being merely consequential.

The unjust distinction thus obtained at common law that one who was injured by the rightful exercise of eminent domain could not recover damages for such injury, however great, unless some portion of his property was actually taken. If the least portion of his property was taken, however, the owner could not only recover compensation for it, but also damages accruing to the remainder of such property. Where no property was "taken," the injury inflicted was held to be consequential damages, and compensation was disallowed, unless the offending corporation or party was made liable by force of its charter or some statute. "This was the mischief," says Chief Justice PAXSON in *Railroad Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. Rep. 690, alluding to the two cases above cited,—"this was the mischief which the constitutional convention had before it when section 8 of article 16 [identical, as we have said, with section 7, art. 14, of the Alabama constitution, now in force] was adopted by that body, and it was the evil the people were smarting under when they ratified the work of the convention at the polls. The constitution, since 1790, had declared that the property of the citizen should not be taken or applied to public use without just compensation. The constitution of 1874 went further, and declared not only that it shall not be taken, but also that it shall not be injured or destroyed, by corporations, in the construction or enlargement of their works, without making compensation, etc. There is no ambiguity in this language," continues the Pennsylvania court. "We have applied it several times to cases arising under it, without the least difficulty."

Keeping in mind the cardinal rule of construction, which has regard for the old law as it stood at the making of the act, the mischief for which that law did not provide, and the remedy provided to cure this mischief, it becomes the duty of the court so to construe the clause of the constitution under consideration as to suppress the mischief and advance the remedy. "Municipal and other corporations," says the constitution, "and individuals, invest-

ed with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed, by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction." Const. art. 14, § 7.

I do not discover precisely this same language in the constitution of any other state, except those of Alabama and Pennsylvania. An analogous phrase, having in view the correction of the same evil, is found in the constitutions of Illinois, Missouri, Nebraska, Georgia, California, and several other states, and provides that "private property shall not be taken or damaged for public use without just compensation." In Texas the language is "taken, damaged, or destroyed for or applied to public use." Article 1, § 17. These constitutions have generally been construed to so far change the common-law rule as to entitle the injured owner to compensation for any damage, whether direct or consequential, done to private property for public use, and this without regard to any physical invasion or spoliation of the property so damaged. *Mills, Em. Dom.* (2d Ed.) § 204a, and cases cited. They are clearly designed as an extension of former provisions for the protection of private property. As observed by THORNTON, J., in construing a similar clause in the constitution of California: "If it was not an additional guaranty to the common and usual one, its insertion was idle and unmeaning." *Reardon v. San Francisco*, 6 Pac. Rep. 317. The whole purpose in view seems to me to be that the party benefited—the public—shall bear the burden of making compensation for any private property taken or damaged for public use. As the improvement is made for the common benefit, it is just that the public should pay for it, and not any particular individual be forced to bear the exclusive expense by the consequential depreciation in the value of his damaged property. *Harmon v. Omaha*, 17 Neb. 548, 23 N. W. Rep. 503; *Moore v. City of Atlanta*, 70 Ga. 611; *Jersey City v. Railroad Co.*, 40 N. J. Eq. 417, 2 Atl. Rep. 262; *City of Elgin v. Eaton*, 88 Ill. 535.

Under our constitution, the right of recovery in such cases is limited, of course, to property taken, injured, or destroyed in a particular mode, viz., "by the construction or enlargement" of the works, highways, or improvements of the defendant corporation. It is generally conceded that provisions of this character are remedial in nature, giving damages where none before were allowed, and therefore that they should be liberally construed to effect their object. This was said in *Townsend's Case*, 80 Ala. 489, 2 South. Rep. 155, and is the settled doctrine in Pennsylvania. *Borough of New Brighton v. United Presbyterian Church*, 96 Pa. St. 331.

The supreme court of Pennsylvania have held that the word "injury," (or "injured,") as used in the constitution of that state, meant such a legal wrong as would be the subject of an action for damages at common law; or, using the language of Mr. Justice PAXSON in a recent case, that the

framers of the constitution "intended to give a remedy merely for legal wrongs, and not such injuries as were *damnum absque injuria*. Among the latter class of injuries," he adds, "are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence, and without malice." *Railroad Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. Rep. 690. This conclusion has been severely criticized, and to my mind is of questionable correctness, but it is unnecessary for the purposes of this opinion to attempt to refute, or even to discuss, it. The critical examiner of the Pennsylvania decisions cannot fail to observe the embarrassment which has resulted from the attempt by that learned court to rescue some cases from the injustice of its logical application. The latest Pennsylvania case which we find reported, bearing on the construction of the clause under consideration, is *Railroad Co. v. Walsh*, 124 Pa. St. 544, 17 Atl. Rep. 186, and does not seem to follow the logical result of the definition affixed to the word "injury," as above stated. There a railroad had been constructed upon the public street of a town under authority of law, so near to a church edifice as to render it unfit and unsafe for use as a parsonage, church, and school, for which it was and had been used, the frequent running of the trains destroying safe access to the property, and seriously interfering with the conduct of religious services, so as to greatly depreciate the value of the edifice. The injury was held to be the direct result of the construction, and to "stand upon the same footing as to consequential injuries as if it had been an actual taking of a portion of the plaintiffs' property."

A case more directly in point, for the purposes of the present decision, is *Borough of New Brighton v. United Presbyterian Church*, 96 Pa. St. 381, where a grade of a street was changed by order of the town authorities, and the church edifice of an abutting proprietor was injured by a depreciation in value in the nature of consequential damages, without any actual taking of the plaintiff's property. It was admitted that the plaintiff would have been remediless without the aid of the constitutional provision, and of a statute enacted to carry it into effect. To the argument that the municipality was not liable for damages for grading the street the first time, by reason of the rights incident to the original dedication, *MERCUR, J.*, said: "The proprietor dedicated the street to public use as the grade then existed. The defendant in error so accepted it, and erected a church edifice on the lot abutting thereon. Whether or when the authorities would change the grade was a matter of conjecture. A change from the natural grade is a change of grade, just as clearly as if changed from a grade previously made by the authorities. It is presumed to have been made for the public benefit; but, as is found, to the injury of private property. * * * When the borough accepted it [the street] she took it as it then was, in width, line, and grade. This statute giving compensation [in execution of the constitution] is remedial.

It gives damages where before none could be recovered. It should receive a liberal construction to effect its object." A judgment of the trial court was affirmed holding the borough liable for the depreciated value of the property resulting incidentally from the grading or construction of the street. There are many other decisions of the same court on analogous questions, an examination of which will throw light on the subject in hand. *County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. Rep. 577; *Railroad Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. Rep. 871; *Pusey v. City of Allegheny*, 98 Pa. St. 522; *City of Reading v. Althouse*, 93 Pa. St. 400; *Railroad Co. v. Duncan*, 111 Pa. St. 352, 5 Atl. Rep. 742.

The authorities, we may add, make a distinction, in some cases, as to the liability of municipalities and other corporations to make compensation for the taking of streets and highways, where the fee of the street or highway is vested in the public on the one hand, and in the adjoining proprietor on the other. Whether any such distinction can be made, under our present constitution, where a depreciation in the citizen's property is caused by the construction or enlargement of municipal highways, we need not decide, as the facts of the present case authorize the inference that the plaintiff, Maddox, owned the fee of the street in question to the center. 2 *Beach, Ry. Law*, §§ 810, 811; *Mills, Em. Dom.* (2d. Ed.) §§ 203, 204; *Railroad Co. v. Williamson*, 45 Ark. 429; *Railway Co. v. Witherow*, 82 Ala. 190, 3 South. Rep. 23; *Protzman v. Railroad Co.*, 68 Amer. Dec. 650; *Railroad Co. v. Marchant*, 13 Atl. Rep. 690, 33 Amer. & Eng. R. Cas. 116, and note on page 140.

I have no difficulty, for myself, in reaching the conclusion that, under the provisions of our present constitution, if the contiguous proprietor of a house and lot is injured, in the sense of being damaged, by the grading of a street, in the mode exhibited by the evidence in this case, and this grading is done by the authority of the municipality, and by reason of this improvement the pecuniary value of such property is diminished, the owner is entitled to be compensated for the damages he has sustained. This rule has the advantage of being plain in meaning, and of easy application in practice. It harmonizes, moreover, in policy with that distinguishing feature of modern republican constitutions which has in view the protection of private rights and personal liberty against the unjust oppression and encroachments of governmental power; and the measure of damages in such cases will be the decrease in the actual value of the property occasioned by the improvement thus made for the public benefit. Unless this construction be given the constitution, it will fail, in my opinion, to afford that just indemnity for the wrongs of the citizen which was intended to be accomplished by its framers; which was, I repeat, to require the public to bear the burden of municipal improvements of this nature made for the public benefit, and not to crush the private citizen by imposing upon him alone the entire damage which may have been caused to his property. Such

an improvement seems to me to be "a construction or enlargement" of a highway, within the meaning of the clause under consideration. And I do not see that any dedication of a street, however long ago it may have been made, could operate to withdraw the case from the operation of the law, in force at the time the improvement is made, which declares, in effect, that the municipality shall indemnify the citizen for any injury or damage to his property resulting from such improvement, equally with any injury or damage done him by the actual taking of such property. It can make no difference in the justice of the case if one's property is reduced to one-half of its original value by an actual taking, or by indirectly covering up his premises with earth piled up at his doorsteps in leveling a street, or in digging down his sidewalk so as to render a ladder necessary for access to the place of his abode or his business.

In my opinion, if the uncontroverted evidence in the present case was believed by the jury, the plaintiff was entitled to a recovery. No question seems to be raised as to the amount of the verdict, the rule in *Townsend's Case*, 80 Ala. 489, 2 South. Rep. 155, no doubt being followed in the charge of the court, which would put the measure of plaintiff's damages at the difference in the market value of the premises before and after the sidewalk was cut down. *Railway Co. v. Eberle*, 110 Ind. 542, 11 N. E. Rep. 467; *Shars. & B. Lead. Cas. Real Prop.* 470-473.

Under these views, the record shows no ruling of the court prejudicial to the appellant, and the judgment must be affirmed.

MCCLELLAN, J. It seems to me there is no escape from the conclusion reached in the opinion of Justice SOMERVILLE, that the rule prescribed by the constitution imposes a liability in all cases for damages resulting either from the taking, the injury, or the destruction of property in the construction or enlargement of the works, highways, or improvements of municipal or other corporations having the power to take private property for public use. I find no warrant in the constitutional provision, or in any canon of construction as applied thereto, in connection with pre-existing doctrines of the common law, for limiting the right to compensation for such injuries by a consideration of a supposed reservation of power to take, injure, or destroy in the original dedication of streets to the public use. I fully concur in the foregoing opinion.

CLOPTON, J. I concur in the affirmance of the judgment on the principles declared in *Townsend's Case*, 80 Ala. 489, 2 South. Rep. 155, but not in the modification of the rule laid down in that case.

STONE, C. J. I concur with Judge CLOPTON.

BOONES v. COMMON COUNCIL OF ALEXANDER CITY.

(*Supreme Court of Alabama*. April 14, 1890.)

PROOF OF CITY ORDINANCE.

A book in which all the ordinances of a town are recorded, kept in its custody, is sufficient proof

of the existence of an ordinance therein, in a prosecution for drunkenness.

Appeal from circuit court, Tallapoosa county; J. R. DOWDELL, Judge.
John A. Terrell, for appellant.

MCCLELLAN, J. The present appeal is prosecuted from a judgment of conviction rendered by the circuit court, on appeal from a judgment of the mayor of Alexander City convicting the appellant of violating an ordinance of the town. The assignments of error are predicated upon the action of the circuit court in allowing proof of the ordinance alleged to have been violated to be made by the identification and introduction "of a book called the 'Ordinance Book' of the town, in which said ordinance was recorded," and in which, it was shown, all the ordinances of the town were recorded. No question was raised as to the regularity of the enactment, or as to the sufficiency of the publication of the ordinance, but the sole point of the objection appears to be that the existence of the by-law could not be proved in the manner allowed. We do not think the objection is tenable. "Even in the absence of statutory provision," say *Horr & Bemis*, "the printed volume containing the city ordinances is *prima facie* evidence, and will be considered sufficient proof of their existence until controverted;" and, in like manner, a book purporting to contain all the ordinances, and shown to be in the custody of the corporation, as shown here, will be received without further attestation. *Horr. & B. Mun. Ord.* § 185; *Barr v. Auburn*, 89 Ill. 361; *Tipton v. Norman*, 72 Mo. 380.

Where the point at issue involves the proper and regular enactment of the ordinance, and not merely its *prima facie* existence as a law of the town, a different mode of proof must be resorted to. It then becomes necessary to have recourse to the journals of the town-meeting, and from them it must appear that every essential step in the enactment of the law has been observed and taken. "Proof of the existence and identity of the ordinance," in other words, offered, should by right be all that is required of the prosecution in any case until some showing has been made that there was irregularity in the enactment of the ordinance, in which case it becomes necessary to prove that it was properly enacted in order to sustain a conviction or judgment. If no such question is raised, the presumption that the ordinance was properly passed becomes conclusive. *Horr. & B. Mun. Ord.* § 185; *Flora v. Lee*, 5 Ill. App. 629.

The judgment of the circuit court is affirmed.

PATTERSON *et ux.* v. SOUTH & NORTH ALA. R. Co.

(*Supreme Court of Alabama*. April 10, 1890.)

DEFECTIVE BRIDGE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Where a bridge maintained by a railroad company as an approach to a crossing is reasonably safe and convenient for the use of the traveling public, the company is not responsible for an injury sustained by the stepping of plaintiff's mule

through a hole which is near one end of the bridge, and out of the usual route of travel.

2. In an action for personal injuries by a fall caused by plaintiff's mule stepping through a hole in a bridge approaching a railroad crossing, which it was the duty of the company to maintain, evidence of the mule's habit of stumbling is relevant, as tending to show contributory negligence.

3. In an action for personal injuries, an expert may be permitted to testify that they were occasioned by a fall of some kind, but he cannot give his opinion about specific facts of the fall, as to which he does not pretend to know anything.

4. Vindictive damages in such case can only be recovered when the evidence shows that defendant has been guilty of gross negligence.

Appeal from circuit court, Cullman county; JOHN MOORE, Judge.

This action was brought by the appellants against the appellee, and sought to recover damages for personal injuries sustained by Mrs. Mary E. Patterson, the wife of her co-plaintiff. The facts, as disclosed by the bill of exceptions, and upon which the plaintiffs base their right to recover, are that Mrs. Patterson, while riding mule-back along a public road, which was crossed by the defendant's railroad, was thrown from the mule and injured, by the mule stepping in a hole in a bridge which was required to be kept in repair by the defendant,—the said bridge being within the defendant's right of way, and constituting an approach to the defendant's crossing. The evidence for the defendant tended to rebut any negligence or failure on the part of defendant to keep the said bridge in proper repair, and to establish contributory negligence on the part of Mrs. Patterson, by her riding too near the edge of the bridge, and out of the usual route. On the examination of one Dr. Sams, after describing the injury and expressing his opinion thereupon, he said: "Suppose said injuries were painful from the way she complained of the same. My opinion is that said injuries were caused from a fall off of a mule or horse falling through a crossing on the railroad." The defendant objected to the introduction of the testimony of Dr. Sams, quoted above, and the court sustained the objection, to which ruling the plaintiff excepted. On the examination of David N. Patterson, one of the plaintiffs, and husband of Mrs. Mary E. Patterson, he was asked, on cross-examination: "What was the character of the mule Mary E. Patterson was riding at the time of the accident, for stumbling?" The plaintiffs objected to this question, but the court overruled the objection, allowed the question to be asked and answered, and the plaintiffs duly excepted.

Among the charges requested by the defendant, and given by the court, and to each of which the plaintiff duly excepted, were the following: "(13) The court charges the jury that if they believe from the evidence that the said bridge, at the crossing where the alleged injury is said to have been incurred, was maintained by the defendant in such manner as not to unnecessarily impair the usefulness of said public road, or to interfere with the safe enjoyment of said public road, then the defendant is not liable, and their verdict should be for the defendant." "(17) If the

jury believe that if Mrs. Patterson, in attempting to cross the bridge in question, had followed the usual and ordinary method of crossing it by the general traveling public, she would not have been in any danger, and if they find from the evidence that if Mrs. Patterson was hurt at all she was hurt by riding near the ends of the cross-ties, which place was out of the usual line of travel, then, in riding where she did, she so far contributed to her own injury as to prevent any recovery in this case. (18) If the jury believe from the evidence that Mrs. Patterson was negligent in attempting to cross the bridge in question by riding out of the usual route taken by the traveling public, when she could have crossed it with safety to herself by keeping in the usual route, then she so far contributed to the accident and injury as to prevent any recovery in this case, and the jury must find for the defendant." "(25) If the jury believe from the evidence that, at the time of the accident, the bridge in question was reasonably safe and convenient for the traveling public, exercising ordinary care and prudence for their own safety, they must find for the defendant." There were many exceptions taken to the rulings of the court below, and all were here assigned as error.

W. T. L. Cofer, for appellants.

SOMERVILLE, J. 1. It was competent for the witness Dr. Sams to give his opinion, as an expert, that the injuries of the plaintiff Mrs. Patterson were caused by a fall of some kind, but not by a fall from a mule or horse at a particular railroad crossing, as to the facts of which he neither knew, nor pretended to know, anything. The evidence bearing on this point was properly excluded.

2. The evidence tended to show that the injury complained of was received by reason of the plaintiff's mule falling through a hole in a bridge. The habit of the animal for stumbling was a relevant fact, in view of the liability of such a vice to contribute to such an accident. The evidence bearing on this point was properly admitted to throw light on the inquiry as to any alleged contributory negligence on the plaintiff's part which may have produced the injury. It is sufficiently obvious that the inquiry as to the "character" of the animal for stumbling had reference to habit, and was so understood by the witnesses.

3. The court properly charged the jury that there could be no recovery of exemplary or vindictive damages by reason of any want of care on defendant's part less than gross negligence. *Railroad Co. v. McLendon*, 63 Ala. 266; *Lienkauf v. Morris*, 66 Ala. 406; *Telegraph Co. v. Way*, 83 Ala. 542, 4 South. Rep. 844.

4. If a railroad company constructs its road across a public road or highway, the duty devolves upon it to put and keep the approaches and crossing in proper repair for the use of the traveling public. This duty will be sufficiently discharged if the highway is maintained in a reasonably safe and convenient condition so as not to materially impair its usefulness, or interfere with its safe enjoyment by trav-

elers, who exercise ordinary care and prudence for their own safety in using it. *Coal Co. v. Davis*, 79 Ala. 308; *Railroad Co. v. McLendon*, 68 Ala. 266; 9 Amer. & Eng. Cyclop. Law, 411; *Shear. & R. Neg.* §§ 357, 451, 452. Charges numbered 13 and 25 harmonize entirely with this view of the law.

5. We perceive no error in the court's giving instructions numbered 17 and 18, requested by the plaintiff. If the plaintiff Mrs. Patterson was so negligent as to ride out of the usual route of travel, commonly used by others, and which could have been used with safety by herself, on the occasion of her injury, and was hurt by riding near the end of the bridge, this would presumptively be a want of ordinary care, such as would defeat recovery, provided it contributed to such injury. The instructions assert nothing more than this.

6. The record does not show the rulings of the court on the several demurrers with sufficient certainty to enable us to pass on them intelligently; nor do the assignments of error, based on these rulings, appear to be insisted on in argument. We decline, therefore, to consider them. The other rulings of the court seem to be free from error, and the judgment is affirmed.

WILLIAMS *et al.* v. FLOWERS.

(*Supreme Court of Alabama.* April 14, 1890.)

PROMISSORY NOTE—USURY—ATTORNEY'S FEES.

1. A stipulation in a note to pay "all costs for collecting the above, not less than ten per cent.," includes an attorney's fee for bringing suit.

2. Such agreement does not render the contract usurious, though only a reasonable fee could be recovered.

Appeal from chancery court, Jefferson county; THOMAS COBBS, Chancellor.

The bill in this case was filed by the appellee, as transferee of the note sued on, to enforce a vendor's lien on the land for the purchase money for which it was given by the appellants, defendants below. It contained a stipulation to pay costs of collection in addition to legal interest. A demurrer by defendant was overruled. Upon final hearing on pleadings and proof, the chancellor decreed plaintiff relief as prayed. The defendants appeal, and assign the decree of the chancellor as error.

Mountjoy & Tomlinson, for appellants. *Alex. T. London*, for appellee.

CLOPTON, J. A demurrer was interposed to so much of the bill as seeks to enforce the collection of solicitor's fees under the following stipulation contained in the note upon which the bill is founded: "It is further agreed that the undersigned [makers] shall pay all costs for collecting the above, not less than ten per cent., on failure to pay at maturity." The special grounds of demurrer are that the term "costs for collecting" does not include solicitor's fees for bringing the suit, and, if it does, that the contract is usurious. In practice, costs and fees are different in their nature; costs being an allowance to a party for expenses

incurred in prosecuting or defending a suit, and fees being compensation to an officer for services rendered in the progress of a cause. *Tillman v. Wood*, 58 Ala. 578. In common parlance the compensation paid an attorney is denominated a "fee." In contradistinction to the costs incident to the judgment; but in its legal sense the term "costs" denotes not only the expenses incurred by reason of being a party to legal proceedings, but also the charges which an attorney is entitled to recover from his client as remuneration for his professional services. *Rap. & L. Law Dict.* It is manifest that the parties meant that the term "costs for collecting," as used in the note, should be understood in its broadest signification; otherwise the stipulation would have no effect, for without it defendants would be liable to the costs incident to the decree. We therefore construe the term as having been intended to include the compensation which the payee of the note might have to pay an attorney for bringing a suit to enforce its collection. It is well settled by our decisions that an agreement to pay the reasonable attorney's fees, which the payee of a note would have to pay if forced to collect by suit, in addition to the legal interest, does not render the contract usurious.

Defendants contend that the terms of the agreement to pay all costs for collecting, not less than 10 per cent., without reference to the reasonableness of the charges, makes the contract usurious. In *Munter v. Linn*, 61 Ala. 494, the agreement was to pay, if it became necessary to institute legal proceedings to recover the amount of the notes, the fee of the attorney employed, "such fee to be ten per cent. of the amount sued for and recovered,"—an unconditional agreement to pay 10 per cent. It was held that this stipulation does not constitute the contract usurious, but that the creditor could recover only a reasonable fee, though he stipulated for a larger sum or per cent. In *Wood v. Machine Co.*, 83 Ala. 424, 3 South. Rep. 757, the note obligated the maker to pay principal, interest, and 10 per cent. attorney's fees. It was ruled that the note was sufficient to support a judgment by default for the entire amount due, including attorney's fees, without the intervention of a jury. These decisions show that an agreement to pay 10 per cent. of the amount recovered in addition to the legal interest is not itself usurious. The amount stipulated must be reasonable, or at least not obviously excessive; for no form which may be given to the contract—no device—can evade the statute against usury if the intent appears, or is shown, to secure a profit in addition to the legal interest and the reimbursement of the creditor of the expenses which he may incur in collecting the note. The chancellor referred to the register the ascertainment of what was a reasonable attorney's fee, and he reported that 10 per cent. was reasonable. The proof fully sustains his report. There is not only no evidence tending to show a purpose to take usury, but the proof overcomes the defense. Affirmed.

POWELL et al. v. HIGLEY.

(Supreme Court of Alabama. April 9, 1890.)

SPECIFIC PERFORMANCE—CONDITIONS—STATUTE OF FRAUDS.

1. Where a purchaser of lands who had agreed to erect thereon one residence within four months, and another within a year, was notified within the four months, and while building the first house, to surrender possession to the vendor, who shortly after sued in ejectment, the failure to build the second house within the year was not the laches of the purchaser, and did not estop him from obtaining equitable relief.

2. Where plaintiff asked a specific performance, and failed to make out a case for it, but showed facts entitling him to have a lien declared upon the premises for reimbursements, the case was properly retained for the purpose of giving such relief.

3. Under a contract of sale of lands made in his own name by one who had no title, but who was authorized thereto by the owner, the vendee acquired only an equitable right.

4. An agreement for the future exchange of lands for a piano was released from the operation of the statute of frauds (Code Ala. § 1732, subd. 5) when the vendor received the piano and exercised dominion over it.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

The bill in this case was filed by the appellee against the appellants, C. B. Powell and E. B. Powell, and sought to have a contract specifically performed by the conveyance of certain lots in Cleveland, Ala., as shown by the bill, and to have compensation awarded for the purchase money paid and improvements placed on said lots by complainant, in case a specific performance of the contract could not be decreed. The contract sought to be enforced was made September 7, 1887, between the complainant, Higley, and E. B. Powell, one of the defendants. By this contract E. B. Powell sold four lots in the town of Cleveland to complainant for \$1,800, and agreed to take in payment therefor a "Decker & Son Extra Style piano, in mahogany case, and an exact duplicate of Mr. McDaniel's piano;" and complainant agreed, within four months from "October 1, 1887, to erect a neat two-story residence on two of the lots, and within twelve months to build a residence house on the other two lots, to cost not less than \$1,500." The complainant alleges that he performed his part of this contract by delivering the piano, and by building one of the houses, and that he was proceeding to build the other house, when he was stopped by respondents, who proceeded to dispossess him by an action of ejectment. In the answer of both of the respondents, this contract is admitted, but it is claimed that E. B. Powell was without authority to bind C. B. Powell by said contract; the lots belonging to C. B. Powell. The bill was filed on the 6th of March, 1888, within the 12 months within which the second house was to be built, but after the action of ejectment had been brought by the respondents. The bill averred that the said E. B. Powell was the agent of C. B. Powell, and had a power of attorney to sell the lots in question. The respondents deny that E. B. Powell had at the time a power of attorney to sell these lots, but each admit that he had had such power of attorney, but that it had been revoked;

but it is shown that C. B. Powell had never given E. B. Powell any notice of the revocation, and E. B. Powell says that he thought he was acting under such power. There was testimony tending to show that C. B. Powell, on being informed of the trade, ratified it, as is shown by an exhibit to the bill, in which he changed the contract of sale by changing the numbers of the lots sold, by striking out some and inserting others. It is further shown that, after having been fully informed of the contract between Higley and E. B. Powell, C. B. Powell stood by and saw Higley expending his money in improving the property, and rather encouraged Higley in so doing, by showing him his lines, pointing out the lots, and telling him where to build. It is also shown that Higley paid a part of the purchase money, and was put in possession by C. B. Powell. It is contended by the complainant that he met the obligation of the contract to deliver Powell the piano according to the specifications; but Powell denies this. It is shown by the complainant that, after the arrival of the piano, it was turned over to Powell, and was delivered by Higley, according to the instructions of C. B. Powell, to one Watkins, to whom Powell had traded it for brick. Additional facts are stated in the opinion. From the decree the defendants appeal, and assign the same as error.

Cabness & Weakley and Smith & Lowe, for appellants. *Lane & White*, for appellee.

STONE, C. J. Many grounds of demurrer were interposed in this case, questioning the sufficiency of the bill. The city court overruled the demurrer, and at the same time overruled the motion of defendants to dismiss the bill for want of equity. Those rulings are severally assigned as error. We think the bill sufficient, and find no error in either of these rulings.

It is also urged on behalf of appellant that there is a fatal variance between the allegations of the bill and the proof in the cause, and for that reason the decree should be reversed. We hold that the variances complained of are only incidental to the main inquiry, and that there is a substantial conformity of the proof to the allegations. There is no merit in either of the foregoing objections.

There is very great contrariety of testimony in this record. We think that upon all material questions, save one, there is not much difficulty in arriving at the true state of the facts. We summarize them, as we feel authorized to find them reasonably established: *First.* The legal title to the lots was in C. B. Powell, and he alone was authorized to make a contract of sale which, *per se*, would be binding under the statute of frauds. *Second.* That E. B. Powell was the agent of C. B., his brother, to negotiate sales of the lots, with enlarged discretion, if not some expectant interest, which, as a rule, C. B. Powell would and did ratify and make binding. *Third.* That when C. B. Powell was informed of the sale to Higley, and its terms; he did not repudiate it outright, as being unauthorized, but that he so far sanctioned and approved it, though reluc-

tantly, as to induce Higley to put improvements on the lots in value exceeding that of the lots in their unimproved state; and that he stood by and witnessed the erection of the improvements without remonstrance or objection. *Forney v. Calhoun Co.*, 84 Ala. 215, 4 South. Rep. 153. *Fourth.* That when the piano arrived he still failed to disaffirm the contract, and knowingly permitted the improvements to progress, until Watkins, by flight, disgrace, and confessed insolvency, demonstrated that nothing could be expected from him.

The question upon which the testimony leaves the mind less satisfied is whether, when the piano arrived, Powell so far recognized and treated it as his own as to effect its sale through Higley as his agent. On this question the testimony of Higley and that of Powell stand diametrically opposed. But taking no account of the testimony of Watkins, who is heavily impeached, Higley's testimony is materially corroborated by that of the witnesses Jemison and Lusky. In reaching the conclusion he did, the chancellor must have found this issue in favor of Higley, and we concur with him. The contract, as we have said, was not, when made, enforceable, by reason of the statute of frauds. When the piano, the promised consideration of the lots, was received by Powell,—we mean by received, when he assumed control and dominion over it by directing its exchange for brick,—this was payment for the lots, and took the contract without the statute of frauds. Code 1886, § 1732, subd. 5, and note; *Heflin v. Milton*, 69 Ala. 354. The chancellor did not decree the contract to be specifically performed; but, as we understand the record, his failure to do so was not induced by any finding of his that the contract was not fair, just, reasonable, and equal. 3 Brick. Dig. 361, §§ 415 et seq. Passing on to the question of values, the testimony inclines us to believe that, in negotiating the trade, both the lots and piano were overvalued. We are not convinced that the four lots had a greater value than the piano. The real difficulty was that the year had expired, and Higley had not built the second house, which his contract bound him to build within the year. This rendered it impossible to enforce the specific performance of the contract. If this failure was the result of his own neglect, or non-excused failure to perform his part of the stipulations, then chancery will grant him no relief, but leave him to his remedy at law, if he have any. Was his failure the result of his own non-excused fault? The chancellor must have found that it was not, and we agree with him. The contract was made in September, 1887, and by its terms Higley was to erect on the lots one house in 4 months after October 1st then next, and a second house within 12 months. The first house was nearing completion when in January, 1888, Powell notified Higley to surrender the possession of the lots to him at once, or pay him \$1,800, the purchase price. This was before the expiration of the four months allowed for the erection of the first house, but after the receipt and sale of the piano.

Soon thereafter Powell instituted the action of ejectment to turn Higley out of possession. This excused Higley from proceeding to erect the second house, and fixed the fault of the failure on Powell.

The chancellor, although he declined to decree the specific execution of the contract, did not dismiss the bill. On the contrary, he decreed that complainant was entitled to relief, and ordered, adjudged, and decreed "that compensation be allowed and made to complainant for the payment made by him in and by the piano, * * * and for the improvement made by him upon said lots, * * * and that said lots [describing them] be, and they are hereby, charged in favor of the complainant * * * with an amount equal to the value of said piano, with interest thereon, * * * and also with an amount equal to the value of said improvements, with interest thereon, * * * less an amount equal to the value of the use of said premises during the complainant's possession thereof." He then made an order referring the question of taking the account to the register.

It is contended for appellant that, if appellee has any cause of action, it is a legal demand, and he should have been remitted to that forum for its assertion. We cannot agree to this, for two reasons: *First.* The title being in C. B. Powell, and the contract made in the name of, and signed by, E. B. Powell, complainant's right was and is equitable, and can only be adequately enforced in equity. *Second.* Higley, under the circumstances of this case, was entitled to have a lien declared on the lots for his reimbursement, and equity alone can declare and enforce such lien. There may be other reasons, but the foregoing are sufficient.

In *Aday v. Echols*, 18 Ala. 353, that able jurist, Chief Justice DARGAN, said: "The rule is that when a purchaser enters into possession, and upon the faith of a contract has made valuable improvements upon the land, and afterwards files his bill to compel a specific performance, but fails to make out such a case as entitles him to that relief, the bill may be retained for the purpose of allowing him compensation, if he has not a full and adequate remedy at law." *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Allen v. Young*, 6 South. Rep. 747; 2 Story, Eq. Jur. §§ 799, 799a; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Pratt v. Law*, 9 Cranch, 456; *Masson's Appeal*, 70 Pa. St. 26; *Pinnock v. Clough*, 16 Vt. 500; *Rider v. Gray*, 69 Amer. Dec. 135; *Land Co. v. Grady*, 33 Ark. 550; *Nagle v. Newton*, 22 Grat. 814; *Wat. Spec. Perf.* § 515.

We think the principle declared in *Aday v. Echols*, 18 Ala. 353, precisely covers this case, and that the city court did not err in the decree rendered.

Affirmed.

ROBINSON et al. v. HOLT.

(Supreme Court of Alabama. April 14, 1890.)

LANDLORD AND TENANT—DENIAL OF TITLE—HOLDING OVER.

Plaintiffs bought lands of defendant on foreclosure, and afterwards rented them to him for 1887. Before the expiration of the term defend-

ant notified plaintiffs that he claimed the land as owner, and would hold no longer as tenant. *Held*, that he could not repudiate his tenancy without surrendering possession, and, having occupied the lands during 1888, was liable for rent as upon a contract, in the same terms as that of the previous year.

Appeal from circuit court, Macon county; J. R. DOWDELL, Judge.

This was an action by the appellants against the appellee, and sought to recover the rent for the year 1888. The suit was commenced by the issuing and levying of an attachment. The evidence tended to prove, for the plaintiffs, that they rented the land to the defendant for the year 1887, and took his rent note for the same; that during the year one Thompson, the agent of the plaintiff, told the defendant, on one or two occasions, that he could have the land for the next year on the same terms as for 1887, but the defendant said nothing, except that it was his intention to redeem the said land, which had been bought by the plaintiffs at a sale under a mortgage made by defendant; that on another occasion he admitted he owed the rent for 1888; that the defendant never redeemed the land, nor did he ever surrender possession during the year 1887 or 1888, but that he continued to occupy the same during the year 1888. The evidence for the defendant tended to show that the defendant did not admit that he owed the rent for the year 1888; that in the fall of 1887 he notified the agent of plaintiffs that "he would no longer hold the lands as plaintiffs' tenant, but that he repudiated the relationship of tenant and landlord between them." He further testified that "he did not hold the lands in 1888 as tenant of plaintiffs, but claimed them as his own." This was substantially all the evidence; and thereupon the court, of its own motion, charged the jury as follows: "If they believed from the evidence that in the fall of 1887, and before the beginning of the year 1888, Holt notified Thompson, as agent for plaintiffs, that he would no longer hold the land as their tenant, but that he repudiated the relationship of landlord and tenant between them, and nothing more was said between the parties, and no other contract entered into between them, then they must find for the defendant." The plaintiffs excepted to this charge, and to other rulings of the same tenor. Verdict and judgment for defendant, from which plaintiffs appeal.

W. F. Foster, for appellants. J. E. Cobb, for appellee.

MCCLELLAN, J. It is thoroughly well settled and familiar law that a tenant cannot dispute the title of his landlord while in possession under a lease, or while holding over after the expiration of his lease. 1 Tayl. Landl. & Ten. § 89; 2 Tayl. Landl. & Ten. §§ 705-707; Elliott v. Dycke, 78 Ala. 150; Wells v. Sheerer, *Id.* 142; Crim v. Neims, *Id.* 604; Pope v. Harkins, 16 Ala. 321; Houston v. Farris, 71 Ala. 670, 74 Ala. 162.

It is equally well settled that a tenant for one year, "who holds over after the expiration of his term without paying rent, or otherwise acknowledging a continu-

ance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. * * * But the tenant has no such election. His mere continuance in possession fixes him as a tenant for another year, if the landlord thinks proper to insist upon it;" and this notwithstanding the fact that the tenant refuses to continue the lease, and gives notice of his purpose not to do so. From this state of facts, the landlord electing to treat the continued occupancy as a tenancy, which he will be held to have done from slight circumstances, the law implies a contract between the parties for a lease of another term of one year, on the same terms as were agreed on in the expressed contract for the previous term; and all the incidents of this implied lease, all the relations, rights, and remedies of the parties thereunder, are the same as if it had been an express renewal. 1 Tayl. Landl. & Ten. § 22; Conway v. Starkweather, 1 Denio, 113; Schuyler v. Smith, 51 N. Y. 309; Parker v. Hollis, 50 Ala. 411; Wolfe v. Wolfe, 69 Ala. 549.

The aspect of the evidence in this case most favorable to the rulings of the court below established the relation of landlord and tenant between the plaintiffs and defendant, within the foregoing principles; and those rulings, in so far as they denied a right of recovery in this action, proceeding as it did, by attachment for the rent of the premises during the year in which the defendant held over, were erroneous.

The judgment is reversed, and the cause remanded.

THROWER v. BRANDON *et al.*

(Supreme Court of Alabama. April 14, 1890.)

SUMMONS—TIME OF SERVICE.

Code Ala. § 2731, provides that, "when the summons is executed twenty days previous to the return term thereof, the cause * * * stands for trial that term." Section 11 provides that "the time within which any act is provided by law to be done must be computed by excluding the first day and including the last." *Held*, when a summons was executed 20 days before the return-term, counting the first day thereof, the cause was properly tried at that term.

Appeal from circuit court, Dale county; J. M. CARMICHAEL, Judge.

This was a statutory real action, in the nature of ejectment, brought by the appellees against the appellant. The sheriff's return on the summons and complaint showed that the same was executed on the 24th day of December, 1888, and the court convened on the 14th day of January, 1889. The appellant contends that this was not such a service of 20 days previous to the return-term as would allow the case to be tried at that term of the court.

Chas. Wilkinson, for appellant. J. F. Flournoy, for appellees.

MCCLELLAN, J. There is nothing in the objection relied on to operate a reversal of the judgment in this case. In determining whether service of summons has been perfected 20 days previous to the return-term, the first day of the term is the last day of the period limited; and if, by including this day, as required by section 11 of the Code, 20 days have elapsed after the day of service,

the case stands for trial at that term. Such has been, we believe, the universal understanding and practice of the bar and nisi prius courts, and is, we do not doubt, the sound construction of section 2731 of the Code. *Garner v. Johnson*, 22 Ala. 494, 501.

The judgment of the circuit court is affirmed.

WEBB et al. v. BALLARD.

(*Supreme Court of Alabama.* April 16, 1890.)

ADMINISTRATORS—SALE OF LAND—CONVEYANCE.

1. An administrator having sold lands by order of the probate court, and received the price thereof, a decree was entered ordering him to make a conveyance to the purchaser, which was never done. The purchaser, without taking possession, exchanged the lands for others, but gave no conveyance to his vendee. The latter went into possession; and plaintiff, claiming by proper conveyances from him, prayed the court to order the administrator to execute a conveyance to him. *Held*, that the exchange was void under the statute of frauds, and the probate court, having no equitable powers, could not make such order.

2. Code Ala. § 2124, provides that, when the purchase money of lands sold by order of court has been paid "by the purchaser or his heirs, or any other person holding under him, directly or derivatively," the court, on application, shall order a conveyance to such person. *Held*, that plaintiff was not "holding" under the purchaser, and the court could not properly order the conveyance.

Appeal from probate court, Randolph county; T. J. THOMASON, Judge.

W. H. Smith, Jr., and J. W. Oliver, for appellants. James Aiken, for appellee.

STONE, C. J. Perryman was administrator of Jacob Presnell, deceased; and, under an order of the probate court, he, in January, 1880, sold the land in controversy, 120 acres, and Milton Webb became the purchaser, and received a certificate of purchase. The sale was partly on time. On July 9, 1889, Perryman reported the sale to the probate court, and reported that the purchase money had been paid. On July 25, 1889, the probate court confirmed the sale, and "authorized, empowered, and required" the administrator to execute and deliver title to the purchaser; the report showing that Milton Webb was the purchaser of the land in controversy. It is not shown that any title was made to Webb. On August 12, 1889, Joshua Ballard filed his petition in said probate court, claiming that he held said lands derivatively under said Webb, and praying that said lands be decreed to, and a conveyance executed by the administrator to him. Milton Webb and Perryman, the administrator, were made parties defendant to Ballard's petition, and they were brought in by notice served. Webb pleaded various pleas in defense, and, among others, that his interest in said purchased lands had never been conveyed or transferred by any writing signed by him or by his authority.

On the trial the following facts were developed: At the sale the lands were bid off by Webb, and he was set down as the pur-

chaser. The lands were then uncleared. They were never cleared or occupied by Webb. Some time after his purchase, Webb made an agreement with one Veal to exchange said lands for another tract, paying a money difference, and received from Veal a conveyance of the land thus received in exchange. Webb took possession of the lands he had thus obtained from Veal, and has remained in possession ever since. He has, however, expended a large sum of money in defending his title and possession, but he has defended them successfully. He made no written transfer or conveyance to Veal of the land he had purchased at administrator's sale, but the regularity and sufficiency of the conveyances from Veal down to Ballard are not questioned. Veal, while he claimed to own the land, cleared and cultivated a small part of it; and Ballard, after he claims to have acquired it, made much more extensive improvements, and has occupied it ever since under claim of right. On a hearing of Ballard's petition, the probate court, on August 28, 1889, decreed that the administrator should make title to Ballard. From that decree the present appeal is prosecuted.

In defense of the ruling of the probate court, it is claimed that Ballard holds derivatively under Webb, and, the purchase money having been paid in full, and the sale confirmed, the probate court did not err in decreeing title to be made to him, (Ballard.) This contention is based on section 2124 of the Code of 1886. Sess. Acts 1880-81, p. 29; 1884-85, p. 95. This remedy is purely statutory, (*Anderson v. Bradley*, 64 Ala. 263,) and is administered by a court of limited statutory powers, with no equitable jurisdiction. It may be that Ballard is equitably entitled to the land; but an oral exchange of lands, without written evidence, is clearly within the statute of frauds. Browne, St. Frauds, §§ 76 to 78 inclusive. We cannot think Ballard showed himself to be such derivative holder under Webb as to be entitled to the statutory relief claimed. The probate court erred in the relief granted.

In Pennsylvania, there is no separate chancery court, and no tribunal authorized to administer separate equitable relief. Rulings of that state are shaded by the peculiar, blended system which prevails there. *Reynolds v. Hewett*, 27 Pa. St. 176; *Moss v. Culver*, 64 Pa. St. 414.

There is, perhaps, another fatal objection to the relief granted in this case. Before Ballard's petition was filed the court had made an order that the administrator should execute a conveyance to Webb. That order, so far as we are informed, stood, and yet stands, in full force, unreversed and unrevoked. Was it permissible to make the second order while the first was in force? Did not the existence of the first order cut off all jurisdiction to grant another that was absolutely repugnant to it?

The decree of the probate court is reversed, and a decree here rendered dismissing Ballard's petition at his costs.

Reversed and rendered.

LAKESIDE LAND CO. v. DROMGOOLE.

(Supreme Court of Alabama. April 16, 1890.)

PROMISSORY NOTES—ACTIONS—STATUTE OF FRAUDS.

1. Code Ala. § 2594, requires suits upon bills of exchange and promissory notes payable at a bank or banking-house, to be brought in the name of the person having legal title. *Held*, that a plea which averred want of legal title in plaintiff, but failed to aver that the note was payable at a bank or banking-house, was not demurrable, when that fact appeared from the complaint.

2. An indorsement in blank vests the legal title to a note in one who takes it as owner, and the note itself, in the absence of rebutting proof, is *prima facie* evidence of ownership.

3. A contract that "we agree to buy an interest in four hundred acres of land described below, [the description following,] and agree to pay one hundred and twenty-five dollars per acre for the number of acres set opposite our names. Payments to be made, to-wit: Two-fifths cash; bal. in three equal payments, six, twelve, and eighteen months from date." The agreement was signed by the purchasers, and notes of same date were given for the deferred payments. *Held*, that these writings, taken together, form a sufficient "memorandum," under the statute of frauds, (Code Ala. § 1732.)

4. The vendor under this agreement sold with the purpose of forming an incorporated land company, which was done. In a suit on one of the notes, the maker alleged as a defense that the vendor had promised him, as an inducement to enter the company, that he would sell enough of its stock and lands at a profit to pay defendant's notes as they matured; which he had not done. *Held*, that this agreement, being verbal, and previous or contemporaneous, is presumed to be merged in the written contract, and oral evidence of it was improperly admitted.

5. The fact that the vendor said, during the negotiations for the sale, that he would sell enough land and stock to pay defendant's notes as they matured, is not sufficient to establish a contract to that effect.

Appeal from city court of Birmingham;
H. A. SHARPE, Judge.

Cumming & Hibbard, for appellant. J. J. Altman, for appellee.

CLOPTON, J. This case having been heard and determined by the city court, without the intervention of a jury, the appeal brings for revision the conclusions and judgment of the court on the evidence, as well as the questions of law involved.

The action is brought by appellant as a corporation, and is founded on two notes, which the complaint avers are payable to the order of F. W. Miller at the Jefferson County Savings Bank, by whom they were duly transferred to plaintiff. Section 2594 of Code 1886 requires that suits upon bills of exchange and promissory notes payable at a bank or banking-house, or at a designated place of payment, must be instituted in the name of the person having the legal title. It may be conceded that the complaint was subject to demurrer, on the ground that the averment as to the transfer of the notes does not necessarily imply a transfer in writing, which is essential. *Ragland v. Wood*, 71 Ala. 145. This, however, was not assigned as a cause of demurrer. Defendant raised the question as to the right of plaintiff to institute the suit, in its own name, by plea averring that plaintiff was not, at the commencement of the suit, the legal owner of the notes. Plaintiff demurred to the plea, the only ground of demurrer assigned being

that it does not set out that the notes are payable at a bank or banking-house or designated place. As this appears on the face of the complaint, such averment in the plea is not essential. The court was prohibited from considering any other objections to which the plea may be subject; not being subject to the objection specifically stated, the demurrer was properly overruled. *Eads v. Murphy*, 52 Ala. 520.

It appears that the notes were indorsed in blank by Miller, the payee, and pledged to the Birmingham National Bank as collateral security for money loaned him. The bank having been paid, Miller caused the notes to be transferred and delivered, so indorsed in blank, to plaintiff. The blank indorsement conferred on plaintiff, being a *bona fide* holder, the right to fill it up by inserting its own name. Whether it should be filled up before judgment the authorities do not accord. In this state, the rule may be regarded as settled. It was held, more than 40 years ago, that a blank indorsement vests the note in the holder, if the owner, as completely as can be done by any other mode, and that it is unnecessary for the indorsement to be filled up before the note goes to the jury. *Riggs v. Andrews*, 8 Ala. 628; *Sawyer v. Patterson*, 11 Ala. 523. There has been no departure from this ruling. Filling up the indorsement is regarded as merely formal, and bringing suit on the note manifests the intention of the plaintiff to treat the indorsement in blank as a transfer of the note to him by the indorser. 2 Daniel, Neg. Inst. § 1195. Plaintiff's possession and production of the note, so indorsed, was *prima facie* evidence of ownership, and, in the absence of rebutting proof, showed the right to maintain the action in its own name.

By the second, third, and fourth pleas defendant sets up the statute of frauds, failure of consideration, and an offer to set off damages alleged to have been sustained by the breach of a contract between Miller and defendant. The uncontradicted evidence establishes the following facts: Miller, being the owner of 400 acres of land, proposed to sell certain undivided interests to a number of persons, who should form a company and become incorporated. Defendant and several other persons purchased each a one-fifth interest. The record contains a copy of an instrument in writing, dated March 1, 1887, of the following tenor: "To whom it may concern: Be it known we agree to buy an interest in four hundred acres of land described below, [the subdivisions and numbers of the sections, township, and range being here named,] and agree to pay one hundred and twenty-five dollars per acre for the number of acres set opposite our names. Payments to be made, to-wit: Two-fifths cash; bal. in three equal payments, six, twelve, and eighteen months from date." This instrument was signed by defendant and the other purchasers, the number of acres purchased by each, the amount of the cash payment, and the aggregate amount for which notes were to be given, being set opposite the name of each. The notes on which the action is founded were given for the deferred payment at six

months, and bear the same date as the agreement. The company was formed and incorporated under the name of the "Lake Side Land Company," being the plaintiff. Miller conveyed the lands to the corporation, as it was understood and agreed he should do. A short time afterwards it was discovered that the lands were incumbered by two mortgages made by Miller. An arrangement was thereupon made between plaintiff and Miller, by which he transferred and delivered to plaintiff all the notes given by the purchasers of the land, who were the stockholders in the corporation, which had not been collected by the bank; and plaintiff agreed, in consideration thereof, to assume the payment of the mortgages, and release Miller from all liability to the company arising out of the sale of the lands to the stockholders, and also from the mortgages. Shortly thereafter the notes, payable in 12 and 18 months, were, by direction of the board of directors, surrendered to the makers, defendant receiving and receipting for those given by him. The notes payable at 6 months were retained by the corporation, and placed in the hands of an attorney for collection.

The requirement of the statute of frauds is that the contract of sale, or some note or memorandum thereof, expressing the consideration, must be in writing, and signed by the party to be charged therewith, or by some other person thereunto lawfully authorized in writing. Code, § 1732. The form of the writing is immaterial. A note or memorandum is a sufficient compliance, if it sets forth the essential terms of the contract with such certainty that they may be understood from the writing itself. *Carter v. Shorter*, 57 Ala. 253. The contract of sale states the property sold, the price at which it was sold, and the terms of sale, and is signed by defendant, and, in connection with the notes for the deferred payments contemporaneously executed, takes the contract out of the operation of the statute of frauds. It is also evident that the notes are supported by a valid and valuable consideration.

The fourth plea, after setting out the facts of the purchase and formation of the company, avers that Miller solicited defendant to become a purchaser of an undivided one-fortieth interest, and, as an inducement to make the purchase, undertook and agreed with defendant that he would sell enough of the land or stock of the company at such profit as would be sufficient to pay off the notes of defendant as they matured, and that he should not be called on for payment of the notes in any other manner than by the application of such profits; and that Miller failed to perform the agreement whereby defendant has sustained damages, which he offers to set off.

The real defense set up is a prior or contemporaneous agreement that the notes should be paid from the profits to be realized from sales of land or stock,—from particular funds or particular sources,—and that defendant should not be required to pay them personally; a collateral undertaking, the breach of which is relied on as

a bar to a recovery on the notes. If land or stock had been sold at profits sufficient to pay the notes, if the collateral agreement had been executed, this would have constituted a full defense to the action. The notes are absolute and unconditional obligations to pay the money on the day specified. The effect of the undertaking and agreement set forth in the plea is to make the payment of the notes conditional on the happening of a future and uncertain event. The stipulation, being verbal, and previous or contemporaneous, is presumed to be merged in the written contract. Oral evidence is inadmissible, as between the parties, to add to, alter, or contradict the writing, especially when the stipulation is a material term of a contract of sale of land, which the statute requires to be in writing. The collateral engagement, not having been executed, is no defense to the action. *McNair v. Cooper*, 4 Ala. 660.

Moreover, the evidence introduced by defendant, in support of the plea, fails to establish an undertaking and agreement such as is set forth therein. The entire evidence is that Miller said to defendant, during the negotiations for the sale, that he would sell enough land or stock to pay his notes before they became due. There is no evidence tending to show a stipulation that the notes should be paid from the profits, and that the defendant should not be called on to pay them in any other manner. The statement, as proved, is the mere expression of an opinion or expectation. The defense is not based on the claim that Miller knew that the expectation could not be realized, or that defendant was thereby induced to make the purchase, or was misled. So far as appears, he had equal knowledge and opportunity to judge of the feasibility of selling land or stock at such profit. *East v. Worthington*, ante, 189, 88 Ala. —.

Our conclusion on the evidence is that plaintiff is entitled to recover. The notes contain a waiver of exemptions. The result is, the judgment of the city court is reversed, and judgment is rendered against defendant for the sum of \$312.20, and against this judgment, and the execution to be issued thereon, there is no exemption of personal property.

Reversed and rendered.

DRYER v. CRAWFORD *et al.*, (two cases.)
(*Supreme Court of Alabama*. April 16, 1890.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

A will provided "that my whole estate be kept together and enjoyed by my beloved wife, S., and my children," five in number, naming them, (one of whom afterwards died unmarried,) and appointed the wife sole executrix, "with all the privileges and rights of buying, selling, and conveying my property * * * that I would have if living." *Held*, that the widow and children took equal shares, their rights accrued simultaneously, and, where the lands were levied upon in the hands of the widow's grantees to satisfy a debt incurred before the grant, such levy was null except as to her undivided one-fifth interest.

Appeal from circuit court, Macon county; J. R. DOWDELL, Judge.

The appellant sued tenants in possession, in a statutory action in the nature

of ejectment, to recover the land described in the complaint. The appellees were made defendants as landlords. The question of title turned upon the following paragraphs of a will: "*First*. I will that my whole estate be kept together and enjoyed by my beloved wife, Sarah B. Crawford, and my children, Abel H., Eliza G., M. Elizabeth, Jno. W., and Julia S., as long as my wife remains unmarried and my children are minors or are unmarried, to enjoy the profits and income of the same." "*Thirdly*. I will that when my children shall become of lawful age, or if they or either of them should get married at an earlier age than the legal age, then, and in that event, I will that such portion of my estate be given them as my executrix, who I shall appoint, shall think right and proper, not exceeding an equal distributive share of the whole estate. And *fourthly*. I will that my beloved wife, Sarah B. Crawford, be and act as my sole executrix, and that she be endowed with all the privileges and rights of buying, selling, and conveying any property that I have, with any rights and titles thereto in the same way that I would have, if living, to do and transact the business myself. And *fifthly*. I will that she be not required to give security for her executrixship." At the close of the testimony the defendants asked the court to charge that, if the jury believed the evidence, they must find for the defendant, which was granted against plaintiff's objection. The latter then requested a charge that, if the jury believed the evidence, they must find for the plaintiff for an undivided one-fifth interest in the land sued for, which was refused. Verdict and judgment for defendants, from which plaintiff appeals.

W. F. Foster and E. H. Dryer, for appellant. J. A. Bilbro, for appellees.

STONE, C. J. These cases are in all respects alike, and depend on the interpretation of William G. Crawford's will. Testator died in 1867, leaving a widow, Sarah B. Crawford, and five children, living, John W. Crawford and Julia S. Crawford being two of the children. Mary E. Crawford, one of the five children, died intestate soon after the death of testator, without issue; she never having married. The widow, Sarah B., never married, and is still living.

In January, 1887, Mrs. Crawford executed a note due and payable in January, 1888, on which judgment was rendered against her in July, 1888. On this judgment, execution was issued, the lands in controversy levied on and sold, and E. H. Dryer became the purchaser, and received deeds from the sheriff. These conveyances vested in Dryer all the title to said lands which was in Mrs. Crawford, the widow. In other words, all the title which the will of William G. Crawford clothed her with, if it clothed her with any title which could be reached by execution, became Dryer's. In December, 1887, after the debt was incurred under which land was sold, Mrs. Sarah B. Crawford, by deeds of gift, conveyed to her two children John W. and Julia A. Crawford, in separate lots, the land severally sued for in these actions. It is clear these conveyances could not

avail anything against her debt previously incurred. 3 Brick. Dig. p. 515, § 119.

The will confers on Mrs. Crawford "the privileges and rights of * * * selling and conveying property" which the testator then owned,—a very full power of disposition. This, it is contended, enlarges her estate into an absolute fee. We cannot agree to this for two reasons. *First*. The will does not give to Mrs. Crawford the individual exclusive use and enjoyment. Its language is "that my whole estate be kept together and enjoyed by my beloved wife Sarah B. Crawford and my children."—naming them,—five in number. There is in the devise no discrimination between the wife and children in the quantum of interest given. *Second*. The power of disposition is conferred on the wife, not as an individual, but in her executorial capacity. This cannot enlarge her individual interest.

At the time the will was made, as well as at the time it took effect, the five children for whom it made provision were *in esse*, and were capable of taking under it. The provision, as we have seen, was equally, and without discrimination, in favor of the wife and of the children, by name. Whatever estate one took the others were equally entitled to, and their interests accrued at the same time; not in succession, one to the other. No proper interpretation of the language, considered in connection with the attendant facts, can install the widow as first taker, and leave the children to come in as successors to her. Under the rule declared in *Wild's Case*, 6 Coke, 16b, as well as under the language of the will itself, the widow and children took coequally and contemporaneously; each having the same property rights as the other. 2 Jarm. Wills, (Bigelow's Ed.) 389 et seq., Id. 411 et seq.; Rap. & L. Law Dict. tit. "Wild's Case."

The logical result of what we have said is that Mrs. Crawford, under the will of her husband, acquired an equal, undivided interest with her children in the land sued for, and that interest became Dryer's under his purchase at sheriff's sale. To that extent, according to the facts shown in this record, he was entitled to a verdict and judgment. The rulings of the circuit court were not in harmony with these views.

Reversed and remanded.

STATE V. HARPER.

(Supreme Court of Louisiana. March 17, 1890.
42 La. Ann.)

INTOXICATING LIQUORS—ILLEGAL SALES—PENALTIES—POLICE JURIES.

1. Under Act 126 of 1855, now become sections 1911-1916, inclusive, of the Revised Statutes, the power conferred upon the police juries and the authorities of towns and cities relating to the retailing of intoxicating liquors went no further than to authorize them to grant or withhold licenses for this purpose. The legislature fixed the penalty for retailing intoxicating liquors without a license from the local authority.

2. A police jury ordinance to prevent the retailing of spirituous liquors, which defines offenses and imposes fines not known to the laws of the state, is null and void.

3. Under article 170 of the constitution, it is

within the power of the legislature to delegate to local authorities full and plenary authority to regulate the sale of intoxicating liquors by uniform regulations, and to make a violation of the same an offense against the state. The legislature has not yet passed any act conferring such power in pursuance of said article.

(Syllabus by the Court.)

Appeal from district court, parish of Lincoln; BARKSDALE, Judge.

Walter H. Rogers, for the State. Potts & Hudson and Fred W. Price, for appellee.

McENERY, J. William Harper was indicted by the grand jury of the parish of Lincoln for violating a police jury ordinance prohibiting the sale of spirituous liquors within the limits of said parish. He filed a motion to quash the indictment on the following grounds: (1) That the indictment charged no crime, misdemeanor, or offense under the laws of the state of Louisiana; (2) that the police jury was without power and authority to enact said ordinance, as no authority or power had been delegated to said police jury by the legislature for such purposes; (3) that said ordinance violated article 170 of the state constitution.

Section 1 of the ordinance prohibits the retail of spirituous liquors within the limits of the parish of Lincoln. Section 2 prohibits the taking of, or negotiating of, orders for the sale of intoxicating liquors. Section 3 prohibits the sending of orders or messages, written or verbal, by mail or by wire, or in any other manner, within the limits of said parish, for spirituous liquors in retail quantities, for any other person than for the sender. Section 4 prohibits the receiving or delivery of spirituous liquors in retail quantities within the limits of said parish. Section 5 prohibits the business of ordering spirituous liquors within the limits of said parish. Section 6 is as follows: "That any person who violates any portion of this ordinance shall be liable to criminal prosecution before the district court on an indictment by the grand jury, or on information filed by the district attorney." Sections 7 and 8 provide for a civil proceeding to recover a fine and forfeiture imposed, and authorize the district attorney to sue for the same, and by injunction to restrain violation of the ordinance. Section 10 prohibits the sheriff and tax collector from issuing licenses for the retail of spirituous liquors for the year 1890.

The indictment contains counts for the violation of the several sections of the ordinance. The motion to quash was sustained, and the district attorney appealed. For a reversal of the judgment, the district attorney relies upon sections 1211-1214, Rev. St., (Act 76 of 1884,) and State v. Bott, 31 La. Ann. 663.

Article 170 of the state constitution declares the sale of alcoholic liquors a police regulation, and confers upon the general assembly the power to regulate their sale and use. Under this article, there can be no question of the power of the general assembly to delegate to the several police juries the right to regulate their sale and use, and for the legislature to provide a uniform penalty for a violation of the reg-

ulations thus permitted to be enacted. So far the general assembly has not passed any law conferring the full extent of this power upon the police juries of the several parishes, so as to authorize them to enact any regulations other than to prohibit the retailing of spirituous liquors.

Section 1211 of the Revised Statutes gives the police juries, and the authorities of the towns and cities, the exclusive power to make such laws and such regulations for the sale, or prohibition of the sale, of intoxicating liquors, as they may deem advisable, and to withhold licenses from drinking shops and houses within their respective limits as the majority of the legal voters may determine. By section 1212, the state relinquished all right to grant licenses when the local authorities had prohibited, under section 1211, the sale of intoxicating liquors. Section 1214 made it the duty of the several political subdivisions to carry out the object and purposes of the act. Having conferred the power to grant or withhold licenses for the retail of intoxicating liquors, the legislature then adopted section 1215, which imposed a penalty of not less than \$100, nor more than \$500, and in default of payment imprisonment not less than 15 days nor more than 4 months, for retailing spirituous liquors without a license from the local authorities. The police jury of Lincoln parish, therefore, under the grant of power already conferred by the legislature relating to the sale of intoxicating liquors, could only prohibit the sale of intoxicating liquors within the limits of the parish, in which case no state license could issue; and, if any one then sold liquors in violation of the prohibition, he subjected himself to the penalty provided in section 1215.

In the case of State v. Bott, 31 La. Ann. 663, which has since been overruled in case of State v. Baum, 33 La. Ann. 981, on the ground that the object of the statute had not been expressed in its title, the defendant was indicted for selling liquors on Sunday, in violation of Act 84 of 1878. The act delegated full and plenary powers to the police juries to make regulations for the sale of, or a prohibition of the sale of, intoxicating liquors on Sunday; and it was made an offense against the state for a violation of the ordinance passed in pursuance of said act. In Act No. 126 of 1855, (now sections of the Revised Statutes referred to) there is an absence of such delegated power; and the police juries are without authority, therefore, to pass any ordinance relating to the sale of intoxicating liquors by retail, which affixes a penalty for the violation of the same. The extent of the authority of the police jury of Lincoln went no further than to prohibit the sale of intoxicating liquors by retail, or the keeping of a grog or tipping shop. Act 76 of 1884 does not enlarge or extend the power conferred by Act 126 of 1855.

We have referred to State v. Bott for the purpose of showing that the act, as interpreted by the decision in that case, does not sustain the position taken by the district attorney. The ordinance creates offenses not embodied in the criminal law of the state, and provides a penalty for

their commission, and directs a prosecution for their violation in the name of the state. The police jury evidently exceeded its authority, and assumed functions not delegated to it, but belonging to the legislature.

We do not intimate that the police juries are without the power to enforce penalties for violation of ordinances passed in pursuance of the authority vested in them for local police purposes. The legislature, in conferring certain powers on the police juries relating to the sale of spirituous liquors, only conferred authority to prohibit; and the state reserved the right to prosecute where spirituous liquors were sold by retail without a license from the local authorities.

The count in the indictment against the defendant that he "did willfully retail spirituous liquors without previously obtaining licenses therefor from the police jury or any town or city authority," was dismissed; and we have, therefore, been confined to a consideration only of those counts which charge a violation of the sections of the ordinance referred to. They are clearly null and void.

Judgment affirmed.

BURCHFIELD V. CITY OF NEW ORLEANS.

(*Supreme Court of Louisiana. Jan. 6, 1890.*
42 La. Ann.)

MUNICIPAL CORPORATIONS—CONTRACTS OF OFFICERS.

1. Courts will not enforce against a municipal corporation a contract made for it, and in its name, by one of the officers who had not the authority to make such a contract.

2. Under the provisions of the charter of the city of New Orleans, the commissioner of public works is powerless to bind the city by a contract for the purchase of materials for his department, independently of the action of the city council. Such power did not exist even before the passage of Act 185 of 1888, of the legislature.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Sam. L. Gilmore and T. McC. Hyman, for appellant. *B. K. Miller*, for appellee.

POCHÉ, J. This is an action on an alleged contract with the city of New Orleans, through the commissioner of public works, for the supply of shells, delivered to and used by said officer in repairing and filling certain streets of the city in January, February, March, and April of the year 1888, which shells were furnished at the agreed price of one dollar per cartload. On the allegation that, at the proper time, the city council refused to pass the necessary financial ordinance directing the payment of his bills which had been approved by the then commissioner of public works, plaintiff sued out and obtained an injunction restraining the council from making any appropriations which would hinder or prevent the payment of the sums due to him in accordance with the rank and preference which he claimed. Judgment was rendered in favor of plaintiff for his demand in full, and for all the relief which he prayed for, excepting the interest which he claimed, and which was denied him. The defense is a general de-

nial, and under it the city makes the point that the commissioner of public works was without the authority or power to bind the corporation in the contract sued on. The point is well taken, and it should have prevailed as a defense; hence the judgment appealed from must be reversed. Under the provisions of the charter of the city of New Orleans, the right of contracting in the name and in behalf of the corporation is vested exclusively in the city council, where official acts must be done and evidenced by means of ordinances or resolutions. And the power of the council itself to enter into contract for purchases, in the name and for the use of the city, is regulated by special provisions contained in the charter. The exercise of that power is so restricted and circumscribed that an ordinance is not of itself sufficient to legally affect the purchase of certain things. Section 21 provides that all contracts for public works, or for materials or supplies ordered by the council, shall be offered by the comptroller in presence of the finance committee of said council, and given to the person making the lowest proposal therefor, who can furnish security satisfactory to the council. It will be noticed that the management of contracts for the purposes enumerated is intrusted, with very limited powers, to the comptroller, to whom is conferred the duty of the general superintendence of the fiscal affairs of the corporation, and that, in reference to such contracts, no power is vested in, and no duty intrusted to, other executive officers of the corporation. Hence it follows that, under a proper construction of that provision, the power is withheld from the commissioner of public works, and from the then executive officers, to represent or to act in behalf of the city in the matter of purchasing supplies or materials necessary to their respective departments. But, in addition to that reason, other provisions of the charter can be invoked to conclusively show that the power or authority to enter into contracts for materials was not to be exercised by any executive officers independently of the council. Section 24 of the charter provides as follows: "The commissioner of public works shall have general charge and superintendence of all matters relating to water-works, railroads, canals, levees, weights and measures; the fire department, and manufacturers; streets, sidewalks, pavements, and wharves; the construction, cleansing, and repair of the same; the construction and repairs of bridges, and drainage and hygiene of the city, in so far as the same may be compatible with the laws and duties of the board of health; and shall be vested with and perform such other functions as may be prescribed by said council."

Nothing in that language can even suggest a remote intention of vesting the commissioner of public works with the power of contracting for materials for the city, and of determining the price to be paid therefor, or the quantity to be procured. After lodging that identical power exclusively in the city council, and presenting to the comptroller the mode of assistance which he alone could render in the prem-

ises, the lawmaker could not consistently intrust the same authority to another and different department or officer. In order to leave no doubt as to the true meaning of the charter on this very important question, which, notwithstanding its clearness, seems to have been misunderstood, the legislature passed Act 135 of 1888, which provides that "neither the council of the city of New Orleans, nor any committee thereof, nor any of the officers of said city, shall have the power to bind the city by any contract for any public work, or for the purchase of any materials or supplies for any of the departments of the city government, unless there shall have been previously passed a resolution authorizing the said contract or the said purchase, and unless the said contract for public work, or for the furnishing of said materials and supplies, shall have been let by the comptroller to the lowest bidder, as provided in section 21 of the city charter."

A close analysis of the various provisions of the city charter, and a comparison of the sections therein contained with each other, can leave no doubt on an impartial mind that the spirit of the restriction announced in that statute pervades the entire charter; and the only legal effect of the enactment of a special statute was to condense the limitation already breathed in the charter, in clear, terse, and unambiguous language. Of course, the act itself, as an independent legislation, could not control the contract now under discussion, as it antedates the statute; but it is useful as a legislative construction of a previous enactment, and it also serves to meet and answer the argument made here as to the inconvenience which might result from our construction of the power of the commissioner of public works, in connection with the purchase of materials necessary to his department.

The law, as it stood previous to the existence of the power now conferred by the last act on that officer, to make bills for supplies and materials not exceeding \$50, in case of emergency, may have been very inconvenient in its effects, but it was the law, and courts have no other mission but to enforce it. Having concluded that the commissioner had no power to bind the city in the contract now in suit, we have nothing left to do but to apply the effect so tersely described by Judge Dillon in his works on Municipal Corporations: "The general principle of law is settled beyond controversy, that the agents, officers, or even city council of a municipal corporation cannot bind the corporation, by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know." Section 457; *Fox v. Sloo*, 10 La. Ann. 11. It is therefore ordered, adjudged, v.7so.no.16—29

and decreed that the judgment appealed from be annulled, avoided, and reversed; that the preliminary injunction herein obtained by plaintiff be dissolved; that his demand be rejected, and his action dismissed, at the costs in both courts.

ON APPLICATION FOR REHEARING.

FENNER, J. After considering all the views submitted in the able brief for rehearing, we adhere to our clear conviction that under the city charter, as it would have been under Act 135 of 1888, the plaintiff's contract was clearly unauthorized and illegal.

The authorities cited to show that, although unauthorized, yet the city, having received and used the property of plaintiff, is liable for its value *ex æquo et bono*, might have weight if the city were capable of contracting debts except as a charge upon her current revenues.

But the city has no such capacity under the constitution and laws of the state. Plaintiff's claim is presented in contest, not with the city practically, but with her lawful creditors, over whom he claims a preference on the revenue of the year. His illegal claim cannot compete with their legal claims. The utmost he could claim would be to have his debts satisfied out of the revenues of the year after payment of all lawful claims thereupon. But as the allegations of his petition show the inadequacy of the revenue to meet the charges, such relief will probably be futile.

We, however, reserve his right to sue the city on a *quantum meruit* for a judgment payable out of any surplus of the year's revenue.

Rehearing refused.

MONTEGUT v. BACAS.

(*Supreme Court of Louisiana*. Feb. 10, 1890.
42 La. Ann.)

DESCENT—RIGHTS OF WIFE—COLLATERAL RELATIONS—ILLEGITIMACY.

1. The wife inherits from her husband, who has left no lawful ascendants or descendants, or lawful collateral relations, to the exclusion of his natural collaterals.

2. There is no law authorizing the aunt to inherit from her illegitimate nephew.

3. "Collaterals," as used in article 917, Rev. Civil Code, mean lawful collateral relations.

4. An illegitimate person, leaving no lawful ascendants, cannot have lawful collateral relations.
(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

J. E. Blanchard and *W. S. Benedict*, for appellant. *J. Meunier*, for appellee.

MCENERY, J. This is an appeal from a judgment sustaining an exception of no cause of action to plaintiff's petition. Plaintiff alleges that she is the sole and only heir of the marriage of her mother, Seraphine Merlon, to Jacques Ferrand; that her mother had a natural sister named Marie Joseph Le Duc, who cohabited with one Philip Ross, and had by him one natural child, called Philip Ross, Jr. He acquired property, and married Eugénie Alza. He died intestate, and without issue, on the 9th of February,

1864. His widow was recognized as his heir, and placed in possession of his property. Mrs. Ross made a will giving the property she inherited from her husband to her sister Adele Faure. She made a will appointing Paul A. Bacas executor, and he was also the executor appointed in the will of Mrs. Ross. Both wills were probated, and letters testamentary issued to Bacas. All the parties to the last will were made defendants, and the prayer of the petitioner is that all the proceedings had in the succession of Ross, Mrs. Ross, and Adele Faure be decreed null and void, and the petitioner be placed in possession of the property, purely and simply, in the succession of Philip Ross, Jr., as the petitioner is the sole and only heir of Philip Ross, Jr.

The plaintiff alleges that, under article 917, Rev. Civil Code, natural collaterals inherit, and that she is the nearest collateral, and is entitled to inherit from Philip Ross, Jr., as he died without leaving lawful ascendants or descendants, to the exclusion of his surviving widow.

The article is free from ambiguity. Lawful collaterals only can inherit, except when the law, under certain conditions, has favored the natural brothers and sisters, and designated them as "heirs," and directs that the estate of the natural brother or sister deceased shall pass to them or their descendants. Rev. Civil Code, art. 923. A natural child cannot have an illegitimate ancestor, and collateral relations capable of inheriting from him, other than the brother and sister, or their descendants, under the conditions prescribed in article 923, Rev. Civil Code. An illegitimate child has no relations, in a legal sense, in the ascending or collateral line. Id. art. 238. He has no heritable blood, and therefore cannot share in the estate of his legitimate relations, (Id. art. 921;) and he can only transmit his succession to such irregular heirs as the law designates.

The Revised Civil Code mentions three kinds of successions,—testamentary, legal, and irregular; and there are three kinds of heirs corresponding to these successions,—testamentary or instituted heirs, legal heirs or heirs of the blood, and irregular heirs. Id. arts. 875, 879. The nearest blood relation capable of inheriting is the heir in a legal succession. An irregular succession is that which is established by law in favor of certain persons or of the state, in default of the heirs, either legal or instituted by testament. Id. art. 878. In article 917, Rev. Civil Code, therefore, "collateral relations" refer to the legal or lawful collaterals. In the Code, (chapter 3,) "Of Irregular Successions," there is no disposition made in favor of any natural collateral kindred except the brother and sister and their descendants. Under the Code, the wife is preferred to all the natural relations of the husband who are called to his succession, and designated in the chapter, "Of Irregular Successions." *Victor v. Yaglasco*, 6 La. 646; *Succession of Duclosange*, 2 La. Ann. 98; *Layre v. Pasco*, 5 Rob. (La.) 9; *Succession of Fletcher*, 11 La. Ann. 59; *Duplessis v. Young*, Id. 120.

The right of inheritance is created by law. There is no statutory provision

authorizing the uncle or the aunt of an illegitimate person to inherit from him. *Succession of Fletcher*, 11 La. Ann. 59; *Succession of Miller*, 27 La. Ann. 574. In this case (*Succession of Miller*) the facts presented and the issue decided are identical with those in instant case. Miller was illegitimate. He married, and died intestate, without issue, leaving a surviving widow. His uncle and aunt brought suit to be placed, as his sole heirs, in possession of his estate. Their pretensions were dismissed, and this court said, in affirming the judgment appealed from: "The surviving wife was left without competitors for the heirship, and was properly decreed entitled to the property."

Judgment affirmed.

SMALL V. SALOY.

(*Supreme Court of Louisiana*. Feb. 10, 1890.
43 La. Ann.)

TRANSFER OF STOCK—PLEDGE.

A regular transfer of shares of stock will remain undisturbed, unless satisfactory evidence is adduced showing that it was conditional, designed to serve as collateral or pledge to secure a payment, or was simulated, and not intended to transfer the ownership. It stands until demolished. This was not done in this case.

(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; KING, Judge.

Chas. Longue, for appellant. *Buck, Dinkelspiel & Hart*, for appellee.

BERMUDEZ, C. J. The plaintiff seeks to be recognized as the owner of 26 shares of bank-stock standing in defendant's name. The allegation is that the stock was pledged to the defendant to secure payment of plaintiff's note for \$3,400, as is shown on the face of the note; that subsequently, "for reasons of convenience," the stock was transferred to defendant; that interest has been paid on the note up to a certain time, as well by money disbursed by plaintiff as by dividends received on the stock by defendant, and applied to such interest; that plaintiff, being desirous to take up his note, has offered to pay the same, on the transfer back to him of the stock; but that defendant refuses to receive payment, and to transfer the stock. The prayer is for the stock, or the value thereof, less the amount of the note and interest. The answer is a denial of ownership in plaintiff, and an averment of title in defendant, under a valid and absolute transfer by plaintiff to him. From the adverse judgment the defendant appealed. Since the case was submitted the defendant died, and his widow and universal legatee made herself a party. During the trial below, exceptions were taken by defendant's counsel to several rulings of the district judge; but as our attention was not drawn to them, and as it would be unnecessary to pass upon them, in view of the conclusion which we have reached, we will not notice them. The record shows that the plaintiff, being indebted to the defendant in the sum of \$3,400, executed his note for that amount, on December 20, 1883, payable on demand, bearing 8 per cent. interest from date, to his own order, and by

him indorsed, for value received, with the stipulation that it was secured by pledge of the 26 shares which are described on the back, and that, in case of non-payment, the holder would have authority to sell the security, and apply the proceeds to the payment of the note. Indorsements show that interest was paid on June 20 and on December 20, 1884. On December 17, 1885, it appears that, under a formal power of attorney, one Bier transferred the stock on the books of the bank, in the name of the defendant. A further indorsement on the notes shows that interest was acknowledged to have been paid on it, on the 20th of December, 1885. It also appears that from the date of the transfer to December 30, 1887, inclusive, five dividends, each for \$130, were paid on the stock, and received by the defendant. The question presented is, simply, whether the transfer effected was conditional or absolute. There is nothing on its face to show that it was effected on any contingency. Under the stipulation expressed in the note, the holder, in case of non-payment, could have sold the stock, and applied the proceeds. On the day of the transfer, 17th December, 1885, the note was due and remained unpaid, and the event under which the holder could have sold had happened. He did not sell, but on that day an agent of plaintiff made the transfer to the defendant, who, it would seem, became apprised of the fact shortly after. From plaintiff's statement, the transfer was authorized by him in apprehension of a suit which had been brought against him, and to save defendant from trouble in consequence of it.

From defendant's testimony, it results that the transfer was made in furtherance of a previous understanding with plaintiff, who, acknowledging his inability to pay the note, had proposed to defendant to take the stock in payment, the latter assenting, the stock being then worth about the amount of the debt. It appears that it was after the transfer had taken place that defendant credited the note, on December 20, 1885, with interest up to that date, and canceled it by erasing or crossing the name of the drawer, placing back the note in his bank-box, in that condition, as a warning of its worthlessness to his heirs.

Defendant says that he did not return the note to plaintiff, owing to his absence at the time in the country. It does not appear that plaintiff, who is dealer in stock, after the transfer felt any uneasiness about the note. He merely inquired about it, and, on being answered that it was worthless, rested satisfied. It was only some two years and a half after the transfer, the shares having gone up considerably, that the plaintiff called on the defendant for a transfer back to him, expressing a readiness to take up the note, without, however, making any tender of the money. The claim has the characteristics of a stale demand, and appears to be an after-thought.

The seriousness of the transfer which is patent on its face, corroborated by defendant's unequivocal and unimpeached testimony, unassailed by any counter-letter or equivalent proof, has not been affected by

it. An examination of the evidence, and a consideration of all the surrounding circumstances, lead us to the conclusion that the case is with the defendant, *mellor est conditio possidentis*. It is therefore ordered and decreed that the judgment appealed from be reversed. It is now adjudged that plaintiff's demand be rejected, with judgment for defendant, recognizing title in him or his estate to the 26 shares of the Germania National Bank, old No. 265, transferred on the 17th of December, 1885, and that the plaintiff pay costs in both courts.

Rehearing refused.

WOODS v. HALSEY et al.

(Supreme Court of Louisiana. Feb. 10, 1890.
43 La. Ann.)

NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSER—EXTENSION—JOINT OBLIGORS.

1. In case an accommodation acceptor and indorser of a piece of commercial paper acquiesces in its retention by a bank discounting it, notwithstanding it has been in part paid, and the payment of the remainder extended, for which extension a new note is furnished to the bank, such acceptor having also indorsed said time note jointly with another, he is bound on both, and the obligation is not restricted to the latter.

2. In case of such acceptor's making payment of the whole of the latter, both notes will be extinguished; but, if he refuse to pay more than half because his obligation is joint, his obligation on the former would remain in full force. Hence plaintiff, having paid the whole of the joint obligation, is not entitled to reimbursement for the amount paid in excess of his share thereof.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Bayne, Denegre & Bayne, for appellants.
Harry H. Hall, for appellee.

WATKINS, J. Plaintiff demands \$2,362.45 in reimbursement of money paid defendants in error, and without his being under any natural obligation to pay the same. His contention is that on the 10th of February, 1887, defendants held a certain promissory note of \$10,000, bearing date June 9, 1885, and maturing at 60 days thereafter, whereby the Chalmette Mills promised to pay to the order of A. G. Ober and petitioner, jointly, said sum, which had been reduced by partial payments to \$4,724.90; that said note was indorsed by the payees, who thereby became liable jointly, and not *in solido*, to any future holder of said paper; that on said 10th of February, 1887, said note was by the defendants duly presented to the petitioner for the payment of said balance, they averring his liability therefor; that he paid the full amount of said balance, relying on defendants' representations as to his liability therefor, and truly believing himself to be bound for the payment of the full amount, whereas, in truth and fact, he was only bound for one-half thereof, being a joint indorser on said \$10,000 note with A. G. Ober, to whose joint order the same was made payable. His further contention is that his indorsement was only for accommodation, and wholly without any consideration as to him.

In effect, the defense is that the plaintiff is and was primarily bound for the whole, and consequently there was no error in his making payment as he did; and, if he was not so bound, he was under a natural obligation to pay said sum, and has no right of action for its reimbursement.

There was judgment for plaintiff, and defendants have appealed.

The facts appear to be as follows: At the date of the transactions under consideration, the plaintiff, as well as the defendants, were stockholders and directors in the Chalmette Mills, and plaintiff was the acting secretary of that corporation. The corporation being desirous of obtaining some money with which to tide over some financial difficulties, defendants negotiated a loan on the faith of the plaintiff's indorsement; and on the 12th of April, 1884, a demand note of the company was executed for \$20,106.67, with 8 per cent. interest, signed by A. G. Ober, president, and plaintiff as acting secretary, payable to plaintiff's order, and by him indorsed. On the 9th of June, 1885, the sum of \$10,000 was paid; and a 60-day note for \$10,000 was executed by said corporation officers, payable to the order of A. G. Ober and the plaintiff jointly, with 7 per cent. interest, and the same was by them jointly indorsed. There was made contemporaneously a statement showing a balance due to that date of \$821.58 in excess of the \$10,000 note, which was paid on the 12th of June thereafter, and appropriate memoranda indorsed on the demand note. All of these were retained in the possession of defendants until February 10, 1887, when the balance due was paid by plaintiff, and they were then surrendered to him.

While there is some variation between the statements made by plaintiff and defendant Hoffman,—and there were no other witnesses,—we are satisfied, from a critical examination of the whole of the evidence, that the 10,000-dollar time note was intended and accepted as an evidence of the extension of time for the payment of that sum for a period of 60 days from its date, June 9, 1885. This paper carries on its face satisfactory proof of that fact, in that the original note was due "on demand," and the later was payable "sixty days after date." Manifestly, the object in view was an extension of time; and this form was agreed upon between Ober, president of the debtor corporation, and the creditor defendants. This new obligation, and the memoranda indorsed contemporaneously on the demand note, evidence this fact. In this light, it seems reasonable that the creditors should have retained the original obligation as well as the supplementary one. There was certainly no intention on the part of defendants to novate the debt. The new note shows the contrary. The only substantial differences between the two are the extension of time, the addition of Ober as payee, and the reduction in the rate of interest from 8 to 7 per cent. We view this new note as a species of collateral paper evidencing new and additional stipulations between the contracting parties, and the modifications of the terms of the orig-

inal agreement, and not the novation or extinction of it. In furtherance of this theory, we note the admissions of the plaintiff as a witness, to the effect that he consented to indorse the demand note to enable the corporation to obtain money to relieve its embarrassment, and that it was upon the faith of his individual acceptance and indorsement of this accommodation paper that defendants made the loan. He states that he knew that defendants held the demand note, and that he saw it in their possession when he accepted and indorsed it. Then there was no doubt of the fact that the demand note became a primary obligation of the plaintiff, and so remained up to the date of the issuance of the time note. In reference to that paper the plaintiff states that, some months after its execution, he learned that the demand note had not been paid, and expressed to the president of the corporation his surprise and dissatisfaction thereat, and was by him informed that it had been taken up; but he at the same time stated that he was in need of \$10,000 for other purposes, and requested his indorsement for that amount, but he declined compliance. That soon afterwards Ober returned with the 60-day note, signed by him as president, and, after some deliberation and hesitancy, he (plaintiff) signed as acting secretary of the company, and indorsed it personally and jointly with Ober, and delivered it to the latter, who carried it away.

Conceding the correctness of this state of facts *arguendo*, another argument is furnished in favor of the proposition announced supra, and it is to the effect that the acceptance and indorsement of the plaintiff of the time note was only as a personal accommodation to Ober, to enable him to raise money for other purposes than those represented in the prior transactions with defendants, and with which it had no connection. On this theory, the time note was, confessedly, not a novation or extinguishment of the demand note, but wholly disconnected from it. Such being the case, plaintiff's averment of error should have been that he never signed a renewal note at all, and not that he paid in full a note for the payment of which he was only jointly bound with another. That such is the position assumed by the plaintiff, his own testimony furnishes conclusive proof: "Question. You went on and made a payment on this balance? When did you make that payment of the balance, on the 10th of February, of \$4,700, after you had refused to indorse except jointly? Answer. In the first place, you don't quote me exactly. In the first instance, I refused to indorse at all. He subsequently came back, and asked me, if he would go in jointly with me, would I indorse it? I hesitated for some time, and declined, and he discussed the matter with me; and I finally yielded, and consented to go in jointly with him. Q. And did you say you would not have signed it singly? A. I say I did not. I had already refused to sign it singly. Q. Then, having indorsed it jointly, you understood you were in for one part, and Mr. Ober for one part? A. Yes, sir. Q. You understood you were

bound for one-half, and Ober for another half? A. Yes, sir. Q. Then why—having that understanding at the time you signed this note, or having that view of your obligation when you signed this note—is it you paid that balance on the 10th of February? A. Because in the mean time Ober had failed, and I supposed that either indorser would be liable for the whole amount."

Then it is clear that in this transaction the plaintiff dealt with Ober alone, and not with the defendants; that in so doing he relied on Ober's statement that he had taken up or retired the demand note before the time note was indorsed; and that this statement superinduced plaintiff's acceptance and indorsement of it. It is also clear that the plaintiff did not make any inquiry of the defendants about it, notwithstanding the demand note bound him personally and individually, and did not bind Ober, and was confessedly the property of the defendants. The evidence abundantly shows that, in reference to the time note, the dealings between Ober and the defendants looked solely to an extension of time for the payment of the balance of \$10,000 remaining due on the demand note; and, whatever may have been the representations of Ober to the plaintiff in reference to the demand note having been paid or retired, it also fully shows that it had neither been paid or retired, as a matter of fact.

The truth is that defendants held both the demand note and the time note for \$10,000, and on both of which plaintiff was bound. While it is true that plaintiff may have been overreached or deceived by Ober in the last transaction, he was undoubtedly bound in a double obligation for the same debt to the defendants until the latter was discharged by payment. Notwithstanding he declined to indorse any other than a joint obligation with Ober, yet he paid voluntarily, and that payment discharged both his joint obligation and his own individual indorsement. In thus making payment, he was not taken by surprise, nor does the proof show that defendants made any representations as to the extent of his obligations on which plaintiff acted. On the contrary, the knowledge of defendants' continued possession of the demand note was brought home to the plaintiff more than a year prior to his making payment, and hence he was informed that Ober's statement was untrue; and yet he made no protest or complaint to the defendants, though they repeatedly urged him to pay. The fact is, the plaintiff had consented that defendants should accept payment from other persons than himself, without prejudice to his indorsement, and that defendants reciprocally consented with the plaintiff to an additional extension of time until the affairs of the insolvent corporation could be liquidated, and the proceeds realized from liquidation applied, as far as possible, to the satisfaction of the debt, and to hold him for the residue only.

A statement in the record (see plaintiff's brief at page 11) shows that on the 31st of July, 1886, more than a year after the date of the time note, the sum of \$5,000 was paid

on it by "dividends from liquidation of Chalmette Mills," and on the 11th of December following an additional \$1,250 was paid from the same source. It is the resulting balance of \$4,724.90 that the plaintiff paid in settlement.

On the whole, we take it to be clear that the time note only evidenced the extension of \$10,000 of the original debt, for the payment of which the plaintiff was personally bound, and that if he had been sued on the demand note the execution of the time note would have been no defense. Hence, while the payment of the latter discharged the former, its existence did not. Therefore, error in the method or amount of the payment on the latter, cannot relieve plaintiff, or ground his action for reimbursement.

The judgment appealed from is erroneous, and must be reversed. It is therefore ordered and decreed that the judgment appealed from be reversed, and that the demands of plaintiff be rejected and disallowed, and that he be taxed with costs in both courts.

FENNER, J., absent.

Rehearing refused.

Succession of BOUDREAUX.

(*Supreme Court of Louisiana*. Feb. 10, 1890.
42 La. Ann.)

ADMINISTRATORS—APPOINTMENT—TUTORS OF MINOR HEIRS.

1. Where the beneficiary heirs are all minors, their tutors are entitled, by preference, to be appointed as administrators; and the term "tutors," as used in article 1044 of the Revised Civil Code, embraces a duly-qualified female tutor as well as male tutors.

2. In such case, where two tutors of different beneficiary heirs apply, the judge is vested with a large discretion in deciding between them; and, unless manifestly wrong, his conclusion will not be disturbed.

(*Syllabus by the Court*.)

O'Sullivan & Knoblock, for appellant.
Knoblock & Moore, for appellee.

FENNER, J. Appeal from the district court for the parish of Lafourche. The decedent, P. J. Boudreaux, left two sets of minor beneficiary heirs, viz.: (1) A son by his first marriage, represented by his grandmother and legal tutrix; (2) three children of the second marriage, represented by their mother and natural tutrix, the surviving widow. The case presents a contest between the two tutrices for the administration of his succession. The judge *a quo* decided in favor of the tutrix of the older minor, whom he appointed as administratrix, from which judgment the other tutrix appeals. The appellant assigns error on two grounds: (1) That the legal tutrix being a woman and only a grandmother, is not capable, under the law, to fill the office of administrator; (2) that if both were capable the judge erred in not giving the preference to appellant.

1. Article 25 of the Revised Civil Code provides that "women cannot be appointed to any public office, nor perform any civil functions, except those which the law especially declares them capable of exercising." Article 302 specially declares the mother and

grandmother of minors to be capable of being appointed as their tutrices. Article 1042 declares that, "in the choice of the administrator, the preference shall be given to the beneficiary heir over every other person, if he be of age, and present in the state." Article 1044 provides that, "if all the beneficiary heirs be minors, their tutors can claim the preference for the administration, and it shall be given them, under the charge of their being personally responsible for their acts of administration," etc.

It is not necessary to refer to article 3556 of the Code, which says: "The masculine gender comprehends the two sexes whenever the provision is not one which is evidently made for one of them only." The use of the term "tutrix" to distinguish a female from a male tutor is conventional. The terminology of the Code recognizes no such distinction of sex in tutorship. A tutor is a tutor, whether the person be man or woman. Although, in some articles, the Code refers to a female tutor as a "tutrix," yet, in all the articles prescribing the nature, powers, and duties of tutorship, it uses simply the terms "tutor" and "tutorship;" and those provisions, of course, apply equally to female as to male tutors. So, when the law gives to tutors of beneficiary heirs the right and preference to be appointed administrators, it embraces any tutor, male or female. Indeed, it is obvious that the preference is given out of consideration to the rights and interests of the beneficiary heirs themselves, and is given to their legal representatives only because, owing to their minority, the heirs are not capable of exercising it.

Our jurisprudence has constantly recognized the right of female tutors of beneficiary heirs to be appointed administrators, and even their right to administer without such appointment, in the interest of the heirs whom she represents, when creditors do not object. Succession of Forstall, 39 La. Ann. 1052, 3 South. Rep. 277; Succession of Gusman, 36 La. Ann. 299; Succession of De Lerno, 34 La. Ann. 40; Succession of Penney, 10 La. Ann. 290; Succession of McKinney, 4 La. Ann. 25. The fact that in some of the cases quoted the applicant was married, and that the husband, as her co-tutor, joined in the application, does not affect the principle. We therefore hold that the tutrix who received the appointment was fully capable.

2. In selecting which of the two applicants should be appointed, the judge was invested with a legal discretion which should not be interfered with unless manifestly misused. The Code, art. 1043, provides: "If there be two or more beneficiary heirs of age, and present in this state, the judge shall select one or two, whom he shall consider the most solid, for the administration of the succession." The same rule is evidently applicable to the case where different tutors of beneficiary heirs apply. We have held that in such a contest "a large discretion is vested in the judge who makes the appointment, and, unless manifestly wrong, his conclusion will not be disturbed." Succession of Chaler, 39 La. Ann. 308, 1 South. Rep. 820.

It does not appear that the appellant is more "solid" than the appointee, or that the latter is in any way deficient in solidity, or in any qualification for the administration. The judge has evidently exercised careful consideration in the matter, and we can discover no good reason for disturbing his decision.

Judgment affirmed.

Rehearing refused.

Succession of GASSIE.

(Supreme Court of Louisiana. March 8, 1890.
42 La. Ann.)

ADMINISTRATOR'S ACCOUNTS—ACTION—DISMISSAL.

When it appears that the only persons practically interested in an account are the accountant and the opponent, both of whom are *sui juris*, and when it is shown that they have made extrajudicial settlement of the matters involved, and, by their joint action, have involved affairs in such confusion that a readjustment is impracticable, the judge *a quo* will be sustained in leaving the parties where they have placed themselves, and in dismissing the case.

(Syllabus by the Court.)

Appeal from district court, parish of West Baton Rouge; TALBOT, Judge.

Samuel Matthews, for appellant. Alexander Hebert, for appellee.

FENNER, J. August Gassie died in 1873, leaving a widow and two minor children. His estate consisted entirely of community property, and under the law the widow was owner of one-half, and was usufructuary of the other half, which belonged to her minor children. August Gassie and his brother, William Gassie, were common owners of part of a plantation which they worked in partnership, and were also mercantile partners in a store. The succession of August Gassie was opened, and his widow qualified as tutrix of the minors, and her father, Emile Lefebvre, as their under tutor; in which capacity they administered all the estate, except the partnership property, of which William Gassie, as surviving partner, was appointed administrator, and qualified as such, Mrs. Gassie and Mr. Lefebvre becoming securities on his bond. After this the parties seem to have cut loose from the court, and to have taken the administration of the estate into their own hands. The planting interest was conducted by them jointly, while William Gassie administered and carried on the affairs of the store. It is very clearly shown that the mercantile copartnership was insolvent at the death of August Gassie. Therefore the minors had no interest therein, and any profits made in conducting the business thereafter belonged jointly to William Gassie, and to Mrs. Gassie, as widow in community and as usufructuary. The same may be said of the fruits and revenues of the plantation. Thus, practically, the only real partners in interest were William Gassie and the widow. They compromised and settled the debts as best they could, and, with the full sanction and co-operation of both, the store and plantation operations were carried on. They had frequent and full settlements with each other. So matters

went on until 1889, when Mrs. Gassie filed the present proceedings to compel William Gassie to account, and an order to that effect was issued by the judge. In obedience thereto William Gassie filed a bungling account, containing serious errors, subsequently shown, against himself, and, no doubt, others in his favor. But the testimony of William Gassie showed that the parties had taken cognizance of everything that had been done, and had had annual settlements with each other embracing all the matters in controversy, and his statements are not substantially contradicted either by Mrs. Gassie or her father, who advised and assisted her, and both of whom testified. The judge *à quo* came to the conclusion that the matters involved in the account had been extrajudicially settled and liquidated between the parties, and therefore dismissed the whole case. We think he did not err.

It is clear, as heretofore stated, that the only parties interested in this accounting are William Gassie and Mrs. Gassie personally. We have puzzled our brains over this confused record in a vain effort to adjust their rights upon the evidence adduced, and the only clear conclusion we have been able to reach is that they are equally responsible for the inextricable confusion in which the matters are involved; that, at frequent intervals, they have gone over and agreed upon settlements to date; and that it passes the capacity of the most expert, on the evidence here presented, to make any better settlement than they have themselves already made.

Judgment affirmed.

JOHNSON v. FLANNER, (two cases.)

(Supreme Court of Louisiana. March 3, 1890.
42 La. Ann.)

MUTUAL ACCOUNTS—SALE OF LAND—EVIDENCE—ESTOPPEL.

1. Oral testimony, in the absence of charges of fraud, error, or violence, is inadmissible, between the parties to a sale of real estate, to show the simulation of the transaction. None but documentary proof is legitimate in such a case.

2. A party is concluded by his judicial declarations. After asserting claims, as a creditor, for the price of property sold, a vendor, or any one under him, is estopped from denying the character and reality which he has attached to the transaction. He cannot be permitted to play fast and loose.

(Syllabus by the Court.)

Appeal from district court, parish of Natchitoches; PIERSON, Judge.

Jack & Dismukes and Scarborough & Carver, for appellant. *Chaplin, Breaseale & Chaplin*, for appellee.

BERMUDEZ, C. J. The object of these suits is an adjustment of the respective liabilities of the parties *inter se*. Flanner having issued two writs, one of execution, another of seizure and sale, against Johnson, the latter enjoined them, claiming to be entitled to credits which were not allowed him. Flanner answered that the transactions relied on by Johnson to set

up his claims were not real, but simulated, concluding in a reconventional demand, with a prayer for a judgment against Johnson for the whole amount due him. The differences of the litigants were most extensively inquired into before a jury, who returned a verdict crediting Johnson with certain sums, and liquidating Flanner's claims to the difference, \$4,520, with interest. From the judgment rendered on the verdict Flanner appealed, and Johnson, answering, prays for increased credits. It appears that, in 1887, Flanner sold certain lands to Johnson for \$9,290.72, which were settled for in four notes, payable at one, two, three, and four years. On the maturity of the first note, Flanner brought suit *via ordinaria* against Johnson, alleging the nature of the transaction—the sale—in consequence of which the notes had been issued. Johnson came forward, confessed judgment, and paid \$1,250 on account, obtaining indulgence. Subsequently, Flanner, remaining unpaid, issued execution, levying upon the property sold and other property. Johnson enjoined on the grounds that he had not been credited with the previous payment of \$1,250, and that Flanner had no right to exact payment without having paid the indebtedness assumed by him in the act of sale to him and his vendor, which amounted to \$7,355.31, part of which was represented by vendor's notes, figuring \$3,500, which had been placed in his possession by Johnson, who owns them, to secure a loan of \$1,800, which had been paid back; the notes not being, however, returned, etc. Flanner answered the petition for an injunction, admitting the proceedings on which the confession was made, the payment of the \$1,250, and the issuance of the *f. fa.* and the seizure; but charges that he is not liable for the indebtedness assumed by him in the act of his vendor, Sers, which is a simulation, and that the consideration of the transaction was a different one. He further avers that the Sers notes have no real existence, and were surrendered to him because of that fact, and not to secure a loan; that it had been intended to insert a clause in the act exonerating him from all liabilities; but that, through error and oversight, it was not done. He further sets up his claims against Johnson on the notes, and complains of damages sustained in consequence of the injunction. He concludes by asking that the injunction be dissolved, with damages; that he be declared not liable for the assumptions; and that the property seized be ordered to be sold for the whole debt, for cash to cover the part due, and on terms of credit, to correspond with the parts not due. Before those issues had come to trial, Flanner brought executory proceedings on the second maturing note of Johnson, with a credit of \$200, averring the suit on the first note, the sale, and praying for the seizure and sale of the property for cash sufficient to pay the note sued on of March 9, 1889, attorney's fee, etc. On the proper order, the writ issued, but was enjoined by Johnson on grounds substantially similar to those set forth in his petition for an injunction arresting the *f. fa.* Flanner answered mainly as he did to the

first injunction in accordance with the responsibilities resulting from his assumptions. The cases were consolidated, and so tried. The plaintiff offered documentary evidence in support of his averments, to show that he was entitled to the credits claimed, and that Flanner had bound himself to pay debts of his vendor, and that he should be held to do so previous to exacting payment of the notes sued on. The defendant offered oral testimony to show the simulation alleged by him, and consequently his non-liability under the assumptions. The court allowed the testimony over plaintiff's objections, which were reserved by bills, and which were that parol testimony between the parties is not admissible, but that a counter-letter was the only legitimate proof, and, even then, that, by his judicial declarations of the reality of the transaction in which Johnson had issued the notes, Flanner was estopped from all contradiction of them. It needs no discussion or reference to authorities to show that it was error to have heard the oral testimony. The case is one which is between the parties, and in which none of the averments has been made which would have opened the door for such proof.

Besides, the judicial declarations which Flanner has made in the two suits, and the exercise of the rights which he asserted therein, and which affirm and reaffirm the sale from him to Johnson as a reality, effectually estop him from denying its seriousness. He cannot be permitted to play fast and loose. There is no evidence showing that a clause had been intended to be inserted in the act for his relief, and that by error and oversight it was admitted. It may not be out of place to say that during the trial, feeling that written evidence was necessary in such a case, he averred the existence of a counter-letter, in a supplemental answer, but that he afterwards abandoned the claim to such proof. It appears that Flanner assumed the four notes due by his vendor, Sers, for \$3,500; that those notes are the property of Johnson, and are therefore due by Flanner; and that by as much they offset Flanner's claims against Johnson. The manner in which those notes came to Flanner's possession is differently stated by Johnson and Flanner, but after hearing them, and the other proof in the record on the subject, the jury and the judge rightly preferred Johnson's statement. Flanner ought to have credited Johnson with the \$1,250 paid by him in the suit on the first note, and Johnson is entitled to a credit of \$200 on the second note sued on in the executory proceedings. Johnson is further entitled to offset the claim of Flanner by the notes of Sers, which Flanner owes by assumption, and which are Johnson's property, amounting to \$3,500. The verdict of the jury, and the judgment of court on it, have done justice, as far as they go; but Johnson is entitled to a further reduction of \$200, which puts down his indebtedness to Flanner at \$4,340.73. It is therefore ordered and decreed that the verdict of the jury and the judgment thereon be amended so as to entitle Johnson to a reduction of Flanner's claim against him to \$4,340.73, instead of \$4,540.73, and that, thus amend-

ed, said judgment be affirmed, the costs of appeal to be paid by Flanner.

Rehearing refused.

MILLER V. SHUMAKER.

(Supreme Court of Louisiana. March 3, 1890.
42 La. Ann.)

NUNCUPATIVE WILLS—EVICTION—RENTS—IMPROVEMENTS.

1. The omission to make express mention in a nuncupative will by public act, or in equivalent terms, that it was written by the notary, is fatal, and invalidates the instrument.

2. Rents and revenues cannot be recovered from a possessor in good faith, except from judicial demand, when evicted.

3. Such possessor cannot be required to demolish works put up by him, and is entitled to recover from the owner, on the latter's choice, either the value of the materials and the price of workmanship, or the reimbursement of a sum equal to the enhanced value of the soil.

(Syllabus by the Court.)

Appeal from district court, parish of Concordia; Young, Judge.

Steele & Dagg, for appellant. Luce & Lemle, for appellee.

BERMUDEZ, C. J. This controversy involves the validity of an authentic will of a wife in favor of her husband; the liability of the latter for rents, since the death of the former, of property left by her, and of which he had possession; the right of the husband to recover from the succession certain money claims which he sets up, should the will be annulled. The plaintiff, who is the sister of the deceased wife, charges the nullity of the will, which is the in the nuncupative form, by public act, on the main ground that it does not appear from its contract that it was written by the notary who received it. It would be cumbersome to incorporate here the *pro-verbal* of the making of the will, as prepared by the notary. It suffices to say that there was made by that official no statement that he has written the will, and that the omission to make express mention of that important fact is fatal to the validity of the instrument, as no proof can be adduced *allunde* to supplement the omission. The notary declares that he was called on by the testatrix "to write, at her dictation, her last will and testament;" that she did "dictate to me [him] the following, as her last will and testament," which it is needless to transcribe; and he concludes by stating that the testatrix, having heard the will read, declared, etc. Surely, from that statement, it appears that the notary was called on to write the will; that the testatrix dictated it, and that it was read to her; but it does not appear that the notary wrote it down after the dictation. There is nothing in the language used from which it can be deduced that he did so. He ought to have so declared expressly, or used analogous terms. His failure to have done so carries the invalidity of the instrument. It makes no difference that in truth he did write it, for it is a circumstance which cannot be legally established otherwise than by the declaration of the fact by the notary in the act itself. Article 1578, Rev. Civil Code, and the

jurisprudence expounding it, unmercifully demand that express mention be made of the dictation, writing down, and reading, and, for a failure to observe the formalities prescribed, the subsequent article 1595 emphatically declares that the testament shall be null and void. It is useless to refer specifically to other authorities to show that, unless the notary declares that he has written down the will, or employs words of equivalent import, the will is a nullity.

There can be no doubt that, under the proof and the admission, the plaintiff is the nearest of kin of the deceased, and therefore her sole heir at law. She is consequently entitled to be so recognized, and has a standing in court to make further demands. She claims that the defendant, her sister's surviving husband, owes her the rent of the property left by his deceased wife, from the time of her death up to settlement, at the rate of \$25 per month. To this the defendant answers that, being a possessor in good faith, he is not accountable for such rents, which he besides denies having received.

The defendant was in possession of the property, not merely by virtue of the will by which it was bequeathed to him, but of a judicial decree, which ordered "that its provisions be executed." Neither the will, nor the decree made to carry it out, were absolute nullities; for their validity could have been acquiesced in, expressly or impliedly, as being in favor of private individuals.

By the lapse of time, five years, (Rev. Civil Code, art. 3542,) an action to annul it would have been barred. The defendant was in good faith when he deposited the will in court; the officer who made the decree for its execution thought it was a valid will; the attorneys who presented it to the court were under the same impression; the plaintiff herself and her counsel, for a time, did not suspect its invalidity, for a claim for money was made by them from the defendant, treating him, as it were, as the testamentary heir of the deceased. The defendant has set up the fact of this claim as an estoppel, shutting out plaintiff from the present suit; but it has none of the essential elements which can affix upon it the character of a formal and knowing acknowledgment of the will as a valid instrument, and cannot, therefore, be considered as a ratification of an act as valid which was known not to be so. It can serve, however, to show that the defendant could be in good faith when he treated the will as valid, or that his wife's sister, the only person who could have raised adverse rights, herself had taken it to be so. Viewed as a possessor in good faith, the defendant cannot be held responsible for all the rents claimed. The district judge, after hearing the evidence adduced, thought that the rent could be put down at \$17.50 per month, and rightly allowed it from the date of judicial demand. The plaintiff further claims the value of property of the wife alleged to have been disposed of by the husband since the death. The record does not show that the defendant has done any such act. The district judge thus found, and so do we.

In his reconventional demand, the defendant had set up claims aggregating \$2,075, which were allowed below to the extent of \$578.50 only. In his brief on appeal, the defendant has stated the different items on which he now insists, and which sum up \$1,122. The items for \$450 for improvements put upon the property of the wife before, and for \$250 for similar improvements after, her death, have been formally admitted as correct. The plaintiff, however, contends that, having made an election under article 508, Rev. Civil Code, this demand can be settled by the defendant taking and removing the building; but that very article, in its last paragraph, expressly provides that, if the edifices or works have been made by a third person, evicted and not sentenced to make restitution of fruits, because such person possessed *bona fide*, the owner shall not have the right to demand the demolition of the works, but shall have his choice, either to reimburse the value of the materials and the price of workmanship, or to pay a sum equal to the enhanced value of the soil. The remaining items—one of \$150, paid by the husband out of his separate funds, to extinguish a mortgage on the wife's property; another for \$100, to pay fees to an attorney; another for a like amount, paid for her account; and another for \$30, paid in the same way; and finally one for funeral expenses for \$42—are not so well established as to be allowed in full. The district judge who heard the numerous witnesses who testified in the case and the defendant himself came to the conclusion that he was entitled to recover \$578.50 only. The appeal was taken by the defendant, and the plaintiff, answering, joined in the same, praying for an affirmance of the judgment as far as it benefits her, and its reversal otherwise. We think that the district judge has done substantial justice.

Judgment affirmed.

Rehearing refused.

PAYNE v. JAMES *et al.*

(Supreme Court of Louisiana. March 3, 1890.
43 La. Ann.)

LEASE—COVENANTS—REPAIRS—SALE BY LESSOR.

1. Under a contract of lease which binds the lessee to keep the property in good repair, and to surrender it at the expiration of the lease in the same good order in which he received it at the beginning of the lease, he has the option to make the required or necessary repairs at the end of the lease, and his lessor has no cause of action for damages for his failure to make repairs until the expiration of the lease.

2. Hence, when the cause of action arises, the conditions on which the work was to be done have ceased to exist, and in such a case the action for damages need not be preceded by a putting in default of the lessor. Rev. Civil Code, art. 1883, exception 1.

3. The lessor, who sells the leased property during the continuance of the lease, with the express reservation of all his rights and claims as lessor, specially including the right to sue for damages caused to the property during the possession of the lessee, has a legal right of action for such damages after the expiration of the lease, unaffected by the sale made in the mean time.

(Syllabus by the Court.)

Appeal from district court, parish of West Feliciana; SEMPLE, Judge.

H. H. Hall and S. McC. Lawrason, for appellant. *W. W. Leake and R. C. Wickliffe*, for appellees.

POCHE, J. Plaintiff claims damages in the sum of \$5,000 for alleged violation of a contract of lease, in which the defendants, as lessees, had bound themselves to keep the leased premises in good order and repair during the continuance of the lease, and, at the expiration thereof, to surrender the property in a like good order and repair, which they utterly failed to do. Plaintiff appeals from a judgment which sustained an exception to the effect that his petition, which alleged a passive violation of a contract, contained no averment that the debtor had been put in default. Plaintiff's counsel argue with much force that the violation of the contract, disclosed by their allegations, is an active and not a passive violation; and that therefore a putting *in mora* was not an indispensable prerequisite to the demand in damages. But for the purposes of the conclusions which we have reached in the case we find it unnecessary to discuss that question. Conceding, therefore, for the argument, that the alleged violation of the contract is passive, and that the case is controlled by the provisions of article 1933 of the Revised Civil Code, we think that plaintiff's demand on the face of the pleadings is amply protected by the first exception which the Code makes to the article under consideration, and which reads as follows: "When the thing to be given or done by the contract was of such a nature that it could only be given or done within a certain time, which has elapsed, or under certain circumstances, which no longer exist, the debtor need not be put in legal delay to entitle the creditor to damages." From the contract, which is annexed to the petition, it appears that the lease was for a term of five years, and that the clause which has a bearing on the present controversy reads as follows: "The lessees further obligating themselves to keep the herein leased premises, including all buildings, fences, ditches, improvements, etc., in good order and repair during the continuance of this lease, and at the expiration hereof to surrender the same to the said lessor in the like condition, good order, and repair, in which they acknowledge to have received the same." And the charge is that, in violation of their agreement, the defendants allowed the buildings to become dilapidated, the fences to fall, and the ditches to become choked and obliterated, in consequence of which the lessor was damaged in the amount claimed herein.

Under a proper construction of the contract it appears to us that at any time before the expiration of the lease, even a few weeks before that time, the lessees could have repaired the buildings, rebuilt the fences, and reopened the ditches, all in a manner sufficient to have restored the leased premises in the same good order and repair in which they had received them. In such a case, the lessor would have had no cause of complaint under the law. It is, on the other hand equally

clear that it was too late for the lessees to undertake such works and repairs after the expiration of the lease. Hence it follows that the time for action on the part of the lessor did not occur or arise until or before the expiration of the lease, although he had already suffered apparent damages. But at that time the circumstances under which the lessees could restore the leased plantation to proper repair and good order, and which were their possession of the premises as lessees, had ceased to exist. It is therefore apparent that when the obligation of the lessees to restore the leased premises to good order and repair for the purpose of surrendering the same to the lessor culminated, the latter had yet no authority in law to require the necessary repairs, and that his rights only accrued at the very moment that the possession of the premises reverted to him under the contract. But, as we have said, it was then too late to coerce the lessees to a specific performance, and the law cannot impose a useless proceeding as a prerequisite to a legal demand. *Beck v. Fleitas*, 37 La. Ann. 493.

We therefore conclude and we hold that in this case the law could not and did not require that plaintiff's demand should have been preceded by a putting in default.

In plaintiff's petition it is averred that, nearly a year before the expiration of the lease, he had sold and parted with the possession of the leased plantation; and that circumstance is made the ground of a second exception on the part of the defendants, who urge that, this sale having been made before the time for repairing had elapsed, plaintiff has no interest in the value of said repairs. An easy answer to that contention would be that the lessor is not here claiming the value of the neglected or omitted repairs. His demand is for the damages caused to his property by the neglect or failure of the lessees to make the repairs and works stipulated in the contract. In his petition he avers that, owing to the dilapidated condition of the plantation, as a result of the lessees' violation of their obligation, he was compelled to accept as purchase price thereof \$5,000 less than would have been its actual or market value if the same had been in proper repair, or in the same order in which the lessees had received it at the commencement of the lease.

We are clear in the opinion that such allegations unquestionably disclose an actionable interest in the complaining lessor. But the present case is still stronger. Plaintiff alleges that, in the act of sale which he made of the property, he specially reserved all his rights and claims as lessor, including in terms the right to sue for the recovery from the said James and Trager of all damages which the said plantation should have sustained while in their possession. It has been held that in our jurisprudence "the purchaser of property is presumed to acquire all actions appurtenant to the property, and necessary to its perfect enjoyment; but, as to damages actually suffered by the vendor before the sale, they are personal to him, and cannot be recovered by the purchaser, without an express subrogation." *Clark v. Warner*,

6 La. Ann. 408. In this case the damages claimed by the lessor were continuous from the beginning to the end of the lease, and an amount of \$5,000 is alleged to have been already occasioned at the time of the sale, although the right to claim the same had not yet accrued; and the vendor, far from subrogating his right to claim these damages, to his vendee, specially reserved his right of action thereunder. Hence we conclude that there is no merit in the second exception.

We note that the district judge rested his decree exclusively on the strength of the first exception, without reference to the second. But both were means of defense submitted below, and both were proper subjects of judicial consideration on appeal, and the ends of justice were best subserved by disposing of both at this time. *Macready v. Schenck*, 41 La. Ann. 456, 6 South. Rep. 517. It is therefore ordered that the judgment appealed from be annulled, avoided, and reversed; that the exceptions herein interposed by the defendants be overruled and dismissed at their costs in both courts, and that the cause be remanded to the district court for further proceedings according to law.

FENNER, J., recuses himself on account of affinity to plaintiff.

STATE v. RICHMOND.

(*Supreme Court of Louisiana.* March 17, 1890.
42 La. Ann.)

MURDER—INDICTMENT—EVIDENCE—JURY.

1. An indictment charging that the accused "did kill and murder a female child, whose name is to the said jurors unknown," contains a sufficient description of the deceased.

2. Expert testimony is inadmissible for the purpose of proving that puerperal mania is of common occurrence at child-birth, in the absence of all proof tending to show any mental derangement at the time she gave birth to the child.

3. Proof of a separation of the members of the jury, during the time of their deliberations, some of them sleeping in a room, and some in an adjoining hall; some remaining in the room, while others walked out on a gallery,—is insufficient to vitiate their verdict; because such a separation is not such as to have necessarily or reasonably prejudiced the rights of the accused.

4. A juror is an incompetent witness by whom to impeach the verdict of the jury of which he was a member.

(*Syllabus by the Court.*)

Appeal from district court, parish of Vermillion; EDWARDS, Judge.

Walter H. Rogers, Atty. Gen., for the State. A. & C. Fontelleu, for appellant.

WATKINS, J. The accused was indicted on the charge of murder, convicted of manslaughter, and sentenced to 10 years' imprisonment at hard labor, and from the judgment and sentence has appealed. The causes assigned for relief are that the judge erred (1) in overruling her motion to quash the bill of indictment; (2) in disallowing certain testimony; and (3) in refusing a new trial.

1. The indictment charges "that one Polly Richmond unlawfully, willfully, feloniously, and of her malice aforethought did kill and murder a female child, whose

name is to the said jurors unknown;" and the ground of objection is that the description of the deceased was insufficient. In counsel's brief, his contention is that, "the deceased being a new-born babe, and the offspring of the accused, it was necessary that the indictment should have set out the name of its mother." The objection is not a good one. It was so decided in *State v. Bayonne*, 23 La. Ann. 78, and that decision is in keeping with common-law authorities. *Whart. Crim. Pl. & Pr.* §§ 104, 111.

2. The accused offered a physician as an expert witness by whom to prove that puerperal mania or insanity was a common disease after child-birth, and often took on the form of homicidal mania, and the trial judge disallowed the testimony, because no proper foundation had been laid for its introduction. In support of his ruling, he states that, while it was in proof that the accused occasionally had spasms, they were not shown to have occurred at the time of the birth of the child, nor to have been referable to it; that, outside of the statement of the accused, there was no satisfactory proof that she was alone, and unassisted, at the birth of her child. We cannot perceive any analogy between the evidence introduced and that which was offered and refused. In the absence of all proof tending to show any derangement of the mind of the accused at the time she gave birth to the child, or, indeed, even tending to show what was her condition at the time, or that she was alone and unattended, expert testimony, like that in question, could serve no valuable purpose, and was inapplicable and inadmissible, and properly rejected. It was irrelevant.

3. The grounds assigned for a new trial are (1) that the jury separated after they had retired to their room to deliberate on their verdict, and, in so doing, were guilty of misconduct that vitiates their verdict, which was subsequently rendered; and (2) that the verdict rendered is null and void, because the jury, in the course of their deliberations, "drew plans and maps of the situation of the residence of the defendant, and of the distance from her house to that of her nearest neighbor, whereas no such evidence was adduced on the trial," and same was greatly to her prejudice.

a. The proof of a separation of the jury is that on one occasion some of the jurors slept in a room, and the others in an adjoining hall, notwithstanding the room was amply large to have accommodated all; that, on another occasion, two or three of the jurors were in a room of the building occupied by them, out of the presence of an officer, while the remainder of the jury were on the gallery which fronted the street. That a separation will not vitiate a verdict unless it be of such a character that prejudice to the complaining party may be expected to have resulted therefrom, is a proposition well supported by authority. *State v. Vines*, 34 La. Ann. 1073; *State v. Johnson*, 30 La. Ann. 921; *State v. Frugé*, 28 La. Ann. 657; *State v. Turner*, 25 La. Ann. 573; *State v. Forney*, 24 La. Ann. 191; *State v. Tucker*, 10 La. Ann. 501.

Such separations as those described in the evidence are not such as would necessarily or reasonably have prejudiced the accused. There is no proof of the building having been occupied, at the time, by other persons than the jury and sheriff, with whom any member of their body could have come in contact. The judge entertained a proper appreciation of the evidence, and held the separation insufficient to vitiate the verdict.

b. It has been repeatedly decided that a juror is an incompetent witness, by whom to impeach the verdict of a jury of which he was a member; and that a court must derive its information, in reference to the misconduct of a jury, from some source other than members of that body. *State v. Caldwell*, 3 La. Ann. 435; *State v. Brette*, 6 La. Ann. 652; *State v. Millican*, 15 La. Ann. 557; *State v. Frugé*, 23 La. Ann. 657; *State v. Beatty*, 30 La. Ann. 1266; *State v. Wallman*, 31 La. Ann. 146; *State v. Nelson*, 32 La. Ann. 842; *State v. Chretien*, 35 La. Ann. 1031; *State v. Price*, 37 La. Ann. 216; *State v. Bates*, 38 La. Ann. 491; *State v. Bird*, Id. 497. This is the common-law rule. *Whart. Crim. Pl. & Pr. § 847*; *Whart. Crim. Ev. § 510*; 1 *Bish. Crim. Proc. § 1270*. As it was upon evidence to be obtained from members of the jury alone that the defendant's counsel relied, it was properly refused. The judge correctly overruled the motion for new trial.

Judgment affirmed.

WEBRE v. LORIO, Sheriff, et al.

(Supreme Court of Louisiana. Feb. 10, 1890.
42 La. Ann.)

COMMUNITY PROPERTY—RIGHTS OF SURVIVING SPOUSE.

1. There is nothing in the jurisprudence of this state which prevents the surviving spouse from disposing of his or her part of the community property subject to the debts and charges of the community.

2. The personal creditor of either can subject it, by seizure and sale, to the payment of his debt, subject to the debts of the community.

3. The death of either spouse terminates the community, and the survivor is seized of one undivided half of the community property absolutely. The law fixes the title of the survivor to the property. The amount of community debts cannot determine the extent of the title,—make it more or less than one-half of the property.

4. The surviving spouse receives the property just as any other proprietor receives title to property burdened with debts.

5. It may be absolute, yet it may be divested by the creditor who had claims upon it, and may be seized and sold to satisfy the same.

6. The law provides the mode for the settlement and liquidation of the community; and, when the heirs or creditors require it, the succession must be administered.

7. No one can interfere with the administration of the succession by selling its property, so as to take it away from the control of the administrator.

8. The sale of the wife's community property transfers all of her rights and interest to said property. The purchaser, however, acquires no greater right to said property than the widow in community had to the same. It passes subject to community debts and the right of the creditor, through an administrator, to manage the same for the payment of these debts. The property must be left, when the succession is under administration, with the succession effects, until final settlement, when

the purchaser will receive the property if the incumbrances have been paid, or what remains in money, if it has been necessary to sell the property to pay the debts of the community.

(Syllabus by the Court.)

Appeal from district court, parish of La-fourche; BEATTIE, Judge.

L. P. Caillouet, for appellant. Knoblock & Moore, for appellee.

McENERY, J. F. Hollander & Co., judgment creditors of Mrs. J. R. Le Blanc, the surviving widow of J. Rosmund Le Blanc, issued an execution on their judgment, seized and advertised for sale the undivided half of certain real estate as the property of the defendant in execution. The sale was arrested by an injunction taken out by J. Albert Webre. In the petition for the injunction, it is alleged that the plaintiff in injunction is a creditor of the succession of J. R. Le Blanc, who died in 1887, in the sum of \$500, and that there are other creditors of the succession of Le Blanc, and of the community which existed between him and the surviving widow, and that there are no assets to meet said claims except the property, the undivided half of which was under seizure, and about to be sold, by the personal creditor of Mrs. Le Blanc; that the said Mrs. Le Blanc is not the owner of the undivided half of said property by an absolute and indefeasible title, but had only a residuary interest therein, dependent on the settlement of the community; that all the said judgment creditors can seize and sell is the right, title, and interest in and to the undivided half of the community property; that, as the community was greatly involved, the sale of the undivided half of the community to pay the individual debts of the surviving spouse would greatly injure and depreciate the value of the property; that he had applied for the administration of the succession of Le Blanc, which was pending, awaiting legal delays, before his final appointment. The application to administer was made after the execution issued on the judgment and the seizure of the property. The injunction issued on the day of sale. The defendants in injunction filed a motion to dissolve on the face of the papers "for the reason that plaintiff is without any warrant of law, so far as is disclosed on the face of his petition, to invoke the equitable writ of injunction." This motion was sustained by the district judge, and from a judgment thereon dissolving the injunction the plaintiff appealed.

The question presented is, has the surviving wife such an ownership in the undivided and unliquidated community property that it can be seized and sold for her individual debts? There is nothing in the jurisprudence of this state, in the Code, or the decisions of the court, to prevent the surviving spouse from disposing of his or her part of the community property subject to the debts and charges of the community. Therefore, the individual creditors of either can subject it by seizure and sale to the payment of his debt, subject, of course, to the debts of the community. After the death of the husband or wife, the community is terminated, and the sur-

vivor and the heirs of the deceased each become seised of the undivided half of the property subject to the payment of the debts. The law fixes the title to the community property of the surviving spouse. It is an absolute and indefeasible title to one-half of the community property. This title can be divested by the creditor of the community in the manner pointed out by law, by its sale to pay debts and to settle the community. The amount of the debts cannot determine the extent of the title,—make it more or less than one-half. The surviving spouse receives the property just as any other proprietor receives title burdened with debts. The title may be absolute and indefeasible, yet it may be divested by the mortgage creditor, by seizure and sale of the property resting in it, when he acquired it either by inheritance or purchase.

In the instant case, Mrs. Le Blanc is the owner of one-half of the community property acquired during her marriage with her deceased husband. *Gale v. Davis*, 4 Mart. (La.) 653; *Dickson v. Dickson*, 36 La. Ann. 453; *Hart v. Foley*, 1 Rob. (La.) 378. As stated in *Dickson v. Dickson*, referred to: "The widow and the heirs take the estate absolutely, subject to the debts and charges against it; and all that is meant by 'residuary rights' is that the property is thus incumbered." In the same case this court announced three propositions as having been fully recognized by our jurisprudence, and said: "In either case the widow and heirs can mortgage their interest in such property, if it be real estate; and the creditor acquiring such mortgage is entitled, in case of non-payment, to have it seized and sold to satisfy his claim, subject to be expropriated or outranked only by creditors of the community and of the succession of the deceased spouse, and whose mortgage was recorded anterior to his own; the succession creditors, however, to be paid out of succession property." The law provides the mode for the settlement and liquidation of the community; and, when the heirs or creditors require it, the succession must be administered. The succession of Le Blanc and the community owed debts, and an administration of the same was necessary. Chapter 6, § 3, Rev. Civil Code; Succession of Scott, 41 La. Ann. 668, & South. Rep. 792. No one can interfere with the administration of the succession by selling its property, and taking it away from the control of the administration. *Soye v. Price*, 30 La. Ann. 93; *Cestac v. Florance*, 31 La. Ann. 493; *Dickson v. Dickson*, 32 La. Ann. 272.

In the case of *Dreyfus v. Richardson*, 33 La. Ann. 602, we understand that the injunction was sustained so as to prevent the property from being taken from the possession of the administrator. The court said: "Whether the holder and owner of such claim and security, however legal the same may be, can proceed, *via executiva*, and have the property composing the security seized and sold while the succession of which the property forms part is still under administration, so as to strip the succession representative of the possession to which he would be other-

wise entitled for the liquidation of the succession affairs. The law negatives the question. It is manifest that what the heir himself could not do his transferee or creditor cannot." And to the same effect is the decision of *Deblieux v. Hotard*, 31 La. Ann. 194. In this case the executor answered, as garnishee, that he had in his possession property and effects belonging to the judgment debtor Hotard, one of the heirs. The motion of plaintiff was that, as he had answered that he had property and effects belonging to the judgment debtor, that the said executor "be ordered to turn over into the hands of the sheriff all the property, rights, credit, and money now under his control, when same shall become due, and that same be applied to satisfy, as far as it may, the writ of *n. fa.* in the hands of said sheriff against Joseph Hotard." "It is manifest," said the court, "that until said succession is administered, and its debts and legacies paid, the executor cannot be compelled to surrender the property, or any part thereof." The question as to the validity of the seizure by garnishment was not raised.

In the instant case, from what we have said, we are of the opinion that the seizure was legal and valid, as it was of the undivided half interest of Mrs. Le Blanc to the community property, and a sale of the same under the seizure would transfer all of her right and interest on said property to the purchaser. But he could acquire no greater rights than Mrs. Le Blanc had to said property. She acquired it at the dissolution of the community subject to community debts, and the right of the creditor to settle and liquidate the community. The creditors have asserted their rights by an application to administer the succession of Le Blanc and the community, and to settle and liquidate the same. The creditor of Mrs. Le Blanc cannot interfere with this administration by taking the community property from the administrator. If sold, it must be left in the succession, under the control of the administrator, until final settlement, and the ascertainment of Mrs. Le Blanc's interest, either in money or property. The purchaser would occupy the same relation to the community as Mrs. Le Blanc. The creditors, through an administrator, administer the succession for their benefit. He is their agent or trustee. If the community debts are paid, the widow will receive her half of the community; and, if it has been necessary to sell the same property to pay debts, she will receive in money the one-half of the excess of the proceeds of sale devoted to this purpose.

From the views we have expressed, we conclude that the sale of the property seized in this case should be proceeded with, but the property to remain with the succession effects, to be administered according to law. To make our decree the more explicit, we find it necessary to set aside the decree of the lower court, and enter such a decree as will conform to our views. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and it is now ordered, adjudged, and decreed that the injunction herein be perpetuated only

so far as to prohibit the defendant or the purchaser at the judicial sale from taking the property under seizure from the control or possession of the administrator of the succession of J. Rosmund Le Blanc, the same to remain with the succession effects, to be administered according to law. In all other respects the injunction is dissolved, the appellee to pay costs of appeal.

JENNINGS V. STATE.

(*Supreme Court of Mississippi*. April 28, 1890.)

PERJURY—IMMATERIAL TESTIMONY.

False testimony, on trial of an indictment for robbery, that the witness overheard defendant, at the trial before the committing magistrate, say to another person, who was also on trial before the magistrate, "I do not believe I will swear to that," and the other's reply, "What did you want to tell me a damned lie for; you had better stick to it, if you know what is good for you,"—is not perjury, since it is immaterial to the issue.

Appeal from circuit court, Attala county; C. H. CAMPBELL, Judge.

Defendant, George Jennings, one Lumpkin, and others were arraigned before a justice of the peace for robbery, and, after a committing trial, were held to answer in the circuit court, where they were indicted. A severance was demanded and granted, and Lumpkin was put upon his trial. On the trial, Jennings testified that he had heard the following conversation between Lumpkin and one Fuller, at the time of the committing trial before the justice of the peace, to-wit, (Lumpkin speaking:) "I do not believe I will swear that." (Fuller, replying:) "What did you want to tell me a damned lie for; you had better stick to it if you know what is good for you." Fuller testified on the trial of Lumpkin that no such conversation had occurred. Jennings, being indicted for perjury, and convicted, appeals.

Brantley & Smith, for appellant. T. M. Miller, Atty. Gen., for the State.

WOODS, C. J. Many errors are assigned, but we confine our consideration to that one which brings under review the materiality of the alleged false swearing. To amount to perjury in law, the false-swearing must have been done with reference to some matter material to the determination of the issue involved. It may be, and it doubtless is, true that Jennings did not hear the conversation to which he deposed, between the witness Fuller and his co-defendant in the original case, Lumpkin; but it is, to our mind, too clear to admit of controversy that the alleged false-swearing was touching a wholly immaterial matter, and was not therefore perjury.

Reversed and remanded.

EUBANKS V. STATE.

(*Supreme Court of Mississippi*. April 28, 1890.)

CRIMINAL LAW—COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY.

Under Code Miss. § 1603, allowing the accused to testify in his own behalf in any prosecution for an offense against the person or property of another, and providing that his failure to do so in any case shall not prejudice him, or be commented on by counsel, comments of the district at-

torney on the failure of defendant to testify on a trial for burglary are ground for reversal of a judgment of conviction.

Appeal from circuit court, Noxubee county; S. H. TERRAL, Judge.

Lewis Eubanks was indicted for burglary and larceny, and on his trial did not testify in his own behalf. The statute permits the defendant to testify in his own behalf, but, if he fails to do so, prohibits the district or prosecuting attorney from commenting on his failure to testify. In this case the district attorney did comment on the failure of the defendant to testify. From a verdict and judgment of guilty defendant appeals. Code Miss. § 1603, provides that "the accused shall be a competent witness for himself in any prosecution for an offense committed on or against the person or property of another; * * * and the failure of the accused in any case to testify in his own behalf shall not operate to his prejudice, nor be commented on by counsel."

John E. Madison, for appellant.

COOPER, J. For the conduct of the district attorney in commenting before the jury on the failure of the defendant to testify in his own behalf, which the statute expressly and clearly forbids, the judgment is reversed, and a new trial awarded.

LOUISVILLE BANKING CO. V. PAINE.

(*Supreme Court of Mississippi*. May 12, 1890.)

INSOLVENT BANK—DIRECTION TO PAY DEBTS—TRUST.

A person directed his bank to pay certain debts, which would mature during his absence, and gave a check to cover the amount. The bank paid one creditor with a sight draft on its own correspondent, and failed before the draft was paid. A receiver was appointed, and plaintiff, holder of the draft, filed a bill to have the receiver declared a trustee of the assets for its benefit. Held, that a trust was not created by the mere revocable direction of the debtor, to which plaintiff was not a party.

Appeal from chancery court, Monroe county; B. McFARLAND, Chancellor.

One Mayer, having on deposit with Gattman & Co., bankers of Aberdeen, more than \$18,000, and being about to start to New York, and owing sundry debts which would mature during his absence, and desiring to provide for their payment, on February 14, 1888, drew his check on Gattman & Co. for amount necessary to make such payments, and left this check with Gattman & Co., with directions that the amount be applied to the payment of these sundry debts when due, to which arrangement the bankers, Gattman & Co., agreed. Among the debts was one due to the appellant, the Louisville Banking Company, which would mature March 13, 1888. The amount of the check drawn by Mayer was charged up to him by Gattman & Co., and on March 13, 1888, Gattman & Co., endeavoring to carry out the wishes and directions of Mayer, their customer, drew their sight draft in favor of the Louisville Banking Company on a New York bank, and mailed said draft to the Louisville Banking Company, with the request that it should cancel and return Mayer's note, which was done. The draft of Gattman

& Co. was forwarded by the Louisville Banking Company to the New York bank for payment, which was refused, because Gattman & Co. had no funds there; said Gattman & Co. having, in the mean time, failed, and were attached, and were wholly insolvent. Appellee, Paine, was appointed receiver of the assets of Gattman & Co., and now has on hand a sum sufficient to pay appellant's claim. Hence the Louisville Banking Company filed this bill, asserting a trust on said funds in the hands of said receiver, and prays that it be enforced. The receiver demurred to the bill, said demurrer was sustained, and the bill dismissed, from which decree the Louisville Banking Company appealed.

E. H. Bristow and *Thos. B. Sykes*, for appellant. *Sykes & Richardson* and *Geo. C. Paine*, for appellee.

CAMPBELL, J. We fully approve the principle applied in *Ryan v. Paine*, 66 Miss. 678, 6 South. Rep. 320, and stand ready to apply it again in a like case, but this is a very different one. Here there was no trust. Mayer, the customer of the Gattman & Co. bank, directed it to apply a portion of his deposit to the payment of specified claims thereafter to mature, and among these was that of the appellant. Gattman & Co. assented to this, and provision for it was made by Mayer drawing his check on Gattman & Co. for the required sum. The appellant was no party to this arrangement, and did not know of it when made. It was a mere direction by Mayer to Gattman & Co. to carry out his wishes, with his funds. He had the legal right to revoke the arrangement, and this is destructive of all idea of a trust in favor of appellant. *Van Eaton v. Napier*, 63 Miss. 220; *Trustees v. Pace*, 15 Ga. 486, and citations; *Mayer v. Bank*, 51 Ga. 325, and cases cited; *Bolles, Banks*, § 44; 1 *Morse, Banks*, § 398, and numerous citations. We have examined all the cases cited by counsel for the appellant, and, after much consideration of this case, feel no hesitation to affirm the decree.

Affirmed.

OGLESBY et al. v. STRIBLING.

(*Supreme Court of Mississippi*. May 12, 1890.)

JUDGMENT BY DEFAULT—ACTIONS EX CONTRACTU —AFFIDAVIT OF DEFENSE.

Where, in action against five defendants on a note, the declaration is verified under Acts Miss. 1888, c. 46, § 3, and service had 30 days before the return-term on three, and all five plead the general issue unverified, plaintiff may have judgment by default against the three served, but not against the other two, under section 1 of that chapter, providing that, where process is served 30 days before, actions *ex contractu* shall be triable at the return-term unless a meritorious defense, supported by affidavit, is disclosed by the answer.

Appeal from circuit court, Lee county; *L. E. Houston*, Judge.

J. L. Finley, for appellants. *Blair & Stribling*, for appellee.

Woods, C. J. The appellee, Stribling, brought suit on a promissory note against

the appellants and one McPherson in Lee circuit court. The declaration was properly verified by affidavit, and the summons was issued and executed on appellants Oglesby and Carroll, and on McPherson, 30 days before court. On the other two appellants, Rice and Hall, the process was served less than 30 days before court. The plea of the general issue was interposed on behalf of all those sued, but was not sworn to. During the term, appellee moved to strike out the unsworn plea, and asked for judgment against all by default; and this motion was by the court sustained, and judgment entered.

The correctness of the action of the court below depends upon the proper construction of chapter 46, Acts 1888, entitled "An act in relation to practice in civil cases, and to prevent unnecessary delay and expense in litigation." By the first section of that act it is provided that all actions *ex contractu* in the circuit court, where process has been served 30 days before court, shall be triable at the return-term, except where defendant discloses a meritorious defense supported by affidavit. By section 2, suits for the enforcement of mechanics' liens are made triable at the return-term; and by section 3, in all actions of the character referred to in sections 1 and 2, the plaintiff may verify his complaint by affidavit, in which event the answer shall be under oath.

The contention is as to the meaning of the third section; the appellants' counsel insisting that actions *ex contractu*, where process has been personally served at least 30 days before court, and mechanic's lien suits, are triable at the return-term, and that the complaint in such suits, when verified by affidavit, shall be met by a sworn answer. The appellee's contention is that section 3 makes all actions *ex contractu*, and suits to enforce mechanics' liens, triable at the return-term, if the original declaration has been verified by plaintiff's affidavit.

To state the contention, in the face of the plain wording of the act itself, is to determine it. It bears its plain construction in its own open text. It is apparent on a mere inspection of the act that only actions *ex contractu* in which service of process has been had 30 days before court are triable at the return-term, and not all actions *ex contractu* without reference to the time of bringing of suit and service of process. The act must be construed all together, and its meaning gathered accordingly, and not by regarding any single line or paragraph alone.

It follows that the judgment in the court below as to McPherson and the two appellants Oglesby and Carroll was correct, and that it was error to enter judgment against the other appellants, Rice and Hall. The two latter had not been served with process 30 days before court, and as to them the suit was not triable at the return-term. The plea of the general issue unsworn, as to Rice and Hall, was ample to prevent any judgment by default as to them.

Wherefore the judgment is affirmed as to all the appellants except Rice and Hall, and is reversed as to them.

SKINNER *et al.* v. HENDERSON *et al.*, County Commissioners.

(*Supreme Court of Florida.* March 31, 1890.)

COUNTIES—TAXATION—BRIDGES IN TOWNS—INJUNCTION.

1. Under the constitution and laws of this state, a county cannot impose taxes except for county purposes; and the building of a bridge in a county within the corporate limits of a municipality, in which the county outside of those limits is in no wise interested, the same being for the sole benefit and advantage of the municipality, is not a county purpose.

2. Where an injunction is sought against a county to prevent the appropriation of its revenues to aid in the building of a bridge in a city, and the allegations of the bill are that the bridge is on a city street, and not a county road or highway, and that the county outside of the city is in no wise interested in it, and that it is for the sole benefit and advantage of the city, it is error to sustain a demurrer to the bill.

3. But the statute authorizing the city to build bridges within its limits does not necessarily revoke the authority given to the county by general statute, without restriction as to locality, to build a bridge within those limits. As there may be bridges serving only a city purpose, so there may be others demanded in the same territory for county purposes; and, where the circumstances create this demand, and the bridge is for the use and benefit of the people of the county at large, or of some considerable portion of them, and intended and needed as well for those outside as for those inside the city, the authority of the county to build it is not annulled by the local city statute.

4. The circumstances of each case must determine the line of authority, even where there is assent of the municipal government; but, in case of conflict between municipal and county officials, it would seem that the county should give way, in deference to the general policy against one jurisdiction clashing with another.

5. If a county may build a bridge within the limits of a municipality when the circumstances suit, it may also aid the municipality in building one under like circumstances, even though it is to be constructed under a contract with the municipality, and is to be under its control.

(*Syllabus by the Court.*)

Appeal from circuit court, Hillsborough county; G. A. HANSON, Judge.

William Hunter, for appellants. *Sparkman & Sparkman*, for appellees.

MAXWELL, J. The city of Tampa, in Hillsborough county, made a contract with a certain bridge company for the construction of a bridge, within the corporate limits of the city, across Hillsborough river. The cost of construction was to be \$13,800. Upon petition to the county commissioners of the county by the citizens of Tampa, and application in behalf of the city by the president of its council, said commissioners ordered an appropriation of \$4,600 towards the construction of the bridge, to be paid by the county, this amount being one-third of the contract price for its construction, and contributed on the understanding that it should be a free bridge. Thereupon appellants filed a bill against the county commissioners, appellees, praying that they be enjoined from paying out said amount for the construction of the bridge. Besides the foregoing facts stated in the bill, it alleges, among other things immaterial here, that complainants are citizens and tax-payers of the county of Hillsborough; that the commissioners levied a tax for the year

1887 for general revenue purposes, which will produce a large surplus, and that they did this for the purpose, and with the intent, of assisting the city of Tampa "to build a bridge across Hillsborough river on Lafayette street, which is a city street, and not a county road or highway," and said bridge "is to be entirely and exclusively under the jurisdiction and control" of said city; that the county "outside of said city of Tampa is in no wise interested in the building of said bridge, and that the same is for the sole benefit and advantage of said city;" that the county "receives no consideration" for said appropriation; that "said bridge, being wholly within the corporate limits of said city, * * * is entirely a municipal improvement, and the expense thereof should be defrayed entirely by said city; that the revenues collected from your orators by county taxation are not levied for the purpose of making such improvements in * * * Tampa or any other municipality, and cannot be legally expended for such purposes, as the building of said bridge in said city is not a 'county purpose,' within the meaning of the constitution." The defendant's demurred to the bill for want of equity, and the demurrer was, in effect, sustained, though the ruling and order thereon were irregular; the order being "that the injunction be denied, and the bill dismissed." Then appellants entered an appeal, but no point has been made here on this irregularity.

It is contended by appellant that the money proposed to be expended by the commissioners to aid in the building of the bridge is not for a "county purpose," and that they have no authority to appropriate money raised by taxation for the county to any other purpose. As to their authority, this is clearly correct. The constitution (section 5, art. 9) provides that the "legislature shall authorize the several counties and incorporated cities or towns in the state to assess and impose taxes for county and municipal purposes, and for no other purposes." What is a county purpose, as distinguished from a municipal purpose, is a question arising here, from the fact that the city of Tampa is a part of the county of Hillsborough, and from the further fact that the county is authorized by statute to build bridges in the county without restriction as to locality, and that the city is authorized by its charter to build bridges within its corporate limits; both having authority for the same purpose there, if that given to the city does not exclude its territory from the domain within the jurisdiction of the county for such purpose. Confining ourselves to the allegations of the bill, it appears that the building of the bridge is wholly a matter belonging to the city of Tampa. The contract for building was its contract. The highway—on opposite sides of the river—to be connected by the bridge is alleged to be a city street, and not a county highway; and it is further alleged that the county outside of the city is in no wise interested in the building of the bridge, and that the bridge is for the sole benefit and advantage of the city, being wholly within its corporate limits,

and entirely a municipal improvement. These facts, taken as true under the demurrer, show that the expenditure on the bridge would be for a city, and not a county, "purpose." They do not present the question whether the county can build, or aid in building, a bridge in the city, under any circumstances, or in other words, whether the jurisdiction of the city entirely excludes the county from its territory for such work. If the constitution will permit requirements of the county in its highways, and in the interest and convenience of all its citizens, to affect this question, so as to allow concurrent authority where the work will serve both a county and city purpose, that cannot determine the case here, in its present shape. As there may be bridges in a city altogether for local convenience, for aught that appears before us the one in question may be of that class. The bill avers that it is. We know judicially that Tampa is the county-seat of Hillsborough, and that outside of Tampa there is habitable territory on both sides of Hillsborough river; but these relations of the county to the city do not of themselves authorize the former to enter the latter for any work that answers only a city purpose, such as the bill alleges of this bridge. If allowed to enter at all, it must be for work that answers a county purpose; that is, work for the use and benefit of the people of the county at large, or of some considerable portion of them, and intended and needed as well for those outside as for those inside the city. The bill does not show that the bridge is a work of this kind, but, on the contrary, shows only such facts as bespeak a work for merely city use and benefit. We think the county commissioners are not authorized to aid in such a work, and that their demurrer to the bill should have been overruled.

While this conclusion decides the case upon the present record, we find in the argument of appellant's counsel, and in that of counsel for appellees, a full discussion of the question whether the legislative grant of authority to the city of Tampa to build bridges within its corporate limits does not intercept the general authority for that purpose given to the county, so far as the territory of the city is concerned; the counsel for appellants insisting that it does, and the counsel for appellees that it does not. Anticipating that, in the further progress of the case below, this question may be more pertinently presented, our views on it now will not be out of place. The theory of appellants is that the officials empowered to act in the management of county affairs have no authority to expend money they raise by taxation for county purposes in building bridges within the corporate limits of any municipality in the county. Whether they have or not is the question to be solved. It is admitted for appellants that, if the county has the right to build the bridge, it would likewise have right to appropriate for a part of the expense, but insisted that, if it could not pay in whole, it could not pay in part. Then the problem is, can the county officials, under their general authority, and notwithstanding the spe-

cial authority of the city, go into the city to build a bridge, or to act in conjunction with the city for that purpose? The rulings on this question are diverse, but they all agree that it depends on constitutional provision or legislative enactment applicable in the particular case, with general principles of law to interpret or construe these. We have mentioned all there is in the constitution and laws of this state on the subject. Counties cannot expend money except for county purposes; and, where a county and municipality cover the same ground, there is nothing which expressly directs what each may do, respectively, in the line of its authority. The nearest approach to any decision on the question in this state is in the case of *State v. Commissioners*, 23 Fla. 632, 3 South. Rep. 164, where it was held that the establishment of a municipality on territory over which passes part of a public road established by the road authorities of the county does not of itself abolish the road as a public highway, nor revoke or suspend the powers and duties of those authorities in regard to it. The court was careful to go no further. But in this decision it appears that a county may, under some circumstances, have powers and duties touching highways in a city or town for the proper exercise and enforcement of which it can be held responsible; and the same would be true of a bridge similarly situated.

There may be distinctively municipal purposes in respect to bridges within a corporation, as where a small stream, purely local, and having no connection with county highways, should be bridged for the convenience of citizens of the corporation; and it is conceivable that there may also be county purposes in the same respect therein, as where the bridge connects public highways of the county, and is of use and importance to the citizens of the county, irrespective of residence in the corporation, and especially if the courthouse of the county is in the corporation. It would seem but just and reasonable, in such case, that the county should take or share the burden of furnishing to the public the convenience of the bridge. In this connection, it is worthy of observation that all the tax-payers of the county—those in municipalities not excepted—are required to contribute to the revenue of the county for bridge purposes, without reference to residence. If residing in a municipality, they must pay a bridge tax for any and every locality inside or outside thereof, if in the county; while, if not residing in a municipality, if appellants' view is correct, they cannot be taxed for a bridge therein, though for a county purpose. It should not be assumed, and in the absence of assumption there is no reason to hold, that such inequality of tax burden was intended to be imposed. This involves relieving the county from the burden when a county purpose is to be subserved in a municipality, but holding the municipality liable for both county and municipal burden, whether in or out of the corporate limits. The palpable injustice of this is most striking. It is nothing more nor less than imposing a double

burden upon municipal citizens, one of which is a burden for a county purpose within the municipality, and exempting other citizens of the county from any burden for such purpose, although interested in common in the object to be attained.

We hence conclude that the special authority given to any municipality to build bridges within its limits does not necessarily supersede the general authority given to the county. But, as there may be a municipal purpose in which the county has no concern, and a county purpose in which all are alike, though perhaps not equally, interested, the circumstances of each case must determine the question of authority; and it seems to us that this would be so even where there is assent of the municipal government. Whether that authority should be exercised in the event of conflict between the two bodies is not involved in this case, as the city and county are in accord in the building of the bridge. In cases where such conflict would arise, we are inclined to the opinion that the county should give way, in deference to the general policy against one jurisdiction clashing with another.

As we have said, the authorities differ on the main question under discussion. But much of this difference grows out of the difference in statutes that govern. We will not undertake a review of the cases, but content ourselves with citing those which sustain the views we have expressed. In Ohio it is held that, if there is nothing in the act incorporating a town which limits the power of the county commissioners to establish a county road through or within its corporate limits, that power still exists. *Wells v. McLaughlin*, 17 Ohio, 89; *Butman v. Fowler*, Id. 101. In Connecticut (*City of Norwich v. Story*, 25 Conn. 44) it is held that the charter of a city conferring power on its common council to lay out new highways, etc., did not divest the county court of the jurisdiction given by statute for the same purpose. A similar ruling in Iowa is valuable as coming from Judge DILLON, one of the most eminent of American jurists and law authors now living, and valuable, also, as having been announced in an opinion which fully discusses the subject. *Bell v. Foutch*, 21 Iowa, 119. See, also, *Barrett v. Brooks*, Id. 144. There is this difference, however, between our statutes and the statutes of Iowa: that, while the authority to the counties to build bridges is the same, our statute gives authority to the city of Tampa to establish and regulate bridges within its limits, while that in Iowa (general act) gives to cities and towns "care, supervision, and control of all public * * * bridges * * * within the city, and shall cause the same to be kept open and in repair," etc. But the reasoning on which it is held that the counties are not divested of authority to build bridges in cities is equally applicable to both, with proper modification, giving due weight here to the authority of counties to act for "county purposes." We think the doctrine of these cases is to be preferred under the system established by our constitution and statutes.

The cases cited for appellants, and maintaining the position that county revenues cannot be expended under a contract to which the county is not a party, do not seem to us to have the force attributed to them here. *Colton v. Hanchett*, 13 Ill. 615, simply decides that, where legislative authority is given to an individual to build a toll-bridge, the county officials cannot appropriate county funds to aid in its construction, because no law of the state authorizes such appropriation. If the view on which we rest our opinion, that in this state a county may build a bridge in a municipality to meet a county purpose, is correct, there is law here to authorize county appropriation of money therefor, and the authority is none the less existent because the appropriation is in aid of a municipal contract to build the bridge, if a county purpose is thereby advanced. Why should not a county expend money to aid in building a bridge, when it has authority to pay the whole expense of building it? If there is anything in the *Holton-Hanchett* Case that seems to make a distinction, it goes beyond the controversy there; for it was a case where the authority to build the bridge was not in the county officials, and of course, therefore, they could not aid therein. The other case (*Attorney General v. Board*, 34 Mich. 46) was one where county supervisors undertook to appropriate money for township roads, leaving to the townships to say to what roads it should be applied. It was held this could not be done, partly because the county board had no occasion to raise money for other than its own roads, and partly because there was no definition of purposes, as the expenditure was to be under the direction of the town officer. As to the first ground, that is fully met in this case, if the bridge answers a county purpose; and, as to the second, there is no indefiniteness of purpose to which the money is to be applied. But the court says in the case that "taxes and loans, when authorized to be raised by any public body, must be raised under the implied condition that they are to be applied to the public uses under the control or care of that body. They cannot be raised for the purposes or uses of others, unless such a power is plainly given." It will be seen, upon scrutinizing the case, that this and other similar language of the opinion applied to the action of county supervisors in respect to roads under the supervision of township supervisors, when by the statute their action was limited to "state and territorial roads." The distinction between that case and the present is obvious. As in that it was held that county revenues could not be used for township roads, so in this we hold that county revenues cannot be used for city bridges as such; but in that the money was being applied to roads not "state and territorial," and not embraced within any authority of the county supervisors, while in this, if the conditions suit, it will be applied to an authorized "county purpose." It does not seem reasonable that in all cases there is such necessary connection between the expenditure of money for public uses and the control ordinarily re-

sulting from such expenditure as to prevent the expenditure when made for a lawful purpose, because in accomplishing that purpose it is done in a way to relieve from the control that entails further liability.

It is no objection to our conclusion, as applicable to the case at bar, if it can be shown that the bridge answers a county purpose, as distinguished from a local city purpose; that the bridge was to be constructed under a contract with the city; and that the city will have control of the same, and must bear the responsibilities connected with it. This will be that much better for the county. So far as it is said to be objectionable on the ground that the appropriation by the county is towards the payment of a debt of the city, the bridge being built under a contract with the city, that is met by the fact, if found to exist, that the appropriation is for a county purpose, and would be, in effect, a payment of its own obligation; and, so far as it is said to be objectionable on the ground that the ownership and control of the bridge will be in the city, that is met by the admission, connected with our view as to the authority of the county to build the bridge itself, if thereby serving a county purpose, that, if "the county would have a right to build the bridge, it would likewise have a right to appropriate for a part of it." As to responsibility for proper care and repair of the bridge, we express no opinion. But, if the county discharges a duty in the attainment of a county purpose in such manner as to be relieved from further responsibility in the matter, this furnishes no reason against the validity of its action. We are to understand that in making the appropriation the commissioners acted, not as aiding the city in a work with which they had no concern, but as performing a primary duty of their own under the power vested in them to build bridges in the county. The reservation they made, that the bridge should be a free one, was to guard against restrictions in its use which would not be within the scope of their authority, and was a proper consideration for joining in the work.

Under our conclusion, it will be for the defendants to determine, upon existing facts of the situation, whether they will further resist the injunction. The decree is reversed, with leave to them to answer if they should deem it advisable.

LOCKWOOD v. FITTS.

(*Supreme Court of Alabama.* April 23, 1890.)

RESCISSION OF CONTRACT—FRAUD—LACHES.

1. In a suit to rescind an exchange of lands and to cancel the conveyance of complainant on the ground of fraudulent representations as to the value and location of lots conveyed by defendant, the testimony showed that the exchange was made in March, and that in April complainant discovered that the lots were not as valuable as represented, nor situated where he had been led to suppose them to be. There was a mortgage on the lots, which complainant assumed in consideration of six additional lots. In May he began to negotiate with defendant for the exchange of other lands, and in July he wrote to defendant's agent, stating that he wished to exchange the lots included in the second

agreement, as well as those in the first exchange, for renting property, so that he might be able to meet the interest due on the mortgage in September. In August he notified defendant that he would not execute the second agreement, and offered to rescind the exchange already consummated. *Held*, he had waived his right to rescind by continuing to treat the property as his own after discovery of the alleged frauds.

3. In an action to rescind an exchange of lands on the ground of fraudulent representations as to the value of the lots conveyed by defendant, complainant testified that defendant said the lots would be very valuable, and would come into market soon, and that he considered them worth \$2,000 each; and that they would sell for \$1,000 each at forced sale. *Held* that, although the lots could not have been sold for more than \$500 each, the representations afforded no ground for relief, being merely an expression of opinion, and not an affirmation of fact.

Appeal from city court of Birmingham;
H. A. SHARPE, Judge.

W. C. Ward, for appellant. Lane & White, for appellee.

CLOPTON, J. On March 23, 1887, the parties made an exchange of lands; appellant conveying to appellee a one-fourth undivided interest in 200 acres of land situate in Jefferson county, Ala., containing iron ore, receiving in exchange 20 lots near Minneapolis, Minn. In the transaction the land of appellant was rated at \$800 per acre, and the lots at \$2,000 each. By the bill appellant seeks a rescission of the contract, and cancellation of the conveyance made by him to appellee, on the ground of misrepresentation as to the location and value of the lots. The specific representations alleged in the bill are "that defendant assured and represented to complainant that said lots of land were each worth the sum of (\$2,000) two thousand dollars, in all \$40,000, and that they were situated within three miles, or only a distance of three miles, from the center of said city of Minneapolis, a large city, and rapidly growing in the direction of said lots of land; that said lots of land would bring, at a forced sale, or sale by the sheriff, the sum of one thousand dollars each." The answer denies the representations as charged in the bill, and avers that whatever statements defendant made as to the location and value of the lots were merely his opinion and judgment.

While a court of equity will rescind a contract procured by a misrepresentation by a vendor of land relating to the subject-matter of the contract, and constituting an inducement to the purchaser, upon which he had a right to rely, and did rely, and by which he was actually deceived and injured, the representation must be the affirmation of a fact, in contradistinction to a mere expression of opinion. An assertion of the vendor as to the present or prospective value of property he is attempting to sell, if not the affirmation of a specific fact affecting the quality, will, of itself, form no substantive ground for a rescission of the contract. Such affirmations are regarded as the expressions of mere judgment or opinion in reference to the matter, upon which the purchaser is supposed to be competent to form as correct an opinion as the vendor. They are the usual and common assertions in respect to

property, made for the purpose of effecting a sale, upon which the purchaser cannot safely rely, and are not sufficient ground for rescinding the contract, unless proved to have been made with a fraudulent intent, or artifice is employed to aid the deception. 1 Benj. Sales, § 641, note 10; 2 Pom. Eq. Jur. § 878; *Homer v. Perkins*, 124 Mass. 431; *Gordon v. Butler*, 105 U. S. 553; *Suessenguth v. Bingenheimer*, 40 Wis. 370.

Complainant testifies, that defendant said the "lots would be very valuable, and would come into market soon, and that he considered them worth every dollar of two thousand dollars each. He said that said lots would sell for \$1,000 each at a forced sale." Defendant testifies that he never represented the lots to be worth \$2,000 each, but that he said he thought they were worth \$1,000 each. Taking the representation as testified by complainant, it is, in form, the expression of an opinion, and must have been so understood by him. The negotiation was pending for several days, if not for two or more weeks, and nothing was said or done to hinder or prevent complainant from making inquiries as to the value of the lots. He said that he would be satisfied if he could realize a thousand dollars per lot. Though the evidence shows that they could not have been sold at that time for more than half that sum, nothing is shown to take the representation out of the operation of the general rule; of itself, it forms no ground for relief. It does not appear to have been so stated that complainant could reasonably treat it as the affirmation of a fact upon which he could safely rely.

The representation as to the distance of the lots from the city of Minneapolis was the affirmation of a fact which, if false and material, would authorize a rescission of the contract, unless complainant has lost his right by acquiescence or waiver. As to the distance from the business center of the city and the post-office, the witnesses vary from four and a half to five and a quarter miles. They also vary as to the place which is the business center. One of them testifies, and the only one who does testify to this fact, that the lots are three miles distant from the residence center, and the evidence shows that they are not three miles distant from the city limits proper. What was the representation as to the distance? Complainant testifies, on his direct examination, that defendant said, "lots were located about three miles from the center of town;" but being asked, on cross-examination, to state the language of defendant, he answered: "Defendant said that said lots were situated in Remington Park, about three miles from the city of Minneapolis. I have given his language as nearly as I can remember it. * * * I do not remember whether he said said lots were a certain distance from the city of Minneapolis, or from the business portion of said city, or from the center of said city; but I understood it to be a certain distance from the center of said city." Defendant's testimony is that he said, "not more than three miles from the city;" by which he meant, "from where it was built up." The only other witness

who testified to this representation is Hawkins. His evidence is: "I remember it was stated positively by Fitts to Lockwood how far said lots were from the business portion or post-office of Minneapolis, but I do not now remember how far it was. I believe, however, it was about four miles in the direction of St. Paul." He admits that his recollection of the details is very indistinct, and his memory is at fault as to the direction of the lots. Complainant and defendant would probably recollect more distinctly the representation, and on their evidence we assume it to have been not more than three miles from the city. This representation is susceptible of different constructions. It may mean from the limits of the city, or the business center, or the center of population, or the actual center. The allegation in the bill is, "within three miles, or only a distance of three miles, from the center of said city of Minneapolis." What center? In this class of cases, the representation alleged to be false must not only be precisely averred, but also clearly and satisfactorily proved as alleged. The truth or falsity of the representation depends on what part of the city it had reference to. On the different understandings of the parties, it is questionable whether the evidence proves the representation substantially as alleged in the bill, and if it does, the evidence, which is mainly directed to the distance of the lots from the business center or post-office, does not clearly prove the representation to be false. The center of the city literally means the actual center, and there is no evidence that the business center or post-office is the central point.

But there are features of this case which render unnecessary further comment on the evidence as to distance. The right to rescind the contract for fraud may be lost by its confirmation, or by a failure to manifest the election to disaffirm it within a reasonable time, or, where the transaction is a sale of property, by dealing with the property, as owner after the discovery of the fraud. Mr. Pomeroy says: "All these considerations as to the nature of misrepresentation require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. * * *

If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it was still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations." 2 Pom. Eq. Jur. § 897. In *Dill v. Camp*, 22 Ala. 258, the following quotation is made approvingly from an English decision: "If the vendee neglect to return goods immediately upon discovering a breach of warranty or fraud, but keep them and treat them as his own, by putting them up to sale, or exercising other acts of ownership over them, he cannot afterwards reject the contract." *Parker v. Palmer*, 4 Barn. & Ald. 387; *Ex parte Briggs*, L. R. 1 Eq. 483; *Coal Co. v. Neill*, 87 Ala. 153, 6 South. Rep. 1.

A day or two after the exchange of the lands, complainant asked defendant for the name and address of his agent in Minneapolis. He states: "I opened correspondence with said agent, through whom

I commenced to learn that the lots were not panning out as represented, and, meeting Capt. Fitts on the street a short while after, I called his attention to the above fact, and told him he was beating me out of a good deal of money; and he brought in that, the way he had figured it out, he had gotten about ten thousand dollars the advantage of it." He states that this conversation occurred about the 1st of April. Defendant says the 10th or 15th of the month. It is proper to remark that defendant says that he said he had such advantage if complainant's land was worth what he estimated. Brame, the agent, testifies that he thinks he wrote complainant in the early spring as to the value and location of the lots, and defendant testifies that about the 10th or 15th of April complainant told him he had received a letter from Brame. On May 9, 1887, complainant entered into a second agreement with defendant for the exchange of another one-fourth interest in his lands for some other lands and other lots near those first obtained, and which he took at \$1,000 each, but this agreement or exchange was not carried out. Complainant further states that he found out the value of the lots in the month of June. On July 23, 1887, he wrote to Brame the following letter: "As you once had charge of Capt. Fitts' property in your city, and should know something about it, I write to you to know if you think I could exchange it for some kind of property that would rent for something, so as to help pay the interest. The property I traded with him for, brings in no revenue, and I am not able to keep up the interest on it, and, if you know of any trade that I could make for improved property, I would like you to send me a description of it. I own all of Blk. 18, Remington's 5th, and ten lots in Blk. 22, and one lot in Calhoun Park." The lots mentioned in his letter as situated in block 22 and in Calhoun Park were lots embraced in the agreement of May 9, 1887.

Complainant admits that he was informed of the value of the lots in June, and the evidence sufficiently shows that he discovered their location and value as early as April. According to his own testimony, the offer to rescind was made in August, and, according to defendant's testimony, in that month he received a letter from complainant, when in New York, stating that he would not consummate the second trade, nor would he let the first stand, and this was the first he had heard of an offer to rescind; also that his offer to rescind was made after his return from New York, and a short time before the bill was filed, which was October 29, 1887. There is no evidence that complainant has confirmed the contract by entering into new stipulations in respect to its subject-matter; but delay in exercising the option to rescind is evidence of an election to treat the contract as valid, dependent for its weight upon the circumstances. At the time of the exchange of land there was a mortgage for \$250 on each lot, created by the vendor of defendant, the interest payable semi-annually, which complainant assumed to pay, receiving six additional lots in consideration thereof. The semi-

annual interest became payable early in September, and is the interest to which complainant alludes in his letter to Brame. It was near this date that the offer to rescind was made. It should also be observed that the estimates of the witnesses of the value of complainant's land, at the time of the exchange, greatly vary. In his letter to Brame, complainant states that he owns the lots, and proposes to exchange them for other property. This was after the discovery of the fraud, and is inconsistent with an election to disaffirm the contract. Such dealing is consistent only with acquiescence in the transaction, as subsisting and binding. The foregoing authorities authorize the conclusion that such subsequent dealing with the property, accompanied by a distinct avowal of ownership, constitutes a waiver sufficient to defeat the equitable remedy; but we need not go so far. It certainly is evidence strongly tending to show that complainant did not rely upon the representation of value and location, and was not induced by them to enter into the contract. It raises a presumption of acquiescence, which he is called upon to rebut. *Schiffer v. Dietz*, 83 N. Y. 300; *McCulloch v. Scott*, 13 B. Mon. 172. The circumstances rather lead to the conclusion that the offer to rescind was not the result of a fraud committed by defendant, but of the inability of complainant to meet the interest becoming due on the mortgages. However exaggerated may have been the statement as to value, and whatever may have been the representation as to distance, on the whole case made by the record, we are forced to declare that complainant is not entitled to a rescission, and must be left to his remedy at law. Affirmed.

*
BURRUS et al. v. MEADORS et al.

(*Supreme Court of Alabama. April 15, 1890.*)

ESTOPPEL IN FACT.

Defendant, who had gone into possession of land belonging to his father, and continued in the possession after his father's death, agreed with the other heirs to submit to arbitration "all deeds and paper titles of every kind to any property now claimed by us, formerly belonging to said estate," (of their deceased father,) the award to be "final and binding." The award held that the land occupied by defendant belonged to the estate of the father, and directed it to be sold by the administrator for debts. Held, that defendant was estopped to contend that his possession was adverse, though the administrator, instead of selling under the award, procured an order of sale from the probate court.

Appeal from circuit court, Lee county;
J. M. CARMICHAEL, Judge.

Harrison & Ligon, for appellants. J. M. Chilton, for appellees.

STONE, C. J. The question propounded to the witness Murphy, on cross-examination, is not so clearly stated as that we can feel safe in ruling on it. Considering all the testimony in this case, we feel justified in inferring that defendant B. F. Meadors went into possession of the land in controversy under, and with the consent of, his father. The fact, unexplained, that the father continued to pay the taxes on the land until his death, showed that he

had not relinquished all claim to it. Acquiring possession, not by purchase, but permissively under his father, it requires more than the exercise of the ordinary act of ownership to convert that possession into an adverse holding. Cultivating the land and disposing of the crop from year to year are not enough to accomplish that purpose. To have such effect, in a case like the present, there must have been an open disclaimer, and assertion of hostile title, and knowledge thereof carried home to Isham Meadors, the father. 3 Brick. Dig. p. 17, §§ 20, 21; Iron Co. v. Roberts, 87 Ala. 436, 6 South. Rep. 349. And until such disclaimer is carried home to the holder of the title the statute of limitations does not begin to run.

Another principle may shed light on this case. The possession of a tenant in common is not adverse to that of his co-tenant, unless there is an actual ouster or refusal to let the co-tenant occupy. Newbold v. Smart, 67 Ala. 326. Being one of the heirs at law of Isham Meadors, when the latter died, until there was adversary claim set up under the will, or by the personal representative, the heirs at law were authorized to occupy the lands which were of the estate of the ancestor as tenants in common, and the possession of one was not *prima facie* adverse to the rights of the others. Hence, unless B. F. Meadors had, under the rule stated above, acquired the *status* of an adverse holder before his father's death, he could not acquire it afterwards, without actually evicting his co-tenants, or, what is the same thing, refusing to permit them to enter.

We will not point out the defects in the various charges. Charges 2 and 8, given at the instance of defendant, are manifestly wrong, and for those errors the judgment of the circuit court must be reversed. The third was not faulty as a universal proposition, but, when construed in the light of the evidence before the jury, it cannot be vindicated. 3 Brick. Dig. p. 109, §§ 33, 34.

In 1883, while W. K. Meadors was the administrator of the estate with the will annexed, the four brothers, heirs at law of Isham Meadors, together with their mother, submitted to the arbitrament of five selected persons, not only all matters and dealings growing out of the partnership, but also agreed "to submit, with the evidence of each for himself, both for and against, all deeds and paper titles of every kind to any property now claimed by us, formerly belonging to said estate. And they agreed that the award made by the arbitrators should be "final and binding." At that time a good deal of litigation was pending between the brothers in reference to property which had belonged to their father's estate. The arbitrators acted, making a most elaborate award, covering, so far as we can discover, the entire assets of the estate, real and personal, and every subject of contention between the brothers having any connection with the estate of Isham Meadors, their father. Among other findings of the arbitrators is the following: "We find that all the lands claimed by the children and heirs of Isham Meadors, late of Lee county, de-

ceased, of right belong to the estate of said Isham Meadors, and are subject to the payment of his just debts," after allowing the widow's dower. This award was rendered in August, 1883, and ascertained several large sums that were due from Isham Meadors' estate to his several children. It also ascertained other debts due from the estate to creditors other than the heirs, and who were not parties to the submission or award, aggregating \$744. The arbitrators awarded that all of said lands, including the tract involved in this suit, be sold by the administrator, W. K. Meadors, for one-half cash, and the other half at 12 months, and the proceeds applied to the payment of the debts of Isham Meadors' estate. The estate had been decreed insolvent in 1882, by regular proceedings in the probate court instituted for the purpose by the administrator. On the same day on which the award was made—August 29, 1883—the brothers executed deeds, one to the other, by which they expressly ratified the award of the arbitrators. The administrator did not sell the lands under the award of the arbitrators, but petitioned the probate court for an order of sale, obtained it, made the sale, reported it, it was confirmed, and under the court's order titles were made to the purchasers. These several proceedings came before this court on appeal, and were pronounced regular. *Meadows v. Meadows*, 78 Ala. 240; *Same v. Same*, 81 Ala. 451, 1 South. Rep. 29. One Burrus and one Blanchard became the purchasers of the land sued for in this action, and, receiving title, Blanchard and the heirs of Burrus, he having died, instituted this suit.

The present suit was instituted in August, 1885, and the defense relied on was the statute of limitations,—adverse possession for 10 years before suit brought. In preclusion of this defense, among other evidence, the plaintiffs offered the agreement submitting the matters of dispute to arbitration, mentioned above, the award of the arbitrators, and the deeds of ratification. These were offered severally and as a whole. The court, on objection of defendants, excluded the evidence, stating the reason on which the ruling was based as follows: "Because the oral and other testimony showed that the agreement and arbitrament were disregarded, and never carried out." The only disregard of the award as made, which could affect B. F. Meadors, was that the administrator sold the land under the order of sale, and for cash, and not under the award of the arbitrators, and under the terms prescribed by them.

We have shown above that there were other creditors of the insolvent estate of Isham Meadors besides the Meadors brothers, sons of the testator. Those other creditors were not parties to the arbitration, and hence the award did not conclude them as to the amounts of their several claims, nor as to the several claims of the Meadors brothers; nor did it conclude them as to the manner and terms of the sale. If sale had been made or attempted under that award, those other creditors could have objected, and required the sale to be made under an order of court, and

according to law. Aside from the harassing litigation to which a sale under the award would have exposed the administrator, a title acquired at such sale would probably have been regarded as so questionable that prudent buyers would have been deterred from bidding. It was both the right and the duty of the administrator to obtain an order of sale, and to sell under it. We may be permitted to add that, while in the submission the parties expressly embraced all claims to parts of the land which the several contesting brothers had set up, we find no submission of the question as to how the land should be disposed of. And we are not able to see that the manner of disposing of the lands did or could exert any influence in deciding the validity of the several claims set up to parts of the land. "An award in part good and in part bad may be divided, and the objectionable part rejected as mere surplusage, if it can be readily distinguished from the rest, and the good part will be sustained." 1 Amer. & Eng. Cyclop. Law, 710. The circuit court erred in excluding the arbitration proceedings from the jury. "A valid award has the same effect as a judgment, and concludes the parties to the controversy effectually from litigating the same matters anew." Id. 711. True, the award does not pass title to real estate, but it acts as an estoppel, and prevents the losing party from denying the superiority of the other's title. Id. 698, 713. The defendant's reliance being on the statute of limitations, and evidenced by no paper title, the award of the arbitrators, if there were any doubt of the universality of the proposition, manifestly estops him from setting it up.

Reversed and remanded.

COLUMBUS & W. RY. CO. v. LUDDEN et al.
(Supreme Court of Alabama. April 15, 1890.)

CARRIERS OF GOODS — LIABILITY AS WAREHOUSEMEN — NOTICE TO CONSIGNEE.

1. The liability of a carrier, as such, does not end, and its liability as a warehouseman begin, until a reasonable time after the goods have reached their destination, and have been deposited in the carrier's depot or warehouse, or otherwise made ready for delivery to the consignee. Explaining *Railway Co. v. Kidd*, 85 Ala. 209.

2. Notice to the consignee of the arrival of the goods at their destination is not necessary before the reasonable time begins to run after which the carrier's liability as such terminates, and its liability as a warehouseman begins, unless the place of destination is a town of 2,000 inhabitants, having a daily mail, in which case such notice is required by Code Ala. § 1180.

3. As to what is a reasonable time after the lapse of which liability as a carrier ends, and that of a warehouseman begins, is a question of law for the court.

4. The fact that the consignee lives 23 miles from the place to which the goods are consigned will not be considered in determining what is a reasonable time after the arrival of the goods within which he should have called for them.

5. Where the property, a piano, which could have been removed from the carrier's depot in about an hour, was shipped over a continuous line of railroad, and the distance from the place of shipment to the destination is such that the property might reasonably have been expected to arrive on

the day of the shipment or the next day, and it is allowed to remain three days after its arrival, the carrier will be held liable only as a warehouseman.

Appeal from circuit court, Lee county; J. M. CARMICHAEL, Judge.

Action by Ludden & Bates against the Columbus & Western Railway Company, as a common carrier, for goods destroyed by fire, while in defendant's depot. There was a judgment for plaintiffs, and defendant appeals.

Harrison & Ligon, for appellant. J. M. Chilton, for appellees.

McCLELLAN, J. It has been supposed by some text-writers and annotators that this court, following that line of authority on the subject of which *Norway Plains Co. v. Boston, etc., Ry. Co.*, 1 Gray, 263, is the leading case, has adopted the rule that the extraordinary liability of a railway company as a common carrier of goods ceases when the consignment arrives at its destination, and is unloaded from the cars, and that nothing further, so far as the transit is concerned, remains to be done by the carrier, and that thereafter the liability of the carrier is that only of a warehouseman for hire. This supposition is based on an interpretation of the opinion in the case of *Railroad Co. v. Kidd*, 35 Ala. 209, which has never obtained in this court, or been entertained by the profession here. That case has always been construed by this court to sustain the rule which extends the liability, as such, for a reasonable time after the transit has been completed, for delivery of goods to consignees. *Railroad Co. v. McGuire*, 79 Ala. 395. And our later decisions fully support the rule first announced by the supreme court of New Hampshire in the case of *Moses v. Railroad Co.*, 32 N.H. 523, and ably vindicated by Justice COOLEY in *McMillan v. Railway Co.* 16 Mich. 79, and now recognized by text-writers, and by many courts of last resort, as sound in principle,—that the liability of a common carrier by rail, as an insurer of the consignment, continues throughout the transit, and until the goods have been unloaded from the cars and deposited in the depot or warehouse of the carrier, or otherwise made ready for delivery, and a reasonable time thereafter has elapsed to afford the consignee an opportunity to come and take them away, and that only after the lapse of such reasonable time, beginning when the transit is complete, and the shipment is ready for delivery, will the liability—in the absence of special stipulation—of the carrier, as such, be converted into the less rigid and exacting liability of a warehouseman for reward. *Hutch. Carr.* § 373; 2 Redf. R. R. 79-82; *Express Co. v. Armstead*, 50 Ala. 350; *Kennedy v. Railroad Co.*, 74 Ala. 430; *Railroad Co. v. McGuire*, 79 Ala. 395; *Railroad Co. v. Grabfield*, 83 Ala. 200, 3 South. Rep. 432; *Railway v. Little*, 86 Ala. 159, 5 South. Rep. 563.

There is also great conflict of authority whether notice of the arrival of goods at the point of destination should be given to the consignee by the carrier before the reasonable time within which the extraordinary liability will continue begins to

run; or, in other words, whether the relation of carrier to the property gives place to that of warehouseman, in any case, until such notice has been given, and opportunity thereafter afforded to the consignee to receive and take away the consignment. In this state, however, the rule, certainly in all cases where the delivery is not to be made at a town of 2,000 inhabitants, having a daily mail delivery, as to which there is a statutory provision, (Code, § 1180,) is settled that no such notice is necessary, and that the change in the degree of the railway's liability will be affected by the lapse of a reasonable time for the property to be taken away, in the absence of notice. *Railway v. Little*, supra; *Railroad Co. v. Wood*, 66 Ala. 167; *Railroad Co. v. Oden*, 80 Ala. 38.

Where the evidence on the point as to the length of time which has elapsed from the arrival and unloading of the goods to the time at which it is claimed the liability as common carriers ceased, and that of warehouseman attached, is without conflict, the question should not be submitted to the jury, but is one of law, for the determination of the court. *Hutch. Carr.* § 376; 2 Redf. R. R. 75, 76; *Roth v. Railroad Co.*, 34 N. Y. 548. In the case at bar, there was a conflict in the evidence as to the length of time elapsing between the arrival of the property and its destruction by fire; one aspect of the testimony showing the lapse of six days, and the other three days. There was no conflict as to the fact that the goods had been kept by defendant in its warehouse, ready for delivery, as long as three days; nor was the testimony at all conflicting as to any other fact, as, for instance, the length of the carriage, or other circumstance bearing on the question as to whether the consignment might have been expected to arrive at any definite date, the character of the goods, etc., proper to be looked to in determining whether the consignee had had a reasonable time to have taken away the property before the fire which destroyed it. The submission of this matter to the jury, therefore, can only be justified on the theory that six days were such reasonable time, and three days were not, since, if no period which the evidence tended to show was sufficiently long, the court should, as a matter of law, have held the defendant to the liability of a common carrier, and, if any period which all the testimony concurred in establishing was sufficiently long, in like manner the court should have held, aside from custom, that the liability as insurer had ceased, and that of bailee had begun.

In determining the question as to how long the carrier's liability as such will continue after the property has reached its destination, and is ready for delivery, the peculiar circumstances and environment of the consignee cannot be considered. His convenience or necessities, proximity or remoteness of his residence or place of business to the point of consignment, are matters of no importance in reaching a conclusion on this point. The law proceeds, not unreasonably, on the assumption that he has been already advised of

the shipment, and, wherever he lives or engages in business, he will seasonably appear, and claim and remove his property. So that it is not of moment in this case that the consignee resided at a distance of 28 miles from the place of delivery. *Hutch. Carr.* § 377; *Railroad Co. v. Wood*, 66 Ala. 172; *Railroad Co. v. Oden*, 80 Ala. 41.

Her rights, and the degree of the responsibility resting on the defendant, were the same in all respects as if she had resided in the town of Goodwater, to which the shipment was made. The point, then, may be treated as upon these facts: The consignee had contracted with plaintiffs to ship to her from Columbus, Ga., over the road of the defendant, a piano and piano stool, for delivery to her at Goodwater, Ala. The distance was comparatively short, and the entire carriage over one continuous line of railway, so that the arrival of the goods at the point of destination might reasonably have been expected on the day or the day after the shipment. The character of the property was such that its removal from defendant's depot would have been one act, involving scarcely one hour of time. It was allowed to remain there at least three days. On these facts, none of which are disputed, our opinion is that a reasonable time for the consignee to have received and removed the property had elapsed before its destruction, and that, of consequence, at the time of the fire it was held by the defendant as a warehouseman, and not as a carrier. Several of the rulings below, predicated solely on the facts stated above in this connection, and without reference to a certain custom to be hereafter considered, are not in harmony with these views.

The custom to which casual reference has been made, and which was relied on to expand the time within which the extraordinary liability as common carrier would continue, was in regard to the giving of notice to persons residing at Lineville, the place of consignee's residence, and at other places away from Goodwater, for whom consignments were made to that place. It was alleged that a custom to that effect did exist, and had existed, in the conduct of the Goodwater office, in such sort as that the consignee had a right to rely upon the notice being given her in this instance as a part of the contract of affreightment, and was consequently under no obligation to go to defendant's depot for this property until she had been so notified. It is not denied that a custom to give notices of this kind, properly established by the evidence, would have the effect here claimed. If, however, the proof fails to show that the usage has existed for such a length of time, and has been so uniformly acted upon, as to have become established and generally known throughout the community having dealings with the office involving a resort to it, it cannot be looked to in determining the contractual rights of parties. *Hutch. Carr.* §§ 40, 368; *Story, Bailm.* § 543; *Redf. R. R.* 155-157; *Railway Co. v. Kolb*, 73 Ala. 396, 6 South. Rep. 762.

We apprehend that the fact that a custom to give notice obtains only with respect to consignees living beyond the immediate vicinity of the place of destination will not vitiate it when relied on against the carrier, whatever might be the effect, on considerations of public policy, operating against discriminations, when invoked in the carrier's favor. When a usage and course of dealing has long obtained, and been so substantially universal, in respect to the inhabitants of a particular town or towns, that they have a right to expect a continuance, and predicate their action or non-action in a given instance on such well-grounded expectation, we are not prepared to say that the carrier may defend against any right which would have been theirs, had the custom been a good one in all respects, merely on the ground that it was had in that it was not of universal application. Hence, if the custom under consideration was well established as to consignees residing at Lineville, in such manner that they were not expected, and it was not their practice, to remove their goods until notice of arrival had been given them, the common carrier liability of the railway company would continue for a reasonable time after such notice, and this notwithstanding the usage did not obtain in regard to Goodwater. But, however universal in territorial application, long established, and well known, the usage, if it only be resorted to by the carrier for his own convenience in relieving an overcrowded warehouse, and only when there is an unusual accumulation of property in its depot awaiting delivery therefrom, the custom cannot be looked to as a part of the contract of shipment, having the effect to extend the period of the carrier's extraordinary liability. The purpose of notice of the character, and given under the circumstances, last supposed, it would seem, is not advice to the consignees of the arrival of goods with a view to delivery by the carrier, but to facilitate delivery by the warehouseman; the carrier's responsibility having ceased. Again, the fact that defendant's agent occasionally, or "about as often as not," gave the notice in question, would not be sufficient to establish the existence, much less the notoriety, of a custom which would have authorized the consignee in this case to forego that diligence in removing her property which, we have seen, the law, apart from usage, required of her. On the other hand, neither the fact that the alleged custom was of the agent's own adoption, without instruction from his principal, nor that it was sometimes departed from, and notice pretermitted, would have the effect of vitiating the usage. Whether any custom was shown, and, if shown, whether it was of a character to extend the carrier's liability as an insurer of the property for a reasonable time after notice given, were questions for the jury, as instructed by the court, under the facts adduced; there being some evidence which tended to show such a course of dealing as would have the effect relied on by the plaintiff. If such a custom was not shown, the liability of the

defendant at the time of the destruction of the goods was that only of a warehouseman for hire, and the degree of care which the law imposed upon it as warehouseman was that only which an ordinarily prudent and diligent man would bestow upon his own property.

We deem it unnecessary to consider the various exceptions reserved in detail. We find no error—at least none which was of injury to the appellant—in the rulings of the trial court on demurrer to the pleadings, or in reference to the admission of testimony. There was error, however, in several particulars, with respect to the giving and refusing to give instructions to the jury. What we have said will furnish sufficient guidance for the court in charging the jury on a retrial of the cause.

The judgment of the circuit court is reversed, and the cause remanded.

MIRE v. EAST LOUISIANA R. Co. et al.

(Supreme Court of Louisiana. March 17, 1890.)

MASTER AND SERVANT—NEGLECT—PROXIMATE CAUSE.

1. The proof disclosing that plaintiff, while acting in the capacity of fireman on a railroad locomotive, was injured by a fall occasioned by the derailing of the engine, tender, etc., and that the accident was caused by the car-wheels coming in contact with a loose plank resting on one of the rails of railroad track, *held*, that the plaintiff, in order to recover of the master, must show that the accident was caused by the direct and immediate act of its servants.

2. In case the proof shows that the accident would not, in all likelihood, have happened, but for the interposition of some independent responsible third party between the servant's negligence and the injury sustained, and it affects the result, and is the immediate cause of the injury, the plaintiff cannot recover against the original wrong-doer.

POCHE, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

Farrar, Jones & Kruttschnitt and Mott & H. Hall, for appellant. *A. Roman and B. K. Miller*, for appellee.

WATKINS, J. On the 24th of May, 1888, the plaintiff was employed, and actually engaged in the performance of duty, as fireman on a locomotive of one of the trains of the East Louisiana Railroad Company, running on the road from Covington, in the parish of St. Tammany, to the city of New Orleans. On that morning the company's train on which Mire was so employed left Covington for New Orleans on schedule time, and *en route* had passed Pearl River station, running at the usual rate of speed, and had taken the track of the Northeastern Railroad Company, and made a distance of one and a half miles from said station, when, just as the locomotive was in the act of going over a dirt-road crossing, it struck a plank or board which was loose, and lying partly on the track, and very near the crossing, and was thereby thrown suddenly from the track. By this sudden shock, derailing the tender, locomotive, etc., of the company's train, the plaintiff was violently thrown upon an adjacent pile of

cross-ties, causing a fracture of his left knee, and occasioning him great pain and serious injuries.

Plaintiff charges that said plank or board which caused the accident "was, negligently or carelessly, not spiked down, or left loose upon one of the rails of said track, by the servants or employees of the New Orleans & Northeastern Railroad Company, for whose acts and omissions the East Louisiana Railroad Company is responsible;" that the latter was at the time using and operating the track of the former from Pearl River station to New Orleans under a lease, and whose duty it was to furnish a track upon which the lessee's train could be at all times safely run, and free from risk or hazard to its employees. It is specially averred that the breach of duty on the part of each one of said two corporations was the sole cause of the accident, and the resulting injuries of the plaintiff. On this generalized statement of facts, plaintiff brought suit against the two corporations *in solido* for \$15,000 damages, and from a verdict and judgment for \$2,500 against each the defendants have appealed.

The questions for solution are, therefore, (1) whether one or both defendants are chargeable with fault on account of a loose plank or board having been negligently left on one of the rails of the Northeastern Company's track by its servants or employees; and (2) if left in such a position as to have been easily cast or thrown upon the track by some independent third person, or some responsible extraneous agency, is one or both of the defendants responsible for the accident, and for the plaintiff's consequent damage?

No fault is charged against, or attributed to, the officers or employees of the derailed train. There is no question in the case of any violation by that company of a contract of safe carriage of a passenger. No charge is made that the accident happened on account of faultiness in the construction of the Northeastern track or road-bed, or of faultiness of the material of which it was built, or of its having been in bad condition at the time the accident happened. The fault charged is that the servants and workmen of the Northeastern Company, at the time of the accident or just before, being engaged in ballasting its track, had for that purpose removed some of the planks from the dirt-road crossing, and negligently failed to spike them down again, and left them loose upon the track, or in such close proximity thereto that they were thrown upon it by some third person, or by means of some extraneous force unknown, and thus caused the accident to the train and the injury to the plaintiff. Suit is brought by one of the servants or employees of the East Louisiana Company against that corporation as his employer, and against the Northeastern Company as the lessor of his employer, *in solido*, for the damage he sustained through the fault or negligence of the servants or employees of the lessor company, and for whose acts and omissions the lessee company is responsible to him.

On this statement of the issues involved,

we deem it essential to plaintiff's recovery that he should establish, by a clear preponderance of proof, (1) that there occurred such an accident; (2) that thereby he sustained the injuries complained of; and (3) that the accident occurred through the fault or negligence of the Northeastern Company, its servants, or employees. To make the fault plausible or reasonable will not suffice. He must also show in what manner the Eastern Railroad Company is responsible to him for the fault or negligence of its lessor.

In the answer of the Northeastern Railroad Company is the distinct and specific averment "that no plank was left by it or its agents where it could have been dragged or fallen on the track, and, if such plank was the cause of the engine * * * being thrown from the track, * * * such plank could only have been placed there by design and with malice, and that it was not so placed by any person over whom this respondent could or did exercise control or authority, or whom it could have prevented from thus acting." It thus appears that the issue of fault or negligence of that company, *vel non*, is squarely made, and must be as squarely met. It involves a question of fact as to whether the accident happened through the fault or negligence of the company's employees, and a question of law as to whether the company is responsible for the injury inflicted by the independent act of some third person which intervened between the defendant's negligence and the plaintiff's injury, and which was the direct and immediate cause of the accident and the injury.

An attentive and painstaking examination of the record discloses the following state of facts: The only eye-witness of the accident was a lady of the name of Mrs. Mary Davis, who resides about 300 yards from the railroad track, at the point where it happened. She saw the train from her front gallery at the moment the engine turned over. It was between the hours of 6 and 7 o'clock A. M. when the accident happened. She states that another train had passed down the road, in the direction of New Orleans, about half an hour before the accident happened; that the wrecked train was going in the same direction; that during this interval of time she saw a timber wagon or carry-log pass over the dirt-road crossing, hauling logs towards Pearl river, and being driven by a person of her acquaintance, disconnected with either of the defendant companies. Several witnesses were interrogated in reference to the *locus in quo*, and the immediate cause of the accident, between whose statements there appears at first inspection to be an irreconcilable conflict, but which disappears entirely when the point of time at which the different witnesses made their respective examinations is taken into consideration. The superintendent of the East Louisiana road was a passenger on the derailed train, and made an examination immediately after the accident, and saw the plank that caused it, and states that one end rested on the track, and a part of it had been mashed

or "chewed" up by the wheels of the engine passing over it; that the other end was 12 or 15 feet distant from the dirt-road crossing, as at first seen. He describes it as being of some 16 to 18 feet in length, 3 inches in diameter, and 9 inches in width, and of sound heart-pine timber, which had been in the road crossing for a year or more. He states that he, aided by two other persons, lifted it up, and ranged it along-side of, and parallel with, the railroad track, and several feet distant from the original position it occupied when he first saw it. Says that the edges of this plank had been worn round by carry-logs and wagons passing over it. States that, from his observation and knowledge of the location of this plank, it was, in his opinion, impossible for it "to have been pushed into the position it was found by any wagon or other vehicle passing along the road over the crossing." The auditor and passenger agent of same company was also a passenger on that train, and likewise made an examination. He it was who made the model exhibited to the court, as illustrating the situation and surroundings of the wrecked train. He describes the little mounds of loose sand which had been dropped on either side of the tracks for the purpose of elevating the road-bed to be of the average height of 18 inches to 2 feet. In other respects, this witness substantially confirms the statement of the superintendent. He says his examination was made within 10 minutes after the happening of the accident. These are the two principal witnesses of the defendant; but their evidence is corroborated in its most material part by one of plaintiff's witnesses, also an employee of same company who states that, immediately after the accident occurred, he went up the road with a flag to stop an expected train, and when he had returned he examined the *locus*, and found "the plank lying alongside the track at the railroad crossing." This statement is chiefly antagonized by an employee of the Northeastern Company, who states that, at the time of the occurrence, he was working at a gravel pit on Pearl river, about a mile and a quarter from the place when the accident occurred. Says that it was about a half an hour afterwards that he was informed of it and went up there, and of his examination he says: "I saw somebody had taken it [the plank] off the road crossing, which was in bad condition, and had not thrown it out far enough, but had left one end over the public road; and right at one end of the plank I saw the print of a carry-log wheel. I know that is what wrecked the train." This witness makes about the same estimate of the size, length, and quality of the plank as other witnesses have done. This witness is not supported in the statement quoted above by a solitary witness of the 11 interrogated. That of the engineer of the derailed train does not support it. He says his examination was made some 15 minutes after the accident, and subsequent to that made by Messrs. Poltevant and Ferguson. Says he saw some planks at a little distance away, and one of the crossing planks near by, which looked like the train had run over it. States that one end

of that plank was about two or three feet from the wagon road, but is not quite certain whether "it rested on the hill or in the bottom." In corroboration of the evidence of the defendants' other witnesses, a wagon driver in no way connected with defendants, or either of them, is placed upon the stand, and who in substance states that, on the day previous to the occurrence, he passed over the dirt-road, driving his wagon, and found thereon several planks, lying loose, and on returning that afternoon he found the planks lying in a two-foot ditch, in a pile, near the railroad track. Another wagon driver testifies that, on passing the road the day previous to the accident, he found the planks thereon, and with the assistance of another man removed them, and put them in the ditch, at a distance of five or six feet from the public road. After the wreck these two witnesses visited the train, and state that the plank which had been separated from the pile was in a position nearly parallel to the railroad, the end of it nearest the dirt-road being six or eight feet distant from it. Another witness says, along-side of the two planks remaining in the ditch, there was an impression of the third one in the sand.

From this summary of the evidence, it is our conclusion, that the plaintiff's theory, that one end of the loose plank had been left, negligently or carelessly, resting on the dirt-road crossing by some of defendant's workmen, and a passing carry-log, running over it, had tilted the other end of it upon the track, and thus caused the accident, is without substantial foundation. Indeed, it appears quite impossible that any vehicle passing one wheel over one extremity of a 3 by 9 inch plank, of 16 to 18 feet in length, could have thus tilted the other extremity, up an incline of several degrees, upon the track. Even had such a feat been possible, how is it possible that the plank was not again tilted in a different direction by the blow it received from the engine's wheel? *Reductio ad absurdum*.

But, conceding, for the argument, all that is contended for by plaintiff's counsel, how can it be plausibly or reasonably argued that the Northeastern Railroad Company should have been sufficiently on the *qui vive* to have detected and removed this impediment from its track within the brief half hour which elapsed between the passing of its train and that of the East Louisiana road; and, for its neglect in not so doing, it has laid itself liable for plaintiff's damages? We do not think that its responsibility can be so extended; for, had any responsible member of that company occupied the exact position of Mrs. Mary Davis, he would have been justified, in our opinion, in believing the track was free of any obstruction, though in point of fact it was not. Let us suppose that some other theory, in reference to the manner in which the loose plank was cast upon the track, be adopted,—the workmen and employees of the Northeastern Company having been primarily at fault, in not spiking this plank down,—and yet liability cannot be placed upon them; for the truth is, as shown by

the record, that neither of the defendants, their servants or employes, either placed the loose plank upon the track, or left it loose upon the dirt-road crossing of the track. But it is shown by the record that the servants of the Northeastern Company carelessly or negligently left these loose planks near the crossing, and one of them was cast upon the track by some third person, or by means of some extraneous force or cause unknown. In order that an employer be held liable for an injury inflicted, the damages must be both the natural and proximate consequence of the act complained of, and the direct, and not remote, result of the defendant's wrong; for Mr. Weeks says: "Whenever there intervenes the independent act of a third person between defendant's negligence and the injury sustained, and it affects the result, and is the immediate cause of the injury, the plaintiff cannot recover against the original wrong-doer." Weeks, D. A. Inj. § 115 et seq. Mr. Wharton affirms this principle, and says: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent, responsible human action." Whart. Neg. § 134.

It was maintained in *Fairbanks v. Ker*, 70 Pa. St. 86, the court announcing that, "as a general rule, one is answerable for the consequences of his fault only so far as they are natural and proximate, and may therefore be foreseen by ordinary forecast; not for those arising from a conjunction of his fault with circumstances of an extraordinary nature." And we take it that our Code is bottomed on this principle. It says that "every act whatever, of man, that causes damage to another, obliges him by whose fault it happened to repair it." Rev. Civil Code, art. 2315. It also declares that "we are responsible, not only for the damage occasioned by our own acts, but for that which is caused by the act of persons for whom we are answerable," etc. Id. art. 2317. It says: "Masters and employers are answerable for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed." Id. art. 2320. As if to put the question beyond cavil or doubt, that article declares that "in the above cases responsibility only attaches when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it." These principles were recognized and applied in *Williams v. Palace Car Co.*, 40 La. Ann. 417, 4 South. Rep. 85; and the *Louisville, New Orleans & Texas Railway Company* were coerced to respond in damages for the act of the porter of the *Pullman Company* in assaulting a passenger on its train. But in neither the Roman law nor in our own has vicarious liability been recognized as actionable. On the contrary the resulting damages have always been held as remote and conse-

quential, and not recoverable. In this case it is clear that the accident occurred through the interposition of an independent, responsible human agency, and not from the act of defendant's servants or employes; and hence plaintiff cannot recover.

It is therefore ordered that the judgment appealed from be reversed, and plaintiff's demands rejected, at his cost in both courts.

Rehearing refused.

POCHE, J., dissents from the opinion and decree of the majority, and will file his reasons later.

FENNER, J. I concur in the decree herein exclusively on the ground that the plaintiff has entirely failed to establish any causal connection between the negligence of defendants and the injury complained of. Conceding that the railroad company was guilty of negligence in leaving the loose planks which it had taken up from its crossing lying upon the wagon road in such position, and in such proximity to its track, that passing wagons, in the ordinary use of the road, might have dragged or thrown the planks upon the track, and conceding that if, as claimed by plaintiff, a passing carry-log in going over the end of one of said planks, had dragged or tilted it so that one end of it was thrown upon the track, causing the accident, the defendant would have been liable, yet the plaintiff has entirely failed to prove the latter fact, and it is distinctly disproved by the testimony of two witnesses, Dawes and Crawford, corroborated by a third, Davis. Dawes testifies that, the day before the accident, he crossed the road with his wagon, and found the planks lying across the road, where they had been left by the employes of the railroad company; that they were an obstruction, and that, as he was going to return in the dark that night, he removed the planks from the road, and laid them in or along a ditch, placing them at a distance of six or eight feet from the wagon road. Crawford states that on the same day he crossed the road, and found the planks lying upon it, and shortly afterwards met Dawes going towards the crossing, and that when he returned, the same day, he found the planks had been moved from the road; thus fully confirming Dawes' statement. Davis testifies that after the accident he went with Dawes, who showed him where he had placed the three planks, and found two of them still lying there, and a mark on the sand showing where the third had lain before it was removed. These witnesses are entirely uncontradicted. Not a single person testifies to having seen the planks upon the road after the time when Dawes and Crawford state that they had been removed therefrom. Porter, the driver of the carry-log which passed over the crossing about one half an hour before the accident, and who had the best opportunity of knowing whether or not the planks were then upon the road, was not summoned, though he lived hard by; and no suggestion is made of any ina-

bility to secure his testimony. The negligence of the company in leaving the planks lying loose upon the wagon road was entirely cured by the act of Dawes in removing them before the accident, and placing them in a position where, according to all the evidence, they were free from any danger of being thrown on the track by the operation of any natural or ordinary causes. If the defendant had placed them there originally, it would have been free from any charge of negligence. How the planks got on the track is a mystery not solved by the evidence. The only theory advanced, by plaintiff, viz., that a carry-log passing on the road crossed the plank, and tilted it onto the track, is sustained by no evidence, and is contradicted and rendered impossible by the testimony above referred to. Defendant was not required to account for the presence of the plank on its track, further than to absolve itself from any connection therewith; but the record is not barren of evidence suggesting that it may have been placed there by the voluntary and malicious act of a third person or persons; for which, if it be true, the defendant certainly could not be held responsible.

MCENERY, J., concurs in this opinion.

Succession of THOMPSON.

(Supreme Court of Louisiana. Feb. 10, 1890.
43 La. Ann.)

EXECUTORS—SALES BY ORDER OF COURT.

1. The validity of an *ex parte* order of sale in a succession proceeding, by an executrix, to pay debts, may be assailed by rule.

2. A probate court which has not acquired jurisdiction over mortgaged property by an omission or commission, or laches of the mortgage creditor, whose contract contains the pact *de non alienando*, has no authority to order the sale of the property affected to him on terms different from those which he is entitled to fix, and which injuriously affect his right.

3. A mortgage creditor, under such pact, who applies for executory process shortly after the maturity of his claim, before the death of his debtor, and within 30 days after the opening of the succession, is not dilatory, and cannot be charged with laches or consideration conferring or recognizing jurisdiction. The pact authorizes the creditor to subject the property to payment of his claim, without regard to any subsequent alienation or incumbrances of the same.

WATKINS, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; KING, Judge.

J. C. Gilmore, for appellant. Henry C. Miller, for appellee.

BERMUDEZ, C. J. The question presented is simply whether an order of sale, procured by an executrix to pay debts, can be rescinded on a rule, at the instance of a first-mortgage creditor, who claims to be aggrieved thereby, and who seasonably asserts the right to proceed *via executiva*, under his mortgage contract, which contains the clause *de non alienando*. Adam Thompson died on August 8, 1889. His executrix qualified on the 14th following. Three days after, she prayed for an inventory, and on the 20th following procured an *ex parte* order of sale of all the proper-

ty belonging to the succession.—the movables, cash; and the immovables, part cash and part on credit, one and two years, including real estate on which the Louisiana National Bank had a mortgage to secure a claim of \$15,700,—the act containing the pact *de non alienando*. Of this claim, \$6,200 had matured on June 17, 1887, and \$9,500 on July 5, 1889. On August 30th the bank took a rule to rescind the order of sale obtained by the executrix, on the grounds that it had been made without notice to it, previous to the return of the inventory, before 30 days had elapsed since her appointment; that it directs the sale to be made part cash and part on credit; that it subjects the sale to the inventory appraisement. The executrix excepted to the proceeding by rule, averring that the order attacked cannot be assailed, unless by petition and citation in nullity, or by appeal. Before the return-day of the rule to rescind, the bank filed a petition for executory process, annexing the notes and the copy of the act of mortgage. On the return-day, (September 3d,) after hearing, the court overruled the exceptions, and made the rule absolute, rescinding the order of sale obtained by the executrix. On the same day an order for executory process was signed by the judge. The executrix appeals from the decree, setting aside the order of sale obtained by her to pay debts.

1. The bank had a right to proceed by rule to annul the *ex parte* order of sale. The attack was not collateral, but direct. It was not leveled against any final or definitive judgment, but against an interlocutory decree, which the court might, *propria motu*, have vacated. Such orders can be summarily undone, while final judgment may be annulled only by ordinary proceedings terminating by a definitive judgment. Code Prac. art. 604. The rulings to which the appellant refers have no bearing. They were made in cases in which collateral attacks had been attempted, or executory process decrees had been assailed summarily. It has been held that mortgage creditors of a succession are entitled to notice of an application made by an executor to sell the property on which their mortgages exist, (French v. Prieur, 6 Rob. La. 299,) particularly when the mortgage ranks first on the property, and the mortgage creditor complains before the day of sale. It may be different if he allow the property to be sold.

It appears that the order of sale was made six days after the appointment of the executrix, and more than a month before the return of the inventory into court; but on these irregularities it is unnecessary to pass, however true it may be that, before the court should order a sale of the immovable property of a succession, it should wait for the return of the inventory to know what are the assets of the succession, and until 30 days have elapsed since the appointment of the executrix, who in this regard may be assimilated to an administratrix or to a curatrix, but is governed by the will and the law, while the other officials are governed by the law alone.

The rights and principles which an act of mortgage duly recorded, containing the

part *de non alienando*, as does that in the instant case, secures to the creditor, are important. Under it, he has the right, at the maturity and non-payment of his claim, to proceed against the property, in whosoever hands found, even against a succession. He can have it seized and sold free from any subsequent incumbrances by the sheriff. He is entitled to retain the price, without giving security should he purchase, or to receive from it the amount accruing to him on his claim, without delay.

Were the order of sale obtained by the executrix not obstructed, it would deprive the mortgage creditor of the right to proceed *via executiva*, and have the property sold for cash, and without appraisalment by the sheriff, all appraisalment having been waived by the mortgagor in this case; and in case of purchase he would not have the right to retain the price without giving security. The proceeds of sale, cash and notes, would go into the hands of the executrix of the deceased, who would not make any distribution of funds until after the rendition and final homologation of an account and *tableau*; thus putting the creditors to avoidable delay.

While there exists no doubt that, as a rule, all the property, which a person dies owning, becomes subject to the jurisdiction of the probate court for the benefit of creditors and heirs, it is equally true that such jurisdiction is not so absolute as to strip the mortgage creditors of the deceased of the right of proceeding summarily against such of said property as may have been affected to them, to satisfy some money claim, unless it is shown that such creditors have directly or indirectly relinquished the same; and have submitted entirely to the probate jurisdiction over the mortgaged property. Neither can there be any doubt that, where a creditor fails to apply, within reasonable delay, for executory process, and the probate court assumes jurisdiction over the property, and on proper proceedings directs the sale, the creditor would be estopped by his laches from subsequently questioning the order of sale, so as to press a claim for executory process against it. In cases of acquiescence, express or implied, or of laches, his only remedy would be to apply for a modification of the terms of sale, when not cash, if those fixed infringed on his pre-existing right to different creditors. The cases to which the counsel of appellant refers show that the creditor, having either formally or inferentially, or by his laches, in some way acquiesced in the probate jurisdiction, was not permitted afterwards to resort to executory process. By reference to the act of mortgage, it appears that the bank had the right to have the property sold without appraisalment. As the debt was due and exigible, the bank could besides have had the sale made for cash. Were the order attacked permitted to be executed, the sale could not take place, unless the property was bid upon for at least two-thirds of its appraisalment in the inventory, and, even then, the purchasers would not be held to pay, in ready money, the amount of adjudication; the terms fixed by the court

and announced in the advertisement being part cash and part at one and two years.

The bank is not chargeable with any fatal omission or commission, from which it can be inferred that it has consented that the jurisdiction of the probate court should attach, and that the court should direct the sale of the property at the instance of the executrix. No intervention is shown by the bank in the *mortuaria*, except to protect, and it does not appear that the bank was dilatory in the exercise of its right to executory process. The order of sale complained of was obtained with unusual irregularity and haste, 12 days after the death of the debtor, more than a month before the return of the inventory, some 8 days after the appointment of the executrix, and without notice to the creditor. The debt due the bank, as holder and pledgee of the notes of the deceased, had matured quite shortly, in June and July, before the death of the debtor, which occurred, as stated, early in August. Praying for executory process on the 30th of August, in the same month in which the debtor died, was seasonably enforcing the right to executory proceedings. The creditor could hardly have proved more diligent. Besides, the pact *de non alienando* which the contract contains is an important factor in this matter. It secures expressly the mortgagee and any holder of the notes, notwithstanding any transfer or incumbrance of the property by the mortgagor to his injury, and it relieves him eventually from the vexations of an hypothecary action. Surely, that which such mortgage creditor could have done, even as against a third possessor, he had the right to do against the mortgagor or his succession, however represented: for it is clear as daylight that neither his creditors nor his heirs could, by his death, have acquired greater rights, principles, or immunities than he himself possessed, and which were cut off by the express stipulation in the contract. How, then, can it be claimed, with any plausibility, that the executrix, by her *ex parte* action in the matter, could have and has stripped the mortgage creditor of the right of resorting to executory proceedings, when the mortgagor himself, had he lived, could not have done so? A mere statement refutes the pretention.

The mortgage creditor has an interest in having the property sold separately from the other property of the succession, through the sheriff, so as to receive the proceeds, without unnecessary delay, avoid succession costs, commission of executrix, auctioneers' and attorneys' fees, etc., and the filing and homologation of an account or *tableau* of distribution. It is clear that, as the bank had the right to require a sale for cash and without appraisalment, and had done no act from which it can be deduced that it has abandoned that right, and as the order assailed proposes to sell the property subject to the appraisalment, and on terms which are not cash, the bank had a right to complain, and to ask the rescission of the order concerning the property, the more so as it received no notice of the application of the executrix,

which was made and granted altogether *ex parte*. It will not do to say that, if the terms did not suit the bank, it should have intervened, and sought a modification of them in cash. The right of the bank, under the pact *de non alienando*, to proceed *via executiva*, not having been in any way abandoned, and the petition for executory process having been filed seasonably, must be recognized and enforced. No case is found in the books, presenting the characteristics of the instant one, in which the mortgage creditor, whose contract contained the pact *de non alienando*, was denied the right to proceed *via executiva* against a succession, under similar circumstances.

Considering that the judgment appealed from rescinds the order of sale only so far as concerns the property mortgaged to the bank, it is affirmed, with costs.

WATKINS, J., (*dissenting*.) The testamentary executrix obtained a probate order in the *mortuaria*, for the sale of the property of the succession of the deceased, movable and immovable, to pay debts; the immovables to be sold for part cash, and part on terms of credit. The bank, as a special mortgage creditor for some \$15,000, on a portion of the realty included in the terms of the order, seeks to have it vacated, so that it may at once proceed *via executiva* against the mortgaged property, and have it sold under an order of sale, which it has already obtained, though subsequently to the granting of the probate order assailed. The grounds set out by the bank are, viz.: *First*. The prematurity of the executrix's application for the probate order. *Second*. If executed, it would divest it of material rights, to its prejudice.

The first ground is clearly untenable, because, if fault there was on the part of the executrix in hurriedly making an application for the order of sale before the completion of the inventories, and within 30 days after confirmation, it was condoned by the like haste of the mortgage creditor in obtaining an order of seizure and sale afterwards. But it is submitted that the delay of 30 days which must elapse after the appointment of a curator, before an order is granted for the sale of immovables of a succession, is for the sole purpose of such curator being able to obtain sufficient information concerning the debts of the succession, and to determine "if it be necessary to sell them [immovables] in order to pay the debts." Rev. Civil Code, art. 1164.

The only restraint that the law imposes upon the curator is that he "is bound to wait thirty days." Why is he bound to wait? "In order that he may know if it is necessary to sell the immovables in order to pay debts." Then it is merely in aid of the curator's acquisition of that knowledge that he is required to wait. If he can obtain the requisite information before the expiration of that delay, there ceases to be a necessity for him to longer wait. Such is the case under consideration. Within the 30-days delay, the executrix ascertained the amount and character of the debts of the deceased, and filed

a tabular statement of them, on the faith of which she claimed the order of sale. There was no necessity for additional delay.

It is further submitted that this rule does not apply to an order of sale of succession property granted on the application of an executrix, because the Code provides that, "in default of funds sufficient to discharge the debts and legacies of sums of money, the testamentary executor shall cause himself to be authorized by the court to sell the movables, and, if they are insufficient, the immovables, to a sufficient amount to satisfy those debts and legacies." Rev. Civil Code, art. 1668. There is no delay fixed in respect to an executor. On the other ground, in my opinion, there is no just cause for the revocation of the probate order of sale. The opinion of the court says that, under the act of mortgage, "the bank had the right to have the property sold, without appraisal, and for cash." It follows that the executrix had not the right to have the property sold partly on terms of credit. But it does not follow that she had no right to have it sold under her order at all. To my mind, it is clear that all the bank can require is to have the terms of sale so modified as to conform to the terms of the mortgage. A mortgage is but a security for the payment of a debt,—a *jus ad rem*, and not a *jus in re*. *Wisdom v. Buckner*, 81 La. Ann. 57.

The debtor is entitled to absolve himself from the mortgage by paying the debt secured. His executrix has the same right, or to discharge it as speedily as possible by sale of the mortgaged property. In case the debtor or his executrix are guilty of delay or laches of any kind in discharging the debt, or in making a sale, the right of the creditor to institute legal proceedings springs into existence, and he may procure an order for the seizure and sale of the property specially mortgaged. But I am not aware of any penalty the law attaches to the exercise of undue haste on the part of either in discharging a debt, or in effecting a sale in the effort to discharge it. I was not apprised of the existence of any doubt of the legal right of a succession representative to procure an order of sale of all the property of a succession for the purpose of paying acknowledged debts, without first procuring the consent of mortgage creditors, or giving them prior notice of his intention to apply for an order of sale. Indeed, the Code declares that, "if the amount of debts known is such that it is necessary to sell the whole or part of the immovable property which belongs to the succession, the curator shall present his petition to the judge who has appointed him, to obtain an order for the sale of this property, or of such a part as may be necessary to pay the debts of the succession." Rev. Civil Code, art. 1165.

The law does not provide that any notice of an anticipated sale shall be given to mortgage creditors, but it merely provides that, "if a succession be insolvent, the curator is bound to apply for an order for a meeting of creditors. This meeting has for its sole object "to deliberate on the

most advantageous manner of selling the effects of the succession." Id. art. 1172. It has no power to control the granting of an order of sale at all. To this meeting, all creditors, private and ordinary, are summoned alike.

The Code provides: "If, at the meeting of the creditors thus assembled, the creditors, by privilege or mortgage, require that the sale of the effects be made for cash, their wish in this respect shall prevail over that of the other creditors." Id. art. 1175. On homologating these proceedings, the judge "is bound to order to be sold for cash so much of the property of the succession as will be sufficient to pay the creditors by privilege or mortgage, * * * if they require the sale to be thus made." Id. art. 1177. French v. Prieur, 6 Rob. (La.) 299, is not authority to the contrary. In that case a rule was taken upon the recorder to have certain mortgage inscriptions canceled, on the ground that certain succession property had been disposed of at public sale by the register of wills, and that the effect of such sale was to transfer the lien of the creditors to the proceeds, and pass the title free of incumbrances. This the court declined to do, and expressed the opinion that "mortgage creditors have by law certain rights secured to them, in relation to the sale of property belonging to successions; and it would seem but just that they should have some notice of an application to sell that on which their lien exists, and thereby to discharge it." Under this state of facts, the court seemed to think that the sale of mortgaged property, in a succession, by a register of wills, without notice to the mortgagees, was irregular; but it does not follow that, had the sale been made under an order of court, to pay debts, at the petition of a succession representative, the court would have so held.

Quite the contrary is true, for the court observes, in the same connection, that "there cannot now be a doubt that a sale of the property composing a succession, legally and regularly made under a judgment of the court of probate, discharges the mortgages on it which may have been given by the deceased. The purchasers take it free of any such incumbrances, and the court of probate has the power to erase them all."

The record shows that the total debts of the deceased are \$63,480, and the appraisement of all properties in the inventory aggregates \$111,827.06,—the value being nearly double the amount of debts. The estate is *prima facie* solvent, and there was no occasion for the convocation of a meeting of creditors. The conclusion, to my mind, is irresistible that the bank has no right that has been infringed by the probate order, except in respect to the terms of sale contained in the act of mortgage. It has no right in law to demand the revocation of the probate order of sale, more especially when it has already procured a subsequent order for the seizure and sale of the mortgaged property. Of course, there is no question of its right to thus proceed, if the executrix had not obtained a prior probate order of sale.

The judge of the proper jurisdiction had the power to grant an order of sale. When he granted the probate order of sale, on the application of the executrix, and within the *mortuaria*, his power to grant an order of seizure and sale was exhausted. By the former order, the property was placed *in custodia legis*, and consecrated to the mass of creditors of the succession, subject alone to a change or modification of the terms of sale, so as to conform to the acts of mortgage of any or all the mortgage creditors.

The identical question litigated here was squarely decided in *Poutz v. Bistes*, 15 La. Ann. 636. The plaintiff had procured an order of seizure and sale of certain mortgaged property subsequent in date to a probate order of sale granted in the *mortuaria* embracing the same property. The court said: "The plaintiff, after the second district court had issued its order for sale, ought to have applied to that court for a modification of the terms of sale, if he was not satisfied with the same. Any other rule would produce unnecessary embarrassment." Under similar circumstances, this court in *Morere v. Preston*, 34 La. Ann. 873, maintained a probate order of sale, in the succession of Porter, and reversed a judgment sustaining an injunction of a mortgage creditor, who had begun executory proceedings against certain mortgaged property in the succession, four years before, and the only defect in which was the want of notice to the proper parties. The court said: "The consequence is that as to the creditors of C. C. Porter, represented by the administrator of his succession, the property ordered to be sold was not *in custodia legis*, and that, the probate court having acquired jurisdiction over it before any seizure had been effected, the order of sale was properly rendered." *Poutz v. Bistes*, 15 La. Ann. 636. *Walmsley v. Levy*, 36 La. Ann. 226, is to the same effect.

Under quite similar circumstances, our predecessors said, in *Tertron v. Comeau*, 28 La. Ann. 633, of an injunction that was sued out by a mortgage creditor, for the purpose of restraining a sale of succession property, on the identical grounds laid in opponent rule: "It was the duty of the administrator to have the property sold, if the estate was in debt, and that fact is shown by plaintiff, who claims to be a creditor in the sum, exceeding \$16,000. The order of sale was necessarily *ex parte*, and we can see no injury which can befall the plaintiff by the sale of the property. Indeed, we do not see how else he could be paid."

In the case of *Wells v. Wells*, 25 La. Ann. 194, an additional and stronger reason is assigned by the court why the probate order should be maintained. They say: "It is sufficient to say that a mortgage creditor has no right to enjoin a sale for want of notice of the application therefor, when the sale was ordered to pay creditors having a higher rank or a preference over that mortgage creditor. In this succession it has been decided by this court that the debts for the services of attorneys and the commissions of the executor, being debts of the succession, should be paid by prefer-

ence over the debts of the deceased." To the same effect are Succession of Whitehead, 2 La. Ann. 396; Succession of Lauve, 18 La. Ann. 721; Succession of Patrick, 25 La. Ann. 154; Succession of Tabor, 33 La. Ann. 343.

In this succession there appears one debt, in addition to such as are enumerated in the opinion cited, of over \$4,000, for taxes, which certainly prime the mortgage of the bank *pro tanto*. Such privileges extend to movables and immovables alike, and, for want of sufficient movable property, must be paid for from the proceeds of the immovables, and by preference over mortgages. Rev. Civil Code, arts. 3352, 3353, 3366, 3367. This must be done in the premises on a *tableau* of distribution, and on a judgment of court. Id. art. 1181. How can that be done, if the executrix had not the possession of the funds for distribution?

The rights of the bank will be perfectly protected by requiring the executrix to furnish security; and, if there be a likelihood of the property being sold at a sacrifice, it can buy on its own account, and hold its proceeds on furnishing proper security to the succession. The opinion lays stress on the fact that the bank's mortgage contains the pact *de non alienando*. Its effect is solely to prevent the mortgagor from making conventional sale of the mortgaged property, to the prejudice of the mortgagee's rights. In this case no such sale has been made, and the existence of the pact does not affect this case in the least.

There is, in my opinion, no question of diligence or laches in the case. If there was, the fault is certainly with the bank, because its mortgage was executed, and the notes of deceased delivered, on the 13th of August, 1885, and they became due at 12 months after date. Hence, when, on the 20th of August, 1889, the probate order of sale was granted on the petition of the executrix, they were three years past due, and at any date within that period of time the bank could have procured an order of seizure and sale had it chosen to do so, but did not.

This court held in *Chaffe v. Farmer*, 34 La. Ann. 1017, that it was "administrator's duty to obtain the highest price for the property." What was the executrix to do, standing, as she was, in the presence of five special mortgages, on five different pieces of real estate of the succession of the deceased, and aggregating \$56,000 in amount? Should she have waited longer for action by the various mortgages, or provoked them to commence five separate executory proceedings against the five mortgaged properties? Had she done so, it is perfectly manifest that the added burdens of accumulated costs, commissions, attorney's fees, advertisements, etc., would have resulted in a ruinous sacrifice of the property, and pressed the succession to the verge of insolvency. Had she thus waited or proceeded, in my opinion the executrix would have violated her plain legal duty. She is bound to protect the rights of all, whether privileged or ordinary creditors alike, and endeavor to save something for the heirs. If a different rule obtain, and the rule of opponents be made absolute,

property specially mortgaged will be liberated from administration entirely by the succession representatives.

It is with respect I submit that the opinion of the court vacating a probate order of sale of succession property, to make way for an order of seizure and sale, in behalf of a mortgage creditor, is a departure from the settled jurisprudence of more than a quarter of a century, and will greatly embarrass the administration of successions in the country parishes. The conservative and salutary rule of *stare decisis* ought to control, for it has been wisely said that, "in order to secure certainty and stability in the administration of law, it is a rule of jurisprudence that, when a particular construction of a statute has been for a long time acquiesced in, not only by those whose personal and property rights are affected, but by those whose duty it is to execute it, the courts will recognize it as the true construction, and enforce it accordingly." To this effect are various authorities: *Hawkins v. Beer*, 37 La. Ann. 55; *State v. Thompson*, 10 La. Ann. 122; *Levy v. Hitsche*, 40 La. Ann. 500, 4 South. Rep. 472; *Insurance Co. v. Debole*, 16 How. 431; *Douglas v. County of Pike*, 101 U. S. 677.

For these reasons I deem it my duty to dissent.

LALANNE v. PAYNE et al.

(Supreme Court of Louisiana. Feb. 10, 1890.
43 La. Ann.)

JUDGMENT—NOTES SECURED BY MORTGAGE—MERGER.

1. The peculiar statutory action authorized by Rev. Civil Code, art. 3547, providing for the renewal of judgments by suit, must not be confounded with other precepts of the Code on the subject of legal interruption of debts, which are likewise applicable to judgments.

2. A judgment *in personam* against a payee of promissory notes, secured by a special mortgage, and in which there is a recognition of the mortgage, and a decree for its enforcement, merges the notes, completely and perfectly, so that thereafter the judgment is the only evidence of the debt; but not so as to the mortgage. It retains the full force, effect, and rank after the judgment that it had before; the judgment only rendering it executory by ordinary *à. fa.*, but not precluding executory proceedings subsequently.

(Syllabus by the Court.)

Appeal from district court, parish of St. Landry; E. T. Lewis, Judge.

Henry L. Garland and Laurent Dupie, for appellants. Estilette & Dupie, for appellee.

WATKINS, J. As the holder of two judgments against Widow Galliger, *née* Amelia Keller, and subsequently Widow Webb, duly recorded, and regularly reinscribed, plaintiff institutes this suit against Payne, holder of certain special mortgages against same, previously recorded, and likewise regularly reinscribed, for the cancellation of same, as being null and void. The ground assigned for the nullity is that, in 1874, Payne sued his mortgage notes to judgment, and therein obtained a recognition of his special mortgages, and that said notes and mortgages became merged in said judgment, and had thereafter no

separate existence; that this judgment was recorded in the book of mortgages in 1877, and the mortgage has not been preserved by proper reinscriptions since, and is therefore perempted; and the judgment, not having been revived by suit timely instituted, has become extinguished by prescription.

The facts are briefly as follows: Plaintiff is the holder of two judicial mortgages against Widow Galliger, properly recorded and reinscribed. Payne is the holder of several conventional mortgages against the same debtor, recorded previously, and from time to time likewise regularly reinscribed. In 1874 the latter obtained a personal judgment against his debtor, on her several promissory notes, and a recognition of his conventional mortgages securing the payment thereof. This judgment embodies a full and comprehensive statement of the recognized mortgages, as well as a description of the mortgaged property. The judgment was recorded in the book of mortgages in 1877, and that inscription has not been since renewed by proper inscription. No suit for the revival of the judgment has been instituted, but various acts, transactions, and judicial decrees have from time to time otherwise interrupted the current of prescription against it, whereby it has remained in full force and efficacy.

The district judge was of the opinion, and held, that the judgment had been kept alive, and was in full vigor, but that the mortgage had ceased to have effect as to third persons, for want of proper reinscription; and that the original, special mortgages were merged in the judgment, and thereafter ceased to have any separate existence, and therefore the reinscription of them was without any effect whatever. On the latter question, our learned brother expressed himself as entertaining a contrary view, and, in rendering judgment, only yielded his convictions to what he deemed to be the weight of superior judicial authority. He carefully stated his views, as derived from decisions of this court, in an elaborate opinion of marked ability, in which numerous adjudicated cases are collated and compared.

As we understand plaintiff's counsel, his contention is that, while it is the settled jurisprudence of this court that the prescription of a judgment may be interrupted by other means than a suit to revive, only parties to the record can be affected by such interruption *in pais*. The judge *a quo* gave judgment against defendants, ordering the clerk to cancel the various conflicting and antecedent inscriptions of Payne's special mortgages, and he has appealed.

1. On the proposition last referred to little is necessary to be said. In neither the law nor jurisprudence can we find any sanction for the stated contention of plaintiff's counsel. In Succession of Patrick, 30 La. Ann. 1071, our predecessors held that "the peculiar, statutory action" authorized by Rev. Civil Code, art. 3547, providing for the revival of judgments by suit, must not be confounded with other precepts of the Code, on the subject of legal

interruption of the prescription of debts which are likewise applicable to judgments. The doctrine announced in the case was affirmed by this court in Calhoun v. Levy, 33 La. Ann. 1296, and in Levy v. Calhoun, 34 La. Ann. 413, as well as in other cases. Hence we conceive the argument in favor of the binding force of a judgment, the prescription of which has been legally interrupted, is just as strong as that of a judgment of revival. Either mode rehabilitates the judgment, and keeps it as much alive for one purpose as for another.

2. The main question is whether a judgment *in personam*, on the mortgage notes, recognizing and enforcing the mortgage, as against the debtor and mortgagor, operates a merger of the notes and mortgage in the judgment, so as to necessitate the registry of that decree in the book of mortgages, and its subsequent reinscription, in order to preserve the effect of the mortgage as to third persons and other mortgagees. Has a conventional mortgage any separate and independent existence after the rendition of a judgment *via ordinaria* recognizing it? and does the subsequent reinscription of the original act of conventional mortgage have the effect of preserving its effect and rank as to third persons?

As supporting his judgment, the judge *a quo* cited the following cases, viz.: Mackee v. Cairnes, 2 Mart. (N. S.) 599; Oakey v. Murphy, 1 La. Ann. 372; Smalley v. His Creditors, 8 La. Ann. 388; Bordelais v. Maugars, Id. 375; Hair v. McDade, 10 La. Ann. 534; Railroad Co. v. Thornton, 12 La. Ann. 786; Sturges v. Sheriff, 14 La. Ann. 281; Denistoun v. Payne, 7 La. Ann. 334; Succession of Gilmore, 12 La. Ann. 565.

In all of those cases it was held that a judgment on notes, drafts, or other evidence of debt had the effect of merging the latter into the former so that they ceased to evidence the debt altogether, and the judgment became the sole proof of its existence; but only in the last two of those decisions was it held that mortgages, as well as notes, are so merged; and, in those cases, there were no questions of the rank of competing mortgages, or of their appropriate inscription, and reinscription so as to affect third persons with notice. But, without any discussion, the court contented itself with an expression of opinion to the effect that the mortgages as well as the notes became merged in a judgment.

We have frequently held that debts and obligations are not created by judgments of court, but only recognized by them, and rendered executory; that they confer no new right, only confirm those already in existence. Kinder v. Lyons, 38 La. Ann. 718; Thomas v. Guilbeau, 35 La. Ann. 927; Succession of Anderson, 33 La. Ann. 581. But we know of no case in which we have held that a mortgage, as well as the note secured, was merged in a judgment *in personam*, recognizing its existence, and making it executory. Counsel for appellee, with perfect confidence, cites us to what our immediate predecessors said on a kindred question, in Watson v. Bondurant, 30 La. Ann. 10, viz.: "If the mortgagee, in

stead of proceeding *via executiva in rem* against the property, elects to sue his debtor *in personam*, and to attempt to enforce his judgment by execution *via ordinaria*, the pact *de non alienando* will not enable him to seize the mortgaged property in the hands of a third possessor claiming the ownership. He must exhaust his remedy against property subject to seizure under the writ *heri facias*; and, failing to obtain satisfaction by this means, he can reach the mortgaged property only by an action—the regular hypothecary action of our law—against the third possessor."

From that expression counsel deduces the conclusion that it was based on the theory that the mortgage was merged in the judgment, and therefore it was not susceptible of separate enforcement for that reason. But in a more recent case, which appears to have escaped counsel's attention, this court held, after deliberate consideration of the question, that a mortgage creditor is entitled to executory process against his mortgagor, or against his transferees of the hypothecated property, notwithstanding the fact he has procured judgment against the mortgagor on mortgage notes. "The fact," says the court, "that he [the mortgagee] had obtained a recognition of his mortgage, by judgment against the original debtor, if it did not enlarge, certainly could not diminish, his rights against the third possessor of the thing mortgaged." *Montejo v. Gordy*, 83 La. Ann. 1118. On the original hearing of that case, the court maintained and perpetuated an injunction restraining the seizure and sale, on the ground that it was "illegal, null, and void, and unwarranted by law;" but on the re-hearing a contrary opinion was announced. We are therefore safe in concluding that it was deliberately expressed, and regard it as being perfectly conclusive against plaintiff's theory of a judgment merging the mortgage, as well as the note it secures.

While it is perfectly true that a judgment does merge and extinguish a note, draft, obligation, or other evidence of a debt, it does not follow that it has that effect in respect to mortgages or privileges securing the payment of a debt. The rank of mortgages and privileges is one of their most essential elements, and necessarily so, because it is that which determines the right of one or more creditors to a priority in receiving payment from the proceeds of the thing on which their respective liens exist. It is for the special purpose of enabling a creditor to preserve the rank of his mortgage, and his priority in payment, that the Code declares that the inscription must be renewed "in the manner in which it was first made." Rev. Civil Code, art. 3369.

The rank of mortgages is determined by the date on which they are first recorded. Rev. Civil Code, art. 3329. Reinscription maintains their rank in perpetuity. If, then, it be conceded that a judgment merges the mortgage, what becomes of its rank? For if there is a merger it is complete, and creditors and third persons would have to consult the judgment, and

not the act of mortgage. In *Miltenerberger v. Dubroca*, 84 La. Ann. 818, we held the registry of a judgment rendered on a mortgage note to be insufficient as a reinscription of a mortgage, because the judgment did not contain, and, when registered, did not convey, all the necessary information for the purpose of the reinscription. "The judgment," say the court, "sufficiently describes the property, but fails to mention the name of the officer who passed the act, or the date of the act, or of its original registry, or the name of the original mortgagee, or the total amount for which the mortgage was given." *Hart v. Caffery*, 89 La. Ann. 894, 2 South. Rep. 788.

If, in law, the mere rendition of a judgment effected the merger of the mortgage, what difference could there be if such recitals were wanting? But, as we held that their absence from the judgment rendered its registry unavailing for the purposes of reinscription, the conclusion is irresistible that the sufficiency of such a reinscription depends solely on the sufficiency of the recitals of the judgment, and not on its existence. We doubt not that, if a judgment contained a full description of the mortgage in every essential particular, its registry would amount to a reinscription, not for the reason that such a judgment was a merger of the mortgage, but because this mode is recognized as an adequate one for the preservation of the mortgage.

It is our opinion that the original mortgage acts continued, after the judgment, to evidence the mortgagee's rights, and that they are not merged in the judgment. *Payne* obtained on the mortgage notes, and that the reinscription of those acts was the proper mode of preserving same, and had full effect as to the plaintiff.

The judgment appealed from is erroneous, and must be reversed. It is therefore ordered and decreed that the judgment appealed from be, and the same is, reversed; and it is now further ordered and decreed that plaintiff's demand be rejected, at his cost in both courts.

FENNER, J., recuses himself, on the ground of relationship to *Payne*, defendant.

PERRY, GOVERNOR, v. WOODBERRY.

(*Supreme Court of Florida*. March 22, 1890.)

SCHOOL FUNDS—COUNTY TREASURER—BOND—ACTIONS—PLEADING.

1. The act of February 27, 1877, (McCl. Dig. p. 323, § 6,) by which the county treasurers of the several counties were "constituted the treasurers of the school funds in their respective counties," did not create a new county office of treasurer of the school funds, to be filled by whomsoever might be county treasurer, but it transferred to the office of county treasurer the duties and responsibilities of the custody of the school funds of the county.

2. The act of February 18, 1878, (Id. p. 323, § 5,) provided that county treasurers should be required to give bonds to the governor in a sum to be fixed by the county commissioner, and to be in no county less than double the amount of money that might at any one time come into the treasurer's hands, and a treasurer's bond executed under it after the approval of the act of February 27, 1877, by which county treasurers were constituted treasurers of the school funds, (Id. § 6,) became a security as well for the proper performance of his du-

ties in connection with school funds as with any other funds of which he might be the legal custodian under former or other legislation.

3. It was the duty of the county commissioners, when fixing the amount of the official bond to be given by a county treasurer, after the approval of the act making him treasurer of the school funds, to consider the effect of that act with reference to the amount of money which might at any one time come into his hands.

4. An action on the official bond of a county treasurer, payable to the governor, *held* to be properly brought in the name of the governor for the use of the board of public instruction of the county to recover for school moneys as to which the county treasurer failed to properly account, and that the action should not have been brought for the use of the successor of the delinquent county treasurer.

5. The fact that certain officers, when fixing the amount of the penalty of an official bond, failed to consider a certain matter which, had they considered it, might have caused them to fix a larger penalty than they did, is not a defense to an action against a surety on the bond.

6. A statement in a plea to an action on a complete written contract that the contract was not intended to cover the moneys sued for, and that the defendant, a surety, signed the contract with that understanding and belief, is not the averment of a fact, but of a conclusion of law, and is demurrable.

7. In an action instituted in the name of the governor for the use of a board of public instruction on the official bond of a county treasurer to recover for school moneys as to which he was in default, the bond having been executed April 14, 1884, and being conditioned that the county treasurer should render a faithful account of all moneys that might come into his possession or custody by virtue of his said office, and faithfully perform all the duties of the office as prescribed by law, a plea was interposed by a surety to the effect that the county commissioners did not in fixing the amount of the bond take into consideration any school moneys that might be paid to the principal as county treasurer of the county, but fixed the amount to cover moneys only which were controlled by the county commissioners; and that said bond was not intended to cover any school moneys which were subject to the control of the board of public instruction of the county, and that the surety signed the bond with that understanding and belief. *Held*, that the plea is demurrable for the reason that the result of the neglect of the commissioners to consider the school moneys could be nothing more than to make the amount of the bond less than it should have been, and this does not harm the surety; and the remainder of the plea is not the averment of a fact, but is nothing more than the assertion of a conclusion of law or a pleader's construction of a complete written contract, which contract is the sole repository of the language of the parties to it as to their meaning and intentions, which language, viewed in the light of the law controlling the subject of the contract at the time of its execution, shows that school moneys subject to the control of the board of public instruction were within the intention of the parties to the bond, and must control the courts as to the meaning, intention, and understanding of the parties.

(*Syllabus by the Court.*)

Appeal from circuit court, Gadsden county; DAVID S. WALKER, Judge.

William A. Blount, for appellant. John W. Malone, for appellee.

RANEY, C. J. This is an action on the official bond of A. W. Smith, as county treasurer of Gadsden county, executed by him and sureties thereon, of whom appellee was one, April 14, 1884. The bond, which was approved by the county commissioners, binds the parties "unto the governor of the state of Florida," and its

condition, including the recital, is that "whereas, the said Smith is about to be commissioned, by the governor, county treasurer in and for the county aforesaid, to hold his office for the term of two years, now, if Smith shall render a correct and faithful account of all moneys that may come into his possession or custody by virtue of the office, and faithfully perform all the duties thereof as prescribed by law, the bond shall be void, but otherwise to remain of full force and effect."

The action, as originally instituted in the year 1886, was in the name of "the Governor of the State of Florida, for the use of the Board of Public Instruction of Gadsden County." Subsequently, the proceedings were amended by making E. A. Perry, governor, etc., for the use, etc., the plaintiff. *Polk v. Plummer*, 2 Humph. 500; *Stephens v. Crawford*, 1 Ga. 574; *Tevis v. Randall*, 6 Cal. 632.

The original declaration alleges that Smith was removed from office by the governor in the year A. D. 1886, and that while he was such treasurer he did not render a correct account of and pay over all moneys which came into his possession or custody by virtue of his said office, nor did he faithfully perform the duties of his office but, on the contrary, has failed and refused, and still fails and refuses, to account for and to pay over to the board of public instruction of Gadsden county the sum of \$1,082.84% of the property of the said board which came into his possession by virtue of the office, and which by law was and is payable to such board.

The plaintiff demurred to the fourth plea as bad in substance, and, the demurrer having been overruled, he suffered final judgment to be entered in the case against him, from which judgment he has taken an appeal.

This plea, upon which the result of the litigation as it stands before us depends to a certain extent, is, in substance, as follows: The county commissioners of Gadsden county did not, in fixing the amount of the bond, take into consideration any school moneys that might be paid to Smith, as county treasurer of the county, but fixed the amount of the bond to cover moneys only which were controlled by said county commissioners; and said bond was not intended to cover any school moneys which were subject to the control of the board of public instruction, and the defendant signed the bond with that understanding and belief.

The statute of February 27, 1877, (McClell. Dig. p. 323, § 6.) enacted that the county treasurers of the several counties in this state shall be, and the same are hereby, constituted the treasurers of the school funds in their respective counties.

Legislation approved February 18, 1873, (Id. p. 323, § 5.) provided that county treasurers should be required to give bonds to the governor in a sum to be fixed by the county commissioners, and to be in no county less than double the amount of money that might at any one time come into the treasurer's hands, and that the sureties should be required to justify. A previous act of 1872 (section 5 of chapter 1888) had provided that the amount of the

bond should be fixed by the county commissioners, and never be less than \$10,000. The provision of chapter 1722, approved June 22, 1869, referred to by counsel for appellant, and requiring that "every school officer" shall, before receiving any moneys or property of any kind for sale-keeping or disbursement, give bonds, with two good sureties, for double the amount that would be liable to fall in his hands at any one time, the bond to be fixed by the board of public instruction, and approved by the county commissioners, was not applicable to the county treasurer prior to the act of 1877, nor did it become so upon the passage of the latter act.

The legislation of 1877 did not repeal that of February, 1878, but one effect of it was to make it the duty of the county commissioners, when fixing the amount of a treasurer's bond, to consider its effect with reference to the amount of money which might at any one time come into that officer's hands, and to act accordingly. It was also the effect of these two statutes, considered together, that a treasurer's bond, executed like this one after the act of 1877, should be a security as well for the proper performance of his duties in connection with school funds as with any other funds of which he might be the legal custodian under former or other legislation. The act of 1877 did not create a new office of treasurer of the school funds, to be filled by whomsoever might be county treasurer, nor was it by virtue of any such distinct office that he was entitled to receive school funds; but it transferred and imposed upon the office of county treasurer, as then constituted by law, the duties and responsibilities of the custody of the school funds of the county, and a proper performance of these is as much within the language and purpose of the bond before us as are any duties which had been imposed upon or had appertained to the officer prior to that legislation. The school law of 1869 and its amendments had practically created a distinct custodian or treasurer of the school funds of the county, and the purpose of the legislation of 1877 was to confer the duties upon the constitutional office of county treasurer.

It is averred by the plea that the county commissioners did not, in fixing the amount of the bond, take into consideration any school moneys that might be paid to the treasurer, but fixed the amount of the bond only to cover moneys which were controlled by themselves, the county commissioners. So far, then, it seems only that they may not have fixed the amount of the bond as large as they should have done. From this omission to regard what the law had made a subject for their consideration, and the consequent neglect of duty, the surety can claim no advantage. His complaint to this point is nothing more than that the penalty of the bond is not as large as it should have been. That does not hurt him.

The plea further asserts that the bond was not intended to cover any school moneys which were subject to the control of the board of public instruction, and that with this understanding and belief the ap-

pellee, a surety, executed it. Considering this assertion either alone or in connection with the previous part of the plea, we find neither in it, nor elsewhere in the record, any pretense that any other written instrument was executed as a component part of the contract, and qualifying the meaning or effect of the bond. The bond is upon its face a full and complete written contract, having no feature to suggest that it was not understood and intended, by all the parties to it, as the complete expression of their meaning and intention, and the sole repository of the language of their undertaking. When parties deliberately put their engagement into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of the engagement, it is, as between them, conclusively presumed that the whole engagement, and the extent and manner of their undertaking, is contained in the writing; and all oral testimony of any previous *colloquium* between them, or of any conversation or declaration at the time of its execution, or afterwards, will be excluded, as their admission in evidence would tend in many instances to substitute a new and different contract from what was really agreed upon. 1 Greenl. Ev. § 275. The instrument is the best possible evidence of their intent and meaning, because it is their own statement of what they do mean and intend at the time. No other language is admissible to show what they meant or intended, and for the simple reason that each of them has made that to be found in the instrument the agreed test of his meaning and intention. *Id.* §§ 276-279, 282.

The written instrument before us is not a mere memorandum, or at all incomplete, (*Id.* § 284a;) nor is there any uncertainty as to the object or the extent of its engagements. According to the terms of the bond, the sureties were to be liable for all moneys which might come into Smith's possession or custody by virtue of his office as county treasurer, and for which he should not correctly and faithfully account, and for a faithful performance of all the duties of that office. Looking at the bond, which is the full expression of the meaning of the parties, we find that such was their intention when the obligors executed it; and under the law the moneys sued for, moneys which were under the control of the board of public instruction to the extent of their application to the educational purposes prescribed by law, are within that intention, for they came into his possession by virtue of the stated office. Turning to the plea we find in it an attempt to limit the compass of the liability expressed in the bond, by an assertion that the moneys in question were not within the intention of the parties. This assertion is nothing more or less than the pleader's construction of the bond, an averment of a conclusion of law which the terms of that instrument refute, and not the presentation of any substantive fact that can be considered in connection with the bond as qualifying its plain legal effect. The bond is the contract, and the appellee must abide by it. The pleadings admit by implication, as effectually as if it were ex-

explicitly stated, that there was no other written instrument executed as a part of the contract; and this being so, and the bond being a full and complete contract, and parol evidence not being admissible, the result is that the proposition presented by the pleadings is simply one of the meaning and effect of the undertaking contained in the bond.

The language of the bond is to be interpreted by the law as it stood at the time, and, though sureties may stand upon the strict language so interpreted, they cannot say they did not intend or mean what the law says the undertaking of their bond is. If this were not so, bonds would be of no value, for they would not be the final expression of the obligation of the parties, but the sport of each party's understanding and recollection of what he intended. *Miller v. Elliott*, 1 Ind. 484; *Booske v. Ice Co.*, 24 Fla. 560, 5 South. Rep. 247; *Dibrell v. Miller*, 8 Yerg. 476. It is urged that the contract set up in the plea is not different from that in the bond, but explanatory, and that for this reason the principle of law invoked by us, and maintained in *Miller v. Elliott* and other authorities, does not apply. If explanatory, it is so in the sense that it proposes to take out of the bond that which is clearly within the legal effect of its terms; or, as may be said, to explain the bond away, and thus make a different contract from that which appears upon its face.

The plea admits that the moneys in question are school moneys, and that they are subject to the control of the board of public instruction, and the law makes the county treasurer the custodian of all school moneys of the county; and by section 25, p. 907, McClel. Dig., the board of public instruction was given the charge, oversight, and management of the common-school moneys with a view to their just distribution and use; and hence it follows, as a necessary consequence, that the sureties are liable upon the strict terms of the bond for any default of the treasurer as to such funds.

What has been said above is upon the assumption that the declaration is not open to the objection of appellee that the action should have been for the use of the county treasurer, instead of for the use of the board of public instruction. Contending, as he does, that the declaration and entire action are thus defective, he claims, upon former decisions of this court, that the demurrer reaches back to the declaration, and asks judgment upon it. *Johnson v. Railroad Co.*, 16 Fla. 623; *Doyle v. Wade*, 17 Fla. 522; *Price v. Drew*, 18 Fla. 670.

The argument of counsel is upon the theory that the successor to Smith in the office of county treasurer is, if there can be any recovery on the bond, entitled to the possession of the money, and therefore he, and not the board of public instruction, is the party for whose use the action should have been brought.

The solution of this question involves the consideration of the character of the relation of the board of public instruction, and of the county treasurer, respectively, to the school moneys.

The general school law of 1869 (chapter 1686) provided, in effect, that the officers of the department of public instruction should be, in addition to those prescribed by the constitution, a board of public instruction for each county, local school trustees, treasurers, and agents. Section 9, p. 905, McClel. Dig.

It made each board of public instruction a body corporate, and authorized it to acquire and hold real and personal estate, receive bequests and donations, and perform other corporate acts for educational purposes, (section 14,) and by the subsequent sections provided that the title of the school property of the county should be vested in them and their successors in office, (sections 20, 21, p. 906 et seq. Id.)

In addition to authorizing and directing the board of public instruction to obtain possession of, accept, and hold under proper title as a corporation all property possessed, acquired, or held by the county for educational purposes, and to manage and dispose of the same for the best interests of education, it gave it charge, oversight, and management of the common-school moneys with a view to their just distribution and use, and made it their duty to locate and maintain schools, audit and pay the just accounts of teachers and other persons, and to keep accurate accounts of all moneys received, held, or disbursed, and gave them full power to perform all acts reasonable and necessary for the promotion of the educational interest of the county. Sections 25, 27, pp. 907, 908, Id.

The ninth section of the same law provided, in its second paragraph, that every school officer should, before receiving any school moneys or property for safe-keeping or disbursement, give bonds, with two good sureties, for double the amount that would be liable to fall into his hands at any one time; and, by its third paragraph, that "any officer in charge of school moneys or property to be so disbursed shall satisfy himself that the officer to whom he issued it is duly assured, or be personally liable for any loss in consequence of such neglect."

Although that statute contemplated "treasurers" as among the officers of the school department, it nowhere expressly designated by such name a treasurer of the county school funds or of the board of public instruction; and, whether the effect of the statute was that the board, or that some member of it, or other person, by its appointment, should act as treasurer, still neither the board as such, nor any member or other appointee, could receive any money or other property of the kind contemplated by the ninth section (McClel. Dig. p. 906, § 17) for safe-keeping or distribution, without having given the bond required by that section.

The purpose of the act of 1877 was to simply make the county treasurer in each county the custodian of moneys or other school property requiring safe-keeping; or, in other words, to devolve upon that officer the custody of such property as could not, before its adoption, have been received by any school officer without having given the bond referred to. The title to any school moneys which have been re-

ceived by the county treasurer is in the board of public instruction, and they are subject to its management and control as to disbursement for school purposes, to which it is alone applicable, just the same as they would have been if the act of 1877 had never been passed, and the same moneys were in the actual custody of the board of public instruction, or of any one of its members, or other appointees of it, after having given the bond mentioned above. The physical custody and responsibility for the safe-keeping of certain public property, the title and management of which, to the end of its legal and just distribution and use, are in one public corporate body composed of certain officers, has been given to another officer. It is the duty of the county treasurer to receive school funds, and safely keep them, and to keep correct accounts of them, and to make the reports required by law, (McCl. Dig. p. 323;) and in his hands they are subject to the orders of the board for school purposes, (section 25, p. 907.) A county treasurer who has misapplied county school funds committed to his custody, or has otherwise become liable for such funds, is not a debtor to his successor in office; but for the legislation referred to above he would be simply the debtor to the county in its corporate name and capacity, but this legislation having vested the legal title to such funds actually held by a county treasurer in the board, in trust, of course, for the body politic of the county, and given it the powers indicated above, the debt arising from a defalcation or other breach of official duty is due to the board as such trustee, and the action lies for its use in the name of the obligee in the bond, who, in the case before us, is the governor. The default of the treasurer is a breach of duty to the board in its official representative capacity. Murfree, Off. Bonds, §§ 468, 475.

It was held in *Hunnicut v. Kirkpatrick*, 39 Ark. 172, that the action could be maintained either in the name of the county treasurer, as the real party in interest, or in the name of the state, the obligee in the bond, as trustee of an express trust. Nevertheless we are satisfied that the board of public instruction, and not the county treasurer, is the real party in interest, in its public representative capacity, for the purposes of such an action under our statutory system controlling the powers and duties of these officers. That the action might have been maintained under section 72, p. 829, McCl. Dig., without joining the board, we do not deny. That section provides that a person in whose name a contract is made for the benefit of another may sue without joining with him the person for whose benefit the action is prosecuted, but this provision does not prevent joining with him the person for whose benefit the suit is instituted; and consequently there was no error in joining the board of public instruction, as has been done in this case, in accordance with a well-established practice in Florida in actions on the official bonds of revenue and other financial officers.

The fact that payments on account of a claim of this character should ultimate-

ly be made to the county treasurer is not a conclusive reason why the suit should be by him. They should be made to him because the law has made him the sole legal custodian of the school moneys, subject, however, to the rights and powers which the law has given the board; and it was competent for the law to do this, without doing more.

Our conclusion being that the circuit court erred in overruling the demurrer to the fourth plea, the judgment should be reversed, and the cause remanded for further proceedings not inconsistent with this opinion, and it will be so ordered.

HELM V. STATE.

(*Supreme Court of Mississippi*, April 28, 1890.)

HOMICIDE—FORMER JEOPARDY—LOSS OF INDICTMENT—EVIDENCE—PRACTICE.

1. Where, on the plea of former jeopardy, it appears that the jury were discharged before a verdict on the former trial, and it is claimed by the state that it was because of their inability to agree, the length of time allowed for their deliberation is a question of fact for the jury, and the sufficiency of the time is a question for the court.

2. In such case, on the question of whether the jury were discharged because they could not agree, the testimony of the trial judge, and of the jurors who were discharged, as to the facts which constituted the legal necessity for the discharge, and as to the failure to agree, is admissible.

3. Where during the progress of a trial the original indictment, on which defendant has been arraigned, is lost, and another indictment, identical with it, is returned by the same grand jury then in session, and substituted, and afterwards the original, being found again, is handed to the jury on its retirement, there is no error.

4. On a trial for homicide, declarations of the deceased made after his wounding, but not *in articulo mortis*, cannot be admitted on the ground that they were against declarant's interest.

5. A person is not disqualified to serve as a juror simply because he has a bad opinion of defendant's character.

6. Under Code Miss. 1880, § 1607, providing that the record of conviction of a witness of any "crime" may be given in evidence as affecting his credibility, and section 8105, declaring that "any violation" of law is a crime, within the meaning of section 1607, the record of the conviction of a witness for larceny of a hog, without felonious intent, is admissible to affect his credibility.

7. On motion to recall sentence and grant a new trial, a witness testified that one D. was present and heard the statements desired to be introduced in support of the motion, but no steps were taken to secure D.'s presence until three days afterwards, and the court then waited until the following day for him. The same witness testified that two other persons heard the same statements, but these persons, though they were subpoenaed and appeared, were not introduced. *Held*, that the court's refusal to wait longer for D. was not unreasonable.

8. Where one person, armed with a deadly weapon provided for the purpose, seeks for another to kill him, and on finding him provokes a difficulty in which he does kill him, he is guilty of murder, though the actual killing is done in self-defense.

This case was before this court at a former term, and will be found reported in 6 South. Rep. 322. The case was then reversed and sent back for a new trial, with leave to the state to reply to the plea of former jeopardy, which the state did, admitting the discharge of the jury, but averring that they were discharged be-

cause they could not agree. The defendant, Helm, made rejoinder. The issue was submitted to the jury, which found in favor of the state. The evidence of the trial judge was to the effect that he had discharged the jury because of communications from them that they could not agree, and the evidence of the jurors on that trial was to the effect that they could not agree. During the progress of the trial the original indictment was misplaced, and it was substituted by the grand jury then in session; but before the case was given to the jury the original indictment was found, so that in fact the defendant was arraigned, and the verdict was returned, on the original indictment. The trial resulted in the conviction of the defendant for manslaughter, and a judgment sentencing him to 10 years in the penitentiary, from which he appealed.

Cahoon & Green, for appellant. *T. M. Miller*, Atty. Gen., and *R. N. Miller*, Dist. Atty., for the State.

WOODS, C. J. The plea of former jeopardy alleged that the jury on the former trial retired to consider of their verdict at 4:30 P. M., June 23d, and were discharged on the morning of the 25th at 11:30. The sufficiency of time for due deliberation had by this court, on the former appeal, been declared to be established *prima facie* on this undenied allegation as to the length of time employed by the jury in deliberation. This allegation as to time was confessed and undisputed by the state on the last trial of the defendant's plea. Its sufficiency for due deliberation, *prima facie*, had been passed upon by this court affirmatively, and this *prima facie* case was not destroyed by any evidence offered on hearing of this plea of defendant; and the propriety or necessity of submitting to the jury the question of the sufficiency of the time for due deliberation shown to have been consumed by the jury in considering the cause, is not apparent to us. The question of the time itself was one of fact, which really needed no proof, as no issue on the allegation of the plea, as to time, was raised by any pleading of the state. The manner in which the jury employed its time, and the facts showing whether there was legal necessity for its discharge, were questions for the jury's determination. The issue on which the jury passed was, clearly, that of the existence of facts showing legal necessity for the discharge. Without dwelling in detail on the various steps taken to bring the pleadings to a definite issue, it is sufficient to say that the court finally and substantially submitted to the jury this question of fact, viz., were the jury discharged on the former trial of defendant because they could not agree? If the issue was found affirmatively, then the legal necessity was made out. If the issue was found negatively, then the legal necessity did not exist, and the prisoner was entitled to discharge. We are of opinion that the real issue was properly made up and submitted to the jury, and we are of the further opinion that the jury properly found the issue for the state. This view seems, virtually, to be conceded to be correct by appellant's

counsel; for in discussing this branch of the case, we find this sentence in counsel's brief: "Time was susceptible of proof, and the court could decide upon its sufficiency, if the issue was left to the jury." This is in perfect accord with our view. The time consumed by the jury was one of fact, and susceptible of proof. The sufficiency of time for due deliberation was a legal question, for the court, and one that was not to be submitted to the jury.

But it is insisted that the testimony of the trial judge who presided on defendant's former trial below, as well as that of the jurors who were discharged on that trial, was improperly given to the jury. We are at a loss to imagine why the facts on which the trial judge acted in considering the question of legal necessity for discharge,—the facts then in his possession, and which satisfied his mind that the jury could not agree,—and the facts disclosed by the jurors themselves, which demonstrated that they could not agree, were not competent evidence on the trial of the issue presented. It occurs to us that this evidence of the judge and the jurors was not only free from objection, but was the very best evidence that could have been offered.

As to defendant's second plea, of former jeopardy, we are of opinion that there was no error in the action of the court below, in its dealing with this plea. The defendant was arraigned, and the verdict rendered, on the original indictment. During the progress of the trial, it was ascertained that this indictment had been lost; and the state was permitted to substitute another indictment, then returned into court by a grand jury, at the time in session, identical with the lost one. But before the case had been given to the jury the original indictment was found, and was handed to the jury on its retirement; the substituted one having been withdrawn. The defendant was not in any way prejudiced by this action. Indeed, it is impossible to conceive how any hurt could have occurred to him by this course. We cannot bring ourselves to sanction for a moment the idea that, whenever an indictment, which is a criminal pleading, is lost or mislaid or stolen during the progress of a trial for a capital felony, there can be no substitution of the missing paper, but that in every such case there must follow the discharge of the prisoner. We hold to the reasonable rule that a criminal pleading, like any other, may be supplied by substitution, in some proper way,—in the manner prescribed by law.

Touching the error alleged by defendant's counsel, to be found in the refusal of the court to permit the witnesses Johnson and Dickson to testify to what King, the deceased, said after his wounding and before his death, we are of opinion that the action complained of was altogether proper. The record shows that this testimony was sought to be introduced as containing the dying declarations of the deceased; but this proposition is so palpably indefensible that it is abandoned here, and its attempted introduction sought to be justified on the ground that they were declarations made against the declarant's interest, and

therefore admissible here, as in civil proceedings. This doctrine has never received the sanction of any court, so far as we are advised, nor does the able and astute counsel offer any support derived from reason. We cannot see the slightest analogy between declarations made against interest by a suitor in a civil proceeding and declarations by a slain man, not made *in articulo mortis*, under a sense of impending dissolution, and after an abandonment of all hope by the declarant. How any declaration can be said to be against the interest of a man already passed into the other world, and beyond the reach of every earthly tribunal and all earthly power, is wholly incomprehensible to us.

The assignment of error which raises the disqualification of the juror Johnson because of his prejudice is not well taken. There is nothing in all the evidence on this proposition which is even persuasive to show that Johnson was not altogether competent to serve as a juror. The juror is not shown to have ever heard what the evidence, or any part of it, was, before he heard it in the jury-box; and it seems impossible that he could have either formed or expressed an opinion as to defendant's guilt, in the absence of proof of any knowledge of the evidence. He is shown, fairly well, to have had not a favorable opinion of the character of the accused, and perhaps no better opinion of that of the deceased; but, if a good opinion of the character of every accused person shall be held requisite for qualification for jury service, then the worst class of criminals must, ordinarily, go unwhipped of public justice. There was no hostility or unfriendliness to the man. There was, at the most, disapprobation of his unlovely character. But this did not and should not be held disqualification as a juror. Nor was there such evidence of a preconceived opinion as will warrant us in saying the court below was not justified in refusing to believe that the juror, in this instance, was so biased as to unfit him for jury service.

The introduction of the record of the conviction of defendant's witness Mise on a charge of larceny of the taking a hog, without felonious intent, was not error. Under section 1607 of the Code of 1880, the record of the conviction of a witness of any "crime" may be given in evidence, as affecting the credibility of such witness; and section 3105 declares that any "violation of law" is a crime, in the general sense in which that word is employed in section 1607.

It is contended for appellant that the refusal of the court to wait longer for the witness Defoor, that he might testify on defendant's motion to recall the sentence and for a new trial, is also error. The judgment of the court below in overruling defendant's motion for a new trial was made on the 9th day of December. In support of that motion for a new trial, a witness (Bell) testified that Defoor was present and heard the statements desired to be introduced as showing why sentence should be recalled and a new trial awarded; and yet no steps were taken by defendant to secure Defoor's presence until the 12th day of December, though defend-

ant and his counsel were both in court when Bell made his statement touching Defoor's knowledge of the facts on this point. The court did await Defoor's arrival until some time during the day following, and then, declining to wait longer, overruled defendant's motion. There were two other persons who were said by the witness Bell to have been present and heard the statements, to testify concerning which Defoor was desired as a witness. These witnesses were duly subpoenaed and appeared, and neither were introduced by defendant in support of his motion. Under all the circumstances, we cannot say the court's action was either arbitrary or unreasonable.

We deem it necessary to consider only one other assignment of error. The 9th instruction for the state is in these words: "If the minds and consciences of the jury are fully satisfied, by all the evidence in this case that Helm was hunting King to kill him, armed with a deadly weapon provided for that purpose, and that, when he found King, he provoked a difficulty with King, or was the aggressor in the difficulty with King, in which he killed King, then he is guilty, even though he killed King in self-defense." We see no error in this charge, under the facts proved on the trial. It is in complete harmony with the law as announced in *Cannon v. State*, 57 Miss. 147, and in *Allen v. State*, 66 Miss. 385, 6 South. Rep. 242. There could be no other rule of safety, so long as the violent hunt up their victims to slay them. How shall a man be heard in a court of justice to discourse of the divine right of self-defense while his hands are yet red with the blood of the object of his malice, whom he has sought out for the purpose of killing, armed suitably to accomplish his murderous design, but whom, having found, he has provoked or driven into a rencounter, and then put to sudden, cruel death? Let it be understood, at any rate, that such plea of self-defense will not avail to save in this court of last resort.

The judgment of the court below was abundantly warranted by the evidence, and is approved by us. Affirmed.

JONES et al. v. GADDIS.

(Supreme Court of Mississippi. April 28, 1890.)

ADVERSE POSSESSION.

1. In ejectment for a tract of land lying between two plantations, plaintiff showed a valid paper title under the former owner of one of them. Defendants showed that B., who owned the other plantation, had, in 1856, surrounded it with a hedge, inclosing the tract in question, which he claimed as part of his land; that he and his heirs continued in possession, cultivating and controlling the tract until the war, during which the plantation was abandoned, though there was always the *animus revertendi*; that after the war B.'s heirs retook possession of the land, including the tract in question, though it was then unfenced and uncultivated; that in 1874 they put an agent in charge, who took possession of the land, including this tract, and who has remained in possession ever since; that in 1885 he inclosed part of the plantation, including the tract in controversy; that this tract was recognized throughout the neighborhood as part of the plantation, and that neither plaintiff nor any one under whom he claimed had ever asserted title thereto until 1889. *Held*, that defend-

ants, claiming under B., his heirs and vendees, showed a good title by adverse possession.

2. The entry of plaintiff under a valid deed of the adjoining plantation, in which was included the tract in controversy, and his actual occupation of all the land thereby conveyed except this tract, to which he asserted no claim, was not such possession under color of title as could divest defendant's adverse title.

Appeal from circuit court, Madison county; J. B. CHRISMAN, Judge.

Nugent & McWillie and Smith & Powell, for appellants. *F. B. Pratt*, for appellee.

WOODS, C. J. This was an action of ejectment brought by Gaddis for the S. $\frac{1}{4}$ of N. $\frac{1}{4}$ of N. $\frac{1}{4}$ of S. $\frac{1}{4}$ of section 8, township 8, range 1, in Madison county. The plaintiff claimed under title derived from Thomas Shackelford, and offered in support of this claim a deed from one Breck, the assignee in bankruptcy of said Shackelford, to one Allen, plaintiff's vendor, and in addition alleges entrance upon and occupation of this particular parcel of land, in addition to the otherlands constituting the Shackelford plantation, for more than 10 years. Jones and his co-defendant below claim by virtue of the actual, open, and adverse possession, for nearly 35 years, by W. L. Balfour and his heirs and their vendees, under the belief that the land in question was part of the Balfour plantation. They show that, as far back as the year 1856, (how much earlier does not appear,) Balfour claimed this particular lot, and had, before the date named, put a hedge around his entire plantation, including this particular piece of ground, and that, up to the year 1859, the date of Balfour's death, he had cultivated and controlled it as a constituent part of his plantation; that Balfour's heirs, and the purchasers under them, have been continuously, notoriously, and adversely in possession from the date of Balfour's death until the present day.

The multiplicity of questions touching the regularity of the tax-sale of the land, and the validity of the tax collector's deed to the state, and the sufficiency of the certificate of the auditor of public accounts to show investiture of the title of the state in Shackelford; the validity or invalidity of the deed from Breck, Shackelford's assignee in bankruptcy, to Allen, the vendor of Gaddis, the plaintiff herein below; and the state of the title as affected by the rights of Hill, to whom Shackelford conveyed the land, in 1860, and out of whom the record in this case shows no divestiture of title, and the rights of McMicken and Fearn, the trustees to whom Shackelford conveyed the property in 1866, to secure his creditors,—we pass by as matters of curious and interesting speculation merely, in view of the opinions which we entertain and the conclusion at which we have arrived.

Let us concede the validity of the deeds offered in evidence on the trial below by Gaddis, and the regularity of the proceedings by which these deeds were acquired, and let us also concede that Gaddis obtained a valid paper title to the land, by virtue of the conveyance from Breck, Shackelford's assignee, to Allen, Gaddis' immediate vendor, in 1871, as well as to

Shackelford's entire plantation, and the inquiry remains, how will the rights of those claiming under Balfour be affected? To answer this inquiry, it becomes necessary to examine the attitude of Balfour and his heirs and their vendees, before and at the time of and subsequent to this sale by Breck, Shackelford's assignee, to Allen, the plaintiff's vendor.

As early as the year 1856 (how much earlier does not appear, as has already been said) we find W. L. Balfour in possession of this lot of land, claiming it, cultivating it as part of his inclosed plantation, and exercising the usual rights of ownership over it. We find the dividing line between the plantations of Balfour and Shackelford (whether by agreement and consent or by mistake we do not know) had been so established and permanently marked by a hedge row as that the lot of land now in dispute was placed in Balfour's plantation, and inside the general hedge inclosing all Balfour's lands, and this condition remained undisturbed and uncomplained of until the death of Balfour, in the year 1859. After Balfour's death we find his heirs still possessing and cultivating the land as their ancestor had done, and we find Hill, to whom Shackelford had sold his plantation in 1860, acquiescing in and recognizing the claim of the Balfours to the now disputed territory. We find that, during the continuance of the late civil war between the states, agricultural operations on the Balfour plantation were practically suspended, and the place itself, now and then, as the exigencies of active hostilities demanded, was abandoned. But we find, too, there was always the *animus revertendi* in the heart of the refugees, and an actual return when the storm had swept by, and a repossession of the abandoned home and domain. We find, with the close of the war, that the cultivation of the Balfour plantation practically closed, and, except in little patches, (as the evidence denominates them,) the once fertile and valuable lands have lain out, open and unfenced and untilled. We find in 1874 that the last Balfour ceased to personally look after and control the plantation, and that Col. Kearney was then put in possession and charge of the same, as agent of the Balfours, and that he took possession of all the Balfour lands, including the 40 acres in controversy, and that he has so continued in possession ever since. We find that, in the year 1885, Kearney inclosed with a wire fence a part of the Balfour plantation, and that the entire lot in controversy was embraced in this inclosure. We find that the land in dispute was universally recognized in the neighborhood as a part of the Balfour plantation. We find no assertion of claim or right to the land on the part of Shackelford or Hill or Allen, ever at any time. We find Gaddis, the plaintiff, only asserting any claim in the year 1889.

Having thus examined the attitude of the Balfour heirs and claimants, together with the circumstances marking their possession, let us turn to the alleged entry and possession of Allen, under his conveyance from Breck, assignee of Shackelford.

We find that not only the facts evidencing the claim and possession of the defendants are not disputed, but that it is affirmatively made to appear by plaintiff that at Capt. Priestly, who always represented Allen, never was in actual possession; for he testifies that he does not know whether he ever so much as went on the lot of land, and, in fact, he is unable to say that he even certainly knows where the lands really lie. Allen himself is not shown ever to have seen the land, and Breck's deed to Allen was only put on record in the month of October, 1886.

Now, then, under the doctrine announced by this court in *Metcalfe v. McCutchen*, 60 Miss. 145, it is clear that Balfour or his heirs and vendees have acquired, under their claim to possession of the land, a title thereto, unless the entry of Allen, under his deed from Breck, assignee, upon the Shackelford plantation, drew to him the constructive possession of this particular lot, which was named in his said deed in connection with all the lands making up the Shackelford plantation, and so put an end to the claim and possession of the Balfours and their vendees. The rule is laid down as stated by appellee's counsel, in *Hanna v. Renfro*, 32 Miss. 125, that "it is well settled that, where a party enters under color of title, he is not considered as a mere disseisor, and confined to the part of the premises in his actual occupancy, but his claim extends to all the lands embraced in the deed under which he claims."

The rule is correct, but this limitation upon the rule must not be overlooked, viz.: "If the title was only void as to a part of the land conveyed, the occupation of that part to which the grantor had title will not give the grantee constructive possession of the other part to which he has no title, so as to dislodge the real owner;" and, to divest the rightful owner "of the whole tract described in the deed, the partial occupation must be of such a character as to give rise to a reasonable presumption that the owner knows that the entry was made under color of title; and if this presumption be not reasonable, under the circumstances of the case, the disseisin will not extend beyond the actual occupation." *Tied. Real Prop.* § 696. See *Bailey v. Carleton*, 12 N. H. 9; *Jackson v. Woodruff*, 1 Cow. 286; *Osborne v. Ballew*, 12 Ired. 373; *Seigie v. Louderbaugh*, 5 Pa. St. 490.

Applying these principles to the facts of the case at bar, and conceding for the Breck deed to Allen all that appellee insists upon, it is nevertheless apparent that there was no disseisin of the Balfour claimants of the lot in question, and that the actual occupation of the Shackelford plantation proper by Allen did not give him constructive possession of this particular parcel upon which he did not enter, and which the Balfours and their vendees continued to claim and occupy.

It follows, in our opinion, that, as against Shackelford and those claiming title derivatively from him, the claim of the Balfour heirs and their vendees has ripened into a valid title. And conceding the validity of the tax-deed from Moor-

man, tax collector, and the sufficiency of the auditor's certificate to show a sale by the state to Shackelford, (as to which we express no opinion,) yet it is manifestly apparent, from an inspection of the record before us on this point, that this title did not pass to Allen by the deed of Breck, assignee.

Reversed and remanded.

WALKER et al. v. WALKER et al.

(Supreme Court of Mississippi. May 5, 1890.)

WILLS—ATTESTATION—FINDINGS OF COURT.

1. A will was prepared at testator's dictation, and at his request three persons were called to witness its execution. The paper was then handed to him, with the remark, "Here is your will," whereat he put on his spectacles and either read or glanced over it, and then signed it. He then asked the witnesses if they could identify his signature, and, after examination, they said they could and thereupon subscribed it within a few feet of him and where he could see them by turning his head upon the pillow, which he was easily able to do. Held a sufficient attestation.

2. Where a jury was waived, and the issue submitted to the chancellor, his finding will not be disturbed, unless without evidence to support it.

Appeal from chancery court, Marshall county; J. G. HALL, Chancellor.

J. H. Watson, for appellants. Fant & Fant, for appellees.

WOODS, C. J. The issue *devisavit vel non* was tried before the chancellor, the parties having waived a jury, and the issue was found for the contestees. We must treat this finding as that of a jury, and decline to disturb it, unless unsupported by evidence. Briefly, the facts are that the will was prepared at the dictation of the testator about ten days before its execution, and that on that occasion the three subscribing witnesses were called in, at the request and desire of the testator, to attest the execution of the instrument. There is evidence to the effect that, after the witnesses had been informed of the purpose in calling them in, and had been introduced into the testator's sick chamber, the drawer of the paper handed it to the testator, with the remark, "Here is your will;" and that the testator, after calling for his spectacles and putting them on, either read or glanced over the will, and signed it thereupon, in the presence of the witnesses. There is also evidence that, immediately after the testator had signed, he inquired of witnesses whether they could identify his signature, and that, after examination, they declared their ability to do so. The whole evidence (with only a single variant note) declares that the instrument was at once attested by the subscribing witnesses, in the testator's room, within a few feet of him, as he lay upon his bed, and that the testator could have witnessed this attestation, if he had so desired, having only to turn his head to see what was done. That he was abundantly able physically to move his head is perfectly manifest.

On this statement of fact, it plainly appears that the instrument was dictated by the testator, and signed by him with knowledge of its character and contents,

as and for his will. This meets all the requirements of our statute as to publication, provided the subscribing witnesses attested by signing in the testator's presence. We have no doubt, from all the evidence, that the witnesses signed in the presence of the testator. He might readily have seen the attestation, if he wished to do so, by merely turning his head upon his pillow. "When the testator, having a mental consciousness of the act which is performed, in consequence of the position in which he lies upon his bed, does not actually see the attesting witnesses subscribe their names, the attestation will be good, provided he had the physical ability to change his position, and by doing so could have seen the proceeding." *Watson v. Pipes*, 32 Miss. 451. The attestation would appear, therefore, to have been altogether sufficient.

Affirmed.

WILSON et al. v. SYKES.

(*Supreme Court of Mississippi*. May 5, 1890.)

TAXATION—REDEMPTION—LIMITATION—INFANCY.

Code Miss. § 531, provides that the owner of lands sold for taxes may redeem within one year, and that infants and persons of unsound mind may redeem within a year after attaining full age or sanity. *Held*, that where adults and infants are co-tenants of lands sold for taxes, and the limitation has expired as to the adults, the infants can only redeem their interest, and not the whole tract.

Appeal from chancery court, Monroe county; B. McFARLAND, Chancellor.

The ancestor of appellants (minors) left certain land, which descended to the appellant minors and certain adult heirs. Said land was sold for taxes, and bought in by the appellee, Sykes. After the period for redemption as to the adult heirs had expired, and the tax-title had become good as against them, the appellant minors, by their next friend, filed a bill to redeem the whole, (said minors owning one-seventh interest in said land.) There was a decree allowing said minors to redeem their one-seventh interest, from which they appealed, because not decreed to redeem the whole of the land so sold. The adult heirs to the land were not made parties to the suit.

Gilleylen & Leftwitch, for appellants.
Sykes & Richardson, for appellee.

COOPER, J. The court decreed to the complainants the right of redeeming from the tax-sale their full interest in the lands, and this was all to which they were entitled. The statute, (Code, § 531.) after providing a right to the owner of lands sold for taxes to redeem within one year, saves "to infants and persons of unsound mind, whose lands may be sold for taxes, the right to redeem the same within one year after attaining full age or sanity. The saving is to the infant to redeem his lands, and not the lands of another. It has reference to the estate or right of the infant, which it preserves from final loss by tax-sales during his minority. But neither the letter nor purpose of the law extends the right secured to the infant to the protection of an adult co-tenant of the lands sold. The complainants have no just

ground of complaint of the decree. It has given them a right to redeem their interest in the lands. The adult co-tenants cannot assign error of the decree, for they were not parties to the suit, and, if they had been, their right of redemption has long since expired. The subject under consideration was fully examined by the supreme court of Iowa in the construction of a statute of that state similar in its effect to ours. The court reviewed the authorities relied on by Mr. Blackwell for the proposition that infants having an undivided interest in a common estate must redeem the whole, and therefore may redeem the whole, and showed that they did not support the rule announced. *Jacobs v. Porter*, 34 Iowa, 841.

The decree is affirmed.

FELD et al. v. PORTWOOD.

(*Supreme Court of Mississippi*. May 5, 1890.)

WRONGFUL ATTACHMENT—REFUSAL OF CREDIT.

Plaintiff's agent presented a bill to defendant, which the latter offered to pay if a certain undisputed credit were allowed thereon. The agent refused the offer, and immediately attached defendant's property. *Held*, that the attachment was wrongful, and damages were properly awarded therefor.

Appeal from circuit court, Leflore county; J. B. CHRISMAN, Judge.

Appellants, Feld & Silverberg, by their agent, attached the appellee, Portwood, on a debt. Portwood did not dispute the debt, but claimed a credit which he had paid, and offered to pay the balance. The jury found that the attachment was wrongfully sued out, and found damages against Feld & Silverberg therefor, on which judgment was entered. Plaintiffs appealed.

Rush & Gardner, for appellants. *Coleman & Barry*, for appellee.

COOPER, J. The uncontroverted fact that Portwood, the debtor, offered to pay to the plaintiffs' agent the total sum due to them, and the manifest effort of the plaintiffs to pervert the laws relative to attachment by suing out the writ because Portwood would not pay the account as presented, waiving a credit to which he was entitled by reason of a payment theretofore made by him on the account, relieves us of the duty of considering the errors assigned to the action of the court upon the instructions.

There is no pretense of support to any claim by the plaintiffs of a real dispute between them and the defendant in reference to the sum due them. Their agent presented an account, which Portwood offered to pay if credited with a former payment he had made, as to which payment there is no dispute. The agent refused to accept his money, and recklessly, and apparently maliciously, sued out an attachment for the whole of the account. Whatever rights of attaching are given by our laws are given to enable creditors to collect their debts against debtors refusing to pay what they owe; they cannot be invoked by a creditor whose debtor offers to pay all that he owes. Our remarks are, of

course, applicable to cases such as this, in which there is not, and has not been, any real controversy or dispute between the parties as to the amount of the debt, and an undisputed offer to pay the sum due is shown.

The judgment is affirmed.

MITCHELL v. STATE.

(*Supreme Court of Mississippi*. May 5, 1890.)

LICENSE TAX—SEWING-MACHINE AGENCY.

Under Code Miss. § 585, which imposes a tax on sewing-machine agencies, a place where machines are stored, and from which they are taken by persons who seek purchasers in their homes, is an "agency," although the books of account are not kept therein; and, where the tax due on such a place has not been paid, the person in charge thereof is properly convicted of a violation of the law.

Appeal from circuit court, Lauderdale county; S. H. TERRAL, Judge.

Code 1880, § 585, imposes a privilege tax upon sewing-machine agencies, and under the law cities and towns are permitted to levy, for municipal purposes, a certain per centum of the state tax on all callings and privileges taxed by the state. The city of Meridian had imposed a tax on sewing-machine agencies. Appellant, Mitchell, was in charge of the Singer sewing-machine agency there, and, failing to pay the tax, was proceeded against, convicted, and judgment rendered against him, from which he appealed.

T. A. Wood, for appellant.

COOPER, J. The establishment at Meridian is a sewing-machine agency, within the meaning of section 585 of the Code. The fact that the course of business was to supply agents from the room who made sales by seeking customers at their homes, instead of selling at the place where the machines were kept, does not so change the character of the business as to exempt it from paying the privilege tax imposed. The legislature, in dealing with the subject of privileges, taxed them in reference to the known and usual course of business, and the burden imposed cannot be evaded by changes in the mere form of transacting the business intended to be taxed, nor by parcelling out among several the duties usually pertaining to one.

The fact that the building in which the agency was established was rented by the Singer Sewing-Machine Company; that the agency was established by Weeks, who lived in Mobile; that a lady was employed to keep the account of stock, and to charge up the machines delivered to those who were employed to sell them; that these agents made their first reports directly to the office in Mobile; and that the accounts were returned to Mitchell, the appellant, for collection,—are insufficient to negative the existence of a taxable agency in this state, or to relieve those actually engaged in its operation from the duty of paying the tax imposed by law. The effort to so divide the responsibility of its management as to leave no one liable to indictment for failure to pay the tax is in vain. The danger is rather that each of the numerous managers may be held to

be indictable than that either may escape.

Weeks having escaped conviction, it is not necessary to express an opinion relative to his guilt or innocence. The conviction of the appellant is supported by the evidence, and the judgment is affirmed.

HEFLIN, County Treasurer, v. KINARD.

(*Supreme Court of Mississippi*. May 5, 1890.)

SUSPENSION OF LIMITATIONS—NEW PROMISE.

Where a new promise was relied on to prevent a bar by limitation of a note held by a county treasurer, the fact that a messenger carried from the promisor to a subsequent treasurer a letter which contained \$25, and according to witnesses' memory read, "Inclosed I hand you \$25, which you will credit on my note in the county treasury. I will come down soon, and pay you the balance of the note," was sufficient proof of the new promise to prevent a bar.

Appeal from chancery court, Itawamba county; B. McFARLAND, Chancellor.

Newnan Cayce, for appellant. Clayton & Anderson, for appellee.

COOPER, J. W. J. Kinard, Sr., on the 15th of March, 1881, executed his note for the sum of \$160, payable on the 1st day of June next thereafter, to J. W. Brown, county treasurer of Itawamba county, or his successor in office, and to secure the same executed a deed of trust upon the lands described in complainant's bill. In July, 1887, Kinard, Sr., conveyed the lands to his son W. J. Kinard, Jr. In November, 1887, Heflin, the successor in office of Brown, caused the lands to be advertised for sale by the trustee for the payment of said note; and thereupon Kinard, Jr., exhibited this bill to enjoin the sale, upon the ground that the debt secured was barred by limitation. The defendant answered, setting up a new promise in writing by Kinard, Sr., made in March, 1884, to one Wiygul, then county treasurer, to pay the note.

The case turns upon the sufficiency of this new promise to prevent the bar of the statute of limitations. The evidence shows that on or about the 20th of March, 1884, Kinard sent by one Cayce the sum of \$25 to Wiygul, to be credited on the note in controversy, and at the same time wrote to him a letter, which has been lost or destroyed. Cayce was examined as a witness, and testified that Kinard read the letter to him, and that its contents were substantially as follows: "Inclosed I hand you \$25.00, which you will credit on my note in the county treasury. I will come down some time soon, and pay you the balance of the note." The witness states that it may be possible the words used were, "I will try to come down soon, and pay the balance of the note," but to the best of his recollection the words were, "I will come down soon," etc. Mr. Wiygul, the former treasurer, was examined as a witness, and he proved the receipt by him of the sum sent by Cayce on the 24th of March, 1884, and credited it on the note, which was the only note then held by the treasurer against Kinard, and that the contents of the letter was "about in these words: 'I will be down soon, and I will pay off the balance of the note.'" "I am

not certain that these were the exact words of the letter, but it is the substance. He also said, 'Give me credit on the note for the \$25.'

It is supposed by counsel that the cases of *Trustees v. Gilman*, 55 Miss. 148, and *Eckford v. Evans*, 56 Miss. 18, are decisive against the sufficiency of the new promise here proved. In this counsel are in error. In *Trustees v. Gilman*, the suit was upon an account stated, and *assumpsit* for rent due and for money loaned. The new promise relied upon was this writing: "To Board of Trustees, C. F. Institute, Canton, Miss.—Gents: It would suit my convenience to execute my note for balance due for rent payable Jan'y 1st, 1877. J. J. GILMAN." This instrument was held insufficient, because it failed to identify the debt referred to. The court said: "It mentions a balance due for rent, but does not state when, nor for what, nor to whom the rent accrued, nor what the balance was. To allow all these things to be proved by parol would produce the evil the statute requiring an acknowledgment or promise in writing, to save the bar of the statute, was intended to prevent."

In *Eckford v. Evans* the writing relied on was this: "I wrote to Mr. McKnight about the first of this month to know how I should send the money, and have not heard from him. I am going to Aberdeen to-morrow, and will send fifty dollars, which is all I can possibly spare at present," etc. It was said by the court that this writing "does not refer to any particular indebtedness, nor, indeed, to any debt whatever, except inferentially. * * * This is not such written waiver or promise as is intended by the statute."

The decisions in these cases are not applicable to the facts disclosed in the present record. The promise here was to pay the note held by the county treasurer against Kinard. The note in evidence is proved to be the only one held by him against Kinard, and the amount due thereon was capable of being definitely and accurately ascertained by mere computation of interest and application of credits appearing on it. It has never been held in this state that parol evidence is inadmissible to apply the writing to its subject, and, this being done here, there is no uncertainty as to what debt was meant by the writer.

The decree is reversed, the injunction dissolved, and bill dismissed.

BROOKS V. STATE.

(*Supreme Court of Mississippi*. May 12, 1890.)

BREACH OF THE PEACE—OFFENSIVE LANGUAGE.

A charge that defendant did willfully disturb the peace of one H. by saying to him that, if he did not "dry up," he would "slap hell" out of him, and that, if he got up out of that chair, he would kill him, does not allege a criminal offense, under Code Miss. § 2769, punishing the willful disturbance of the peace of any family or person by loud or unusual noise, or by any tumultuous or offensive conduct, nor under section 2770, making it an offense to enter the dwelling-house of another, and, in the presence or hearing of the family or of any member thereof, make use of "abusive, profane, vulgar, or indecent language."

Appeal from circuit court, Lee county; L. E. HOUSTON, Judge.

The sections of the Code of 1880 referred to in the opinion are as follows: "2769. Any person who willfully disturbs the peace of any family or person by an explosion of gunpowder or other explosive substance, or by loud or unusual noise, or by any tumultuous or offensive conduct, shall," etc. "2770. Any person who enters the dwelling-house of another, * * * and, in the presence or hearing of the family of the possessor or occupant thereof, or of any member thereof, * * * makes use of abusive, profane, vulgar, or indecent language, * * * shall," etc. The appellant, Brooks, was arrested and brought before a justice of the peace on an affidavit that he, Jim Brooks, did willfully disturb the peace of one Harris "by offensive conduct, to-wit, by saying to the said Harris that, if he did not 'dry up,' he would 'slap hell' out of him, and that if he, the said Harris, got up out of that chair, he, the said Brooks, would kill him," all done in a threatening and angry manner. Brooks made a motion before the justice of the peace to quash the affidavit because (1) said affidavit charges no offense; and (2) that the words set out in the affidavit do not constitute any offense under the Code. The justice overruled the motion, and gave judgment against Brooks, from which he appealed to the circuit court, where he again, for the same reasons, moved to quash the affidavit, which motion was overruled, and he was convicted and fined, from which he appealed to this court.

Clayton & Anderson, for appellant. *T. M. Miller*, Atty. Gen., for the State.

WOODS, C. J. The reasonable construction of sections 2769 and 2770 of the Revised Code of 1880 will demonstrate the error of the trial court in refusing to quash the affidavit on which this prosecution was based. It is obvious that these two sections were designed to prevent the disturbance of the peace of families, whether consisting of one or more persons. Section 2769 was intended to protect the family from the ruffianism of what is denominated therein "tumultuous or offensive conduct," and section 2770 was intended to protect the family from the rowdiness which is denominated therein "indecent and profane language," etc. Two offenses against the peace of families are created, viz., that which consists of offensive conduct, and then that which consists of offensive language. By section 2770 the use of the prohibited language is made criminal. By section 2769 the prohibited conduct is denounced. It would require a violent stretch of interpretation to hold that the legislature intended by these two sections to flood the courts with trifling and vexatious prosecutions for every merely offensive word spoken, even privately, to the individual citizen. The offense charged in this affidavit was not alleged to have been with a view to disturb the peace of a family, nor any single person constituting a family; nor is it alleged that there was any offensive conduct, as distinguished from merely offensive language.

Moreover, and apart from the sections themselves, the fact that the Revised Code of 1880 omits the provision of the Code of 1871, which declared actionable words indictable, is of itself strongly persuasive that the law-making power designed to cut off this source of much vain and annoying criminal prosecution.

Reversed and remanded.

WEISINGER v. COCKE *et al.*

(*Supreme Court of Mississippi*. May 5, 1890.)

DEED—DELIVERY AFTER DEATH OF GRANTOR.

A deed delivered by an agent, after the grantor's death, in pursuance of directions previously given by the latter, conveys no title.

Appeal from chancery court, Tunica county, W. R. TRIGG, Chancellor.

All the facts are fully stated in the opinion, except that J. E. Stone did die while he was in Florida, and that his deputy, after his death, delivered the deed to the grantee.

Powel & Powel, for appellant. *Perkins & Percy*, for appellees.

COOPER, J. Complainant exhibited her bill in this cause, against the heirs at law of J. W. Stone, to cancel as a cloud upon her title a certain deed under which the defendants claim title to the lands described therein. She states that her husband, J. E. Stone, was the owner of said lands, and died leaving no children, whereupon said lands descended to her as his sole heir at law. The facts in reference to the execution of the deed sought to be canceled, as stated in the bill, are that in October, 1882, the said J. E. Stone prepared, or had prepared, a deed conveying said lands to his father, J. W. Stone, which deed he put among his private papers in the safe, of which, as clerk of the chancery court of Tunica county, he had control, where it remained until some time thereafter, when the said J. E. Stone and complainant were about to start on a visit to the state of Florida because of the ill health of her said husband. At that time, J. E. Stone sent to his office for the deed, and acknowledged its execution before a proper officer; and, this being done, he handed the deed to one Jacques, his deputy, who had charge of all his papers, and directed him to put it back in the same place where it had been kept from the day he had signed the same, never intending to part with the control or possession of said deed while he lived, and not to deliver or record the same unless he, the said J. E. Stone, never returned,—meaning unless he died.

The complainant, by her bill, avers "that there was no delivery of said deed by said J. E. Stone to the said J. W. Stone, or to any for him. The intention of J. E. Stone was, if he died before he returned home from Florida, that the said Jacques was to deliver said deed to said J. W. Stone. If he did not die, then the said J. E. Stone was to have control of the same." The appellees demurred to the bill on the ground that the facts stated show delivery of the deed. The demurrer was sustained, and the complainant appeals.

The demurrer should have been overruled. No delivery of the deed is shown. On the facts stated, the deed was never out of the custody of the grantor. It was handed to Jacques, to be by him deposited among the private papers of the grantor, there to remain until his death, or until he should exercise his will over it by dealing with it according to his pleasure. The facts disclose no act or purpose of a present delivery, absolute or conditional. They are entirely consistent with the control of the deed by the grantor during his life, and inconsistent with his parting with any power over it. Mr. Stone evidently thought that he might dispose of his estate by a deed, executed according to the forms of law, of which he remained in possession and control, and which was to be operative only upon his death. In this he was mistaken. *Cook v. Brown*, 34 N. H. 460; *Brown v. Brown*, 66 Me. 316; *Prutman v. Baker*, 30 Wis. 644.

The decree is reversed, demurrer overruled, and defendants allowed 30 days in which to answer after the mandate shall have been filed in the court below.

WOODS v. STATE.

(*Supreme Court of Mississippi*. May 12, 1890.)

SHOOTING ON HIGHWAY—INDICTMENT—CREDIBILITY OF WITNESS—INSTRUCTIONS.

1. Where the defendant testifies in his own behalf, it is error to charge that, if the jury believed "that any witness who has testified in this case has any feeling or interest in the result of this trial, then the jury should consider such feeling or interest, in connection with all the evidence in the case, in determining how far, if at all, they will believe such witness, or consider such testimony."

2. Under a statute which denounces the offense of shooting "in" the highway, an indictment which charged defendant with shooting "on" the highway was sufficient.

Appeal from circuit court, Yalobusha county; W. M. ROGERS, Judge.

Appellant, Woods, was indicted for shooting on a public highway. The evidence for the state was that Woods fired a gun on the public highway, and that the shot fell around one of the witnesses for the state. Woods was introduced as the only witness in his own behalf, and testified that he did not shoot as stated by the evidence for the state; denied *in toto* that any such thing had ever occurred. The court below gave the following instruction for the state: "(1) If the jury believe from the evidence that any witness who has testified in this case has any feeling or interest in the result of this trial, then the jury should consider such feeling or interest, in connection with all the evidence in the case, in determining how far, if at all, they will believe such witness, or consider such testimony." Woods was convicted, when he made a motion in arrest of judgment, because the indictment did not charge any offense. This motion was overruled. Judgment was entered against him, from which he appealed.

I. T. Blount, for appellant.

WOODS, C. J. The motion in arrest of judgment was properly overruled. The

verbal criticism of counsel is ingenious and interesting in its philological aspect. But it is a legal anachronism to now plead to the sufficiency of an indictment that it charges a defendant with shooting "on" a highway, when the statute denounces shooting "in" the highway. The prepositions are interchangeable in this connection, just as they are in prosecutions for racing "on" the highway. In this sense, what occurs on the highway must be held to occur in it, also. The administration of the criminal law declines such subtle distinctions in definitions.

The case must be reversed, however, because of the error of the court below in granting the first charge asked by the state. The appellant was the only witness offered by the defense, and this first charge is clearly obnoxious to the condemnation pronounced in *Buckley v. State*, 62 Miss. 705. The only safety of the defendant lay in his own testimony; and, as was said with great force in the case just referred to, "he had the right to submit his testimony to the jury, to be judged of by it uninfluenced by any suggestions of its probable falsity, or an authorization to the jury to throw it aside as unworthy of belief because of the strong temptation of the defendant to swear falsely."

Reversed and remanded.

GRAHAM et al. v. JONES.

(*Supreme Court of Mississippi*. May 12, 1890.)

REPLEVIN—EVIDENCE—ALTERATION OF DEED OF TRUST.

Defendant, on receiving a deed of trust to secure a debt, inserted therein, without authority, a description of the replevied property, which plaintiff, on threat of a criminal prosecution, delivered to the trustee, and which was bought in by defendant at the sale. *Held*, in replevin for the goods, that a verdict directed for plaintiff was proper.

Appeal from circuit court, Lafayette county; W. M. ROGERS, Judge.

Graham & Son were merchants, and Jones had a running account with them for some years. On March 1, 1887, the account was closed; Jones giving a note for the balance due, and executing a deed of trust on horses, stock, etc., to secure the same. Default was made in payment of the note, and the trustee demanded the property. Jones surrendered all named in the deed as presented, except three colts, which he claimed had been inserted after his execution thereof; but, being threatened with a criminal prosecution for failure to turn over the three colts, he finally surrendered them to the trustee. The horses and colts were sold, and Graham & Son became the purchasers, whereupon Jones brought this action of replevin to recover them. The court instructed the jury to find for plaintiff, which was done, and judgment entered thereon, from which Graham & Son appealed.

Howry & Falkner, for appellants. *A. H. Whitfield*, for appellee.

CAMPBELL, J. Not being sure that the circuit judge was not authorized by the testimony to give the peremptory instruction complained of, and being clearly of

opinion that the deed of trust was altered materially by Graham after its execution, it is manifest that no right was acquired under the deed of trust, and a recovery by the plaintiff was the proper legal result.

Affirmed.

CROSS et al. v. HEDRICK.

(*Supreme Court of Mississippi*. Oct., 1888.)¹

HUSBAND AND WIFE—SEPARATE ESTATE—CONVEYANCE BY WIFE—LACHES.

1. A wife and her husband gave a deed of trust on the wife's land, which by its recitals was to secure an account due from the husband, and future advances to be made to the husband and wife jointly. The advances were made and the account kept in their joint names, a statement thereof being rendered to each. On settlement the land was sold under the deed to satisfy the debt, without any effort on the part of either the husband or wife to prevent it. *Held*, that the wife could not, after waiting eight years, sue to set the sale aside on the ground that the debt was due from her husband alone.

2. Nor can she, after such lapse of time, question the validity of the deed, or the sale under it, on the ground that the accounts were false, where, though the facts appeared on the face of the accounts, or were in her knowledge, she made no such objection either when the statement was rendered her, or in two subsequent suits against her husband and herself to enforce the debt.

Appeal from chancery court, Hinds county; WARREN COWAN, Judge.

Bill in equity by Nancy W. Hedrick against the widow, Daisy M. Cross, and the children, of E. K. Myrick. In 1876 complainant and her husband, H. A. Hedrick, executed to E. K. Myrick, a merchant, a deed of trust on lots in the town of Bolton, Miss., and on the crops to be grown that year on a plantation near the town, to secure a balance on account due from H. A. Hedrick, and future advances to be made, according to a recital in the deed, to Hedrick and complainant jointly. Both the lots and the plantation were the property of complainant. Advances were made, and a statement of the account, which was kept in the joint names of complainant and her husband, was given to each. On settlement of the accounts, the lots were sold under the deed of trust for the balance, Myrick becoming the purchaser. There being a balance still due after the sale, Myrick, to satisfy it, sued complainant and her husband in replevin, and recovered a lot of corn grown on the plantation. He also sued them in an action of unlawful detainer, and recovered possession of the lots. On the death of Myrick, in 1878, defendants took possession of the lots, and were in possession in 1886, when this suit was brought. The bill asks that the trust-deed to Myrick be canceled, and that defendants be made to account to complainant for the rents and profits from the lots while they were in possession, alleging that the deed was given to secure a debt due Myrick from H. A. Hedrick, and advances made to him on his own account; that complainant was only surety for her husband, and for that reason, the property being her own, the deed bound only the income therefrom. The bill also alleged errors and irregularities in the accounts for which the lots were sold. Defendants' demurrer was overruled, and

¹Publication delayed by failure to receive copy.

they answered, denying the allegations of the bill, and setting up the statute of limitations. The cause was referred to a commissioner, who opened up the old accounts between Myrick and complainant, and after an examination filed his report. On the hearing the sale under the deed of trust was set aside, and a personal judgment rendered against defendants for the rents and profits from the lots during their possession. Defendants appeal.

E. E. Baldwin and Calhoon & Green, for appellants. *J. & J. M. Shelton*, for appellee.

COOPER, J. The appellee is precluded of all relief sought by her on the facts stated in her bill by the lapse of time, and her acquiescence in what was done by the creditor, Myrick, in securing the payment of the account as rendered by him to the appellee and her husband. The deed of trust given to secure the payment of the account to be thereafter contracted, designated both herself and her husband as parties to whom the goods were to be sold. The accounts were kept by the merchant in their joint names, and were by him so rendered to them. No objection was then made that the debt was due by the husband alone, nor was the sale under the power in the deed prevented by resort to the courts. Having permitted the execution of the trust, she cannot, after the lapse of so many years, impeach the validity of the sale by evidence that, by an arrangement between her husband and herself, he was conducting business on her farm for his own exclusive benefit, by reason of which the debt secured was his debt, and the security given on her other lands bound only the income, and not the *corpus*, of her estate. This point is settled by the cases of *McDougal v. Bank*, 62 Miss. 667; *Walker v. Ross*, 65 Miss. 523, 5 South. Rep. 107.

If it be true, as alleged in the bill, that the goods sold were charged at exorbitant prices, that some of them were in fact never delivered, and that credits to which she was entitled were omitted from the account, the reply is that these objections should have been made when the accounts were rendered, or, at least, while the matter was *in fieri*. There is no suggestion that any of these facts were concealed from her by the creditor. She must have known them then, for, if they be true, they were shown by the face of the accounts or were in her knowledge. With such knowledge, she submitted to the sale of the land under the deed; was defeated in an action of replevin tried subsequently to such sale, in which it devolved on the creditor to establish the fact that there remained a balance due on the debt after credit had been given for the price of the land; was defeated in a possessory action for the land itself; and only after the lapse of nearly nine years does she seek relief against the wrong done her. If she desired to protect her property from sale on any one of the grounds upon which she now complains, she should have tendered the sum really due, and, if that had been refused as satisfaction, either to have enjoined the sale, or have given notice of her purpose to contest its validity. The creditor (who be-

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came the purchaser at the trustee's sale) was bound by it, and she was entitled to a credit on the account for the sum bid by him. If there were other credits which should have been previously given, and were not, there was a right in her or her husband to recover to the extent thereof in an action at law. Having lost that right by lapse of time, she cannot revive the demand, and secure an indirect recovery, by annulling the sale, to the end that credit may be given on the account. There is no equity in complainant's cause; wherefore the decree is reversed, and bill dismissed.

WHITEHEAD et al. v. CURRY et al.

(Supreme Court of Mississippi. May 26, 1890.)

TENANCY IN COMMON—NON-PAYMENT OF TAXES.

A husband and wife lived, with the wife's mother, on the latter's land, under an agreement whereby the husband was to pay the taxes. By mistake, the mother had the land assessed under a wrong description, and the husband paid the taxes, under such description, without knowledge of the error. The land was forfeited to the state for non-payment of taxes during this joint occupancy, and, after the expiration of the period of redemption, was purchased by third persons. Held that, after the mother's death, and after the husband and his family had ceased to occupy the land, it was no violation of any duty he owed to the mother's heirs, as tenants in common with his wife, for the husband to purchase the land from the third persons for the benefit of his minor children.

Appeal from chancery court, Wilkinson county; *W. R. Trigg*, Chancellor.

Action by *Van Allen Whitehead* and others, heirs at law of *Martha Robertson*, deceased, against *T. H. Curry* and others. From a judgment in defendant's favor, plaintiffs appeal.

Calhoon & Green and *T. V. Noland*, for appellants. *J. H. Jones*, for appellees.

WOODS, C. J. The original bill herein was filed in the chancery court of Wilkinson county for the purpose of having canceled a deed made from the state to *M. and C. Samuel* on November 5, 1886, and a deed made by the *Samuel brothers* to a part of the respondents on January 7, 1889, to the lands described in the bill as a cloud upon complainants' title. The bill avers that complainants are heirs at law of one *Martha Robertson*, deceased, and owners of an undivided five-sixths interest in 300 acres of land in section 2, township 2, range 4, of which lands said *Martha Robertson* had died seised and possessed; that *Thomas H. Curry* and *Elizabeth Curry*, two of the respondents, were husband and wife, and son-in-law and daughter, respectively, to said *Martha Robertson*; that, in 1880, said *Thomas H. and Elizabeth Curry* intermarried, and thereafter lived on the land in controversy with *Martha Robertson*, the mother of *Elizabeth Curry*, up to the day of *Mrs. Robertson's* death, in 1885; that these parties lived together on this agreement, viz.: That said *Thomas H. Curry* was to have the use of said lands rent free, and in consideration thereof was to care for and supply *Mrs. Robertson's* wants, and was, further, to pay the taxes on the lands, and keep the place in repair;

that in 1883 said Thomas H. fraudulently permitted the lands to be sold for taxes; that he fraudulently kept this fact concealed from Mrs. Robertson up to her death; that he fraudulently failed and declined to redeem the lands within the period of redemption; and that, for the purpose of procuring title to themselves or their children, the said Thomas H. and Elizabeth combined with M. and C. Samuel to fraudulently procure the state's deed to the lands to said M. and C. Samuel, with the further fraudulent purpose of having said M. and C. Samuel afterwards convey the title thus acquired to said Thomas H. and Elizabeth Curry or their children, and that, in pursuance of this fraudulent design and purpose, said M. and C. Samuel conveyed the lands so bought by them from the state to the children of said Thomas H. and Elizabeth Curry, the other respondents named in the bill. The bill alleges that, by reason of Thomas H. Curry's and Elizabeth Curry's relation to the land, and their relation to the complainants, as tenants in common, they were incapacitated to acquire this title derived from the state. Wherefore the bill was filed, and Thomas H. and Elizabeth Curry and their children, and M. and C. Samuel, are made respondents.

The answer of the Samuel brothers denies all charges of fraud made against them, but admits the purchase, on the suggestion of Thomas H. Curry, of the lands, with the twofold purpose of gratifying Curry's wish, and of making money out of the purchase. They admit they agreed, verbally, to give Curry the refusal of the sale of the lands, or an option on them, at such price as they and Curry might agree upon, and that they promised to wait a reasonable time on Curry to purchase, if he wished.

The answer of the children is the customary one of minors of tender age.

The answer of Thomas H. and Elizabeth Curry denies every charge of combination and fraud, but admits the principal facts alleged in the bill. They deny that Curry fraudulently permitted the lands sold, or that he fraudulently failed and refused to redeem, or that he fraudulently neglected to inform Mrs. Robertson of the forfeiture of her lands for non-payment of taxes, or that he combined with the Samuels fraudulently to acquire the title to himself or his children. On the contrary, they assert that the 300 acres of land had for a long series of years been erroneously assessed by Mrs. Robertson as in section 3, instead of section 2, in which it really was; that they had no knowledge of such erroneous assessment; and that, in pursuance of Curry's agreement, in good faith, he paid the taxes upon Mrs. Robertson's lands as she had them assessed, beginning with the year 1880, and ending with 1886, when he first learned of the error, and when he first learned of the sale to the state more than two years before. The answer further avers that the 300 acres of land in section 2, which Mrs. Robertson really owned, had been wholly dropped from the assessment roll for many years, and that they were only again restored thereto in 1883, when they were assessed to "un-

known" owner, and that Curry had no knowledge of this until 1886.

The evidence shows conclusively that Mrs. Curry was in total ignorance of all the matters embraced in the bill until afterwards. The evidence shows satisfactorily that the Samuels refused to lend Curry the money with which to buy the lands from the state when he approached them for that purpose, but that they bought as a business venture to make money, giving Curry an option on the lands, if he chose to buy in a reasonable time, and that, after waiting on Curry more than two years, and after their notification to Curry that they had kept the option open for him as long as they thought reasonable, Curry then bought at an advance of about 200 per cent. on the price paid the state by the Samuels. The evidence fairly supports the answer as to Thomas H. Curry's connection with the transaction. We have fully stated the pleadings and proofs, because a thorough apprehension of these is alone necessary in order to at once determine the entire case.

The charges against Mrs. Curry, who was the co-heir and tenant in common of the complainants, are utterly unsupported by any proofs. The charges against the Samuels are likewise not properly supported; and the Samuels, equally with all others, had a perfect right to purchase from the state. The title to the lands was in the state, and the period for redemption had expired, long before the Samuels ever heard of their forfeiture. Why should not they purchase, just as any other stranger might have done? Their only offense was the giving to Curry the option on the lands. We confess our inability to see how this made their purchase fraudulent.

As to Curry the record shows that the lands were forfeited for non-payment of taxes during his occupation of the premises in conjunction with Mrs. Robertson, the owner; but it is manifest, on the whole evidence, that the taxes on the lands were paid faithfully from 1880 to 1886 by Curry, in accordance with Mrs. Robertson's wishes, and precisely as she had herself had them assessed for very many years. It is reasonably certain that Curry supposed, until November, 1886, that the taxes on Mrs. Robertson's lands had been regularly paid, and that he had no knowledge of the error Mrs. Robertson had fallen into, and into which she had led him in the payment of the taxes, until that time. He was not her heir at law. He was not tenant in common with the complainants; and Mrs. Robertson's death, in 1885, had put an end to the agreement under which he had previously occupied the premises. The title of the state had matured by the expiration of the period for redemption, and the lands were open to the world for purchase. And this state of affairs had occurred without any default, much less any fraud, on the part of Curry. It is to be remembered, too, that Curry himself had ceased to reside upon the premises for a year or more antecedent to his purchase of the place from the Samuel brothers for his minor children; and the presumption is, also, from the record, that his entire family has

ceased to reside upon the lands before the purchase from the Samuels. Under these circumstances, we can see no legal objection to Curry's buying either for himself or for his children.

The decree of the chancellor was in harmony with these views, and is therefore affirmed.

JOHN VAN RANGE CO. v. ALLEN.

(Supreme Court of Mississippi. May 5, 1890.)

SALE—RESERVATION OF TITLE—NOTICE.

1. Code Miss. § 1800, provides that, "if any person shall transact business as a trader or otherwise," in his own name, and fail to disclose the names of his partners or principals by placing up a sign in his business house, all the property used in the business shall, as to his creditors, be treated as his property. *Held*, that where an hotel-keeper purchased a cooking-range under a recorded agreement that title was to remain in the seller until the price was paid, one who succeeded him as owner of the hotel cannot hold the range by virtue of this section.

2. Where the purchaser of an hotel had actual notice that a cooking-range therein was bought under an agreement that title was to remain in the seller until the price was paid, he cannot hold the range on the ground that it is a fixture.

3. A cooking-range fastened to the floor of an hotel is not a fixture.

Appeal from circuit court, Tishomingo county; L. E. Houston, Judge.

This is an action of replevin brought by appellant to recover from appellee a cooking-range. One Harrison entered into a written contract of purchase with one John M. Allen for a certain hotel. By said contract Harrison paid a small sum in cash, and was to pay the balance in the future; Allen agreeing to make title at "some convenient season." Harrison went into possession of the hotel with his family, and, desiring a new cooking stove or range, entered into a contract with the appellant, the John Van Range Company, for a range and its appurtenances. By the written agreement, which was recorded in the proper office, the title to this range was to remain in the appellant until Harrison should make payment in full therefor. Harrison paid a small sum on the range, and then died, without having acquired title thereto as per the contract. His family remained in possession of the hotel a few weeks after Harrison's death, and then abandoned it, turning it over to the appellee, R. H. Allen, as agent and tenant of John M. Allen. The appellee, R. H. Allen, had actual notice of the arrangement between the appellant and Harrison as to the range. But said appellee seeks to hold the range by virtue of section 1300 of the Code of 1880, and because it is a fixture attached to the freehold. Section 1300 reads: "If any person shall transact business as a trader or otherwise, with the addition of the words, 'agent,' 'factor,' 'and company,' or 'and Co.,' or like words, and fail to disclose the name of his principal or partner, by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name, without any such addition, all the property, stock, money, and choses in action used or acquired in such business

shall, as to the creditors of any such person, be liable for his debts, and be, in all respects, treated, in favor of his creditors, as his property." The case was tried by the judge without the intervention of a jury, and judgment was rendered in favor of the appellee, Allen, from which this appeal is prosecuted.

Candler & Candler, for appellant.

WOODS, C. J. The hotel-keeper not belonging to the *genus* trader, and Allen, the appellee, not being shown to stand in the relation of creditor to the deceased landlord of the Iuka Springs Hotel, and not having acquired possession or title to the property in question by any legal proceeding, we are wholly unable to see what applicability that statutory panacea, section 1300 of the Revised Code, had to the case at bar. We see no merit in the position, said to have been relied on by appellee in the court below, that this mammoth cooking-stove was a fixture, a part of the realty of appellee. By the words of the written contract between the appellant and Harrison, the hotel-keeper, the use of the range was secured to Harrison in his hotel, but the title of the property was distinctly retained by the appellant until Harrison had made full payment of the purchase money. Harrison had the use of the range in the hotel, (and was forbidden by the contract to remove it therefrom without appellant's consent,) and was entitled to retain possession until he made default in payment, with the right to have title vested in him on full payment of purchase money. Appellant retained title, and remained owner of the property, until fully paid for, and appellee had actual knowledge of this contract, and every one constructive knowledge; for the agreement, properly acknowledged by Harrison, was promptly put to record in the proper office. As was said in *Duke v. Shackelford*, 58 Miss. 555, "the agreement of the parties shows that the property, as between them, was to remain personalty, though annexed to the freehold." In the absence of any agreement, however, on the facts of this case, we are unable to see any plausibility in the contention that the property here is a fixture. It will be time enough to revise the former rulings of the court on this subject when an attorney of this court can be found to assert that a cooking-stove partakes of the nature of real estate, even though it is fastened to a floor.

The judgment of the court below was clearly erroneous, and is accordingly reversed.

ARMSTRONG *et al.* v. GUENTHER.

(Supreme Court of Mississippi. May 12, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

An assignment with preferences, for benefit of creditors, which provides—*First*, for all creditors mentioned in Schedule A; *second*, for those in Schedule B; and, *third*, for those in Schedule C,—is not void, as vesting the assignee with indefinite discretion, because of a clause directing assignee to pay any omitted creditor *pro rata* with those mentioned in Schedule C.

Appeal from circuit court, Montgomery county; C. H. CAMPBELL, Judge.

The appellee, Guenther, made an assignment for the benefit of creditors, with preferences. After making provision for payment of creditors mentioned in Schedules A and B, he provides for payment of other creditors mentioned in Schedule C, and also for the payment of such creditors as were omitted *pro rata* with those mentioned in C, set out in the opinion. Armstrong, Cator & Co., who were of the creditors mentioned in C, sued out an attachment against Guenther, attacking the assignment. There was judgment against the attachment, and in favor of Guenther, from which Armstrong, Cator & Co. appealed.

Sweetman, Trotter & Knox, for appellants. *Calhoon & Green*, for appellee.

WOODS, C. J. The fourth paragraph of the deed of assignment directs that, (after certain payments to preferred creditors,) "if any balance shall remain after paying in full the debts mentioned in Schedules A and B, such balance shall be paid *pro rata* to the other creditors of the party of the first part who are mentioned in Schedule C hereto annexed, together with any other creditor of the party of the first part who may have a just and legal indebtedness against the said party of the first part, and who may have been omitted from said Schedule C." The single question is, does this authority conferred upon the assignee to pay any creditor who has been omitted from Schedule C render the deed of assignment void? The contention of appellants' counsel is that this authority clothes the assignee with too much power, and with a discretion inconsistent with the rights of creditors in Schedule C, by enabling him to postpone a settlement indefinitely. Appellants' counsel confess that the proposition is not advanced with great confidence, and the acknowledgment is every way creditable to the well-known soundness of their judgment, for we fail to see any force whatever in it. On the contrary, this provision for any forgotten creditor appears to us to be right and proper. If the assignee shall make this provision a pretext for delaying settlement, a court of chancery can readily apply the quickening corrective, as it may in case of any dilatoriness of any other assignee.

Affirmed.

COLE V. GARDNER.

(*Supreme Court of Mississippi*. May 12, 1890.)

WITNESS AGAINST A DECEDENT'S ESTATE.

Code Miss. § 1602, provides that no person shall testify to establish his own claim for or against the estate of a deceased person which originated during the life-time of such deceased person, or any claim he has transferred since the death of such decedent. *Held* that, in a suit on a note by the indorsee of a deceased payee, the testimony of the maker, in his own behalf, that he had paid the amount thereof to the deceased, was improperly excluded.

Appeal from circuit court, Lee county; L. E. HOUSTON, Judge.

One W. H. Gardner held a note executed by the appellant, Cole. W. H. Gardner

transferred said note by indorsement to appellee, M. R. Gardner, and died. M. R. Gardner sued Cole on the note, and Cole pleaded that the note had been paid to the original holder, W. H. Gardner, and offered himself as a witness to prove this; but his evidence was excluded on the ground that he could not testify against the estate of a decedent. Code Miss. § 1602, provides that "no person shall testify as a witness to establish his own claim, of any amount, for or against the estate of a deceased person, which originated during the life-time of such deceased person, or any claim he has transferred since the death of such decedent." Cole then offered another witness, one William Cole, to prove that this witness saw a receipt from W. H. Gardner against the note, and to prove the contents of the receipt, which had been lost or destroyed; but the court excluded this evidence because no foundation had been laid for same. It was then proposed to introduce appellant, Cole, to lay the foundation for the introduction of the testimony of William Cole, which the court declined to allow; and there was verdict and judgment against Cole, from which he appealed.

J. L. Finley and Clayton & Anderson, for appellant.

CAMPBELL, J. The defendant, if incompetent as a witness to testify fully, was certainly competent to lay the foundation for evidence of the contents of the receipt alleged to have been lost. *Harper v. Lacey*, 62 Miss. 5. But he was competent as a witness to testify to his defense. *Love v. Stone*, 56 Miss. 449; *Combs v. Black*, 62 Miss. 831.

Reversed and remanded.

STONE V. STATE.

(*Supreme Court of Mississippi*. May 12, 1890.)

INTOXICATING LIQUORS—INDICTMENT—EVIDENCE.

1. By the charter of the town of P. it was unlawful to sell vinous, spirituous, or malt liquors, "except for sacramental purposes;" and it was also unlawful to sell liquors in M. county, wherein P. is situated. *Held*, that an indictment which charged defendant with unlawfully selling liquors in P., "not being wine sold for sacramental purposes," was not bad, as charging the offense under both the charter and the general law, although tending to confuse by reason of the immaterial averment excluding the exception allowed by the charter.

2. Under an indictment charging defendant with selling liquors without a license, it is error to admit evidence of more than one sale.

Appeal from circuit court, Marshall county; W. M. ROGERS, Judge.

The indictment charges that appellant, Stone, "within the corporate limits of the town of Pott's Camp, unlawfully did sell vinous and spirituous liquors in less quantity than one gallon, without first having obtained license so to do as required by law, such liquors not being wine sold for sacramental purposes," etc. The charter of Pott's Camp makes it unlawful for vinous, spirituous, or malt liquors to be sold in said town, except for sacramental purposes. Appellant, Stone, moved to quash the indictment, because it does not negative the exceptions stated in the charter

of the town of Pott's Camp, and because it attempts to charge appellant under both the general law and charter. This motion was overruled, and the trial proceeded. The state first proved by one Reid that appellant had made a sale of whisky to him, but Reid stated that he was unfriendly to Stone, because Stone had knocked him down with a billiard cue. The court then, over the objection of the defendant, permitted the state to prove by one Gatlin that Stone had sold him (Gatlin) some whisky, when Reid was not present, on another and different occasion from that testified to by Reid. Stone testified in his own behalf, and denied having made any sale. There was a verdict of guilty, on which judgment was entered against Stone, from which he appealed.

Strickland & Bates, for appellant. *T. M. Miller*, Atty. Gen., for the State.

COOPER, J. We find no objection to the indictment other than the fact that it contains immaterial averments which tend to confuse. If Stone, without having procured a license, sold intoxicating liquor as charged either at Pott's Camp or elsewhere in the county, he is liable to conviction. There is nothing in the charter of Pott's Camp making it lawful to retail in that town, or which exempts one so selling from indictment and conviction under the general laws of the state. The averment that the sale was in this town was wholly unnecessary,—the venue might have been laid in the county of Marshall,—but the only effect of laying the venue in the town was to confine the evidence to a sale there. The conviction must be set aside, because of the action of the court in permitting evidence to be given of two distinct sales. The rule was announced in *King v. State*, 66 Miss. 502, 6 South. Rep. 188, that, in prosecutions for offenses of this character, the state, having proved and identified one offense, must restrict its evidence to that one, and cannot prove another and distinct act. The facts testified to by the witness Reid proved the offense for which the appellant was indicted, and it was thereafter not permissible for the state to seek a conviction for the sale proved by the witness Gatlin. The judgment is reversed, and cause remanded.

FOSTER v. WOOTEN.

(*Supreme Court of Mississippi*. May 12, 1890.)

SALE ON SUNDAY—ATTACHMENT BY VENDOR'S CREDITOR.

1. The law will not aid a vendor or his creditor to recover property delivered and paid for under a sale that was void because made on Sunday; and, on the trial of an attachment levied by a creditor of the vendor of such a sale upon chattels in the hands of the vendee, it was error to charge that sales of personal property made on Sunday are void, and pass no title, as tending to mislead the jury into the belief that such chattels were still subject to attachment as the property of the vendor.

2. The fact that a bill of sale was executed on Sunday, in pursuance of the terms of a sale which was really made on Friday, did not invalidate such sale.

Appeal from circuit court, De Soto county; *W. M. ROGERS*, Judge.

L. D. Lewis and A. F. Foster bought some Texas horses in partnership. On one Friday, Lewis sold to A. F. Foster his interest in the horses, for which Foster in part paid that day, and on the Sunday following Lewis and Foster met and drew up the bill of sale, which was signed by Lewis. After this, A. F. Foster, being indebted to his mother, the appellant, turned over the horses to her in part payment of his indebtedness to her. L. D. Lewis was indebted to the appellee, Wooten, who, some time after A. F. Foster had delivered the horses to appellant, sued out an attachment, which was levied on the horses in controversy. The attachment was sustained, but appellant, H. W. Foster, interposed her claim to the horses, and on the trial of the claimant's issue, the facts concerning which are sufficiently stated in the opinion, judgment was rendered against the claimant, H. W. Foster, from which this appeal is taken.

Calhoun & Green, *H. R. C. Foster*, and *C. R. Boyce*, for appellant. *Ira D. Oglesby*, for appellee.

WOODS, C. J. The evidence showed quite clearly that the sale of the stock by L. D. Lewis to A. F. Foster occurred on Friday. The execution of the bill of sale on the Sunday following was not the consummation of the sale; it was only the manufacture of the evidence of the antecedent sale. If we shall concede, however, that this sale took place on Sunday, we will still be constrained to hold that the third instruction for the plaintiff in attachment was improperly given. Any charge to the jury, considered as a mere abstract proposition, could not rightfully influence the verdict, looking at the uncontroverted facts of the case. This was an executed contract. The stock had been delivered to A. F. Foster, and the purchase price paid by him to L. D. Lewis, long before the attachment writ was levied. Grant, then, that the sale was made on Sunday. What is the rule of law on such state of facts? Nothing more than absolute non-action. It will give neither party to the contract any assistance, nor listen to any complaint. It will leave the parties where it finds them. That is the extent of the rule. It cannot be reasonably insisted that the seller of the stock, L. D. Lewis, could have made any maintainable appeal to any court for the annulment of the trade and the recovery of the stock. Equally in fault with the buyer, A. F. Foster, the law would decline to afford him any countenance, leaving him just where it had found him, and where his own act had placed him. With what show of reason can it be contended that the attaching creditor of L. D. Lewis could take any step for the assertion of any claim to the stock, thus wrongfully sold on Sunday, which L. D. Lewis himself could not take? But this whole question has been too long and too firmly settled to be now disturbed. Neither L. D. Lewis nor the attaching creditor could dispossess the Sunday purchaser, or any purchaser under him. See *Block v. McMurry*, 56 Miss. 217, and cases there cited.

It follows, therefore, that the third in-

struction of the court below for plaintiff in attachment, to the effect that sales of personal property made upon Sunday are void, and pass no title to the property, was erroneously given, and was misleading. Granting its correctness in the abstract, in the concrete it was eminently and unwarrantedly prejudicial to the claimant on the trial of her issue. It was doubtless regarded by the jury, and with reason, too, as informing them that the Sunday sale from L. D. Lewis to A. F. Foster being void, and no title having passed thereby, the title to the stock levied upon was still in said Lewis, and that said stock was therefore to be subjected to plaintiff's demand, and the issue found against the claimant, the sub-purchaser. This was altogether misleading. The fact (though it was not the fact, as shown by the evidence) that the sale of the stock was made by L. D. Lewis to A. F. Foster on Sunday had absolutely nothing to do with the case.

The contention of appellant as to the amount of the verdict is likewise well taken. The jury returned a verdict for the full value of all the horses, though it was undisputed that the two best animals had died, pending the litigation, without fault on the part of claimant. The court partially remedied this error of the jury by requiring a *remittitur* of the price of one of the deceased animals, but appears to have taken no account of the other horse, shown to have died also. The verdict, therefore, remained excessive.

Reversed.

PAYNE V. STOVALL.

(*Supreme Court of Mississippi*. May 19, 1890.)

ATTACHMENT—AFFIDAVIT AND BOND.

Where plaintiff replevied property taken from him by attachment in a suit for rent and for the price of supplies, and at the trial proved his title, it was error to exclude the papers in the attachment proceeding, offered by defendant, on the ground that the affidavit did not show the dates on which the claims for rent and supplies became payable; that the justice's signature to the writ was not preceded by the words "witness my hand," etc.; and that the bond was not dated or approved by the justice issuing the writ, and recited that the leased premises were, situate in the second district of Chickasaw county, when they were really in the first district. Such objections were frivolous.

Appeal from circuit court, Chickasaw county; L. E. Houston, Judge.

Appellant, Payne, sued out an attachment against appellee, Stovall, for rent for leased premises and for supplies. The attachment writ was levied on cotton and corn, the property of Stovall. Stovall brought this action of replevin for the cotton and corn so levied on, and on the trial proved his title to the property, when defendant in the replevin suit offered in evidence his affidavit for attachment, bond, and writ of attachment, to the introduction of which plaintiff, Stovall, objected (1) because the affidavit does not show the date when the claim for rent was payable, and the date when supplies were payable; (2) because the writ was not signed by the justice of the peace who issued it with his official

signature, *i. e.*, did not close with the words "witness my hand," etc., and said writ was not dated; (3) because the bond for attachment is not dated nor approved by the justice of the peace who issued the writ, and, further, that the bond recites that the leased premises are situate in the second district of Chickasaw county, when the proof shows that they are in the first district. The court sustained the objections of Stovall, and excluded the papers, and refused to allow Payne to amend same. There was verdict and judgment in favor of Stovall, from which Payne appealed.

Orr, Lacey & Orr, for appellant. *Miller & Baskin* and *W. D. Frazee*, for appellee.

CAMPBELL, J. The objections to the attachment proceedings were frivolous, and should not have been sustained. We adhere to *Dudley v. Harvey*, 59 Miss. 34; but this case does not present a single feature of that.

Reversed and remanded.

STATE V. ALABAMA & V. R. Co.

(*Supreme Court of Mississippi*. May 19, 1890.)

RAILROAD COMPANIES—FAILURE TO CONSTRUCT DEPOT.

Laws Miss. 1888, c. 26, § 2, provides that the railroad commissioners are authorized to designate the site of any new depot, and to prescribe the number and dimensions of the rooms therein, and provides for a penalty of \$50 per day against a railroad neglecting to comply with such order. *Held*, the penalty cannot be enforced where a new depot was ordered to be built, but the number of rooms was not prescribed.

Appeal from circuit court, Scott county; A. G. MAYERS, Judge.

T. M. Miller, for the State. *W. L. Nugent*, for appellee.

WOODS, C. J. This suit was brought for the recovery of the statutory penalty of \$50 a day, prescribed in the act of March 11, 1884, and the amendatory act of March 14, 1888, "for the regulation of freight and passenger rates on railroads, and for the creation of a commission to supervise the same, and for other purposes," by reason of the neglect of the appellee to erect a new freight and passenger depot at Lake station, within 90 days from the 4th day of June, 1889, in pursuance of an order to that effect made by the railroad commission on the day named. To the declaration the defendant corporation demurred, alleging, among other grounds, that the order of the commission directed a new depot built, but failed to prescribe the number and dimensions of the rooms therein for passengers, as prescribed in the second section of the amendatory act. This demurrer was sustained by the court below, and the state prosecutes this appeal from that judgment.

By section 2 of chapter 26 of the Laws of Mississippi, passed at the session of 1888, it is declared that, in addition to the power and duties conferred by the former act of March 11, 1884, the railroad commissioners are "authorized to designate the site or location of any new depot building or station-house that may be ordered built, in cases where the site selected by the rail-

road company required to erect the same is deemed inconvenient or inaccessible, provided that said depot shall be located on the line of such railroad, having in view the interest of the public and the railroad company, and to prescribe the number and dimensions of the rooms therein for passengers, designating and providing, if deemed proper, separate rooms for the sexes and for the races," etc.

This is not a case where the railroad commission is authorized, under the original act, to "see that at least one comfortable and suitable reception room is provided at each depot for the use of persons desiring and waiting transportation." Neither is it the case provided for in the amendatory act under that provision which gives the commissioners "authority to require such additions or alterations in passenger depots or station-houses as may be necessary, in their judgment, to secure ample, comfortable, and suitable accommodations for all passengers." That there is much plausibility in the suggestion that a new depot might, in effect, be ordered built by a direction to erect one or more comfortable and suitable reception rooms, and to make certain additions and alterations to Lake station-house, may be granted. But, as the statute we are considering is highly penal in its character, it will require a construction of the law which will rise above the region of plausibility to meet the requirements of the case. Plainly, this was an order for the erection of a new depot building. Not to put the railroad company at the perilous disadvantage—the costly disadvantage, it might turn out—of erecting a new depot which the commissioners might deem not suitable and comfortable, the statute makes it the duty of the commissioners to prescribe the number and dimensions of the rooms therein for passengers, leaving it optional with the commissioners to order separate rooms for sexes and races. The obvious and reasonable construction of the statute shuts us up to the conclusion that, before the railroad company can be required to erect a new depot or station-house, (not to see that a suitable reception room is provided, nor to have additions or alterations in existing depots made,) the railroad commissioners shall "prescribe the number and dimensions of the rooms therein for passengers, designating and providing, if deemed proper, separate rooms for the sexes and for the races." The order of the commissioners wholly failed to comply with this plain, just, and reasonable requirement, and the demurrer was to this extent, therefore, well taken.

Affirmed.

DICKERSON v. THOMAS.

(Supreme Court of Mississippi. May 19, 1890.)

CANCELLATION OF DEED—USURY.

1. Between 1878 and 1884, inclusive, defendant, a merchant, had a running account with plaintiff, an illiterate negro, furnishing him goods and supplies, and taking the cotton grown by him in payment. On suit to cancel a conveyance given to secure a balance appearing on the books of defendant at the close of the transactions, the cause was referred to a commissioner to state an account, and many additional credits were allowed plaintiff

upon evidence consisting of general estimates of the number of bales grown each year, based upon the number of acres planted, and the character of the crop as being good, bad, or fair, etc., which, it was testified, were for the most part delivered to defendant. Many debts of goods furnished plaintiff's tenants or croppers were stricken out for lack of proof of a contract to pay them, though it appeared that the course of business was for the croppers to deliver their cotton to plaintiff to be applied to the discharge of their accounts with defendant. Held such evidence was of too indefinite a character to overcome book entries which for years had been treated as correct by both parties.

2. It appearing that defendant's books showed grossly excessive charges of interest, and in some cases double charges, the conveyance will be canceled, and an accounting ordered.

3. Code Miss. § 1141, declares that, "if a greater rate of interest than 10 per cent. shall be stipulated for in any case, all interest shall be forfeited." Held that, where a greater rate was charged and paid, the contract being executed, only the excess could be recovered back.

Appeal from chancery court, Coahoma county; W. R. Trigg, Chancellor.

Calhoun & Green and D. A. Scott, for appellant. *Cutrer & Cutrer*, for appellee.

COOPER, J. The appellee exhibited his bill in this cause to cancel a conveyance made by him to appellant of a certain plantation and personal property, upon the ground that the same was obtained by the fraud of the grantee, and because of the usurious character of the consideration recited therein. Shortly stated, the averments of the bill are that appellant is a shrewd, designing white man, and appellee is an illiterate and confiding negro, who has through many years dealt with appellant, who was his merchant. That appellee, having confidence in the friendship and honesty of appellant, relied upon him to keep accurate accounts of their transactions, making only proper charges against him, and giving him credits for all payments or other matters to which he was entitled. That from year to year he bought goods of appellant, delivering to him large quantities of cotton to be credited on his account. That from time to time appellant would state to him the balances due, and cause to be prepared deeds of trust upon appellee's farm and personality as security, and appellee, relying upon the accuracy of the balances claimed to be due, would execute the instruments as requested. That in January, 1884, the last security of the series was executed by him, whereby he granted to a trustee the lands in controversy in this suit to secure the payment of a note recited therein to be then given for \$8,034.20. That in December, 1887, the appellant went to the residence of appellee, and informed him that he (appellee) had become very obnoxious to his white neighbors, who, because of his ownership of property to a considerable amount, were unwilling for him to reside among them, and that some of them had written to appellant, warning him to close out his business with appellee, extracts from which letters appellant then professed to read to him. He represented that it was dangerous for appellee to longer remain in that vicinity, and that appellant felt himself called on, in the interest of all parties, to have a set-

tlement of their affairs; that the sum then due was about \$13,000, and that he (appellant) had come prepared to seize the personal property under his deed, and to cause the real estate to be sold under the power of sale conferred by the deed of trust, unless a satisfactory settlement could be made between them; that he preferred an amicable settlement, and, if appellee would execute a conveyance in fee of the lands, and all personalty covered by the securities, and deliver up possession thereof, he (appellant) would give to appellee the sum of \$2,000 in money, and two good mules and a wagon. He reminded appellee that, if the property should be sold under the deeds, it might not bring the amount due, and appellee would be thus left penniless, and probably with a large debt hanging over him. That, appellee relying upon the good faith and the truth of the statements made by appellant as to the condition of the accounts between them, executed the conveyance of his property as required, and delivered to the appellant the possession thereof. That appellant, soon after the execution of the conveyance by appellee, repudiated his promise to give him the \$2,000, or the mules and wagon, and denied that he had made any such promises. The bill further charges that in fact complainant was not indebted to the defendant in any such sum as he had claimed; that the debt claimed consisted largely of excessive and usurious interest, and of illegal and unwarranted items wrongfully charged against him; that the debt, if purged of such usury and erroneous charges, would be very greatly reduced in amount; that, in addition, complainant was justly entitled to large credits upon said debt for cotton delivered to defendant, and which had not been credited on his accounts, and also for work and labor done, and money laid out, in the improvement of a certain farm of the defendant by the complainant; that complainant, at the time of executing the deed sought to be canceled, supposed that the defendant had properly credited his demands with these payments and items, and relied upon the defendant's statement that the balance due was over \$13,000; that in truth no such threatening letters had been written to the defendant about the complainant as defendant professed to read to him, but that defendant had falsely asserted their existence for the purpose of arousing his fear and apprehension, of rendering him anxious to get out of the neighborhood, and therefore willing to close with the defendant's proposition of settlement. The prayer of the bill was for cancellation of the deed, for a statement of accounts between the parties, purged of usurious interest and of illegal charges, and credited by all sums to which the complainant might appear to be entitled, and which had not been extended by the defendant.

The defendant answered the bill, denying all the material allegations of the bill charging fraud and misconduct on his part except as to the matter of usury, which the answer admitted had been to some extent charged; but the defendant insisted that the conveyance was freely

and voluntarily made by the complainant, without any of the fraudulent misrepresentations or conduct charged against defendant. He denies that on final settlement he stated to the defendant the amount of his indebtedness to him, but avers that, in consideration of the conveyance, he surrendered all claims against the complainant, and that, exclusive of usurious interest, there was more due than the value of the property.

A mass of testimony was taken by the parties, and on final hearing the court decreed cancellation of the conveyance, and directed an account to be stated between the parties. The cause was referred to a commissioner with instructions as to the principles upon which the account should be stated; and, he having reported that there was due complainant the sum of \$12,291.02, a decree was rendered in his favor for that sum, from which decree the defendant prosecutes this appeal.

The astonishing result reached by the commissioner and approved by the court, whereby the complainant, who believed himself to be indebted to the defendant in a sum exceeding \$13,000, and conveyed his entire estate in discharge of the debt, is restored to the ownership of the property, and secured a decree against his supposed creditor for nearly the sum he claimed from complainant, demonstrates the necessity of adhering to that rule of judicial proceeding which requires definite and specific evidence for the establishment of facts. The result reached has been arrived at by allowing many large credits claimed by the complainant, and by striking from the accounts many items which had for years been treated by the parties as proper debits against him. If the credits allowed were supported by competent and sufficient evidence, and the debits disallowed were properly disproved, the mere fact that a result so opposed to common experience has been reached should not affect the right of appellee to retain the benefit of the decree. The evidence on both branches of the investigation is wholly insufficient to warrant the decree rendered. The testimony tending to establish the additional credits to which appellee has been found entitled is of the most indefinite and inconclusive character. It consists largely of estimates of the quantity of cotton grown by the complainant from year to year, and general declarations by him and his witnesses that the crops were for the most part delivered by him to the defendant. The volume of testimony is too great to permit us to examine its details in a written opinion, extending, as it does, to complicated transactions running through a series of years. We have neither the time nor the inclination, nor is it our duty, to perform the office of commissioner of accounts, and attempt to disentangle the confusion of books and statements which are presented in the record. The original mercantile books of appellant have been made a part of the record by agreement of counsel; and these, with accounts rendered and stated, accounts of sales of cotton, accounts stated by experts and commissioners, and hundreds of pages of vague and indeterminate testimony, so

confuse the controversy as to render it incapable of accurate and definite solution. The complainant has received each year, during the period covered by his dealings with the defendant, credits for cotton delivered by him from time to time. These credits appear on the books of the defendant. The complainant contends that, beginning with the year 1878, there were each year delivered to the defendant many other bales of cotton, for which no credits were given. To establish these credits, he proves that he had a certain number of acres planted to cotton in 1878, another number in 1879, another in 1880, and so on up to and including the year 1885; that his crop was a good one in a certain year, a fair one the next, a poor one another, etc.; that he ought to have made, and according to his recollection did make, so many bales of cotton one year, so many another, etc.; that his custom was to deliver the principal part of his crop to the defendant each year, and, if he did make and deliver the cotton he believes he did, then he should have credit for a certain (or uncertain) number of bales not credited by the defendant. In some instances more specific testimony is adduced, but it is manifest that the greater portion of the additional credits secured in the accounting are supported only by this sort of indefinite and uncertain evidence. We find it impossible to apply such evidence to any particular credit allowed by the commissioner; but, where the testimony becomes specific and definite, it is not difficult to show that the additional credits sought and secured already appear on the books of the defendant. We will take as an example the additional credits of cotton claimed and allowed for the year 1878. The complainant is credited on the books of the defendant with 26 bales of cotton of the crop of 1878, delivered after March 26th and before May 26th. The complainant claimed and received credit for 18 other bales, which the commissioner states, the evidence shows was delivered, and not credited. It is not difficult to discover the testimony on which this credit was allowed. The complainant turned his books and papers over to one Wildeberger, an expert, to state his account for him, and caused Wildeberger to be examined as a witness. Among other data furnished to Wildeberger by complainant were certain accounts of sales of cotton furnished to complainant by the defendant. Of these there was one for the sale of one bale of cotton sold by Porter, Taylor & Co., May 20, 1879; net proceeds, \$54.42. Another was account sales by A. C. & A. B. Treadwell & Co., of 13 bales of cotton sold May 26, 1879; net proceeds, \$659.11. The testimony of these merchants show, and it is conceded by the defendant, that the proceeds were paid over to Dickerson for account of complainant. In making out his account, Wildeberger gave complainant additional credits for these sums, and on his examination stated that they had not been credited on the books of the defendant. He also testified that the complainant was entitled to an additional credit of three bales of cotton, and the value of a remnant of a bale; all of which appeared

as noted on the books of defendant, but the value was not extended as credit. He also stated that probably credit for one other bale of cotton should be given. It thus appears that complainant, through his expert accountant, claimed credit for 17 bales of cotton, and a part of another bale. The commissioner allows a credit for 18 bales, but we are unable to discover from whence the additional part of a bale is derived. Turning to the books of the defendant, we find the complainant credited on May 20th with precisely the sum of \$54.42, the price of the bale sold on that day by Porter, Taylor & Co., and for which additional credit is given. On May 26th there appears a credit of \$659.11 as the proceeds for 13 bales of cotton, and this is the exact sum for which the 13 bales were sold by A. C. & A. B. Treadwell on that day, as shown by their account of sales. We are unable to conjecture upon what theory it was supposed that the credits given by the defendant represented other cotton. The dates of sales and of credits, the number of bales sold, and the price for which they were sold, correspond with such minute exactness that it is impossible to resist the conclusion that the additional credits allowed are mere duplicates of those already appearing on the books of the defendant.

We have not the time to follow the testimony through the whole series of years. We can only call attention generally to other matters in which errors have been committed. It appears that complainant had, during the years in which he dealt with defendant, a number of tenants and share hands, who were also customers of defendant. The accounts of many of these persons appear charged against the complainant in a lump sum, a portion of which were disallowed by the commissioner because of lack of evidence to show a contract on the part of the complainant to pay them. It is shown that the course of business was for these tenants or croppers to deliver cotton to complainant, to be by him applied to the discharge of their accounts. The testimony, we think, shows that the transactions were about those which usually are had between the owner of a plantation and the tenants or croppers on his place. The accounts appear charged to the laborers. At the end of the season the cotton of the laborers is taken by them directly to the merchant, and sold in payment of the debts due him, or the landlord assumes the accounts, and collects the sums due by his employes or tenants. Evidently, that was the course followed between these parties in many cases. The cotton credited to him must have been largely derived from his tenants and employes, and intended to be applied to the payment of their accounts. If this were not true, why was it that complainant permitted these accounts to be charged against him, and paid by the application of his credits to them, or carried forward in notes executed for balances due? The testimony falls far short of showing an inability on the part of complainant to take care of his own interest, or to establish that childish confidence in the defendant so pathetically set forth in the pleadings.

That there are grossly excessive charges of interest,—double charges in one or two instances,—and failure to give some credits which should have been given, is well shown by the evidence; but this does not serve to release the complainant from the payment of the accounts of his tenants charged against him, and for which, from the facts in evidence, he presumably received their cotton. His obligation to pay these accounts springs not alone from his promise evidenced by his note in which they are included, but from the payment to him of the sums by his employes and tenants. The transactions sought to be opened extend through a number of years, and the evidence to support the particular items or settlement between the parties may have been lost by the lapse of time. The burden of showing the facts rests upon the complainant, and cannot be met by general and indefinite evidence. He must specify and point out the erroneous charges, and by direct and particular evidence relieve himself of the obligation which *prima facie* rests upon him to pay these accounts. He must shed light, and not darkness, upon the subject. It is not sufficient for him to raise a suspicion that indefinite credits, at uncertain times, have been omitted, or that transactions to which he assented at the time, upon sufficient consideration, ought not to have been made. Facts must be shown, in the light of which the court may act with confidence and intelligence. *Clayton v. Boyce*, 62 Miss. 390.

Since the cause must be reversed, we think it best to reopen the account in so far as the additional credits claimed by the complainant, and in so far as it is sought to purge it of the accounts of the tenants and employes charged to the complainant. The facts disclosed suggest that the claim for improvements upon the defendant's plantation is in many respects unfounded and exaggerated.

The remaining question involved is as to what extent the usury shown to have been charged affects the claim of the defendant. It is the settled law of this state that usury paid may be recovered back either at law, or, in proper circumstances, in equity. *Bond v. Jones*, 8 Smedes & M. 368; *Parchman v. McKinney*, 12 Smedes & M. 631; *O'Connor v. Clopton*, 60 Miss. 349; *Warmack v. Boyd*, 63 Miss. 488. It has not been decided whether, in suits to recover usury paid, (suits upon executed, as distinguished from executory contracts,) the whole interest paid, or only the usurious excess, may be recovered. Our statute (Code, 1141) declares that, "if a greater rate of interest than ten per cent, shall be stipulated for in any case, all interest shall be forfeited." Where the proceeding is in equity, in reference to an executory contract enforceable *in pais*, the whole penalty of the statute is enforced, and all interest forfeited. *Bond v. Jones*, 8 Smedes & M. 368; *Parchman v. McKinney*, 12 Smedes & M. 631; *Chaff v. Wilson*, 59 Miss. 44; *Boyd v. Warmack*, 62 Miss. 536; *Bank v. Fraser*, 63 Miss. 234. In *Bond v. Jones* the language of the court is broader than the facts involved, and seems to imply that the same rule is applicable in suits to recover back

usury paid which applies when the defense is made to a suit on the usurious contract, and that in either case the whole interest is forfeited. But in that case, while the usury had been paid as such, and the suit was treated as one to recover back the money paid, its real object was to cause the payment to be credited upon the unpaid principal. The decisions of this court, beginning with *Parchman v. McKinney*, 12 Smedes & M. 631, are not in accord with the current of authorities elsewhere, in that it is here held that, in a proceeding in equity to avoid a usurious security enforceable *in pais*, the complainant is not required to tender, nor will he on final hearing be required to pay, the legal interest which might have been contracted for. In *Parchman v. McKinney*, Judge SHARKEY drew the distinction between an executed and an executory contract, and, while recognizing the rule that, in suits to recover back usury paid, only the excess over the legal rate could be recovered, he established the rule that in proceedings to avoid usurious securities the whole interest was forfeited. We have followed the decision in that case, in deference to the rule of *stare decisis*, but we think it should not be extended beyond the line to which the court then indicated that it should be limited. We are not aware of any case in this state in which, in a suit to recover back usury paid, the plaintiff has been permitted to recover more than the excess over the legal interest. *Bond v. Jones* more nearly approaches such decision; but that case antedates *Parchman v. McKinney*, in which a contrary rule is announced, and is, besides, not a case of a completed—an executed—contract. The complainant should be required to pay interest not exceeding the legal rate on whatever debt may be shown to be due.

We affirm so much of the decree of the court as vacates the conveyance and directs the taking of the account. The specific instruction of the chancellor directing the commissioner to disallow the item of \$614 charged on the account of 1878, and the item of April 11, 1884, charged as "invoice of goods, about \$200," is approved.

Except as specifically referred to in this opinion, the matters involved are not decided.

Reversed and remanded.

RICHARDS v. VACCARO *et al.*

(Supreme Court of Mississippi. April 28, 1890.)

ATTACHMENT—BURDEN OF PROOF—INSTRUCTIONS.

1. Where goods attached upon the ground of fraud were claimed by a purchaser from defendant, and, on trial of the issue of defendant's indebtedness, the transfer was shown to be fraudulent on his part, the burden was on the claimant, on the question of sustaining the attachment, to show that he was an innocent purchaser for value.

2. It was not error to reject an instruction proper in itself, but consisting of a repetition of matters already given in the charge.

Appeal from circuit court, Madison county; J. B. CHRISMAN, Judge.

Smith & Powell and Downs & Ward, for appellant. *Calhoun & Green*, for appellees.

COOPER, J. Vaccaro & Co. sued out an attachment against one Ward, which was levied on certain goods which the plaintiffs claimed had been sold by Ward to Richards for the purpose of defrauding his creditors. Plaintiffs sustained their suit against Ward, and the present controversy is between them and Richards, who interposed a claim to the property seized. On the trial of the claimant's issue, Ward's fraudulent purpose in making the sale was abundantly shown. The claimant contended that it devolved on the plaintiffs to establish not only the fraud of Ward, but that he (the claimant) was not a *bona fide* purchaser for value, but participated in, or had knowledge of, Ward's fraudulent design. The court rejected this view, and instructed the jury that, "if it believed from the evidence that the sale by Ward was fraudulent on his part, then the burden of proof is on Richards to show to your satisfaction that he purchased the goods for value, and without knowledge of Ward's design." The giving of this instruction is the principal error assigned.

There is conflict in the decisions, and much confusion among the text-writers, on the question involved. The effect of the statute against fraudulent conveyances, as held by one line of decisions, is about this: Conveyances made by a grantor in fraud of his creditors are valid unless it be shown that the purchaser is not a purchaser for value, and in good faith. Another line of authorities states the effect of the statute to be that conveyances fraudulent on the part of the grantor are invalid at the suit of his creditors, unless it be shown that the purchaser is a purchaser for value, and in good faith. The authorities are uniform in declaring that one who attacks a conveyance as fraudulently made must establish the fraud. The burden of proof is upon him, and he is opposed by the presumption of good faith and legality that attaches in favor of the ordinary transactions of business. The conflict of decision arises a step beyond, when the inquiry is whether the plaintiff, by proof of the fraud of the grantor, has made a *prima facie* case against the grantee, entitling him to recover, in the absence of any evidence by his adversary. In Massachusetts, New Jersey, Iowa, Wisconsin, Connecticut, and Maryland, it is held that the plaintiff must not only show fraud on the part of the seller, but participation in or notice of it by the buyer. *Bridge v. Eggleston*, 14 Mass. 245; *Foster v. Hall*, 12 Pick. 89; *Insurance Co. v. Tooker*, 35 N. J. Eq. 408; *Tantum v. Green*, 21 N. J. Eq. 364; *Bank v. Northrup*, 22 N. J. Eq. 58; *Adams v. Foley*, 4 Iowa, 44; *Fifield v. Gaston*, 21 Iowa, 218; *Mehlhop v. Pettibone*, 54 Wis. 652, 11 N. W. Rep. 553; *Partelo v. Harris*, 26 Conn. 480; *Cooke v. Cooke*, 43 Md. 524. On the other hand, the courts of Pennsylvania, New York, Alabama, Texas, Arkansas, and North Carolina hold that, where the fraud of the grantor is established, a *prima facie* case is made by the plaintiff, which must be met by the purchaser by evidence that he is a purchaser in good faith, for value. *Rogers v. Hall*,

4 Watts, 359; *Clark v. Depew*, 25 Pa. St. 509; *Lloyd v. Lynch*, 28 Pa. St. 419; *Starin v. Kelly*, 88 N. Y. 418; *Hamilton v. Blackwell*, 60 Ala. 545; *Gordon v. Tweedy*, 71 Ala. 202; *Brown v. Hedge Co.*, 64 Tex. 396; *Miller v. Fraley*, 21 Ark. 22; *Fullenwider v. Roberts*, 4 Dev. & B. 278; *Worthy v. Cadell*, 76 N. C. 82. We concur in the views announced by those courts which hold that proof of fraud on the part of the grantor is sufficient to entitle his creditors to subject the property fraudulently assigned, in the absence of evidence showing the claimant to be a purchaser for value, and in good faith. We fail to perceive why, in cases of this character, the party assailing the conveyance shall be required to assume the burden of showing participation in the fraud by the purchaser, and the non-payment of value for the property fraudulently conveyed.

The decisions holding it to be the duty of the creditor to establish not only the fraud of the seller, but that of the purchaser, seem to rest upon an undue extension of the rule that fraud is never to be presumed, but must always be proved by the party alleging it to exist. The rule is so well established as to have become one of the maxims of the law; but it is not true that, where a transaction has been shown to be fraudulent on the part of one of the actors, it is incumbent upon a party claiming or defending against it to show the fraud of the other actor claiming under it. Good faith and legality are presumed to exist in reference to the ordinary business transactions of life, and the burden is upon him who asserts the contrary; but it is otherwise when the transaction is itself unfair, or is shown to be *prima facie* illegal. *Whart. Ev.* §§ 366, 1248; *Bigelow, Frauds*, 130, 132. Mr. Bigelow, while denying that the defense of purchase for value is new matter in avoidance, concedes that the plaintiff proving the fraud of the seller makes a *prima facie* case. He says: "A scrutiny, however, of the situation, in such a case, will show that the defense of purchase for value is not new matter in avoidance. The defendant, being a purchaser from one having the legal title, * * * has himself acquired that title. The plaintiff can then only have an equitable title, and, to prevail, he must overcome the former; and this whether he sues at law or in equity. In other words, he must show that the purchaser's title is bad. This he undertakes to do by showing that the vendor's title was obtained from him [the plaintiff] by the vendor's fraud; and this is sufficient. But how does it become so? The answer is that in law it shows presumptive notice to the defendant. The defendant is presumed, *prima facie*, to be privy to his grantor's fraud. This presumption the defendant must now meet, but just as he would meet any other fact alleged and testified to, or presumptively shown, by the plaintiff. The defense is still negative, *i. e.*, denial. Hence the burden of proof is still upon the plaintiff." "But it may still be thought necessary to inquire whether the plaintiff himself has really sustained the burden of proof, so as to require the defendant to come to the

support of his defense, by merely showing fraud. It may be asked if the plaintiff ought not to go further, and, though he has made a case of fraud in the grantor, offer some definite evidence of notice, or what, for the present purpose, is the same thing,—that the conveyance to the defendant was voluntary. The answer of the authorities, though not without here and there a discordant note, is that evidence of the fraud is enough, and this whether the case be one of fraud on creditors or fraud on a vendor. Such is the better answer in those states in which, in cases of fraud upon creditors, notice to the purchaser is sufficient to defeat his title."

There are two classes of suits at law so nearly analogous to suits by creditors to subject property fraudulently conveyed that it is difficult to draw a distinction between them sufficient to warrant the application of different rules of procedure. These are suits by one whose property has been secured by the fraud of the vendee, and who sues to recover them from another claiming under the fraudulent vendee, and suits by an indorsee of a bill or note against the maker, who defends upon the ground that the instrument was secured by the fraud of the payee. In these cases it has been uniformly held that proof of the fraud of the first vendee of the property, or payee of the note, imposes upon the party claiming under him the duty of showing that he is a purchaser for value, and in good faith. *Bailey v. Bidwell*, 18 Mees. & W. 73; *Fitch v. Jones*, 32 Eng. Law & Eq. 134; *Paton v. Colt*, 5 Mich. 505; *Clark v. Pease*, 41 N. H. 414; *Bigelow v. Fraud*, 132; *Spira v. Hornthall*, 77 Ala. 137; *Easter v. Allen*, 8 Allen, 7; *Morgan v. Morse*, 18 Gray, 150; *Haskins v. Warren*, 115 Mass. 514. Proof that the purchaser bought for value, the price paid being adequate, is generally held, in the absence of other evidence showing notice of the fraud, to raise the presumption of good faith. *Starin v. Kelly*, 88 N. Y. 418; *Shores v. Doherty*, 65 Wis. 153, 26 N. W. Rep. 577; *Spira v. Hornthall*, 77 Ala. 137.

In view of the very full instructions secured by the claimant in this case, we deem it unnecessary to consider whether the first instruction for the plaintiffs is technically accurate, in announcing the proposition that proof of the fraud of the seller shifted the burden of proof to the claimant, or whether, as contended by Mr. Bigelow, the instruction should have been that such proof made a *prima facie* case for the plaintiffs, which it was incumbent upon the claimant to meet by the production of evidence sufficient to restore the equilibrium. The distinction is technical, and it is manifest that in this case it was not influential in producing the result reached.

This disposes of the errors assigned, except the action of the court in refusing the second instruction asked by the claimant. The substance of this instruction is but a repetition of the matters distinctly specified in the other instruction given for the claimant, and under such circumstances its refusal cannot be ground of error.

The judgment is affirmed.

KELLER V. TOULME.

(Supreme Court of Mississippi. May 26, 1890.)

ELECTIONS—FORM OF BALLOTS—MANDATORY STATUTE.

Rev. Code Miss. 1880, § 137, providing that all ballots shall have "a space of not less than one-fifth of an inch between each name, * * * and a ticket different from that herein prescribed shall not be received or counted," is mandatory and must be strictly complied with.

Appeal from circuit court, Hancock county; S. H. TERRAL, Judge.

This is a contested election case. August Keller and John V. Toulme were rival candidates for the office of mayor of the town of Bay St. Louis. At the election, Keller received 208 votes, and Toulme 126 votes. Toulme entered a contest, alleging that he had received a majority of the legal votes cast; that the ballots cast for Keller did not conform to the law, in that there was less than one-fifth of an inch between the names on the ticket, the election being for mayor and aldermen. Keller responded that his ballots were a substantial compliance with the law, and claimed that the section of the charter of Bay St. Louis adopting sections 136 and 137 of the Code of 1880, in reference to elections and the character of tickets, was simply directory, and not mandatory. The testimony was that the names were a very little less than one-fifth of an inch apart,—a very small fraction, not discernible except by close and accurate measurement,—but in fact the names were less than one-fifth of an inch apart. The ballots for Keller were rejected, and a judgment rendered in favor of Toulme, the contestant, from which Keller appealed.

Rev. Code Miss. 1880, § 136, relates to the conduct of elections and the counting of the ballots. Section 137 is as follows: "All ballots shall be written or printed with black ink, with a space of not less than one-fifth of an inch between each name, on plain white news printing paper, not more than two and one-half, nor less than two and one-fourth, inches wide, without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the tickets, but this shall not prohibit the erasure, correction, or insertion of any name, by pencil mark or ink, upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted."

W. P. & J. B. Harris, for appellant. E. J. Bowers and Robert Lowry, for appellee.

COOPER, J. Section 5 of the charter of the town of Bay St. Louis adopts sections 136 and 137 of the Code of 1880 in reference to the character of ballots to be used in municipal elections, and to the manner of voting, and the reception and count of the vote by the officers of election. Under section 137, a ballot other than that prescribed is not to be received or counted by the election officers. The standard prescribed is arbitrary; and, by the unequivocal provision of this section, its provis-

ons are made mandatory, and not directory. We are not permitted to substitute our opinion for that of the legislative department, or to declare that a departure from the standard prescribed is immaterial because of its degree. *Oglesby v. Sigman*, 58 Miss. 502; *Perkins v. Carraway*, 59 Miss. 222.

Affirmed.

CAGE v. LOUISVILLE, N. O. & T. RY. CO.

(*Supreme Court of Mississippi*. May 26, 1890.)

RAILROAD COMPANIES—STOCK KILLING.

Where the evidence for plaintiff in an action against a railroad company for negligently killing plaintiff's stock is to the effect that the remains of the animals were scattered along the track for more than 300 yards; that they ran some distance on the track in front of the train, which was going up grade, before being struck; that the whistle was not blown until the first one was struck; and that the distance from where they were first seen to where the first animal was struck was 300 yards; while the evidence for defendant is that the animals jumped on the track about 100 feet in front of the engine, and that everything was done to prevent the collision,—the question should be submitted to the jury.

Appeal from circuit court, Wilkinson county; RALPH NORTH, Judge.

Appellant, De Witt Cage, brought this suit against the appellee railway company to recover damages for his stock killed by a train of appellee. Appellant testified that when he was informed that his stock was killed he went to the scene, and found the remains of his animals scattered along the railroad track for more than 300 yards. Another witness for appellant testified that he saw the train kill the animals; that the whistle did not blow till after the first animal was killed; that the animals ran some distance in front of the train before being struck by the engine. Another witness for appellant testified that the train was running up grade when the animals were killed. Another witness for appellant testified that he had measured the distance since the killing of the animals, and that the distance from where they first were seen on the track, as stated by the engineer, to where the first animal was struck, was 300 yards or more. The engineer of the train which did the injury testified for defendant, and stated that the animals jumped on the track about 100 feet in front of the train, and ran some little distance; that he sounded the stock alarm, and did all he could to prevent the collision, but that it was unavoidable. The fireman testified to about the same thing. The court below excluded the testimony of the plaintiff, and gave a peremptory instruction to the jury to find for the defendant, which was done, and judgment so entered for defendant, from which Cage appealed.

D. C. Bramlett, for appellant. W. P. & J. B. Harris, for appellee.

CAMPBELL, J. Upon the evidence in this case we would not disturb a verdict for either party; and applying this, the true, test, it should have been submitted to the jury, and not decided by the court.

Reversed and remanded.

UNION INVESTMENT CO. v. BOARD SUP'RS OF HARRISON COUNTY.

(*Supreme Court of Mississippi*. May 26, 1890.)

TAXATION—ASSESSMENT.

1. The lots of an investment company were assessed for taxation at \$30 each. In a few instances the lots of individuals at the same place were assessed at a less valuation, but in all other cases at a much greater valuation, than \$30, which they testified was a fair valuation. The investment company had sold some of its lots at \$50 to \$200, and had never offered any as low as \$30. *Held*, that the assessment would not be disturbed as excessive.

2. In assessing land for taxation, the probability that a projected railroad may not be built, in which event the land would be comparatively worthless, will not be considered.

Appeal from circuit court, Harrison county; S. H. TERRAL, Judge.

Nugent & McWillie, for appellant. W. G. Evans, Jr., for appellee.

WOODS, C. J. The tax assessor of Harrison county having completed the assessment roll of taxable lands in said county, the appellant filed its written objection to the assessment of its lots in Gulfport, and prayed, impliedly, a reduction in the assessment. The board of supervisors, at the August term, 1889, of the supervisors' court, having overruled the objections filed by appellant, and having declined to make any reduction in the assessment, an appeal was taken by the investment company to the November term, 1889, of the circuit court of Harrison county. A jury having been waived the trial judge heard the evidence adduced, and upon due consideration affirmed the judgment of the board of supervisors; and from this action of the court below the case has been brought before us by appeal.

The questions involved are purely of fact, and the judgment of the court below must be treated as the finding of a jury. The proofs show that the lots of the investment company in Gulfport are assessed at \$30 per lot throughout the plat offered in evidence, and the contention of appellant's counsel is that this valuation is shown to be fictitious and excessive. While it appears to be true that in two or three instances the lots of private persons are assessed at much less than the valuation put upon the investment company's property, yet it is also true that all other lots owned by individuals in Gulfport are assessed at a valuation far in excess of that placed upon the investment company's lots; and these individuals, so far as examined as witnesses, say their property is assessed at a fair valuation. It was, furthermore, plainly made to appear that the appellant had sold all lots disposed of by it to purchasers at prices ranging from about \$50 to \$200 or more, and that the appellant had never offered its lots as low as they were assessed.

It may be true, as contended by appellant, that, unless the Gulf & Ship Island Railroad is revived and built, that the lots in question may prove comparatively worthless. But that contention does not touch the issue presented. To say that the lands may prove, in the event the railroad is built, to be of great value, but

that the building of the railroad is problematical, and that the lands, in case the project of building the road is abandoned, will prove absolutely of no value, sheds no light upon the controversy, but rather tends to obscure and becloud it. Our law takes no such factor into the computation in fixing the taxable values of lands. The intrinsic value of the land to be assessed is to be determined by taking into consideration the improvement, also the proximity to navigation, or to any town, city, village, or road, and any other circumstance that may tend to enhance the value, and not at what it might bring at a forced sale, but what the owner would be willing to accept and expect to get for it if he were disposed to sell it. Applying this standard of determining values to the property in question, we are constrained to the conclusion that the lots in question were not assessed at unfair and exorbitant valuations, and therefore that the action of the court below was not erroneous.

If the circumstance of the possibility, not to say probability, of the construction of the Gulf & Ship Island Railroad through central Mississippi, and northward from its intersection with the Louisville & Nashville Railroad at Gulfport, has tended to enhance the value of lots in the plat of that town, and has in fact so enhanced their value, as to make the investment company willing to accept and expect to get for the lots not less than \$30 each, if it were disposed to sell, then the assessment may not properly be reduced if the valuation was placed at that figure.

Affirmed.

MARTIN *et al.* v. CARTER.

(*Supreme Court of Alabama.* April 17, 1890.)

BILL TO DISCOVER ASSETS.

As the undivided interest of a judgment debtor in notes and a mortgage cannot be reached by garnishment or execution, the judgment creditor's proper remedy is by bill in equity, joining as parties the makers and the other payees of the note, under Code Ala. § 3540, providing that, where an execution is returned unsatisfied, he may bring a bill of discovery; and the court may bring any other party before it, and decree the interest of the judgment debtor in any property discovered to the satisfaction of the debt.

Appeal from chancery court, Jackson county; THOMAS COBBS, Chancellor.

Bill by W. A. B. Carter against John Martin and others to subject an undivided interest in notes and a mortgage to the payment of a judgment. From a decree overruling a demurrer to the bill, on the grounds that it showed that complainant had a remedy at law, and that it was multifarious, respondents appeal.

Hunt & Clopton, for appellants. *W. L. Martin*, for appellee.

CLOPTON, J. Section 3540 of the Code declares: "When an execution for money from any court has been issued against a defendant, and is not satisfied, the plaintiff, or the person for whose benefit such execution is sued out, may file a bill in chancery against such defendant to compel the discovery of any property belonging to him, or held in trust for him, and

to prevent the transfer, payment, or delivery thereof to such defendant, except when the trust has been created by, or proceeded from, some other person than the defendant himself; and the court may bring any other party before it, and decree such property, or the interest of the defendant therein, to the satisfaction of the sum due the plaintiff." It has been said that the statute is intended to declare and establish the principle that a creditor, after exhausting his legal remedies, might go into a court of equity for the purpose of subjecting the equitable estate of the debtor, or other interests which could not be made available at law, and to remedy defects in the course of procedure. Under the statute a bill may be filed to subject property which cannot be sold under execution or reached by legal process, or for discovery in aid of the execution at law. Before the statute the allegations of the bill were required to be specific and precise in respect to the estate or interest therein sought to be subjected, while under the statute the bill need only allege the supposed interests in the property of the defendant in the general terms of the act, either positively or in the alternative. *Brown v. Bates*, 10 Ala. 432.

The bill which is filed by appellee alleges that complainant is a judgment creditor of the defendant John Martin, upon which judgment execution has been issued, and returned: "No property found." It seeks to subject to the claim of complainant the interest of Martin in two notes executed by the defendants Wells & Moore to Martin, and the other five defendants, jointly, and to foreclose a mortgage given by the makers of the note to the payees to secure the payment thereof. Manifestly the interest of Martin in the mortgage property cannot be levied on and sold under execution. *Morris v. Barker*, 82 Ala. 272, 2 South. Rep. 335. It is equally manifest that the interest of Martin in the note cannot be reached and subjected by process of garnishment; for this would be splitting up the cause of action, and rendering judgments against the makers in favor of the joint payees severally. The interest of Martin in the notes cannot be made available at law, and the bill is well filed under the statute.

The court is authorized by the statute to bring any necessary party before it,—any person having an interest in the subject-matter. Without the presence of the other payees, a decree could not be rendered separating Martin's interest which would be conclusive on them. They are indispensable parties.

Affirmed.

WALDRUP *et al.* v. FRIEDMAN *et al.*

(*Supreme Court of Alabama.* April 17, 1890.)

EXECUTION—ISSUANCE—LEVY—RETURN.

1. Under Code Ala. 1886, § 3845, providing that a justice must, unless otherwise directed, after the lapse of five days from rendition of judgment, issue a writ of *fiert facias* for the satisfaction of the judgment, the fact that the writ is issued before the lapse of the five days does not render the writ void, and is of no avail in a collateral impeachment of the proceedings under it.

2. Under Code Ala. 1886, § 3345, providing that an execution issued by a justice shall be returnable not more than 60 days from the date of its issue, a levy thereafter made, and all subsequent proceedings founded on it, are void.

Appeal from chancery court, Tuscaloosa county; THOMAS COBBS, Chancellor.

Bill by W. S. Waldrup and others against Friedman & Loveman. From a decree sustaining a demurrer to the bill, complainants appeal. Code 1886, § 3345, provides that, after the lapse of five days from rendition of judgment, if an appeal is not taken, the justice must, unless otherwise directed, issue a writ of *fiel facias* for the satisfaction of the judgment, which must be signed by him, dated on the day it was issued, and made returnable before him not less than 20 nor more than 60 days from the date of its issue.

Hargrove & Van de Graaff and *Foster & Jones*, for appellants. *Wood & Wood*, for appellees.

MCCLELLAN, J. The present bill is exhibited to redeem a tract of land from mortgagees in possession. By appropriate allegations, it anticipates a defense resting on the acquisition of an independent title by purchase at a sale made under a *venditioni exponas*. The order of sale was made by the circuit court of Tuscaloosa on a judgment rendered by a justice of the peace against complainants' ancestor, an execution issued thereon, a levy thereof on the land sought to be redeemed, and a return of all the papers into the circuit court. The infirmity in respondents' title under these proceedings, which is relied on in reply to the anticipated defense, results from the facts, which are shown by the exhibits to the bill, that the execution was issued by the justice before the lapse of 5 days after the judgment, and was levied by the sheriff after the lapse of 60 days from the date of its issuance, and also from the date at which it could have been regularly issued, that being the longest period which the statute allows between the issuance and return-day of such writs. Code 1886, § 3345. Demurrers were interposed to the bill, setting up that it showed—*First*, that respondents acquired a good legal title through the sheriff's sale, *second*, that they acquired a good equitable title at said sale; *third*, that the complainants "are guilty of such laches as to defeat any equity of the bill; and, *fourth*, that complainants are estopped by reason of the acquiescence of their ancestor for years in the ownership and possession of defendants." Each of these demurrers was sustained, and this appeal is prosecuted from the decree in that behalf.

The 10 years within which a mortgagor may redeem from his mortgagees in possession not having elapsed in this case, as is manifest from the averments of the bill, we are unable to see what relevancy the inquiries as to laches, delay, acquiescence for years, etc., raised by the demurrer, can have to any material issue presented by the record. It seems clear that, if the sale under the order of the circuit court was merely irregular, and hence voidable only, it cannot be drawn in question upon a col-

lateral attack such as this bill attempts, however promptly made, and whether made by the heir or the ancestor; and, on the other hand, if that sale was void,—not merely irregular, and voidable only on direct assault,—we apprehend that no delay, laches, or acquiescence short of 10 years in duration would operate to defeat the right of redemption now asserted by the complainants. Counsel on either side recognize the immateriality of these inquiries, and address themselves mainly to the question of the validity of the sale; and that question alone, we think, need be decided.

The judgment against complainants' ancestor was rendered by the justice on the 26th day of January, 1878. Execution was issued January 29, 1878. The levy was made on April 10, 1878,—71 days after the teste of the writ, and 68 days after the writ might have regularly issued. Upon these facts, two contentions are predicated by the appellants: First, that the sale was void because the execution was issued before the lapse of five days after judgment, as required by the present and former statute on the subject. We cannot admit the soundness of the position. On the contrary, we conceive it to be well settled that the fact that an execution, the judgment being a valid one, is issued at or within a time during which the statute says it shall not issue, does not render the writ void, but is an irregularity merely, which may be remedied in a direct proceeding, seasonably instituted, but which avails nothing in aid of a collateral impeachment of the proceedings under it, such as is here attempted. *Sandlin v. Anderson*, 76 Ala. 403; *Leonard v. Brewer*, 86 Ala. 390, 5 South. Rep. 306; *Steele v. Tutwiler*, 68 Ala. 107; *Carson v. Walker*, 16 Mo. 68; *Freem. Ex'ns*, § 25.

The other position taken by the appellants is that the execution was levied after the return-day fixed by the statute. The law then in force was the same as the present statute, as to the limit of time within which the execution from justices' courts should be made returnable. Code 1876, §§ 3627, 3648. And we apprehend that, if there should be an omission to have the return-day expressed on the face of the writ, it would be held to be returnable on the last day to which the justice in his discretion might have made it run; the principle involved in such a contingency being the same as arises when a day beyond the extremest limits of discretion, or a day which is past, is specified, and holds the officer to the duty of execution and return within the statutory period, regardless of the language of the writ. *Samples v. Walker*, 9 Ala. 726; *Wofford v. Robinson*, 7 Ala. 489; *Freem. Ex'ns*, § 44. But, whether any day or a proper day be specified or not, the writ in no case can be kept alive in the hands of the officer after the latest date at which the statute requires it to be returned. The writ in this case, whatever time was expressed on its face as the return-day, or whether any time was so expressed,—and the record does not enlighten us on this point,—could not be levied after the lapse of 60 days from the 29th of January, 1878; and the

levy, which was in fact made on April 10, 1878, beyond the latest possible return-day, was absolutely void. *Morgan v. Ramsey*, 15 Ala. 190; *Smith v. Mundy*, 13 Ala. 182; *Freem. Ex'ns*, § 106; *Bank v. Reid*, 3 Ala. 299; *Barden v. McKinnie*, 15 Amer. Dec. 519, 522, note; *Barnard v. Stevens*, 16 Amer. Dec. 734.

The levy upon which the order of sale made by the circuit court was predicated being void, that court was without jurisdiction. Its order was likewise void, and the sale and conveyance by the sheriff to defendants' grantors passed no title into them. *Jones v. Calloway*, 56 Ala. 46. The demurrers which set up that title in bar of the relief sought by complainants should have been overruled.

The decree of the chancery court is reversed, and a decree will be here entered overruling all the demurrers sustained below.

Reversed and rendered.

POWDER *et al.* v. CHEEVES *et al.*

(*Supreme Court of Alabama*. April 17, 1890.)

SHERIFF'S DEED—MOTION TO SET ASIDE—LACHES.

In the absence of excuse for the delay, a motion to set aside a sheriff's sale of lands, made 18 years after the sale, will not be entertained, though the purchasers have never obtained possession, and though a suit instituted by them for possession 11 years after the sale has never been brought to trial. *Qualifying Abercrombie v. Conner*, 10 Ala. 203.

Appeal from circuit court, Randolph county; J. R. DOWDELL, Judge.

N. D. Denson, for appellants. W. H. Smith, Jr., and Kelly & Smith, for appellees.

STONE, C. J. The present record presents only one question, namely, the propriety of the circuit court's order setting aside and vacating the sheriff's sale and conveyance. We think, under the facts shown in the record, the sale should have been set aside, unless there is merit in the objection that the motion came too late. *Ruckman v. Cory*, 129 U. S. 387, 9 Sup. Ct. Rep. 316; *Freem. Ex'ns*, § 307.

The sheriff's sale and conveyance were made in August, 1867, under judgment and execution obtained in Randolph circuit court. It is not shown that the purchasers recovered possession of the lands, or took any steps with a view to obtaining possession, until the close of December, 1878, more than 11 years after the sale. The defendant Herren is shown to have been in the actual possession and occupancy of a part of the land when the levy was made, and that he had notice of the levy. As to the residue of the land, there is no proof in relation to its actual occupancy; and there is no proof that the possession and occupancy of any part of the land has been in any manner changed since the sale, or in consequence of it. Herren retained his possession till his death, which occurred within the last five years, and the land has been claimed by his heirs at law from that time till the present. The purchasers at the sheriff's sale instituted suit—a statutory real ac-

tion—against Herren, December 31, 1878, for the recovery of said lands, which suit, so far as the record discloses, has never been brought to trial. At the spring term, 1881, of the circuit court of Randolph county,—the court in which the said judgments against Herren were recovered,—a motion was made in said court to set aside the sale of said lands on grounds which we have said were sufficient, unless such relief had become barred by lapse of time. At Herren's death the motion was revived in the name of his heirs at law, and was brought to trial in 1889. The circuit court granted the motion, set aside the sale, and vacated the sheriff's deed. We have now stated all the material facts which bear on the question before us. There is nothing shown to excuse the delay—over 13 years—in moving to set aside the sheriff's sale, other than the failure of the purchasers for more than 11 years to institute proceedings to recover the lands.

Speaking of a motion to set aside a sale of lands made by a sheriff under execution, this court, in *Abercrombie v. Conner*, 10 Ala. 203, said "There is no necessity for the party in possession to be active until the purchaser obtains possession, or makes an effort to acquire it." The report of that case does not inform us what time had elapsed between the sheriff's sale and the making of the motion to vacate it. In the later case of *Cowan v. Sapp*, 74 Ala. 44, this court reviewed *Abercrombie v. Conner*, and other decisions on the same subject, and laid down a rule that cannot be reconciled with *Abercrombie v. Conner*. In the later ruling, it was said: "We would hesitate to announce it as an inflexible rule or as a general rule, as seems to have been expressed in *Abercrombie v. Conner*, supra, that a proceeding, either at law or in equity, for the vacation of a sale of lands under legal process, will be entertained at any time before the purchaser takes possession, or recovers it by suit. Reasonable diligence, as well as good faith, should be rigorously exacted from parties seeking the disturbance of judicial sales, and the destruction of titles derived from them; and whether there has been reasonable diligence must depend upon the particular circumstances,—whether they are such as may have induced inaction, or ought to have quickened vigilance and action. It is certain that a party may not, in the absence of some satisfactory excuse, enter into litigation with the purchaser claiming a recovery of the lands, speculate upon its chances, and, when he finds them doubtful, or when the litigation is determined adversely to him, then resort to a proceeding, either at law or in equity, for a vacation of the sale. *McCollum v. Hubbert*, 13 Ala. 289; *McCaskell v. Lee*, 39 Ala. 131. There cannot be a time definitely settled within which parties must resort to a judicial proceeding for the purpose of vacating the sale. The proceeding is of an equitable nature, dependent upon equitable principles, and is not capable of being controlled by fixed, inflexible rules. The rules which apply are analogous to the known rules of a court of equity in granting relief to a mortgagor, or those claim-

ing under him, seeking to avoid a purchase by a mortgagee at his own sale, or a *cestui que trust* claiming to be relieved from a purchase by a trustee. There must not have been laches operating injuriously to others; and there must not have been such unexplained acquiescence for a considerable period, with full knowledge of all the facts, as would afford cogent evidence of a waiver and abandonment of the right, if it be not the equivalent of a positive act of confirmation or release." We think the rule declared in *Cowan v. Sapp* more reasonable, and more in harmony with our rulings on kindred subjects; and we prefer to adhere to it, although in doing so we qualify, if we do not overrule, what seems to be the literal interpretation of the language employed in *Abercrombie v. Conner*. *Cowan v. Sapp* was a proceeding to vacate and set aside a sheriff's sale of lands. The decision was that "the rules which apply are analogous to the known rules of a court of equity in granting relief to a mortgagor, or those claiming under him, seeking to avoid a purchase by a mortgagee at his own sale, or a *cestui que trust* claiming to be relieved from a purchase by a trustee." Equity will grant relief to a mortgagor of real estates sold under a power, and bought by the mortgagee, the mortgage conferring on him no authority to purchase, only when the mortgagor makes seasonable application to disaffirm the sale, and to be let in to redeem. What is a reasonable time, in such cases, has been declared by this court. *Ezzell v. Watson*, 83 Ala. 120, 3 South. Rep. 309, 3 Brick. Dig. 656, § 344.

Applying the extremest extension of the rule in such cases to the record facts before us, we feel constrained to hold that the motion to vacate the sheriff's sale was not made in time, and the motion ought to have been overruled. We offer no comments on any other aspect of the case.

The judgment of the circuit court is reversed, and a judgment here rendered denying the motion.

PEOPLE'S BANK OF NEW ORLEANS v. WEST.

(Supreme Court of Mississippi. June 2, 1890.)

ATTACHMENT—LEVY—QUIETING TITLE.

1. The return of a writ of attachment of land occupied as a residence by defendant, which recites that it was levied on the land, describing it by metes and bounds, and that a true copy of the process was delivered to defendant, is insufficient, under Code Miss. § 2424, requiring that in such case the officer shall go to the house of defendant, and there declare that he attaches the land; and section 2425, which requires the officer serving the writ to make a full return of his proceedings, and no lien is fixed thereby.

2. A creditor who after such levy files a bill to set aside as fraudulent a conveyance made by the debtor to his wife before the attachment, and thereby fixes a lien under sections 1843, 1845, has priority, though the decree setting aside the conveyance, and subjecting the land to his debt, is not rendered till after judgment for plaintiff in the attachment proceedings.

3. Where, on a bill to remove a cloud and cancel title, both parties claim from a common source, and defendant proves that he has secured the title derived from that source, he is entitled on his cross-bill to the relief of cancellation against plaintiff.

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4. Nor is that relief to be denied because complainant in the cross-bill can try the validity of plaintiff's title by ejectment, for Code Miss. § 1838, provides that the real owner, whether in possession or not, can have cancellation decreed of any evidence, claim, or pretense of title which may cast suspicion on his title.

Cross-appeal from chancery court, Harrison county; S. EVANS, Chancellor.

E. H. McCaleb and E. J. Bowers, for People's Bank. Nugent & McWillie, Percy Roberts, R. Seal, and Calvit Roberts, for West.

COOPER, J. The controversy in this cause is between I. S. West, Jr., and the People's Bank of New Orleans, each claiming to be the owner of the land described in the pleadings by title derived under judicial proceedings against the former owner, Charles J. Carriere. On the 25th of June, 1884, West sued out a writ of attachment returnable to the circuit court of Harrison county against Carriere, as a non-resident. To this writ the sheriff of Harrison county made return, as follows: "Executed within process this 26th day of June, 1884, by levying upon the following described real estate situated in Harrison county, Mississippi, [as that of C. J. Carriere, deft., to-wit, [describing lands by metes and bounds.] Further executed by handing to C. J. Carriere, deft., in person a true copy of within process." This writ was returnable to the November term of the circuit court, and at that time the defendant appeared and pleaded in abatement to the attachment. At a subsequent term of the court the defendant withdrew all defense, and judgment by consent was rendered in favor of the plaintiff, and the land attached directed to be sold. Under this judgment a writ of *vend. ex.* was issued, and the property described in the writ was sold, and the plaintiff in attachment, West, became the purchaser. On the 1st of July, 1884, (after the levy of the attachment, and before the return-day of the writ,) the People's Bank exhibited its bill in the chancery court of Harrison county against Charles J. Carriere and Mamie Adele Carriere, his wife, and against the infant children of the said Charles J. Carriere, in which it was averred that on the 30th day of May the said Charles J. Carriere was indebted to said bank in a large sum; that he was then insolvent, and, for the purpose of defrauding his creditors, on that day made a voluntary conveyance of the property here in controversy to his said wife and infant children. The property was described in said bill, and, under sections 1843, 1845, Code, a lien was fixed by the filing of the bill against the property proceeded against. This proceeding resulted in a final decree in favor of the bank, canceling the conveyance from Carriere to his wife and children, and subjecting the land to sale for the payment of the complainant's debt. Under this decree the land was sold by a commissioner of the chancery court, and at this sale the People's Bank became the purchaser.

It will be seen that both parties to the present litigation claim to have secured the title of Charles J. Carriere, West claiming title under the attachment suit, and

the bank under the chancery proceeding. The regularity and validity of the chancery suit of the bank against Carriere and others is not controverted, and it is conceded by West that the title of Carriere passed under the sale thereunder, unless he (West) secured a title under his attachment, and the sale under the judgment rendered therein. The present suit was commenced by West, who avers that he is the owner and in possession of the land, and that the claim of title asserted by the bank casts a cloud and suspicion on his title; wherefore he prays its cancellation. The bank answered the bill, and also exhibited a cross-bill, by which it seeks to cancel the title of West as a cloud upon its title. On final hearing the court dismissed the original and cross-bills, and both parties appeal.

Two questions are presented by the record: (1) In whom is the title of Carriere vested? (2) Is the holder of that title entitled to a decree cancelling that of his adversary. The cross-bill exhibited by the People's Bank avers that, at the date of the levy of the attachment sued out by West against Carriere, the lands in controversy were not wild, uncultivated, or unoccupied, but that they were then occupied as a residence by Carriere and his family. This allegation of the cross-bill is not denied, and its truth must be accepted as established, if it be competent to aver the fact in this proceeding.

Section 2424 of our Code prescribes how writs of attachment shall be levied upon real estate. It provides that "every writ of attachment shall be executed in the following manner: that is to say, in case of a levy on real estate, the officer shall go to the house or land of the defendant, or to the person or house of the person in whose possession the same may be, and then and there shall declare that he attaches the same, at the suit of the plaintiff in the writ named. But, in the event the land is wild, uncultivated, or unoccupied, a return upon the writ, by the proper officer, that he has attached the land, giving a description thereof by numbers, metes and bounds, or otherwise, shall be a sufficient levy, without going upon the land." Section 2425 declares that "the officer serving an attachment shall make a full return thereon of all his proceedings, on or before the return-day of the writ."

The contention of the bank is that the levy of the writ of attachment, as shown by the return of the officer, was invalid, and fixed no lien upon the land; that the only act done by the officer was to note the levy on the writ; and, while this would have been sufficient to fix the lien if the land had been "wild, uncultivated, or unoccupied," it had no effect upon the property in controversy, since it was at the time of the levy occupied by the defendant in attachment, and his family. West responds to this assault by replying that the defect in the levy, if any exists, is a mere irregularity which might have been and was waived by the defendant; and again that, in this collateral controversy, it is not competent for the bank to attack the validity or effect of the judgment in the attachment suit, which, as he contends,

adjudicated the validity of the levy, and condemned the land to sale for the debt found due to him.

We have examined many cases touching the position assumed by counsel for West, and though the rule is very generally declared to be that mere irregularities in the proceedings cannot be availed of by third persons, or by the defendant himself in a collateral controversy, it is not clear what defects are to be considered as irregularities only, within the rule announced. The earlier South Carolina Reports contain many cases in which the distinction is drawn between those omissions or defects which are considered irregularities only, and those which are held to vitiate the proceedings, and entitle third persons to contest the validity of the judgment.

It has been held in that state that the following defects are irregularities only, and do not annul the judgment: An omission by the plaintiff to make affidavit of his debt, (*Foster v. Jones*, 1 McCord, 116;) omitting to give the requisite bond, (*Chambers v. McKee*, 1 Hill, S. C., 229;) in giving the attachment bond in double the debt, instead of double the damages or sum sued for, (*Chamberford v. Hall*, 3 McCord, 345;) the omission of the magistrate to return into court the attachment bond. (*Kincaid v. Neall*, Id. 201.)

On the other hand, it has been decided in the same state that the following defects are fatal to the validity of the judgment, and that junior attachers may set aside the prior attachment, and subject the property to their demands: An illegal service of the writ, (*Byne v. Byne*, 1 Rich. Law, 438; *Gardner v. Hust*, 2 Rich. Law, 601;) suing out a writ against one not liable to that process, (*Weyman v. Murdock*, Harp. 125;) that the cause of action is not suable by attachment, (*Sargeant v. Helmbold*, Id. 219;) a writ issued by one partner against another on a partnership demand, (*Rice v. Beers*, 1 Rice, Dig. 75;) that the fund has not been attached, (*Burrell v. Letson*, 1 Strob. 239.) In Louisiana it has been decided that a junior attacher cannot intervene to allege informality in the senior proceedings consisting in a failure of the first attacher to make the affidavit required by law, the affidavit being a substantial compliance with the statute. (*Clamageran v. Bucks*, 4 Mart. (N. S.) 487.)

It seems, however, to be very generally held that a junior attacher or other third person may show that the officer failed to make a valid levy upon the property attached. In *Bank v. McDonald*, 46 Mo. 31, after the return-day of an execution, the creditor sued out a writ of garnishment, (not being permitted by the statute so to do,) and the garnishee appeared and answered, and submitted to judgment. Another creditor subsequently sued out his writ of garnishment, and served it upon the same garnishee. It was held that he could show the invalidity of the first garnishment, and the fund was directed to be paid to him.

In the following cases junior attachers have been given priority over prior attachers because of the defects named in the first proceedings: In *Stone v. Miller*, 62 Barb. 430, because the officer levying the

first writ failed to leave a copy of the writ with the party in whose possession the goods were found, as directed by statute; in *Lindau v. Arnold*, 4 Strob. 290, because a domestic attachment had been issued for \$56, when the statute authorized such attachments to run for not more than \$20; where the debt of the first attacher was not due at the time of the commencement of his action, (*Henderson v. Thornton*, 37 Miss. 448; *Walker v. Roberts*, 4 Rich. Law, 561;) where the officer fails to levy the writ upon real estate in the manner required by law, as by failing to give the defendant a copy of the writ, or to go upon the land, or to levy in the presence of witnesses, (*Schwartz v. Cowell*, 71 Cal. 306, 12 Pac. Rep. 252; *Watt v. Wright*, 66 Cal. 202, 5 Pac. Rep. 91; *Tiffany v. Glover*, 3 G. Greene, 387; *Sherman v. Bank*, 66 Miss. 648, 6 South. Rep. 501;) or because the officer failed to take possession of personal property levied on, (*Gates v. Flint*, 39 Miss. 365.)

Our own case of *Sherman v. Bank*, in 66 Miss. 648, 6 South. Rep. 501, might have been sufficient for the decision of this question, but in that case there was no service upon or appearance by the defendant, and it is contended here by counsel for West that the appearance and confession of judgment by Carriere was a waiver of any defect appearing in the levy. We have therefore cited other cases to show that such appearance and waiver cannot cure defects of this character. The point here made was insisted upon in the case of *Gardner v. Hust*, 2 Rich. Law, 601, and the court said: "Such illegal service creates no lien in cases of attachment. If there was no lien, then the confession of judgment by Hust to Miller is not the revival of a lien by waiving an irregularity, but the creation of a lien by relation back to the illegal service. If the levy had been set aside at the instance of Hust, and it had been a mere irregularity, then it may be that, as between him and Miller, he might, by confessing judgment, waive the irregularity and remove the objection to the levy. He, at least, would not, after the confession, be allowed to question the regularity of the previous proceedings. But the doctrine contended for in this case, that such waiver, by relation back, can defeat rights which had accrued in the mean time, has no support from any case or any legal analogy. In this view of the case, Miller's confession of judgment can only (as to Gardner) be regarded as a common confession, and has no lien except that created by the *fi. fa.*, which was not lodged until October. In the mean time Gardner had acquired a lien by his attachment."

It will be noted that our statute requires the officer to return into court the writ, with a full return thereon "of all his proceedings." The officer here returned that he levied the writ upon the lands described, and executed it personally upon the defendant, and gave him a copy. It is not stated that the officer went upon the lands, or to the house or person in whose possession they were, and then and there declared the levy of the writ. It does not appear that the defendant was notified that a levy had been made. All that was

done was to indorse a levy of the land upon the writ, and to serve the defendant with a copy of the writ. We must assume that the officer's return contains a full statement of "all that he did in the execution of the writ," and, if this be true, no levy was made upon the land. It is by the levy that the lien arises, and that is not a legal levy which does not conform, in substance at least, to the statutory requirements. The judgment of the court cannot create a lien operating retroactively so as to cut out intervening rights of others. It can only give effect to a lien already secured by conformity to the law by which it is provided. The People's Bank, by the institution of its suit in chancery, secured a lien upon the property at a time when no sufficient levy had been made of the attachment writ, and the title derived by it under the decree in that cause related back to the inception of the lien. The consequence is that the bank, and not West, secured the title of Carriere.

The remaining question is whether the bank is entitled to have cancellation of the title of West in this proceeding. West by his bill avers that the title to the property was in Carriere at the time his writ of attachment was issued and served. The chancellor dismissed the bill of West, because he thought the children of Carriere (grantees in the conveyance made by Carriere on the 24th of May, 1884) were necessary parties to the bill. He then dismissed the cross-bill of the People's Bank, because the complainant therein had a full and complete remedy at law to recover the property described, and because it denied the title to have been in Carriere at the time of the levy of the writ of attachment. In this we think the court erred. It is true that the answer denies the title to have been in Carriere, but the effect of this denial is qualified and explained by the statements of the answer and cross-bill, in which it clearly appears that the conveyance of May 24th, which had been canceled at the suit of the bank, was the foundation of the denial. Manifestly the whole controversy between the bank and West is as to which party acquired the title of Carriere. Both parties admit that he once had title, and both claim to have derived that title. It is well settled in this state that one who seeks cancellation of a cloud upon his title must show that he is the owner of the land in controversy. But, where both parties claim under a common source, there is an admission by each that the title was in that source, and this is sufficient to uphold the right of that party who proves that he has secured that title to the relief of cancellation. If the bank were suing West in ejectment for the recovery of the land, it might show that he claimed under Carriere, and then that it was the true owner of his title. This being proved, a recovery would be had by the bank, without any other proof of title in Carriere. *Gordon v. Sizer*, 39 Miss. 805; *Smith v. Otley*, 28 Miss. 291; *Griffin v. Sheffield*, 38 Miss. 359.

Nor do we think that the cross-bill should have been dismissed on the ground that the complainant therein might by ejectment try the validity of the title of West,

who is in possession of the land. The right is conferred by statute (Code, § 1833) upon the real owners, "whether such real owner be in possession, or be threatened to be disturbed in his possession, or not," to cancel, to have cancellation decreed, of any conveyance or evidence of title, or any claim or pretense of claim of title, "which may cast doubt or suspicion on the title of the real owner." It has sometimes been declared by the court that the jurisdiction conferred upon courts of chancery should not be exercised to try conflicting legal titles. In *Huntington v. Allen*, 44 Miss. 663, many expressions of this sort were used, but the court finally disposed of the case by doing precisely what it declared should not be done,—putting its conclusion upon the invalidity of the complainant's title. But we are not aware of any case in which, a clear legal or equitable title being shown in the complainant, the court has declined to cancel the adversary title or claim on the ground that it is in form a legal title, or because of its apparent strength or weakness. In *Glazier v. Bailey*, 47 Miss. 396, the court refused to intervene because there was already pending an action of ejectment in which the titles of the parties could be tested. We know of no line by which the jurisdiction of the court is limited other than that prescribed by the law which confers it. When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant, and should be canceled. The decree dismissing the cross-bill of the People's Bank must be reversed. A decree will be entered here, granting the relief prayed by it, and canceling the title derived by West under his attachment proceeding as a cloud upon the title by the bank.

Decree accordingly.

MADISON COUNTY v. BROWN *et al.*

(*Supreme Court of Mississippi*. May 19, 1890.)

RAILROAD AID BONDS—ELECTION—SUPERVISORS' RETURN—BONA FIDE HOLDER.

On a question as to the validity of certain bonds issued by a county to a railway company, it was claimed that the issue was not authorized by two-thirds of the qualified voters, as required by Const. Miss. art. 12, § 14, and that such fact would appear from an inspection of the registration lists. The board of supervisors, in the performance of their duties, had declared that two-thirds of the voters had voted for the measure. *Held*, that a purchaser was not required to go behind such returns, and one who purchased for value, without actual notice of the wrongfulness thereof, was entitled to recover.

Appeal from chancery court, Madison county; WARREN COWAN, Chancellor.

E. E. Baldwin, for appellants. *W. P. & J. B. Harris* and *F. B. Pratt*, for appellees.

WOODS, C. J. The board of supervisors of Madison county exhibited their original bill in the chancery court of that county for the purpose of enjoining the further payment of any of the bonds issued by said county to the Vicksburg, Canton & Yazoo City Railroad Company. The *gravamen* of complainants' bill is that these bonds are invalid because the subscription to the

capital stock of said railroad company, and the issuing of the bonds, were not made after two-thirds of the qualified voters had signified their assent thereto, as required by the constitution of the state, and the act of the legislature passed in that behalf. The bill does not deny that the respondents are *bona fide* holders of the bonds, and without notice of the alleged irregularity complained of as rendering the bonds invalid; but the ground relied upon in the bill is that the respondents, though innocent purchasers, without notice, in the usual acceptance of that term, are yet not to be protected, for the reason that their innocence in this case is only and really their ignorance of the essential fact, as is alleged, that less than two-thirds of the qualified voters of the county assented to the subscription to the capital stock of said railroad company, and that this essential fact was and is a matter of public record, equally accessible to all persons, being contained in the registration lists of the voters of the county. In other words, this is the underlying proposition on which the contention of the bill of complaint rests, viz.: That, though an election was conducted under the forms, and in accordance with the provisions, of the act of the legislature; though the board of supervisors examined the returns made to it by the officers who managed the election, and, as the result of such examination, determined that two-thirds of the qualified voters of the county had assented to the subscription; and though the recitals in the face of the bonds declare that two-thirds of the qualified voters had cast their ballots in favor of such subscription,—nevertheless the bonds are invalid, even in the hands of *bona fide* holders without notice, for the reason that the board of supervisors had no authority and power to ascertain, determine, and declare the essential fact that the requisite two-thirds of the qualified voters had assented to the subscription, this essential fact being referable to, and determinable alone by, a fixed standard, to-wit, the registration lists of the voters of the county. This summary epitomizes the substance of the bill of complainants. To this bill the respondents presented their demurrer, which by the court below was sustained and from this action an appeal was taken to this court.

The magnitude of the question, and the largeness of the interests involved in the determination of the issue thus made up, has led us to a review of the jurisprudence of this state on this subject, though the same had long been regarded as settled upon an immovable basis.

Counsel for appellants, in argument, concedes that the controversy, in several causes determined in this court, has been, apparently, decided adversely to the views advanced by complainants; but we are pressed to enter upon a revision or modification of the former adjudications on the idea that the identical question now submitted to us has been passed upon recently by the supreme court of the United States, with the result of that tribunal departing or receding from its long line of decisions, beginning with *Knox Co. v. Aspinwall*,

21 How. 539, and we are referred to the case of Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315, and, especially, Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. Rep. 654, as supporting the views of appellants' counsel.

A careful examination of the facts of these two last-named cases, and of the opinions of the court on these facts, shows that in each there was a constitutional limitation imposed upon the power of the counties, over which they might not pass, in making subscriptions to the stock of railroad companies, and that this limitation was determinable, by every person, by a fixed, absolute standard,—by reference to a self-evidencing public record, to-wit, the assessment rolls of the counties. A constitutional provision imposed an unqualified limit upon the power of the counties, and this limit was to be ascertained and determined by reference to a fixed standard,—a public record which was made of absolute verity. In these cases it was held by the supreme court of the United States that the essential fact, as to due observance of the constitutional limitation, was to be ascertained and determined, not by the officers to whom the execution of the power was delegated, but by reference to a standard fixed by law,—a public record; that the essential fact, as to whether the limit of a certain rate per centum on the assessed valuation of the taxable property of the counties had been observed, was to be ascertained and determined only by reference to the assessment roll itself,—a record made by law of absolute verity for the ascertainment and determination of such essential fact. In such cases there are no returns of an election to be made to a certain tribunal, there is no canvass of such returns, there is no determination thereon, and there is no declaration of any final judgment by such tribunal. There is only need of reference to the fixed standard to ascertain and determine the essential fact; and this standard, speaking for itself, and without any assistance from any tribunal, with absolute verity, is open to all, and equally accessible to all, and its voice is equally distinct, in its declaration of essential facts, in the ears of all. In cases of this class the county is never estopped to deny the validity of bonds issued in disregard of constitutional limitation.

That the distinction was clearly in the mind of the supreme court of the United States in its opinion in the case of Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. Rep. 654, (the latest case on this subject determined in that court, on which appellants' counsel relies,) is manifest when Mr. Justice LAMAR, as the organ of the court, says: "The question here is distinguishable from that in the cases ["election cases," as we denominate them, for convenience] relied on by counsel for defendant in error. In this case the standard of validity is created by the constitution. In that standard, two factors are to be considered,—one, the amount of assessed value; and the other, the ratio between that assessed value and the debt proposed. These being exactions of the constitution itself, it is not within the power of a leg-

islature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts." In that case, the constitution having fixed an absolute standard of ascertainment and determination, the legislature could not legally make provision for a tribunal of ascertainment and determination, whose finding of the essential facts should take the place of the unvarying constitutional standard. In that case, as was said by Mr. Justice MATTHEWS, speaking for the court in Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315: "Nothing in the way of inquiry, ascertainment, or determination as to that fact [the assessed value of the property as shown by the record] is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact as it is recorded in the assessment itself is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it."

It thus appears with perfect clearness we think, that, in the two cases we are considering, the supreme court of the United States has not designed to overrule, and has not in fact overruled, the line of cases which hold that the determination and declaration of the tribunal to which authority has been given to ascertain what had been done preparatory to, and as a condition precedent to, its own action, and whose duty it was to issue the bonds if the conditions precedent were ascertained to have been met, shall estop the municipality or county issuing the bonds from denying their validity when the bonds in their body contain recitals of the essential facts, and when they are found in the hands of *bona fide* holders.

These two cases of Dixon Co. v. Field and Lake Co. v. Graham belong to the *genus* which includes the case of Knox Co. v. Aspinwall, 21 How. 539, and the cases, in our own state, of Vickaburg v. Lombard, 51 Miss. 111; Cutler v. Supervisors, 56 Miss. 115; and Supervisors v. Paxton, 57 Miss. 701; but to a different species. The distinction in the classes of cases is plainly marked, and readily distinguished. We have already considered one class. Let us now examine the other, and note the *indicia* which differentiate this from the class just examined.

It will simplify the further argument, and will aid the discussion of the remaining branch of the case, as we have marked it for consideration, to say here that the ascertainment and determination of the limitation of our own constitution upon legislative authority, and county power to issue bonds, in election cases similar to the one at bar, is not referred by the organic law to any absolute, fixed standard. There is no creation, or hint of any creation, in section 14, art. 12, of the constitution, of any fixed standard, by reference to which the limitation imposed in that section and article will be self-evidencing. In

the cases in 111 U. S. and 130 U. S., the constitution made the assessment roll the unvarying standard of ascertainment and determination, whereas, in the provision cited in our fundamental law, a variable and constantly changing registration list is not declared to be the fixed standard, importing absolute verity. In the very nature of things, it is incredible that the constitution designed to make an ever changing, never accurate, registration list the fixed standard of ascertainment and determination. It should be borne in mind that this registration list is itself but a piece of evidence which tends only to show what is the true voting population, and that it is subject to contradiction and overthrow, even when offered in evidence.

Returning now to the point before us, we ask, what are the characteristics distinguishing the class of cases which appellees' counsel insist embraces the case at bar, and which, for convenience, may be denominated "election cases," from the class embracing *Dixon Co. v. Field and Lake Co. v. Graham*? It may be said generally that, where power is conferred upon a municipality or county to make subscription for stock, and to issue bonds therefor, after the requisite number of qualified voters have assented thereto at an election legally held, and where the returns of such election are to be made to a designated tribunal, clothed with the power of making such subscription, and of issuing such bonds, if the conditions precedent to this action have been complied with, then, and in every such case, there is no absolute standard for testing the constitutional limitation, and the case falls not into the small and comparatively modern class,—examples from which we have seen in *Dixon Co. v. Field and Lake Co. v. Graham*,—but into the large and well-known class in which the limitation is ascertained and determined without recourse to a fixed, absolute standard. In this class of cases, there must, nevertheless, be some ascertainment and determination of the essential facts authorizing the subscription before it can be made, and before the bonds can be issued. Indeed, no subscription can be made, or any bonds issued, until there has been investigation, ascertainment, and determination of the essential facts which are necessary to be established as preliminary and prerequisite to the action of the tribunal which is charged with the execution of the power of making the subscription, and of issuing the bonds. By what or by whom is this investigation, ascertainment, and determination of the preparatory and essential facts to be made? Indisputably, not by any infallible standard imbedded in the constitution itself, for there is none such; but, manifestly and of necessity, by some tribunal created for that purpose, and competent for the task,—a tribunal which must hear and compare the evidence as to the facts, and which must investigate, determine, and pronounce judgment. What tribunal, then? Incontestably, that tribunal to which the election returns are to be made, and by which the subscription for stock is to be made, and the bonds issued. This is the only tribunal provided, and, *ex vi ter-*

mini, it is the one charged with the power and duty of ascertaining and determining in reference to the essential fact of assent by the constitutional number of qualified voters. Moreover, to hold that this tribunal shall not ascertain and finally determine, but that this ascertainment and determination is to remain forever open to dispute and adjudication, so long as any given bonds remain outstanding, would be effective to frustrate the public purpose of aiding the development of the country by extending municipal or county assistance to projected railroads; for bonds whose validity was perpetually disputable would have no marketable or other value. See *Coloma v. Eaves*, 92 U. S. 484.

Beginning with *Knox Co. v. Aspinwall*, 21 How. 539, and running through a long line of cases ending with *Township of Bernards v. Morrison*, 10 Sup. Ct. Rep. 333, in which Mr. Justice BREWER delivered the opinion of the court, the supreme court of the United States has uniformly held that the ascertainment and determination of the essential fact of the assent of the required number of voters requisite to authorize subscriptions for stock and the issue of bonds, belongs to the tribunal to which was confided the control of the matter. In the last-named case, Mr. Justice BREWER observes: "While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named." And this conducts us to the conclusion that there is no foundation upon which to plant the contention of appellants' counsel that the supreme court of the United States has either overruled or modified any former decision made in that forum along the line of kindred adjudications.

There can be no room for skepticism as to the true doctrine in this state. In *Vicksburg v. Lombard*, 51 Miss. 127, it was said "that, if the constituted authorities of the city put the bonds on the market, or deliver them to the railroad company for sale, on the assertion that the proper vote was given, the city ought to be estopped from setting up against the *bona fide* holder the plea that the assertion is untrue." In *Cutler v. Supervisors*, 56 Miss. 123, Chief Justice SIMRALL, speaking for the court, said: "The statute under which these bonds were executed made it the duty of the board of supervisors to canvass the votes, and declare the result of the election. Their decision is conclusive on the county in a controversy between it and a *bona fide* purchaser of the bonds." In *Supervisors v. Paxton*, 57 Miss. 708, Chief Justice GEORGE, in speaking of a part of the series of bonds involved in the present litigation, said: "It will be noticed that there is no attempt to shelter Paxton's purchase under the rights which the purchaser from the company may have had, in case his purchase was *bona fide*." The overwhelming force of the two cases last cited as authority in the case at bar will be acknowledged by every one when it is remem-

berd that the bonds whose validity was there assailed, and the bonds in the case before us, are parts of the same issue. That the county is now estopped to deny the validity of these bonds, in the hands of *bona fide* purchasers without notice, must be regarded as placed beyond controversy.

It is hardly necessary to remark that the views herein advanced are to be applied only to a case wherein the illegally issued bonds are found in the hands of innocent purchasers without notice, and that they have no reference to cases of bonds, issued wrongfully, which have not been put upon the market, and bought by innocent purchasers without notice.

If, however, we entertained any doubt as to the weight and value of the great current of authority on which we rest our opinion, we should feel constrained still to protect the rights of the holders of the bonds in this suit. The sound and wholesome rule of *stare decisis* becomes, under the circumstances of this case, a righteous doctrine, not to be departed from. On the authority of the judgment of this court in former cases, these bonds, as we must suppose, have commended themselves to prudent persons seeking safe investment. Surely, then, in the absence of all imperious reason and authority for change, this is a pre-eminently proper case in which to say, we stand by the former decisions.

Affirmed.

MURDOCK v. CHAFFE *et al.*

(*Supreme Court of Mississippi*. May 19, 1890.)

TAX-SALES—LEEVE LANDS—AUDITOR'S DEED.

1. Acts Miss. 1867, p. 247, § 18, provides that lands struck off to the levee boards on sale for taxes should be "exempt from state taxation for levee purposes or otherwise until the same shall be sold or disposed of by the board: provided, that any party seeking to redeem any land so struck off to the board" shall first pay all state, county, and levee taxes that would have been due on said land if the same had remained the property of the person offering to redeem. Acts 1884, p. 182, §§ 1, 2, direct the auditor of public accounts to deliver a quitclaim deed of the state's title to levee lands purchased from the levee commissioners of the first district, Hinds county, when "all state, county, and levee taxes due thereon" have been paid. *Held*, an auditor's deed of such lands, given on proof that all taxes had been paid thereon up to date, exclusive of the time they were held by the levee board, conveyed an indefeasible title.

2. The burden is upon the grantee of such deed to see that all taxes due have been paid; and a deed received upon the auditor's assurance that all taxes were paid, when in fact the taxes due for one year were not paid, was invalid.

Appeal from chancery court, Leflore county: WARREN COWAN, Chancellor.

Appellant, Clarissa Murdock, bought tax-title to land in controversy from the state, and filed bill to have same confirmed. Appellee Chaffe, having acquired tax-title of levee board, contested with the complainant, claiming his tax-title to be the better. Decree was rendered in favor of Chaffe, from which this appeal is prosecuted.

Rush & Gardner and *Brame & Alexander*, for appellant. *Nugent & McWille*, for appellees.

COOPER, J. The first question presented by the record arises upon a construction of the act of March 14, 1884, entitled "An act for the benefit of purchasers of levee lands sold under the decree of chancery court of Hinds county, first district, in case of Joshua Green and others against Hemingway and Gibbs, auditor and treasurer, and *ex officio* liquidating levee commissioners." Acts 1884, p. 182. By the first section of that act, it is provided that "the auditor of public accounts be, and he is hereby, authorized and directed to make, execute, and deliver to all purchasers of lands in the liquidating levee district sold under the decree of the chancery court for the first district of Hinds county, in the case of Joshua Green and others against Hemingway and Gibbs, then auditor and treasurer, and *ex officio* liquidating levee commissioners, and others, and to all persons claiming under said purchaser, by descent or purchase, a quitclaim of the title of the state to the land or lands sold under said decree by the commissioners of said chancery court, upon payment to said auditor of the usual fees for making conveyances by him as now provided by law, if applied for within twelve months after the passage of this act: provided, that nothing herein contained shall be so construed as to abate any levee taxes whatever, either liquidating or otherwise, which had accrued upon said lands, or any of them, prior to the 1st day of January, 1883, but, as to all such levee taxes, either paid or not paid, they shall, if now paid in, and, if not yet paid in, they shall, when collected, be distributed by the liquidating levee commissioners as now provided by law: and provided, further, that nothing herein contained shall be so construed as to repeal any law now in force, or which may hereafter be passed, providing for the collection of levee taxes upon any of said lands in the Mississippi levee district, or in the district for the board of levee commissioners for the Yazoo-Mississippi delta: and provided, further, that no such quitclaim shall be made until all liquidating levee taxes, or other levee taxes, on said lands, shall have been paid." Section 2 is as follows: "Said auditor of public accounts shall not in any case execute such quitclaim deed described in the foregoing section unless all state, county, and levee taxes due thereon up to the date of the execution of the quitclaim deed as aforesaid shall have been paid: provided," etc.

This act is an illustration of the confused and unintelligible legislation so commonly seen, in which matters of great importance are dealt with without any clear views being entertained of the subject. It is inconceivable that a definite purpose, clearly understood, should be so confusedly stated, and so covered by, and limited by, vague exceptions and provisos. Looking to the three provisos to the first section, it seems probable that they were added to that section, and then that some one, appreciating the confusion thereby caused, introduced the second section of the act as a substitute for them, intending to have them eliminated, but that by inadvertence they were left in the act. It

may be, however, that in the course of time some specific purpose to which they were directed may be discovered. We are unable to conceive what office they can perform that is not covered by the second section; and, since they are not supposed by counsel to be operative, in any particular direction, in reference to the matters involved in this cause, we deal with the act as consisting of the body of the first section only, and the second section.

The appellee Chaffe was the purchaser of the lands in controversy from Hemingway and Gibbs, and, it is conceded by the appellant, was entitled to have the quitclaim deed provided for by the act upon payment of "all state, county, and levee taxes due thereon up to the date of the execution of said deed."

The controversy springs from conflicting tax-titles,—one derived from a sale to the state, and the other from a sale to the levee board for levee taxes. The complainant claims to be the owner of the title derived under the sale to the state, and seeks to show its superiority over the title derived from the sale to the levee board, which, she contends, is the only title held by the defendant. The defendant claims to hold not only the title derived from the sale for levee taxes, but that he has also secured that arising from the tax-sale to the state. The history of these titles is as follows: (1) A sale to the state, July 6, 1868; (2) sale to the levee commissioners, May 10, 1870; (3) sale to the state under act of March 1, 1875, (abatement act,) May 10, 1875. These are the conflicting tax-titles: On December 24, 1877, Chaffe bought the lands from Hemingway and Gibbs, commissioners of the court in case of Green v. Gibbs, and received their conveyance. On January 1, 1885, the auditor, acting under the act of March 14, 1884, executed a quitclaim of the state's title, reciting therein that all taxes then due had been paid. On December 8, 1886, the auditor, in consideration of the payment of all taxes then due, conveyed the lands to complainant, Mrs. Murdock. Mrs. Murdock's contention is that the second section of the act of March 14, 1884, prohibited the auditor from conveying by quitclaim deed the state's title to the lands, unless all taxes from and including the year 1875, and up to the year in which the deed was made, were paid. On the other hand, Chaffe contends that by said section the auditor was only required to collect, or to be satisfied by proof of the fact that all taxes accruing after the sale by the liquidating levee commissioners had been paid. This is the principal point of controversy between the parties.

We are of opinion that the construction of the act of 1884 contended for by the appellee Chaffe is to this extent correct. The lands lying in the delta counties of this state have been since the year 1858 subject to two systems of taxation: One, by the state and counties, for state and county purposes; the other, under district levee laws, for raising funds to build and maintain levees for protection against the waters of the Mississippi river. All lands located in this region, and owned by individuals, was at the time of the tax-sales

above noted subject to be sold for the non-payment of either tax. If sold for the non-payment of state and county taxes, they were, if not bought by individuals at such sale, struck off to the state, and while so held were exempt from taxation for levee purposes. If sold for the non-payment of levee taxes, they were, if not purchased by individuals, struck off to the levee boards, and while so held were "exempt from state taxation, for levee purposes or otherwise, until the same shall be sold or disposed of by the board: provided, that any party seeking to redeem any land so struck off to the board under the provisions of this act shall, before he is permitted to redeem the same, pay all state, county, and levee taxes that would have been due and payable on said land if the same had not been struck off to such board, but had remained the property of the person offering to redeem." Act Feb. 13, 1867, § 13, p. 247. The lands in controversy were not redeemed by Chaffe from the levee commissioners, but were sold as the property of the board. If, therefore, the title derived from the sale for levee taxes was a valid one, said lands would only have become again taxable by the state after the date of the conveyance to him, December, 1877.

It will be noted that, under the operation of the act of 1867, any tax-sale made to the levee board was invalid if the land had been previously legally sold to the state for taxes, and continued her property. So, also, any tax-sale made to the state was invalid if the land had been previously sold to the levee board by a valid tax-sale. Hundreds of thousands of acres were claimed both by the levee board and the state under tax-sales. Aside from the questions affecting the validity of these sales because of failure of conformity to the provisions of the laws under which they were sold in other respects, the conflicting claims of the state and levee board stood as an almost insuperable obstacle to purchasers. Neither the state nor the levee board could sell, for no one would risk one title which was in danger of being overturned by the other. The lands were in mortmain as to revenue by taxation. The constant effort of the state, as exhibited by the legislation from 1872 to the present time, has been in the direction of getting these lands into the hands of private persons, where they might be taxable, by offering liberal abatement of prior taxes due thereon, by releasing the claims of the state where they conflicted with other tax-titles under which it seemed probable that the claimants would subdue to cultivation the fertile region in which they lie. The evident purpose and scheme of the act of 1884 was to give security to the holders of the levee titles, by vesting in them the state's title, if by chance that acquired from the levee board was invalid, and that held by the state was good. If the title of the levee board was valid, nothing was added by securing the quitclaim from the auditor; but, if that derived from the commissioners of the board was invalid, it was thought that the purchasers might be secured by investing them with another title,—that held by

the state,—and which might be efficient to protect their possession. The legislature was not swayed by sentiment either for or against the claimants of the levee board title. Its purpose was to encourage the continued private ownership and development of the lands of the delta, to the end that the state might secure a revenue from the annual taxes on the lands. The construction of the act of 1884 contended for by appellant would result in the assertion of a claim by the state to an adversary title to the lands unless the claimant should, within the year prescribed, pay the state not only the taxes that had accrued since the conveyance by the levee commissioners, but also state and county taxes accruing during the time when the levee board was, or claimed to be, the owner.

If the first section of the act stood alone, it is conceded that the auditor might have made a conveyance without demanding the payment of any sum whatever; but it is supposed that, by the second section, he was required to collect all state, county, and levee taxes, without regard to the time when they accrued. The language of the second section excludes this construction, unless it shall be contended that the state desired and intended to collect taxes not due, or to put upon the auditor the duty of determining as between the titles of the state and that of the levee board. Take the case in controversy as an illustration. If the sale to the levee board was valid, there were no state taxes due on the lands until after they were sold to the appellee. If, on the other hand, the levee board's title was invalid, and the state's title good, there were no levee taxes due. The act requires, as a condition precedent to the execution of the quitclaim deed, the payment of all state, county, and levee taxes. Before the applicant can accept the conveyance, under the rule of construction contended for, he must either pay the state and county and levee taxes, though either those to the state and county, or those to the levee board, were not charges on the land, or he must at his peril determine which of the two titles was superior. The rule of construction adopted by us is not only in line with the manifest scheme of the legislature, but removes from the investigation by the auditor the question of the relative superiority of the conflicting titles. We are, therefore, of opinion that, under the act of 1884, it was only incumbent upon the auditor to collect such taxes as had accrued against the land after its conveyance by the levee commissioners, or to require proof that such taxes had been previously paid.

The next question presented is as to the validity of the conveyance executed by the auditor to the appellee Chaffe. Chaffe bought the land from the levee commissioners in December, 1877. They were, therefore, taxable for the year 1878; and, unless this tax had been previously paid, or was then paid, to the auditor, the deed provided for by the act of 1884 should not have been executed. The deed from the auditor recites that evidence was furnished him that all taxes due had been paid, but the bill avers that the taxes of the year 1878

were not paid; and there is no denial, in the answer of this averment, and no evidence in the record, aside from the recital of the auditor's deed, that they were in fact paid. We cannot concur in the view pressed upon us by counsel for appellee, that the offer by appellee to pay all taxes due, and the reply by the auditor that none were due, is sufficient to uphold the validity of the deed, even though the taxes of 1878 were due, and should have been collected. The rule seems to be well established, and upon just grounds, that a party claiming under the exercise of a statutory power of sale by an agent of the state must see to it that the precedent facts exist warranting the exercise of the power. The authority of the auditor is limited and defined by the act by which it is conferred. No one can be deceived as to its extent, or the circumstances and conditions under which it may be exercised.

In *Lee v. Munroe*, 7 Cranch, 366, a question of similar character was presented to the supreme court of the United States; and it was held that one dealing with a public officer must at his peril take notice of his power to convey. The court said: "Were it otherwise, an officer intrusted with the sales of public lands, or empowered to make contracts for such sales, might, by inadvertence, or incautiously giving information to others, destroy the lien of his principals on very valuable and large tracts of real estate, and even produce alienations of them, without any consideration whatever being received. It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper conclusions, it would be very difficult for the public to protect itself." See, also, *Mayor v. Reynolds*, 20 Md. 1; *Denning v. Smith*, 8 Johns. Ch. 331; *Whiteside v. U. S.*, 93 U. S. 247; *Mayor v. Eschbach*, 18 Md. 276; *State v. Hays*, 52 Mo. 578; *Delafield v. Illinois*, 26 Wend. 192; *Swann v. Miller*, 82 Ala. 530, 1 South. Rep. 65; *McCulloch v. Stone*, 64 Miss. 378.

We think it is clearly shown by the record that the controversy in the court below was directed to the question arising from the construction of the act of 1884; and though, as the pleadings now are, it would seem to be conceded that the taxes for the year 1878 were not in fact paid by the appellee to the auditor, we will not enter a final decree here, but remand the cause, in order that the appellee may, if he is so advised, secure leave to amend his answer.

Decree reversed, and cause remanded.

ARNOLD v. ELKINS.

(*Supreme Court of Mississippi*. May 19, 1890.)

WIFE'S SEPARATE ESTATE—ESTOPPEL—FIXTURES.

1. The fact that a husband, in buying machinery with his wife's funds, which is thereafter affixed to her land, does not disclose his agency to the seller, does not estop the wife in a subsequent controversy with creditors of the husband other than the seller from asserting her ownership of the machinery.

2. Where a husband purchases personal property with his own funds, the fact that he has per-

manently affixed it to the wife's land is ineffectual to defeat the claims of his creditors, as Code Miss. § 1178, provides that no conveyance of chattels between husband and wife shall be valid as to third persons unless recorded, and that possession of the property shall not be equivalent to recording.

Appeal from chancery court, Webster county; B. McFARLAND, Chancellor.

Bill by Mrs. Elkins against F. N. Arnold to enjoin an execution sale of personal property. Complainant's husband purchased a steam-engine and appurtenances from one Lusk, which were afterwards permanently affixed to her land. The husband made a partpayment with her funds, and the balance was paid with the proceeds of her estate. Lusk did not know complainant in the sale, or that her husband was acting as her agent. In addition, the husband also bought a gin-feeder and a pair of platform scales, paying therefor from his own funds. These articles were also permanently affixed to complainant's land. Defendant, a creditor of the husband, caused an execution to be levied on them, as the property of the husband, when complainant filed this bill. There was a decree enjoining the execution as to the engine and appurtenances, but subjecting the gin-feeder and scales thereto. Both parties appeal.

Rev. Code Miss. 1880, § 1178, provides: "No transfer or conveyance of goods and chattels, or lands, between husband and wife, shall be valid as against any third person unless such transfer or conveyance be in writing, and acknowledged and filed for record as a mortgage or deed of trust of such property is required to be filed for record; and in such cases possession of the property shall not be equivalent to filing the writing for record, but, to affect third person, such writing must be filed for record."

S. M. Roane and Brame & Alexander, for complainant Elkins. *A. F. Fox*, for defendant Arnold.

COOPER, J. The circumstance that, in buying the machinery from Lusk, Elkins did not disclose the fact that he was acting for his wife, does not preclude her in a controversy with others than the seller from showing the truth. On the facts shown, we think that, as between the husband and the wife, this property would be held to be hers; and, in the absence of any circumstances changing the rule, it is also applicable as against the creditors of the husband.

But the facts relative to the purchase and payment for the feeder and scales make them, when bought, the property of the husband. He bought them on his own credit, and paid for them with his own means. Since they once belonged to the husband, they are, as in favor of his creditors, who are in controversy with his wife, to be deemed his, in the absence of any written recorded transfer to the wife. It is not permissible to defeat the operation of section 1178 of the Code by affixing the personal property of the husband to the land of the wife. No act, however formal, can be substituted for the written recorded transfer required by section 1178 for the conveyance of property between

husband and wife. *Montgomery v. Scott*, 61 Miss. 469.

The decree of the court below is in all things affirmed.

MOBILE & O. RY. CO. *et al.* v. HUMPHRIES.
(Supreme Court of Mississippi. May 26, 1890.)

CONVERSION—MEASURE OF DAMAGES.

In a suit by legatees against a railroad company for the value of shares of its stock owned by the testator, it appeared that the executor had surrendered the stock to a committee of reorganization, and had taken therefor negotiable certificates, to be redeemed by a new issue of stock when the reorganization was effected. These certificates were transferred by the executor after his removal by the court from the trust, and after various transfers they were taken up by the company, and the new stock issued to the holders. *Held*, the railway company was liable for the value of the stock at the time of the new issue.

Appeal and cross-appeal from chancery court, Lowndes county; T. B. GRAHAM, Chancellor.

A. S. Humphries, a legatee in the will of A. S. Humphries, deceased, claiming a pecuniary legacy of \$16,000, filed this bill in Lowndes county against the appellant, W. D. Humphries, C. A. Johnston, the First National Bank of Columbus, and others, for the purpose of recovering from the appellant 526 shares of stock of the Mobile & Ohio Railroad Company, or its value. A. S. Humphries, the testator, died in 1873, owning 526 shares of stock in the Mobile & Ohio Railroad Company. By this will, W. D. Humphries, a son of the testator, was made executor, relieved from giving bond, and given full power to wind up and settle the estate, and to sell all or any part of the assets on any terms deemed best for the interest of all concerned, and to make title to the purchasers. W. D. Humphries qualified as executor, and entered upon the duties of the trust. In the year 1876 the Mobile & Ohio Railroad was in the hands of a receiver appointed by the United States circuit court at Jackson, and by the United States circuit court at Mobile, in foreclosure proceedings instituted by the mortgage creditors of the company. With the view of avoiding a sale of the road and franchises and property of the company, the stockholders agreed upon a plan of reorganization in October, 1876, which was successfully carried into effect in May, 1879. Pending these negotiations the United States circuit court suspended the execution of a foreclosure decree, and the reorganization and readjustment was finally effected, by the unanimous assent of the stockholders, under the auspices and with the approval of these courts. The original stockholders surrendered no rights or privileges, and made no essential change in the nature of their stock, by way of barter, surrender, or exchange; and the whole purpose of the scheme was to preserve the stock by avoiding a foreclosure or sale under the mortgages which the stockholders and the company were then unable to satisfy.

W. D. Humphries, executor of A. S. Humphries, deceased, placed the 526 shares of stock in the hands of the committee of reorganization pending the negotiations

with the creditors of the railroad company, and received two certificates, which were termed provisional certificates of stock, for the 528 shares on June 22, 1877. These certificates were payable to "W. D. Humphries, executor of the estate of A. S. Humphries, Columbus, Mississippi," and in express terms were transferable "by indorsement," without entry on the stock-books of the company. On May 30, 1879, the chancery court made an order removing W. D. Humphries as executor, but providing that he should be held as executor for the purpose of making a final account. On July 7, 1879, W. D. Humphries, executor, sold and transferred by written indorsement these certificates of stock to Williams, Johnston & Co. Afterwards, in October or November, 1879, Williams, Johnston & Co., indorsed and assigned the certificates in blank, and delivered the same to W. D. Humphries. In November, 1879, W. D. Humphries went to Mobile with these certificates thus indorsed, and, armed with a certified copy of his qualification as executor, and a certificate of the chancery clerk of Lowndes county, under the seal of the court, that he was then the duly-qualified executor of the A. S. Humphries estate, and sold the stock to Miller & Co., bankers, of Mobile, for \$12,098. Miller & Co. very soon afterwards sold the certificates to McGinnis Bros. & Fearing, of New York. Upon presentation of these provisional certificates, under the plan of reorganization, new stock, known as "assented stock," for similar amounts, were to be issued. Shortly thereafter the certificates were presented to the company at its office in New York, and the new stock demanded by Kuhn, Loeb & Co. and W. B. McKean, of New York. The provisional stock certificates showed the unconditional sale and transfer by W. D. Humphries, executor, to Williams, Johnston & Co., the indorsement in blank of Williams, Johnston & Co., and were accompanied by the clerk's official certificates, as already explained. Thereupon the Mobile & Ohio Railroad Company issued 528 shares of new stock to the last holders of these provisional certificates. All that the Mobile & Ohio Railroad Company knew of these certificates, or their transfer and ownership, was derived from the face of the papers themselves. Acting in perfect good faith, the new stock was issued.

The complainant sought a recovery against the executor, Williams, Johnston & Co., and this appellant. On final hearing the bill was dismissed as to all the other defendants, and a money decree rendered against the Mobile & Ohio Railroad Company for the value of the stock at the time of its transfer on the books of the company. From this decree the Mobile & Ohio Railroad Company appealed. The complainant, because of the dismissal of his bill as to the other defendants, has also taken an appeal.

E. L. Russell, Orr & Sims, and Frank Johnston, for appellant railroad. *Barry & Beckett, Beall & Pope, L. F. Bradshaw, L. P. Landrum, J. E. Leigh, and A. S. Humphries*, for appellees and cross-appellants. *Arnold & Evans and F. S. White*, for cross-appellees.

CAMPBELL, J. Our conclusion is that W. D. Humphries did not have the right to sell the stock; that the railroad company is liable for its wrongful transfer at the value it had when transferred; that no liability attached to Williams, Johnston & Co., of which the appellant can avail; that nothing appears to debar the complainant from recovering; and that the decree against the appellant is correct, wherefore it is affirmed.

TOWN OF KISSIMMEE CITY v. CANNON.

(*Supreme Court of Florida. May 26, 1890.*)

TAXATION—ASSESSMENT—EQUALIZATION—ILLEGALITY.

1. The statute giving a remedy against illegal tax assessments by petition to the circuit court is still in force, and is not unconstitutional.

2. The right of a *de facto* officer, holding office under color of title, cannot be inquired into collaterally.

3. Where the assessor made valuations in a memorandum book, and afterwards consulted with members of the equalizing board in regard thereto, and adopted suggestions of theirs in raising his valuations on the final assessment roll, and no notice of this was given to the owner, this was not an illegal raising of valuations by the board, nor a violation of section 6 of the Kissimmee City act.

4. This act requires lots to be assessed and valued separately; but where the assessment and valuation in this respect is partly legal and partly illegal, as in this case, the court should so declare, sustaining the former, and setting aside the latter. But the constitution (section 8, art. 9), forbids the granting of relief to the owner for the illegal assessment until the tax is paid on the portion legally assessed.

(*Syllabus by the Court.*)

Appeal from circuit court, Osceola county; JOHN D. BROOME, Judge.

E. D. Beggs, for appellant. *Foster & Gunby*, for appellee.

MAXWELL, J. It is sought by the proceeding in this case, begun by petition under the statute, to have the assessment of appellee's real property in Kissimmee City declared "not lawfully made." Appellant attacks the proceeding in its foundation, contending that the statute under which it is brought is unconstitutional in embracing more than one subject, etc. This is founded on a mistake. When the statute was passed, (1848,) there was no such prohibitory provision in the constitution then existing; and when a part of the statute was repealed (1869) the fourth section was left, and was all that remained. *Shear v. Commissioners*, 14 Fla. 146. This section is the one which authorizes a petition to have assessments, if found to be illegal, declared to be not lawfully made; and it was in force when the present constitution was adopted, and preserved in force by section 2, art. 18, thereof.

The grounds of complaint in appellee's petition are (1) that the assessment was made by one "not a legally elected or appointed assessor of the town;" (2) that the assessment was "never legally reviewed" by the board of aldermen; and (3) that each lot was not valued separately, as the law requires.

There was a demurrer to the petition, in part on the ground that, the assessor not being a party to the suit, his title to the office could not be called in question in this

collateral way. The court overruled this portion of the demurrer, and this is assigned here for error. The facts set out in the petition, which we need not recite, show that the assessor held the office under color of title, and was recognized as assessor by the board of aldermen of the town. This court, in *State v. Gleason*, 12 Fla. 190, has decided that "the right to an office will not be inquired into collaterally," and that the acts of a *de facto* officer, exercising the duties of an office, are as "valid and binding upon the public, or upon third persons, as those of an officer *de jure*." That is the law, and the court erred in ruling otherwise. This disposes of the first ground of complaint in the petition.

The second ground is based upon the allegation that the aldermen raised the valuation of the assessor upon the land in an illegal manner, by meeting with him before the time required by law, and agreeing what values he should assess, and without legal notice to appellee. This, it is argued, is in contravention of the sixth section of the act of June 8, 1889, c. 3954, to enable the town council to levy certain taxes, and provide for a more complete assessment of the property in said town, which reads as follows: "That the town council of Kissimmee City shall meet on the second Wednesday in September of each year, at the council chamber, for the purpose of equalizing the assessment of the real estate in said town of Kissimmee City, and to hear all persons who may be aggrieved by such assessment, and may change the value of any real estate: provided that, should the town council increase any value fixed by the assessor, they shall cause ten days' notice to be given to the owner or agent of said real estate of such increase, and the said town council shall meet on the 4th Monday in September in each year to hear the said parties, should they offer any objections to such increase."

The gist of the complaint is that the raising of the values of his property was made before the proper time, and that he had no notice of it. In the answer of appellant, this action of the aldermen in advising as to values is explained to have been not in their official capacity, but as individuals familiar with the property of the town, and with the values thereof, and that their meeting with the assessor was not as a board, sometimes not more than two of their number being present; and it is further said that the assessor requested their assistance, that he might the better arrive at a correct valuation, it being his duty under the statute to ascertain by diligent inquiry all taxable property in the town, and to affix a valuation thereon, which duty is to be performed between the 1st day of June and the 1st day of September in each year, (section 1 of act,) and also his duty to set down values "according to the best information he can obtain," (section 3:) and, as to the requirement of the fifth section, that he shall complete the assessment on or before the first Wednesday in September of each year, and on said day meet with the town council for the purpose of reviewing the assessment roll, and

the requirement of the sixth section quoted above, the answer says "that between the 1st day of June and the 1st day of September of this year, [1889,] said assessor did make an assessment of the * * * property of said town, and on the first Wednesday of September * * * did meet with the town council * * * for the purpose of reviewing the said assessment roll, and said assessor and the council did review said roll; that the property * * * of complainant was assessed and described upon said roll; that the council met on the second Wednesday of September, and equalized the assessment of the real property of said town, and for the purpose of hearing all persons who claimed to be aggrieved by said assessment, and complainant did not appear before the council on said day, and claim to be aggrieved by such assessment." And the answer further says that, notwithstanding the assessor advised with members of the council as to valuations previous to returning the roll, "the valuations contained in the roll as presented on the first Wednesday of September were the valuations of the assessor;" that they were "affixed by the assessor freely, and of his own volition, entirely * * * untrammelled by said council;" and that "in some instances the assessor placed a higher valuation than that suggested at such meetings, [with members of the council,] and in others affixed a lower valuation, while in others he adopted the suggestions made."

The testimony of the assessor, his clerk, and one of the aldermen sustains these statements of the answer. It is shown that the valuations of the assessor appearing on the assessment roll when completed and presented to the council were not raised at its meeting on the second Wednesday of September, and hence there was no necessity for the notice to complainant under the statute, which he says was not given. The memorandum book showing these valuations—one by the owners, another by the assessor, and the third on the suggestion of members of the council at their informal meetings with the assessor—is not the assessment roll on which the council acted officially when it met to perform the duty required by section 6 of the statute. But it is insisted that it was improper and illegal for the assessor to change and raise his valuations at the instance of members of the council, as was done, before making up his final roll. In other words, that, where the values were thus raised, this was anticipating the duty of equalizing the assessments on the second Wednesday of September, and thereby depriving owners of the benefit of the provision for notice. We cannot agree in this view. The final roll, however made up, was that to which the tax-payers were to look, and the statute gave them the privilege to be heard by the council if they felt aggrieved by the valuation of their property in that roll. The complainant did not avail himself of this privilege, and we think he has no valid ground for saying now that the mode by which the assessor came to arrive at his valuations in the end renders the as-

assessment illegal. The assessor did not in all instances adopt the suggestions of members of the council, and he sought information from other citizens of the town; and there is nothing in the circumstances or in the evidence to indicate that he, or the members of the council, were actuated by any other than proper motives. If there was a question of propriety in the matter, inasmuch as the assessment had to be reviewed afterwards by the members in their official capacity, that does not render their conduct illegal. It is not to be supposed, in the absence of evidence to the contrary, that in this review their minds were not open to fair consideration of any complaint against the assessment; and in fact it appears that, in the only instance in which application was presented at the proper time for reduction of the valuation, a reduction was made.

The third ground of complaint in the petition, that in making the assessment each lot was not valued separately, is a good one to the extent that this is the fact. The statute (section 8) expressly directs that the assessor shall set down in the assessment roll "the value of each and every lot separately." In complainant's case only one lot is thus valued. The other lots, 18 in number, have but a single valuation for the whole group. It is said this was because these are embraced in the same tract, and adjoin each other; but that does not excuse the omission to value each separately. In this respect, therefore, the assessment was illegal.

The result is that part of the assessment should be declared lawfully made, and another part unlawfully made, (City of Pensacola v. Railroad Co., 21 Fla. 492,) to-wit, the assessment of lot 7, block 11, should stand, while the assessment of the 13 lots, from 6 to 18 inclusive, in Cannon's addition to Kissimmee City, should be declared unlawfully made. Lot 8, block 10, included in the decree as unlawfully assessed, is not the property of appellee, but of Mrs. Cannon; and while, under our ruling, it was properly assessed, it had no legitimate place in the decree in this case. But appellee is not entitled to relief for the part illegally assessed except upon payment of that legally assessed, because this is prohibited by the constitution; section 8, article 9, being that "no person or corporation shall be relieved by any court from the payment of any tax that may be illegal, or illegally or irregularly assessed, until he or it shall have paid such portion of his or its taxes as may be legal, and legally and regularly assessed."

It does not appear that the tax on the lot legally assessed has been paid. We think, however, that if appellee should pay this tax, relief may be granted as to the illegal tax; and, unless this is done promptly, the petition should be dismissed altogether. The decree will be reversed, and the case remanded for further proceedings in accordance with this opinion; the costs of this court to be taxed to appellee.

ON REHEARING.

MAXWELL, J. A rehearing is asked in this case, and in the other Kissimmee City

Cases, *infra*, on the ground that "the court overlooked, or did not consider, the point raised in appellee's brief, that the [Kissimmee City] act, having been passed more than sixty days after the annual election, * * * could not be retroactive, and no legal assessment could be held for 1889 under said act, but that the assessment for that year should have been under the old law." It is true that in the opinion rendered the court did not refer specifically to the point mentioned; and this can be accounted for by the fact that the petition of appellee to have the assessment set aside did not allege as a ground of illegality that the assessment was made under the act, instead of being made under the old law, but only that the assessor was not legally elected, having been elected more than 60 days after the annual election of the town, and three days before the passage of the act, and by the further fact that in appellee's brief, besides referring to unimportant incongruities and inconsistencies of the act, the principal reason in support of the point related to the illegality of the assessor's election. So that, in disposing of the question relating to the assessor, the court regarded the point mentioned in the petition for rehearing as also virtually disposed of. Moreover, except so far as it may be supposed that the act was not intended to be operative in the year 1889, because it was impracticable to appoint an assessor for that year within 60 days after the annual town election, as the act provides should be done, there cannot be a question as to the intention of the legislature to make the act operative for the year 1889. This is shown by the express terms of the act itself. It was approved June 8, 1889, and had no other purpose, as shown by its title, than to enable the town council to levy taxes and provide for a more complete assessment of the property of the town; and it directs (section 13) "that this shall become a law, in full force and effect, upon its passage and approval by the governor."

A rehearing is denied.

TOWN OF KISSIMMEE CITY v. DROUGHT, (two cases.)

SAME v. O'QUINN.

(Supreme Court of Florida. May 26, 1890.)

TAXATION—ASSESSMENT IN GROSS—ESTOPPEL.

Where real property should be assessed and valued for taxes in separate lots or parcels, an assessment and valuation in blocks or several parcels in gross will not be set aside if the owner, by listing and valuing the property himself in that manner, consents to such mode of assessment and valuation. He is estopped to complain that it is illegal.

(Syllabus by the Court.)

Appeal from circuit court, Osceola county; JOHN D. BROOME, Judge.

E. D. Beggs, for appellant. Foster & Gunby, for appellees.

MAXWELL, J. By agreement between counsel in these three cases, in connection with the cause of the Town of Kissimmee City v. Cannon, ante, 523, (just decided,)

it is understood that the decision in the latter case shall control in these. The complaint and the issues in all the cases are the same, and under the agreement the questions of law involved in that case must be ruled in the same way in these. But there is some difference in the state of facts as to the assessment of the property of the parties which will make a material difference in the result. The point on which this difference arises relates to the listing and valuation of property. In the Cannon Case, his property was not listed by himself, but by the assessor. In the other cases, each of the parties did list their property, and affix valuations thereto; and in this listing, compared with that of the assessor, it appears that he adopted theirs just as given in by them, and that he valued the property in the same bodies or parcels that they did, though affixing valuations different from those affixed by them.

We find that in this state of facts the doctrine is that a party whose method of valuation is followed should not be heard to complain against this. Blackwell says: "Town lots, though in the same block, and contiguous, and belonging to the same person, must be separately assessed, unless where the owner consents, as where he himself lists them as one tract." Blackw. Tax-Titles, (5th Ed.) § 279. State v. Baker, 49 Tex. 763, is to the same effect. In that case it was held that the lien given by the constitution of Texas on property assessed for taxes "is a charge merely upon each separate tract for the tax assessed against it," and the state failed to recover a tax assessed on several lots in Galveston because they were assessed in bulk as of a gross value; it not appearing whether the lots constituted the whole or a part of the block, "and had been listed by the owners as one tract or parcel of land." But the court said: "We are not to be understood, however, by anything which we now or have heretofore said, as either holding or intimating that either lots or blocks in a town or city, or originally distinct and separate surveys or grants in the country, if listed and assessed by the owner, or with his knowledge and approbation, as a single tract or parcel of land, may not be subject to a lien for the aggregate tax thus assessed."

It would seem to be reasonable that a party who has listed and valued in bulk his contiguous lots should be estopped from complaining that the assessor did the same. Suppose the assessor adopts the list, and also the valuation of the owner, surely he ought not to be permitted to complain afterwards that the lots were not valued separately. The fact that he valued the property at different figures from those of the owner cannot affect the consent that he should value it in bulk. The assessor is not bound by the owner's valuation; and, if the valuation of the former is excessive, redress is to be obtained in the manner provided by the statute.

Our conclusion is that the assessment in each of these cases should stand, and that the several judgments be reversed.

EMERSON et al. v. GAINNEY.

(Supreme Court of Florida. April 2, 1890.)

MECHANICS' LIENS—AFFIDAVIT—ACTIONS.

1. In an action under the mechanic's lien law, (chapter 3747, Laws Fla. 1887,) the affidavit of the plaintiff described the property upon which he claimed a lien as being a steam saw-mill located at a town or place called "Emerson," on the S., F. & W. R. R., 14 miles south of Live Oak, Suwannee county, Fla. *Held*, to sufficiently describe the property, as the plaintiff claimed no lien upon the land.

2. It is alleged that the jury allowed the plaintiff pay for the use of certain tools, used in constructing the mill, to which he was not, under the statute, entitled; but, the evidence failing to show the amount, if any, allowed for the use of the tools, no cause for reversal is shown.

3. The proceedings prescribed by the statute for the enforcement of the lien law are purely legal, and confer no equity powers upon the court; and a proceeding at law, under the statute, to enforce a lien is not unconstitutional.

4. The suit was commenced against the defendants as partners, but the *præcipe* and writ were amended, describing them as "late partners," but the amendment was not carried into the affidavit, which takes the place of a declaration, which describes the defendants as "partners;" but there was no objection to this variance in the court below, and the objection comes too late when first made in the appellate court.

(Syllabus by the Court.)

Appeal from circuit court, Suwannee county; JOHN F. WHITE, Judge.

J. S. White, for appellants. W. S. Hamby and M. E. Broome, for appellee.

MITCHELL, J. Gainey, the appellee, commenced suit in the circuit court for the enforcement of a lien under the mechanic's lien law of June 3, 1887. Chapter 3747, Laws Fla. The *præcipe* for summons *ad respondendum* was filed April 17, 1888. The writ was made returnable *instantly*, and it was issued, executed, and returned the same day; and on the same day the plaintiff filed his affidavit, which, under the statute, is the declaration in such proceedings.

On the 19th day of the same month, the circuit court being put in motion by the action of the plaintiff in filing the *præcipe*, and the issuing and execution of the writ, a jury was summoned,—we assume, from by-standers; and the cause was then ready for trial. At this stage the defendants, by counsel, entered a special appearance for the purpose of moving to quash the proceedings. The motion was refused; and the defendants then, by permission of the court, filed their pleas. The plaintiff joined issue thereon, and afterwards, by permission of the court, amended his pleadings. The cause then proceeded to trial on said 19th day of April, and resulted in a verdict in favor of the plaintiff. The defendants moved for a new trial, and in arrest of judgment, which motions were overruled; and the defendants appealed, and have assigned the following errors: (1) The court below erred in overruling defendants' motion for new trial; (2) in overruling defendants' motion in arrest of judgment; (3) in rendering judgment for attorney's fees for plaintiff.

The grounds of the motion for new trial are that the verdict was against the evi-

dence and the charge of the court, but there is nothing in the record to show what the evidence or the charge of the court was, and consequently we can consider no question sought to be raised by the motion.

The first ground of the motion for the arrest of the judgment is that "the plaintiff, by his affidavit to enforce the lien claimed, does not describe and sufficiently locate the property upon which he claims a lien for work."

The first section of the above act provides that "mechanics, laborers, and all other persons who shall perform any labor upon, or in the construction of, any building, or other work or structure, shall have a lien of superior dignity to all others upon the building, work, or structure upon which they may have worked, in the construction or repair thereof, and also upon the interest of the owner in the lot or land upon which such building, work, or structure stands, to the extent of the value of any labor done by them." The plaintiff claimed a lien upon a steam saw-mill, the property of the defendants, located at a place or town called "Emerson," on the Savannah, Florida & Western Railroad, 14 miles south of Live Oak, in the county of Suwannee and state of Florida, but claimed no lien upon the land upon which the mill was located; and hence, in our opinion, it was not necessary for the affidavit to describe the land or lot upon which the mill stood by metes and bounds. But it would have been otherwise had he claimed a lien upon the land as well as the building.

The second ground of the motion for the arrest of the judgment is: "Because the affidavit of said plaintiff does not allege and set forth in an issuable form the amount claimed, the kind of work done, and what property to which the lien claimed attaches." Now the affidavit, it is true, might have been more specific as to the property upon which the lien was claimed; but there is nothing in the case to show that the defendants, before going to trial,—in fact, before judgment,—raised any objection as to the affidavit; and, in the absence of such objection at the proper time, we cannot consider the question as to its sufficiency. The record does, however, show that, before going to trial, defendants moved to quash the proceedings, or rather that they entered a special appearance for the purpose of making such motion; but the record is silent as to whether or not the motion was made. But, if made, there is nothing to show the grounds of the motion; and, in the absence of such showing, upon the ground that every fair intendment is in favor of the correctness of the ruling of the court, we assume that the grounds of the motion to quash, if any, were not tenable.

The third ground of the motion for the arrest of the judgment is: "Because said plaintiff, by his affidavit, sets up claims for the use of his tools as part of his compensation, and for which a lien is claimed." As to whether the plaintiff received any pay for the use of his tools or not, we are not able to learn from the record; but it may be safely assumed, we think, that no error was committed in reference to any

pay the plaintiff may or may not have received for the use of his tools. If, however, there was error in this respect, the defendants have failed to point it out.

The fourth ground of the motion for the arrest of the judgment is: "Because plaintiff seeks in an equitable proceeding to enforce a common-law right." The fifth is: "Because the plaintiff seeks an equitable right in a court of common law." The sixth is: "Because this court cannot render a judgment for which plaintiff seeks by his said affidavit." These several grounds may be considered together, as they practically raise but one and the same question; and in considering this question we do not agree with counsel for the defendants. The mode of procedure prescribed by the legislature for the enforcement of the mechanic's lien law is a purely legal proceeding, and confers no equity powers upon the trial court in such cases, and is therefore free from the objectionable features insisted upon by the defendants.

The seventh ground of the motion for the arrest of the judgment is: "Because the law under which the plaintiff seeks to enforce his lien is unconstitutional in this: that it attempts to confer upon a court of common-law jurisdiction the powers of a court of equity." The act under consideration, as before stated, confers no such power as contended for by defendants, and hence their contention as to the act being unconstitutional for the reasons insisted upon is not tenable. And what we have said as to the seventh ground of the motion applies also to the eighth, because it seeks to raise the same question that is raised by the seventh ground.

The ninth and last ground of the motion is that the plaintiff did not commence his action within the time prescribed by the statute; but this ground is not well taken, because the record shows clearly that the suit was commenced in six months, the time prescribed by the statute for bringing the suit after the completion of the work by the plaintiff for the defendants.

It is insisted that the court below erred in not quashing the proceedings on the ground of variance between the *præcipe*, affidavit, and writ. In *Robinson v. Hart-ridge*, 18 Fla. 501, the court say: "Having disposed of these objections, we reach the errors assigned in this case. The first is that the court erred in giving judgment upon the verdict of the jury,—the declaration being in *trover*, and the writ in *assumpsit*,—and that the declaration is defective for want of material allegations. The defendant in the court below, without making any objection to this total variance between the writ and declaration, pleads to the changed form of action, goes to trial, and this objection is made for the first time in this court. The objection comes too late. * * * Under the provisions of the act of November 23, 1823, (Thomp. Dig. 351,) 'after verdict, the judgment cannot be stayed or reversed' for this variance. It is thus seen that this variance amounts to but little when urged in the circuit court before verdict, and amounts to nothing when urged after ver-

dict, and that it is no ground for a reversal of the judgment."

In the suit at bar the case stood originally against the defendants as partners in the milling business, but the *præcipe* and writ were amended, and the case then stood against the defendants individually, describing them as "late partners," etc., but this amendment was not carried into the affidavit which describes the defendants as "partners;" and this creates the variance complained of by the defendants. There is nothing in the record to show that the defendants objected to his variance in the court below; but, even if they did, under the decision in 13 Fla. supra, there was no error in overruling the objection. This objection is not incorporated in the record; and, even if there could be any objection on account of this variance, it should have been taken advantage of in the court below. It is too late to raise that question for the first time in this court. There was no error in the court below allowing the statutory fee of \$25.

This disposes of all the questions raised in the case. However, as the defendants have assailed the constitutionality of the act under consideration, we will remark that there is an interesting and important constitutional question involved in this act. The question is, do not the summary proceedings authorized against a defendant deprive him of his constitutional right to be tried "by due process of law?" This question was not raised in this case, and we express no opinion upon it.

The judgment is affirmed.

In re BRANDAU.

(Supreme Court of Florida. April 3, 1890.)

FORGERY—EVIDENCE—HABEAS CORPUS.

The petitioner, Brandau, was imprisoned upon a charge of forgery of a draft; but as there is nothing on the face of the draft alleged to have been forged to induce the belief that the signature thereto was not genuine, and there being no other evidence to show that the petitioner did not sign the draft with his true name, or that the draft had been altered in any respect for the purpose of fraud or deceit, the charge of forgery is not made out, and the petitioner is entitled to his discharge from custody.

(Syllabus by the Court.)

Habeas corpus.

C. J. Perrenot, for petitioner. William B. Lamar, Atty. Gen., for the State.

MITCHELL, J. The petition for a writ of *habeas corpus* was filed in this court March 21, 1890. The writ was issued on the same day, returnable March 24, 1890.

The petition alleges, among other things, that the petitioner, W. R. Brandau, is "confined unjustly, as he apprehends," in the county jail of Walton county, Fla.; that he is held under a commitment issued by S. P. DARBY, county judge of said county, upon a charge of forgery. The petitioner denies that he is guilty of any crime, as alleged. It prays a writ of *habeas corpus*, and an investigation by this court of the charge. J. A. McLeod, sheriff of said county, made return that he held the

petitioner under a commitment issued by S. P. DARBY, county judge of Walton county.

By consent of counsel, James A. McLean, Esq., was appointed to take the testimony in the case, and the testimony, being taken and submitted to the court, is substantially as follows:

"J. B. Cawthon, a witness for the state, says that he, as deputy-sheriff, arrested the petitioner, and that he knew the petitioner by the name of 'Sobey;' that he told petitioner that he was after him; that petitioner asked him what was the matter, and that witness told him that Mr. Bovis was dissatisfied about the check he had cashed for the petitioner, and that witness wanted him to go back to De Funiak with him; that they started back, and petitioner said that he was sorry that he got into it, but, as he was into it, he would tell witness the whole thing; that he asked witness if he would not take the money and let him go, and said that he was afraid to come back here for fear that Bovis had wired the house; that he was wanted at another place; that petitioner said he knew he had done wrong; that he knew the company would not honor his draft; that he had drawn other drafts on the company that had not been honored; and that he wanted the money of Bovis to go home on, and see why his drafts were not honored."

The instrument the petitioner is charged with forging is as follows:

"\$25.00. Jan. 28, 1890.

"At sight, pay to the order of Henry Bovis twenty-five dollars, value received, and charge the same to the account of

"W. R. BRANDAU.

"To Mosler Safe Co., 787 Broadway, New York."

This evidence utterly fails to sustain the charge of forgery against the petitioner. There is nothing on the face of the instrument he is charged with forging to induce the belief that the signature thereto is not genuine. This the attorney general in his argument admits. Nor is there any other evidence in the case to show that the petitioner did not sign his true name to the draft, or that the draft had been altered in any respect for the purpose of fraud or deceit; and, in the absence of such showing, the charge against the petitioner is not made out. 2 Bish Crim. Law, § 523; State v. Thompson, 19 Iowa, 299; State v. Kimball, 50 Me. 409; Barnum v. State, 15 Ohio St. 717; State v. Johnson, 26 Iowa, 407.

Our opinion being that the charge of forgery is not in the least sustained by the evidence, the prisoner should be discharged from custody under that charge; but this release will not preclude his being prosecuted before a magistrate, if the authorities shall see fit to institute the same, and held in default of bail to answer for any offense of which there may be evidence showing probable cause for his detention, whether such proceedings shall be instituted either before or subsequent to his discharge from custody on the charge of forgery.

MAGBEE v. KENNEDY et ux.

(Supreme Court of Florida. May 20, 1890.)

EQUITY PRACTICE—TIME FOR TAKING TESTIMONY—ENLARGEMENT.

1. Where there has been failure to take testimony within the time allowed by equity rule 71, and laches in applying for enlargement of time to take it, the enlargement should not be granted except upon strong showing of disqualification or positive hindrance to act, or of excuse in the indulgence or assent of the other side.

2. The matter of enlarging the time is one of discretion, and, while the refusal of the judge to grant the enlargement is reviewable on appeal, this court will act on the presumption of the correctness of the judge's ruling, and will not change it except in a clear case of mistake or hardship, particularly where the judge was in position to understand fully what weight should be given to excuses for delay based on local conditions and usages.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county; H. L. MITCHELL, Judge.

James T. Magbee, for appellant. M. C. Jordan, for appellees.

MAXWELL, J. This is a chancery suit in which the complainant seeks to set aside certain deeds to the wife of Thomas P. Kennedy alleged to be in fraud of creditors of Kennedy, so as to let executions against Kennedy, assigned to complainant, run against the property conveyed by said deeds. There is no question before us on the merits of the case, and it is unnecessary to set out the allegations of the bill. The only question involved is one of practice, growing out of the refusal of the judge to enlarge the time for taking testimony. Equity rule 71 allows "three months, and no more, * * * for the taking of testimony after the cause is at issue, unless the judge shall, upon special cause shown, * * * enlarge the time." The cause was at issue January 7, 1884; replication to the answer having been filed that day. No other step was taken till April 22, 1884, when the cause was set down for hearing by defendants. June 2d thereafter, according to notice by complainant, he would make application to have the time for taking testimony extended. His application was denied August 5, 1884. There was subsequently a motion for a rehearing of the application, which was also denied. The only errors assigned for our consideration relate to these refusals to enlarge the time for taking testimony.

In his petition for further time, complainant's excuses for delay are that, in consequence of propositions for a compromise, he hoped the matters in controversy would be settled out of court; that he had extended courtesies to defendants by promises not to take advantage of the absence of their counsel; that, immediately after the filing of the replication, he commenced preparing to take testimony, but the witnesses resided in Pennsylvania, and correspondence was first necessary in order to learn what could be proven to show the untruth of the answer; that he was delayed in finding out the proper officials and witnesses to make this proof; that, as soon as he got the information, after having made every effort for that pur-

pose, he left interrogatories at the office of the solicitor for defendants, but was surprised to find that the cause had been set for hearing. He goes on to speak of the usual courtesies of the bar of the circuit, and of the necessity of this on account of the large extent of the circuit, and the frequent absences of attorneys on business, and of the known liberality of the judge in the exercise of the discretion allowed him to prevent failure of justice. He says, too, his duties as a government official required much of his time that otherwise could have been devoted to his case. He then recites the substance of the controversy, and states what he expects to prove in support of his bill, and against the matters of avoidance in the answer, and, returning to his excuses for delay, refers to the absence of the judge from April 7, 1884, to May 1st thereafter, and then immediate absence till about May 12th.

In addition to his own affidavit verifying the petition, he presented other affidavits, one of which does not touch the question before us; another of which, on that question, was by his associate counsel, who says he was frequently absent on professional and official business, and at other times unavoidably absent, and when at his office, at home, was busy a greater part of the time in professional and other matters that claimed his almost constant attention; and another by his wife, who says he was seriously sick the greater part of every day from the middle of December, 1883, to the beginning of April, 1884, so that he was wholly unfit to attend to his law business, and that nearly all the work he did as deputy-collector of customs at the port of Tampa was done while confined to his room.

This is the strength of his case towards showing "special cause," or causes for enlarging the time to take testimony. As to the matter of delay because of propositions for compromise, that is denied by the defendant T. P. Kennedy, who admits conversations for compromise before the institution of the suit, but says there was only one such conversation afterwards, and this was just after the beginning of the suit, and that then he told complainant he could not agree to his demand, and that he must go ahead with his suit; and, as to courtesies in conducting the suit, Kennedy denies his application for the same, except in a single instance, when his solicitor was absent, in attendance upon the supreme court of the state. It cannot be claimed, therefore, in the absence of other evidence, that it is shown there was excuse for delay in taking testimony because of pending efforts for compromise, or because of promised professional courtesy. And we may as well say here that this courtesy alleged to be usual in the circuit cannot be supposed to extend to such abuse of the rights of clients as would follow from indulgence of clear and continued laches. Has there been such laches in this case? From January 11, 1883, when exceptions to the answer were filed, to July 30th of that year, complainant made no move; so that, under the rules of practice, his case was dismissed by the clerk. August 15th, he entered a motion

to set aside the order of dismissal, which was granted by the judge October 16th. Again no move till January 14, 1884, when by consent the exceptions were withdrawn. January 7th, replication was filed. Then he rests till June 2d, when he applies for extension of time to take testimony,—a default of near five months after the cause was at issue. In the meanwhile the defendants, April 22d, had set the case for hearing; this being after issue, and after the three months allowed by the rule for taking testimony had expired. Such neglect of the case as shown by these dates evinces laches not to be condoned except upon very strong showing of disqualification or positive hindrance to act, or of excuse in the indulgence or assent of the other side. We do not find relief for complainant's laches in what he says about the residence of witnesses in a distant state, and the delay caused by the necessity of first hearing who they were, and what they could prove, and the difficulty of this; for, with all this admitted, he still had the rule confronting him, and knowing this, being a lawyer of long practice, he also knew that if he needed further time, and the cause for extension was sufficient, it would be granted if applied for within the three months. But he made no application till near two months after the testimony should have been in. We do not mean to say that under no circumstances should application be entertained if not made within three months, but that in this case no cause yet considered was sufficient to justify or excuse delay beyond that time, and in any case the circumstances should be controlling and unavoidable to excuse delay. The only other fact of any consequence is the sickness of complainant during the greater part of the three months within which his testimony should have been taken. It is observable, however, that in the midst of this sickness he withdrew his exceptions to the answer, and filed a replication, and that he had a week after the sickness ended before the time expired, but took no legal step whatever for two months. It is further observable that the complainant himself makes no mention of his sickness as an excuse for non-action, but says instead that, immediately after the cause was at issue, he commenced preparing to take testimony, and was delayed by non-residence of witnesses, the necessity for correspondence, etc. Besides, it is not shown that during that time his associates solicited or could not have taken the necessary steps for procuring the testimony, or for getting an extension of time for that purpose. Under these circumstances, we think the alleged sickness furnished no sufficient excuse for the delay.

While the discretion of the court exercised in refusing to enlarge the time for taking testimony is reviewable on appeal, this court will act on the presumption of the correctness of its ruling, and will not change the ruling except in a clear case of mistake or hardship; and it is our opinion that in this case the discretion was exercised properly, and that we should not set aside the order of refusal. As said in *Ahren v. Willis*, 6 Fla. 359, it is "a safe

rule for the guidance of the appellate tribunal that every presumption is to be in favor of the correctness and propriety of the ruling of the court below, where the same is made in reference to any point which * * * was a matter purely of discretion." Particularly does this apply here, where the judge was in a position to understand fully what weight should be given to excuses based on the extent of the circuit, absences of the judge and of attorneys, and the professional courtesies usual in the circuit.

The order is affirmed.

WALKER, J., sat in place of MITCHELL, J., disqualified.

TOWER MANUF'G Co. et al. v. THOMPSON et al.

(Supreme Court of Alabama. April 17, 1890.)

EQUITY—JOINDER OF PARTIES.

Several contract creditors of the same debtor, having no privity among themselves, may join in a bill brought under Code Ala. § 3544, to set aside and cancel for fraud a bill of sale, though there is no statute authorizing such joinder.

Appeal from city court of Anniston; W. F. JOHNSON, Chancellor.

Brothers, Willett & Willett and Casady & Blackwell, for appellants. *Knox & Bowle*, for respondents.

MCCLELLAN, J. The present bill is prosecuted by several open contract creditors of V. L. Thompson, and seeks to have the sale of a stock of goods, made by him to C. A. Thompson, set aside, on the ground of fraud, and the property subjected to the payment of complainants' several debts. The decree appealed from and now assigned as error sustained a demurrer "for that the complainants are open contract creditors of V. L. Thompson, and cannot join in one bill to set aside and cancel for fraud, or any other reason, the bill of sale from V. L. Thompson to C. A. Thompson." There was, of course, no privity between or among the complainants, their only connection resting in the fact that each was a creditor of V. L. Thompson, and each in separate right had a standing in court to contest the validity of the transaction by which the common debtor of each had attempted to dispose of his property with intent to hinder, delay, and defraud his creditors. Nor can any statutory provision be resorted to in justification of joining two or more simple contract creditors in a bill filed, as this one is, under section 3544 of the Code. The act of February 20, 1889, to which reference is made by counsel, as authorizing such joinder, is confined, in express terms, to bills proceeding under section 3545 of the Code, for discovery, and was intended to remedy the effect of the decision in the case of *Railway Co. v. McKenzie*, 85 Ala. 546, 5 South. Rep. 322. The practice, however, of joining several creditors as complainants in such bills has been so long and so universally resorted to whenever occasion required, and has passed so often unchallenged through this court, as to have become, in some sort, an established rule of pleading. It has long been held that two

or more judgment creditors might unite in the prosecution of such suits, and in principle the objection to such a course on the part of judgment creditors is as tenable as that now urged to the joinder of contract creditors; and it seems to have been the general understanding of the profession that the two cases in this respect stood upon the same footing. So true was this, indeed, that notwithstanding the numerous cases shown by our Reports in which the point now insisted on might have been made, it does not appear to have ever been made until the recent case of *Ruse v. Bromberg*, 88 Ala. 619, ante, 384, and was then doubtless suggested by the opinion in *Railway Co. v. McKenzie*, supra, where the conclusion announced, with respect to a bill for discovery, was really reached on the doctrine of *expressio unius, exclusio alterius*. In *Ruse v. Bromberg*, supra, Justice CLOPTON says: "The contention is that the statute which authorizes a creditor without a lien to file a bill in chancery to subject, to the payment of his debts, property fraudulently conveyed by his debtor does not extend to such creditors the general rule which permits separate judgment creditors to join as complainants in a bill having such object. The statute has been in operation nearly thirty years. From the time of its enactment it has been the common practice to unite in such bills two or more creditors without a lien, seeking to enforce separate and distinct demands. Many cases have been reviewed in this court without the propriety of the practice being questioned. The statute has been generally considered as operating to place simple contract and judgment creditors, as to the remedy, on the same footing. Were it difficult to perceive any sound principle of equity pleading on which to justify it, we would long hesitate to disturb a practice so general and continuous, especially as its tendency and effect are to promote convenience, and to prevent multiplicity of suits." In view of the well-established practice, the advantages of which outweigh any possible hardships that may result, under peculiar circumstances, and carrying the language quoted above to its necessary and legitimate consequences, we are constrained to the conclusion that the present bill was well exhibited in the names of the several open contract creditors of the defendant. The decree of the city court is therefore reversed, and a decree will be here entered overruling the demurrer in question. Reversed and rendered.

CARTER et al. v. PALMER et al.

(*Supreme Court of Alabama*. April 16, 1890.)

LEVY OF ATTACHMENT—SPECIAL CONSTABLE.

Code Ala. § 2956, authorizing an attachment issued by a justice for a sum exceeding his jurisdiction, and returnable in the circuit court, to be levied by the constable in whose beat the process issued, provided the amount does not exceed the amount of the constable's bond, refers only to the regular constable; and such a levy by a special deputy is void.

Appeal from circuit court, Jefferson county; JAMES B. HEAD, Judge.

The appellants, Carter Bros. & Co., sued out an attachment against the defendant A. T. Palmer, before a justice of the peace, for an amount greater than the justice's jurisdiction, but not in excess of the amount fixed for a constable's bond. This attachment was made returnable to the circuit court. There being no regular constable, the justice appointed a special constable to make the levy of the attachment. Under the writ the special constable took the property in custody; and, while he had the same in his possession as special constable, the defendant sold the goods so levied on to Ellis, Thomas & Hill, and the said purchasers induced the special constable to turn the goods over to them. Upon finding this out, the plaintiffs had the clerk of the circuit court to issue a writ of attachment against the defendant Palmer under section 2955 of the Code; and the same was levied by the sheriff on the goods so sold to Ellis, Thomas & Hill, before they were removed from the state. Thereupon the said Ellis, Thomas & Hill made affidavit, gave bond, and instituted a claim to the said goods. Upon the trial of the claim suit, the court, at the request of the claimants in writing, gave the general affirmative charge in favor of the claimants. To the giving of this charge the plaintiff duly excepted, and also excepted to the refusal of the court to give the general affirmative charge in their favor, and these rulings of the court are here assigned as error.

Lane & White, for appellants. *Smith & Lowe* and *W. T. L. Cofer*, for appellees.

MCCLELLAN, J. We are not inclined to disturb the authority of the case of *Peoples v. Weir*, 60 Ala. 416, as to the competency of a special constable to levy an attachment issued by a justice of the peace, and returnable to the circuit court, for an amount greater than the justice's jurisdiction, and not in excess of the bond required to be given by constables. For many years, at least as far back as 1833, justices of the peace have had authority to issue attachments for sums exceeding their final jurisdiction, and make them returnable into the circuit court. But prior to the act of February 5, 1856, (Acts 1855-56, p. 18,) there was no law authorizing a constable to levy such an attachment, as was held in *Martin v. Dollar*, 32 Ala. 422, in reference to a levy made by a constable in 1838. That act, which now constitutes section 2956 of the Code, authorized such levies to be made by the constable of the beat in which said process may issue, provided the amount shall not exceed the amount of the constable's bond. Many reasons may readily be conceived for confining the power thus extended to bonded officers. The duty imposed involved liability extraordinary in character and amount, as compared with that attaching to the execution of the usual process issuing out of justices' courts, and to which the statute authorizing service by deputies (Code, § 850) applies. It is very clear to our minds that the legislative intent to afford parties aggrieved by the malfeasance or misfeasance of a constable, charged with this extraordinary duty, re-

course upon his bond, and to allow none except the regular constable—a bonded officer—to levy the writ, fully appears on the face of the enactment. It follows that in our opinion the case of *Peebles v. Weir*, supra, which involved a levy by a special deputy, was properly decided; and so, also, was the case of *Brinsfield v. Austin*, 39 Ala. 227, though the reasoning of the learned judge who delivered the opinion in the case last named proceeds on the unfounded assumption that a bonded constable was not authorized to levy such an attachment.

The levy in this case, made by a special deputy, was therefore void, and the officer was a mere trespasser. The sale by the defendant to the claimants, Ellis, Thomas & Hill, after such abortive levy, and before the levy made by the sheriff, was valid; and on his view of the case alone, if not also on the ground that the first levy was abandoned, the court below properly gave the affirmative charge for the claimants.

The judgment of the circuit court is affirmed.

Succession of ARLAUD.

(*Supreme Court of Louisiana*. March 17, 1890.
42 La. Ann.)

APPOINTMENT OF TUTOR—COLLATERAL ATTACK.

1. The order of a competent court appointing an under-tutor cannot be attacked collaterally, and must stand until vacated or annulled by appeal, or in a direct action of nullity.

2. The deliberations of a family meeting convened for the purpose of recommending the appointment of a dative tutor, and resulting in an equal division between the members composing the same, decide nothing, and cannot be the basis for the appointment of any one as tutor.

(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

E. D. Le Breton and Chapella & Depoorter, for appellant. *Ambrose Smith*, for appellee.

POCHÉ, J. This is a controversy over the appointment of a tutor, and of an under-tutor, to the minor, Leah Arlaud, only child of the deceased. At the time of his death, Leon Arlaud was divorced from his surviving wife, Helen Massin, who was then absent from the state. By his last will, the deceased had appointed Miss Helena Fitzgerald his testamentary executrix, and testamentary tutrix of his minor child. When the executrix presented a provisional account of administration, Mrs. Massin interposed an opposition involving the alleged nullity of the will in so far as it purported to affect the tutorship, which she claimed for herself by nature. At this juncture, Agener La France, the present appellant, was appointed and qualified as under-tutor; and, owing to the absence of the mother, who was yet in a foreign land, he instituted proceedings praying for a family meeting to recommend a dative tutor for the minor. An order was thereon made by the district court, convening a family meeting for the purpose of recommending proper persons to be appointed as tutor and under-tutor of the minor. The family meeting, with

six out of seven members appointed present, was duly convened. On the choice of a tutor the votes were equally divided; three members, including himself, voting for Lambert Prudhomme, and three others voting for the appellant, Agener La France. As to the under-tutor, five of the members concurred in the recommendation of the same person. The under-tutor, La France, refused to sign the deliberations of the family meeting, whereupon a rule was taken contradictorily with him for the appointment of Prudhomme as tutor, and of Rapelr as under-tutor. From a judgment making the rule absolute, La France prosecutes the present appeal.

Under the pleadings, two points are presented for discussion: (1) Did the court have the power to submit the question of a choice of an under-tutor to the family meeting? (2) Was the appointment of Prudhomme as tutor recommended by the family meeting?

1. There is no question as to the legality of the appointment of La France as under-tutor. It is not contested that the court appointing him was competent to make the appointment. It is not averred that he has ever resigned, or that he has ever been removed, or that the order appointing him has ever been vacated, or otherwise annulled and set aside. On the contrary, he was recognized as the under-tutor for the purpose of presiding over the family meeting, and for the purposes of the rule now under discussion. It is settled in our jurisprudence that a judicial order or decree stands until set aside by a direct action; and the rule has been extended to an order appointing an under-tutor. The question came up in *Succession of Keller*, 39 La. Ann. 579, 2 South. Rep. 553. In that case the adjudicatee of succession properly refused to accept title on the ground of alleged nullity of the proceedings which had led up to the sale; the illegality being that the family meeting was presided over by an under-tutor whose appointment was unauthorized, null, and void. But the court held that the alleged nullity could not be set up collaterally, for the reason that "the correctness or regularity of a judgment of a competent court appointing a tutor cannot be collaterally reviewed or questioned even by the court which has made the appointment;" and, after referring to numerous authorities in support of that proposition, the court continued, and said: "It requires no argument to show that the same rule must govern in the case of the appointment of an under-tutor, whose functions are not less sacred, important, and indispensable in the interests of minors than those of the tutor." It may be, as suggested by appellant, that the appointment of Voegtte as under-tutor of the minors Keller was unauthorized and illegal; but that is a question which cannot be investigated in a collateral manner. His appointment by a court of competent jurisdiction is full proof of his capacity, and has effect against third persons until set aside by appeal, or in an action of nullity." Comment would be superfluous to show that the foregoing views are absolutely decisive of the point now under discussion.

2. On the second point the consideration is that the deliberations of a family meeting composed of six members, resulting in a vote of three members recommending one person for the appointment of a tutor, and in a vote by the three others recommending a different person, is tantamount to no consideration at all. It stands to reason that in all deliberative meetings the action of the body must result from the expressed will of at least a majority of the members composing the assembly, in the absence of which there is no action. In an election by the people a tie vote is no choice. And we take it that the members of a family meeting who are equally divided can no more make a recommendation than four justices of this court, equally divided in opinion, can render a legal or binding decree. The precise question, as applicable to family meetings, is new in our jurisprudence, but the views herein announced are in accord with the construction of the subject which prevails in French jurisprudence. 4 Laurent, Droit Civil, 573; 4 Demolombe, Minorete, 186. In this case, the judge's sole authority to appoint a tutor was upon the advice of a family meeting. Rev. Civil Code, art. 270. And, as the family meeting convened for the purpose has failed to give its advice, it follows that the appointment made by the judge was made without legal authority or sanction. Hence it cannot stand, and the matter must stand in abeyance until another family meeting, duly convoked and held, shall have legally stipulated in the premises, and given its advice on the subject.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, at the cost of the succession; and it is now ordered that the cause be remanded to the district court for further proceedings according to law, and according to the views herein expressed.

O'HARA et al. v. INDEPENDENCE LUMBER & IMP. Co.

(Supreme Court of Louisiana. March 3, 1890.
13 La. Ann.)

CITATION—RETURN—APPEAL—DISMISSAL.

1. Where a sheriff's return on a citation does not conform to the requirements of law, the judgment will be reversed, and case remanded.

2. As the return may have been defective, and the service good, the case should not be dismissed, but remanded for further proceedings, at costs of plaintiffs in both courts.

(Syllabus by the Court.)

Appeal from district court, parish of Tangipahoa; THOMPSON, Judge.

E. N. Whittemore, for appellants. Reid & Reid and S. D. Ellis, for appellees.

MCENERY, J. Plaintiffs, creditors of the defendant company, alleging its insolvency, the closing of its mills, and the absence from the state of all the officers of said company, prayed for the appointment of a receiver of said company, the judicial sequestration of its property, and the liquidation and settlement of its affairs. The prayer was granted, a receiver appointed, the property sequestered, and or-

der for its sale granted. Berthold & Jennings, a commercial firm of St. Louis, and stockholders in said company to the amount of 137 shares, of \$50 each, appeal from the judgment. They allege the proceedings were conducted and prosecuted to judgment with undue haste, and were *ex parte*; the defendant company having had no opportunity to appear and defend in said suit.

The company was incorporated in February, 1888. In November, 1889, its mills ceased operation. On December 2, 1889, the suit of plaintiffs was filed. On December 8, 1889, the case, on the rule to appoint a receiver, was taken up, tried, and made absolute. On the same day the receiver was appointed, gave bond, and qualified. On the 9th of December the receiver applied for and obtained an order of sale of the property of the defendant company.

In these proceedings, conducted so speedily, the appellants alleged that there was no valid return on the citation to the defendant company, and the judgment on the rule is therefore a nullity. The return on the citation is as follows: "Received this original citation, together with certified copy of same, and a certified copy of plaintiffs' petition and order thereon, and served said certified copy of plaintiff's petition and order on R. D. Manard, a person over the age of fourteen years, whom I found at the domicile of said Independence Lumber & Improvement Company, in charge of said company's property and mill,—the general manager and president being absent from the domicile of said company at the time of service,—and make this my return. F. P. Mix, Sheriff." The return is radically defective in not stating whether the name of the party to whom the citation was handed was known to the sheriff, or whether he learned it by interrogating that person, and omitting to state the day, month, or year when the process was served. Code Prac. arts. 201, (subd. 2,) 202, 203. The return does not show a domiciliary service, and there was no proper foundation for a default.

There was not, however, an utter want of legal service; and, as the party plaintiff could have had the return amended in accordance with the facts of the services, the proper course to pursue is to remand the case. *Adams v. Basile*, 35 La. Ann. 101.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that the case be remanded for further proceedings, at the costs of appellees.

PENONILH et al. v. ABRAHAM.

(Supreme Court of Louisiana. Feb. 10, 1890.)

CONTRACTS—CONSTRUCTION—PERFORMANCE—INJUNCTION.

In case one co-proprietor of real estate enters into an agreement with certain of his co-owners, of whom he is a creditor, to institute a suit against another for a partition of the common property by licitation, and at judicial sale to purchase the whole, and return to his associates their respective portions at a fixed price, stipulating to give them one, two, and three years to pay their indebtedness as an inducement, held that, if said promising co-owner subsequently proceed against the said defendant in the partition suit by a seis-

ure and sale in the foreclosure of a mortgage, and at sale thereunder become the purchaser of her interest, and thereby render further proceedings under the judgment immediately obtained in the partition suit impossible, he is nevertheless bound to keep his agreement with his associates, and cannot proceed against them until the time expires.

ON REHEARING.

1. An injunction arresting executory process for the sale of mortgaged property for cash will be perpetuated, on proof that time was allowed to pay the debt, although part of the claim was due at the institution of the proceedings, in the absence of any prayer by the creditor to restrict the injunction to installments not yet accrued.

2. The right of the creditor to enforce his mortgage in other proceedings will, however, be reserved.

(*Syllabus by the Court.*)

O'Sullivan & Knoblock, for appellant.
L. P. Callout, for appellee.

WATKINS, J. Appeal from the twentieth judicial district, parish of Lafourche. On the 12th of September, 1889, the defendant obtained an order of seizure and sale against the plaintiffs in the enforcement of a special mortgage securing the payment of three notes of \$1,260 each. On the 1st of November following, the seized debtors enjoined the sale on the ground that the seizing creditor had granted time, and the proceedings were premature. Under Code Prac. art. 741, the defendant in injunction obtained an order of court ruling the plaintiffs to summarily prove the truth of his averments; and on the trial of the rule his injunction was dissolved, and he has appealed.

The averments of the plaintiffs' petition for injunction are, substantially, that (1) the seizing creditor entered into a written agreement with petitioner in which he bound and obligated himself not to enforce the payment of said mortgage notes for a term of three years thereafter; (2) that subsequently, in order to induce a family meeting to consent to the institution of a partition suit against Mrs. Aladdin Broussard as a co-proprietor of a plantation owned in indivision with the parties to said written agreement, the creditor reiterated his promise, not to enforce his claim for a period of three years, to the members of the family meeting then assembled.

The facts are substantially as follows, viz.: The Ravenswood plantation was owned in indivision by Simon Abraham, Henry Finney, Mrs. Aladdin Broussard, and the minors Penonilh. All of the co-proprietors seemed anxious to get rid of Mrs. Broussard on account of her alleged disinclination to keep the place in repair, and suitable condition for cultivation; and on the 12th of September, 1888, they entered into a written agreement stipulating that a suit "shall be at once instituted against Mrs. Broussard for a sale of the whole of said plantation to effect a partition; that Simon Abraham shall buy in the whole at a price to be agreed upon by and between us, and shall immediately after said sale sell back to us, the other signers hereto, our respective interests, for a price equal to our respective indebtedness, plus our respective proportions of the costs and fees to effect said partition; said

price to be paid in three equal installments, maturing at one, two, and three years, with eight per cent. interest from date." On the 24th of September following, a family meeting was convoked for the purpose of obtaining their advice and consent for the minors Penonilh to join in the institution of the partition suit contemplated in the agreement; and it is proven by a decided preponderance of the testimony that Simon Abraham expressed a willingness to grant the minors three years' time to pay their indebtedness to him, if they would consent that the minors be made parties to the proposed partition suit against Mrs. Broussard, and that upon due deliberation said meeting assented thereto.

The effect of the recommendation of the family meeting was to ratify and confirm the previous act of the tutor in signing the agreement. To the reception of this parol testimony defendant's counsel objected, and excepted that it was merely explanatory of the written agreement, and could not be legally introduced for such a purpose. We do not think so. The manifest object in view was to confirm the contract entered into by the tutor without authority; and the parol evidence was offered for the purpose of showing what influences were employed by Simon Abraham to accomplish that result, and that the meeting accepted and acted upon them. For this purpose the testimony was admissible, and the judge *a quo* properly ruled to receive it.

On the 15th of October following, only two weeks subsequent to the family meeting, the then parties signing the agreement, including the tutor, instituted a partition suit against Mrs. Broussard; and on the 15th of December, afterwards, judgment was rendered ordering a sale of the common property to effect a division between the co-proprietors. This judgment was never executed. But the record discloses that on the 18th of June, previous to the agreement, Simon Abraham obtained an order of seizure and sale against the undivided interest of Mrs. Broussard in the plantation, and that it was by the latter enjoined on the 16th of August, on the substantial averment that the notes and mortgage were executed by her tutor during her minority, and by Abraham obtained by fraud and collusion. It further discloses that this injunction was dissolved on the 20th of October, subsequent to the execution of said agreement, and on the 5th of January, 1889, the property went to sale, and was purchased by the seizing creditor, and Mrs. Broussard was dispossessed. By this means the coveted object of Abraham was accomplished, and he did not attempt the execution of the judgment in the partition suit. Indeed, it was not susceptible of execution, because the interest of the only defendant in that suit had been sold, and it could serve no further purpose.

In this state of facts, counsel for the defendant insists that, forsooth, the interest of Mrs. Broussard was not sent to sale under the judgment in the partition suit, and his client did not purchase thereunder, but under his own judgment; nothing

was accomplished by the agreement and recommendations of the family meeting; and he is relieved of his obligation to extend the time for the payment of the minors' indebtedness, and was entitled to proceed at the time and in the manner he did to foreclose his mortgage. The counsel in his brief, at page 4, says: "The agreement introduced in evidence is a conditional one, the main consideration of which was the accomplishment of an entirely different object, to which the promise to give time was only incidental. The cause of that agreement was the getting rid of Mrs. Broussard, one of the co-owners of the plantation." And from this statement the inference is clear that, as that end was accomplished by other means, albeit they were of Abraham's own selection, the agreement was put at an end. But the district judge placed his judgment on a different ground. "Had it been stipulated," says he, "that Abraham should purchase this property at any price whatever, or had the price at which he was to buy it been fixed and determined, the contract would, in my opinion, be one that could be enforced against him. At any rate, had the agreement contained such stipulations, I do not think that he could sue on the notes now in suit until such a time as it would be shown that he could comply with the agreement by buying in the plantation. The evidence does not show that any fixed price was ever agreed upon between them as that at which Abraham should bid in the property; and therefore, in my opinion, the contract is inchoate, incomplete, and not susceptible of enforcement."

In our view, the counsel's argument is a complete answer to the judge's reasoning. Abraham acquired the property by other means, it is true, and there no longer exists any question or contention as to the price he was to pay. That feature of the agreement has been eliminated by his own act; he having exercised his discretion under which one of two judgments against Mrs. Broussard he would proceed to expropriate her interest in the common property. But the agreement does fix, definitely and specifically, the price at which he was to sell to other co-proprietors. It says: "And Mr. Simon Abraham shall immediately after the said sale sell back to us, the other signers hereto, *our respective interests, for a price equal to our respective indebtedness,*" etc. (*Italics ours.*) It must have been considered of little interest, as it evidently was, at what figure Abraham was to buy, inasmuch as the exact amount he was to sell to each, and the exact amount which each was to pay, were fixed and stipulated in the agreement. Nor, in the light of subsequent events, was it a matter of any consequence under what particular judgment Abraham should acquire the interest of Mrs. Broussard, or in what particular mode the minors' respective interests in the common property were secured, so that the amount of their obligation to him should not be increased. The only other interest they had was in maintaining the stipulation deferring the time of payment, and to this we think they are entitled.

Surely their tutor has in no way violated the agreement, but has steadily kept faith with Abraham, and united with him in obtaining a judgment against Mrs. Broussard in a partition suit. The relative positions of the parties are just the same as though Abraham had purchased under that judgment, and sold to the other co-proprietors. We are of opinion that the partition proceedings were only intended to effect a sale in the event the injunction suit of Mrs. Broussard had terminated in her favor. But it could not have been brought without making the minors parties. We think the defendant's promise to give the plaintiff time is in full force and vigor, and that he should be kept to his agreement.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, and it is now ordered and decreed that there be judgment in plaintiffs' and appellants' favor quashing and setting aside the defendant's and appellee's order of seizure and sale, and perpetuating plaintiff's injunction, with costs against defendant and appellee in both courts.

FENNER, J., absent.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. The main complaint of the defendant is that by the decree herein rendered the injunction issued, arresting his executory proceedings, was perpetuated. An examination into the matter indeed shows that the time claimed to have been allowed, and which was one, two, and three years, might be computed from the date of the agreement between Abraham and the co-proprietors of the property, which is September 12, 1889. The proceedings for the seizure and sale were instituted just one year later. At that date, the creditor, not having been paid the matured part of his claim, was entitled to proceed against the property to satisfy it. In such case, he ought to have asked the sale on proper terms, allowing to the adjudicatee the time to which the debtors were entitled. He has not done so, either in his original petition, or in any other subsequent proceeding, below or on appeal. We cannot amend the judgment in his favor so as to allow him to proceed further in the seizure and sale case. What can be done is simply to explain that he is not perpetually enjoined from collecting his claim against his debtors, but that he is not allowed to do so in the manner and form in which he has attempted to do so. His rights in other respects are fully reserved.

Rehearing refused.

FENNER, J., takes no part, not having participated in the original decision.

Succession of BELLANDE.

(*Supreme Court of Louisiana.* Feb. 10, 1890.
43 La. Ann.)

HUSBAND AND WIFE—SEPARATE ESTATE—ESTOPPEL.

1. A husband who has been a party to an authentic act by which it is declared that the wife

purchases with her separate paraphernal funds, and for her separate benefit, is estopped from contradicting the verity of such recitals unless he first prove that such recitals were embodied in the act through fraud, error, or violence.

2. He must prove the error before he can be heard to contradict the verity of the recitals.

3. The proof of error must be clear and convincing. Where the terms of the act are unambiguous, when it is shown that those terms were fully communicated to him, he cannot escape their effect by saying that he did not understand the legal significance of the terms used, particularly after the death of his wife, in a contest with her heirs.

(Syllabus by the Court.)

H. H. Bryan, for appellant. A. J. Lewis, for appellee.

ON MOTION TO DISMISS.

BERMUDEZ, C. J. Appeal from the civil district court for the parish of Orleans. The motion has no merit. The case is precisely the same case which was before us under a former appeal, in which the present mover was then appellant. We then entertained jurisdiction, and we still have it. A party cannot invoke our jurisdiction to reverse a judgment rendered against him, and then decline it when invoked to reverse a judgment, in the same case, rendered in his favor.

ON THE MERITS.

BERMUDEZ, C. J. This case involves a dispute between the surviving husband and the heirs of the wife as to the ownership of a piece of real estate purchased by the wife by authentic act, to which the husband was a party, and which declares that the purchase was made by the wife, "with her own separate and paraphernal funds, for herself, her heirs, and assigns." The case was before us on a former appeal, on a ruling of a judge *a quo* which excluded all testimony offered by the husband to show that the act of purchase was executed in error; that it did not recite the desire and intention of the parties, which were simply that the purchase should be made in the name of the wife for the benefit of the community; that the contrary declaration in the act was made through an error of the notary, and was not observed by himself and wife because they did not understand the meaning of the words used. We reversed this ruling, and remanded the case, saying: "However true it may be that a husband under whose authority a wife acquires property, with the recital in the act that the purchase is made by her with her separate and paraphernal funds, and for her exclusive benefit and advantage, and that of her heirs and assigns, may be, as a rule, estopped from contesting the verity of the statement and the character of the investment, it does not follow that he must necessarily be shut out from all right to attack the act on grounds which he might have urged against others than his wife, such as error, violence, or fraud." Succession of Bellande, 41 La. Ann. 493, 6 South. Rep. 505. The judge *a quo*, in his opinion now before us for review, seems to have misconstrued our opinion as meaning that proof of the falsity of the recital in the act was in itself sufficient proof of error. He

makes no other comment on the evidence in the case, except to say: "The proof is convincing, overwhelming, that the wife is not separate in property from her husband, had no separate funds, and that the property, although in the name of the wife, was purchased with community funds, and is community property." It is perfectly clear that before such proof as that above indicated could be considered, or even received, it was first necessary for the husband to establish that the recital to the contrary in the authentic act was inserted and approved through error; for, however false be that recital, if it was embodied in the act with the consent of the parties, they are absolutely estopped from contradicting its verity. *Maguire v. Maguire*, 40 La. Ann. 579, 4 South. Rep. 492; *Kerwin v. Insurance Co.*, 35 La. Ann. 83.

We remanded the case solely for the purpose of receiving evidence on the charge of error, holding, at the same time, that the husband "must be held to establish it by strong, legal, and convincing evidence." Some attempt was made to establish the charge of error, but what does it amount to? The proof shows that the husband and wife jointly conducted the negotiation for the purchase, and agreed with the seller as to the price and terms; that the husband went with the seller to the notary, and that the former instructed him to put the property in the name of the wife; that the notary prepared the act in its present form; that the husband and wife went together to the notary's office to execute the act; that the act was either read to them, or that the notary stated the substance of it in such words as these: "This is an act in which Henry Harris sells to Mrs. Bellande, purchasing with her separate paraphernal funds, the following property," etc.; and that the parties then signed the act. The notary is positive that, if he did not read the act, he stated to the parties the substance of it, and, specially, that the sale was to the wife, purchasing with her separate paraphernal funds." The husband says: "I told Mr. Hero simply to put it in my wife's name, thinking that it was community property; it did not make any difference in whose name it was,—hers or mine." He does not deny that the act was read to him, or that its substance as above given was stated to him, but says he did not understand the meaning of the words "separate paraphernal funds." It strikes one as strange that a person who understood so well what was community property, and that property purchased during marriage in the name of either spouse fell into the community, should have been ignorant of the meaning of the terms "separate paraphernal funds." Admitting that the term "paraphernal" might be enigmatical to the lay mind, the statement that the purchase was with the wife's "separate" funds would seem plain enough to any ordinary mind.

Not the slightest suggestion is made of any reason why the title should have been taken in the name of the wife, if it was intended to give it the character of an ordinary community purchase. The husband, the head and master of the community,

was present, actively participating in the negotiation, and if a community purchase was intended the natural and ordinary course would have been to take the title in his name. The taking of such a title in the name of the wife, under such circumstances, is certainly unusual, and, in absence of explanation, improbable; so unusual that, when instructed to put the title in the name of the wife, the notary naturally and spontaneously inferred that it was a purchase for her separate interest, and prepared the act accordingly. We have no proof, except the bare statement of the husband, as to what the wife's intentions were, and none at all that she did not understand the full meaning of the act which she signed. The after circumstances relied on, that the husband paid the taxes on the property, attended to its repair, and made improvements thereon, at the charge of the community, have little if any significance. Such dealings by the husband with regard to the separate property of the wife are so natural and common that they have no weight upon the question of title, and confer only a right to reimbursement out of the wife's separate estate.

We have before us a perfectly clear and unambiguous contract. In a recent case, we held, (quoting from the syllabus:) "When parties reduce their contracts to writing, and when the terms of the writing exhibit no uncertainty or ambiguity as to the nature, the object, and the extent of the agreement, it is presumed that the writing expresses the true and complete undertaking of the parties. * * * Equity may reform and correct even contracts unambiguous on their face, on clear proof that, through fraud or error, the written instrument has been made to express a different purpose from that which the parties had agreed on, and had intended to embody therein; but to support the relief there must be clear proof of the antecedent contract, and of the error in committing it to writing." *Ker v. Evershed*, 41 La. Ann. 15, 6 South. Rep. 566. The evidence in this case furnishes no such clear proof.

The rule laid down by us, that "a husband who has been a party to an act of purchase, in which it is declared that the price belonged to the wife in her paraphernal right, and that the property is to be such, cannot afterwards contradict it," (*Maguire v. Maguire*, 40 La. Ann. 580, 4 South. Rep. 492,) is founded on considerations of public policy, and the security of titles. It would be robbed of efficacy if, after the death of the wife, he could open the door for such contradiction by simply saying that he did not understand the meaning of the words used in the contract.

It is therefore ordered and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now adjudged and decreed that the opposition of P. M. Gleich to the final account be and is hereby maintained, and that the administrator be ordered to account for the property known as "No. 94 Fourth Street," and the revenues thereof, as the separate property of the deceased, and to amend his account accordingly, without prejudice,

however, to any lawful claims which the community may have against said separate estate; appellee to pay costs in both courts.

Rehearing refused.

PARISH SCHOOL-BOARD OF EAST FELICIANA
v. PACKWOOD et al.

(*Supreme Court of Louisiana*. April 7, 1890.
42 La. Ann.)

SCHOOL-BOARDS—TREASURER—SETTLEMENTS.

1. Where the acts and proceedings of a school-board are within the scope of its authority, and it has examined the statements and vouchers of its treasurer, and approved the same, and granted a discharge, they are conclusive, unless said approval and discharge were obtained on false statements and fraudulent vouchers.

2. The burden of proof, in a suit to rescind a settlement with a school-board for fraud, is on the plaintiff.

3. Although the treasurer of the school-board may have kept his books in an irregular manner, yet, if the funds in his hands were accounted for, he cannot be held liable because his books are apparently different from his settlement with the school-board.

(*Syllabus by the Court*.)

Appeal from district court, parish of East Feliciana; BUCKNER, Judge.

John Stone, Dist. Atty., and *W. R. Rutland*, for appellant. *J. G. Kilbrume*, *Charles B. Lea*, and *F. F. Kernan*, for appellees.

MCENERY, J. This is a suit by the school-board of the parish of East Feliciana against George H. Packwood, ex-treasurer of the school-board, and the sureties on his official bond, for the sum of \$10,000 claimed to be due said school-board by the defendant. The case was tried by a jury, and there was a verdict and judgment thereon in favor of defendants, from which the school-board has appealed.

The defendant was the treasurer of said board from January, 1884, to the 4th day of September, 1888. A new school-board was appointed in 1888, and the books of the defendant delivered to the new board. On an examination of these books the new board conceived the idea that Packwood had not fully and faithfully accounted for the school funds in his custody in his quarterly settlements with the old board. In substance, the petition alleges that the settlements of Packwood with the board were false and fraudulent,—based on false statements,—and that said board received the same in error, and in error granted a discharge to said Packwood. The object of this suit is to rescind the settlements made between the school-board and its treasurer, and the annulment of the discharge granted to him.

The acts and proceedings of the board were within the scope of its authority. The settlement and discharge must be presumed to be correct and conclusive unless the same were obtained, as alleged in the petition, through false and fraudulent statements and vouchers, and accepted by the board through error.

The burden of proof is on the plaintiff to prove the facts which would annul the settlements and discharges made with the school-board by the defendant. On the

trial there was a total absence of any such proof. The defendant, therefore, might have rested his defense on this failure of the plaintiff board to show the fraud alleged in the petition.

The plaintiff, it seems, relied upon the entries and settlements in defendant's books, and the failure of the school-board to hold regular quarterly meetings, when the defendant should have tendered his quarterly settlements. The books may have been irregular in their arrangement, and confused in their statements, in containing summarized instead of itemized accounts, and the school-board may not have assembled as often as duty prompted; yet, if the defendant tendered his quarterly statements when the board met, and accounted for all funds received and disbursed by him, it would be harsh to hold him responsible for his deficiency in book-keeping, or for the failure of the school-board to meet regularly, and receive and examine his quarterly statements. If the funds in his hands were properly administered, and reached their proper destination, he is entitled to credit for the amount legally paid out by him, although he may have been at fault in the exact and proper arrangement of his books, and may not have made his quarterly statements to the school-board at the time appointed for the quarterly meetings. *Simmons v. Boult*, 28 La. Ann. 277. It is not shown by the record that the defendant received any greater sum of money than he charged himself with in his statements made to the school-board, upon which his several discharges were granted. If they were false in this respect, it was an easy matter to show it, as the sources for revenue for school purposes are few, and the information necessary to show the amounts received from each source was accessible.

The disbursement of the fund reaches only a few objects. The main one is for the payment of salaries of teachers, and the others for repairs to school-buildings, salary of secretary, and incidental expenses, amounting in the aggregate to an insignificant sum, when compared to the amount set apart for the payment of teachers. The school-board employed the teachers, and must have known the number of teachers to whom salaries were due, and the amount of such salaries. It is its duty to order repairs and incidental expenses; and it must have known whether the repairs were done, and the incidental expenses incurred, and the amount due for each item of expense thus authorized. It is not probable, therefore, in such matters, embracing such few objects, all of which were within the knowledge of the board, that it could have been imposed upon without culpable negligence on its own part. There is no allegation in the petition, nor is there any evidence in the record, that even suggests negligence on the part of the school-board.

A most significant fact in the case is that there is not a teacher complaining of the failure to receive his salary, nor is there any one complaining of not receiving what was due him.

At various times the defendant made his settlements with the school-board, and re-

ceived a quietus for each settlement. The last and final settlement was made on July 7, 1888. The minutes of the school-board say of this settlement: "The treasurer submitted his reports and vouchers to date, which, together with his books, were examined and found correct, with a balance of \$38.95 on hand, after which the vouchers were burned by the board." The previous statements to the board by the defendant were lost or destroyed. They were in the custody of the board. A summarized statement of each settlement was forwarded to the state superintendent of education. These correspond in amount with the settlements with the school-board. All the members of the school-board signed the last and final settlement on 7th of July, 1888. W. F. Norneworthy was the president of the board during the defendant's official connection with it. He was certainly competent to examine and audit defendant's accounts. He is a graduate of Centenary College, and was at one time a professor in that institution. His testimony is conclusive as to the settlements made by defendant with the board. It shows that all statements and vouchers were carefully and critically examined, particularly the last and final account. His testimony is corroborated by other members of the school-board.

There are some minor details, relating to clerical errors, that it will not be necessary to discuss, such as the fee received by W. R. Rutland, the attorney for the school-board in this suit, which figured in the amount attempted to be charged to the defendant, and which was not credited to him, and defendant's error in his statement as to an amount which he imagined he owed the school-board, and which he expressed a willingness to pay, but which on investigation was found still to be in the state school fund, and was not paid to defendant.

The evidence convinces us that the defendant honestly and faithfully accounted for all the school funds received by him, and the quietus granted him by the school-board was given after a careful and patient examination of his accounts as treasurer of said board.

Judgment affirmed.

HARMONY CLUB v. NEW ORLEANS GAS-LIGHT CO.

(*Supreme Court of Louisiana*. April 7, 1890.
42 La. Ann.)

APPEAL—JURISDICTIONAL AMOUNT—EVIDENCE.

1. The jurisdiction of this court in cases like the present must be tested by the pecuniary amount or value in dispute according to the nature of the action as disclosed by the substantial allegations of the pleadings, and not by mere jurisdictional allegations or affidavits of one of the parties.

2. The record shows that the pecuniary value in dispute here does not exceed \$2,000.

(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; KING, Judge.

H. L. Lazarus, for appellant. Buck, Dinkelspiel & Hart, for appellee.

FENNER, J. We are confronted with a challenge to our jurisdiction *ratione mate-*

ria over this appeal, which we are bound to determine. The facts are simple and undisputed. The Harmony Club had upon its premises, furnished by the Gas-Light Company, what is called a "45-Light Meter," adequate to the supply and registry of all its gas burners. In common with many other gas consumers, it adopted the system of electric lighting; and its use of gas became only occasional, and greatly reduced. The gas company adopted certain rules applicable to this class of consumers, the meaning and effect of which are that it would only furnish meters proportioned in size to the amount of gas consumed; that a 45-light meter would only be supplied or continued when the monthly gas bill was at least eight dollars per month, or if, less, upon the payment of an extra rental of four dollars per month. A copy of these rules was served upon the club, and notice was given that, unless complied with, its meter would be removed, and replaced by a smaller one. The club, being unwilling to comply, and denying the right of the gas company to adopt or enforce such rules, instituted this suit for an injunction prohibiting the latter from removing or interfering with the meter then upon its premises. The gas company responds, affirming its right to adopt and enforce the rules in question. This is the sole issue involved in the case.

If it should be determined that the gas company has the right to adopt and enforce the rules, the injunction necessarily falls. If, *per contra*, it has no such right, the injunction stands. What is the amount or pecuniary value involved in such a suit? It is not pretended that the gas company will interfere with the meter if the club consumes gas to the amount of eight dollars per month, or if, consuming less, it pays four dollars additional for the rent of the meter. It is not denied that the club is bound to pay for the amount of gas, large or small, actually consumed by it. Therefore the only value possibly involved is the right of the company, in a certain contingency, to charge \$4 per month for the use of its meter, or \$48 per annum. If this were a right *in perpetuo*, it would be difficult to find an investor who would pay \$2,000 for the privilege of collecting \$48 per annum. But, in point of fact, the gas company's charter expires in 35 years; and a simple calculation would show that, if, if collected during that period, the gross amount would not exceed \$1,700. Moreover, the club is not the owner of the building, but a lessee, and is only interested during the term of its lease,—the extent of which is not shown, but is, presumably, limited. We are not concerned with the damages which the club might have suffered had its gas supply been cut off or diminished as threatened. No such damages have accrued or will accrue. If the injunction herein be perpetuated, that will prevent such injury. If it be dissolved, the act of the gas company will be declared lawful, and no such claim can arise. We have repeatedly held that the jurisdiction of this court must be tested in such cases by the pecuniary amount or value in dispute, according to the nature of the action as disclosed

by the substantial allegations of the pleadings, and not by the mere jurisdictional allegations or affidavits of the parties. *Buddig v. Baldwin*, 38 La. Ann. 394. *State v. Miscar*, 84 La. Ann. 834; *Wilkins v. Gantt*, 32 La. Ann. 929; *Crean's Case*, Id. 1191.

Most of the cases quoted by appellant only concern the right to sue and to enjoin, neither of which rights are controverted here. We decline to follow him into the records in the cases of *Callery v. Water-Works Co.*, 35 La. Ann. 799, *State v. Levy*, 36 La. Ann. 942, and *Ernst v. Water-Works Co.*, 39 La. Ann. 551, 2 South. Rep. 415, in order to determine whether or not we had jurisdiction in those cases. The opinions show that no such question was raised or passed upon. Had it been, we should have applied to them the same rules now stated. If inadvertently, and in absence of suggestion to that effect, we exercised jurisdiction which we should have declined, (which we by no means admit,) such error neither harms nor benefits the plaintiff here, whose rights must be decided according to law.

It is therefore ordered that this appeal be dismissed at appellant's cost.

STATE v. BUTLER *et al.*

(*Supreme Court of Louisiana*. March 17, 1890.
43 La. Ann.)

CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT —APPEAL.

1. A motion in arrest of judgment, by the principal convicted defendant, that the indictment charging his acquitted co-defendants, as accessories, is fatally defective, as they ought to have been prosecuted as principals, is quixotic and unworthy of notice.

2. A bill of exception to the ruling of the district judge on a motion for a new trial on the ground that the verdict is contrary to law and evidence will not be considered on appeal.

(*Syllabus by the Court.*)

Appeal from district court, parish of Iberville; TALBOT, Judge.

Alex. Hebert, Dist. Atty., and Walter H. Rogers, Atty. Gen., for the State. Chas. A. Roxborough, for defendant.

BERMUDEZ, C. J. Butler was prosecuted for shooting with intent to murder, was convicted, and sentenced to hard labor. The other defendants, Cass and Scott, were indicted as accessories before the fact, and acquitted. Butler complained that the verdict against him was contrary to law and evidence, claiming a new trial. He further complained that the indictment is fatally defective in this: that his co-defendants, prosecuted as accessories, should have been indicted as principals; there being no accessories, in law, to the crime of shooting with intent to kill. The district judge overruled the motion for a new trial and that in arrest of judgment, and bills were reserved.

The bill to the denying of the motion for a new trial is not worth notice, and that to the overruling of the motion in arrest is altogether unfounded. What is it to Butler that his co-defendants, who were acquitted, were or were not properly indicted? He cannot be permitted to cham-

pion any of the rights which they might have asserted and did not urge. They are satisfied with the result of their case. Butler's complaint that his co-defendants were improperly indicted is simply quixotic.

Judgment affirmed.

HEATH V. HEATH.

(*Supreme Court of Louisiana*. April 7, 1890.
43 La. Ann.)

DIVORCE—ABANDONMENT—DOMICILE—JURISDICTION.

1. The abandonment by one of the married persons of the other, to be made the ground of separation from bed and board, must originate in this state, where there is a matrimonial domicile.

2. Where the matrimonial domicile was in Massachusetts, and the abandonment occurred there, and the husband moved to Louisiana, where he acquired a residence, and the wife refused to come to this state, he cannot sue in the courts of Louisiana for a separation from bed and board.

3. The wife never having been in Louisiana, the husband and wife could not in her absence acquire a matrimonial domicile here, and have a common dwelling, to which she could be summoned to return.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

Rice & Armstrong, for appellant. *A. B. Philips*, for appellee.

MCENERY, J. The plaintiff instituted this suit for a separation of bed and board from his wife. A *curator ad hoc* was appointed to represent the absent wife, who filed an exception of no cause of action, which was sustained, from which judgment the plaintiff appealed.

The allegations in the petition, which are taken as true for the purpose of the exception, are that the plaintiff and defendant were married in the state of Maine in the year 1856; that they afterwards moved to and resided in the state of Massachusetts, when in 1878 the defendant wife abandoned the common dwelling; that in 1882 the plaintiff husband came to New Orleans, where he acquired a permanent residence and established his domicile, and has resided in Louisiana since that time; that the defendant wife refused to return to the common dwelling in Massachusetts, and persists in refusing to come to the domicile of the husband in Louisiana.

From this statement of facts, it is evident that the parties to the marriage, which was consummated in Maine, did not contract the marriage under the laws of this state, or with reference to the same. The abandonment complained of did not originate in Louisiana, but occurred and continued in Massachusetts long before the plaintiff came to the state to reside therein. The courts of Louisiana will not entertain suits for separation of bed and board, and for divorce, in matters which occurred in another state before the married parties acquired a domicile in the state. *Edwards v. Green*, 9 La. Ann. 317.

In this case the parties to the marriage never had a matrimonial domicile in this state, as the wife has never been here with her husband. There never has been a common dwelling here, and therefore the

wife could not abandon it. *Muller v. Hilton*, 13 La. Ann. 1; *Champon v. Champon*, 40 La. Ann. 80, 3 South. Rep. 397. The instant case is identical with *Muller v. Hilton*.

In the case of *Larquié v. His Wife*, 40 La. Ann. 459, 4 South. Rep. 335, to which we have been referred by plaintiff's counsel, the wife had resided in Louisiana with her husband, who had acquired a domicile in the state. She abandoned the common dwelling after the husband and wife had established a domicile here. In the instant case the abandonment originated and continued in another state. The married parties have never resided together in the state, and have, therefore, never acquired any matrimonial domicile in Louisiana to which the wife could be summoned to return.

Judgment affirmed.

STATE V. STARKE.

(*Supreme Court of Louisiana*. March 17, 1890.
43 La. Ann.)

CRIMINAL LAW—APPEAL—VENUE.

The supreme court, having no jurisdiction of facts in criminal cases, can afford no relief to an appellant who complains that the venue had not been proven on his trial. That matter was exclusively the province of the jury.

(*Syllabus by the Court.*)

Appeal from district court, parish of Ascension; DUFFEL, Judge.

The Attorney General, for the State.
Fredrick Duffel, for defendant.

POCHÉ, J. The complaint of the accused, who appeals from an unqualified verdict of murder, is error on the part of the trial judge in refusing him a new trial. The ground of his motion was failure on the part of the state to prove the venue of the crime charged against him.

The venue, like any other fact in the chain of evidence required to convict the accused, is exclusively within the province of the jury, with which the appellate court, vested with jurisdiction over the law of the case only, has no right to interfere.

The argument of counsel, based on the line of authorities under which this court deals, in criminal cases, with questions of law blended with facts, cannot avail him in a matter of fact affecting proof of the guilt or innocence of the accused as charged. The cases which he quotes have reference to questions involving the manner of conducting the trial, and of disposing of its incidents, but not to questions of fact to be submitted to and considered by the jury alone. *State v. Hyland*, 36 La. Ann. 87; *State v. Nelson*, 32 La. Ann. 842. This appeal is entirely covered by the decision of this court in *State v. Nettles*, 41 La. Ann. 323, 6 South. Rep. 562, in which the syllabus reads: "A complaint that, in a criminal prosecution, there was no proof of the venue, involves a question of fact exclusively within the province of the jury, and over which the supreme court has no jurisdiction."

Should it happen that we had absolute proof of such a fact, we would be as powerless to relieve the appellant as we would

be should we believe and know that he had not committed the deed for which he stands convicted. We are constrained to repeat here that in criminal cases we have no power or authority to review the finding of the jury on any question of fact.

Judgment affirmed.

DRYSDALE V. BILOXI CANNING FACTORY.

(Supreme Court of Mississippi. May 26, 1890.)

JUSTICES OF THE PEACE—JURISDICTION—ATTACHMENT—LEVY—AFFIDAVIT.

1. The holder of two bills of exchange accepted at different times, maturing at different times, and each within the jurisdictional amount of a justice of the peace, may maintain separate actions on each in justice's court, though together they exceed the justice's jurisdiction, and though, at his election, he might have sued on both in one action in the circuit court.

2. Where the indorsement of an officer on a writ of attachment shows a sufficient levy on land if wild or unoccupied, but insufficient if cultivated or occupied, the supreme court, in an action to have the attachment set aside, will treat the levy as a valid levy on wild or unoccupied land, in the absence of any averment in the debtor's bill that the land was in fact cultivated or occupied.

3. Under Rev. Code Miss. 1880, § 2423, which provides that, if defendant in attachment proceedings can be found, the officer serving the writ shall summon him to appear and answer the action, a failure by the officer to summon defendant or to show that he could not be found is fatal to the attachment proceeding.

4. Failure by an attaching creditor to comply with Rev. Code Miss. 1880, § 2437, which requires him, in case of attachment against a non-resident defendant, to file "with the proper officer his affidavit, if the affidavit for the attachment does not contain such notice, showing the post-office address of the defendant, or that he has made diligent inquiry to ascertain it without success," will nullify all subsequent proceedings in the cause.

Appeal from chancery court, Harrison county; S. EVANS, Chancellor.

Bill by William Drysdale against the Biloxi Canning Factory to set aside certain deeds as a cloud on his title. From a decree in defendant's favor complainant appeals. Rev. Code Miss. 1880, § 2190, vests justices of the peace with jurisdiction over actions where the debt or demand does not exceed \$150. Section 2424, relating to attachment proceedings, after prescribing the manner of levying on cultivated or occupied land, provides: "But in the event the land is wild, uncultivated, or unoccupied, a return upon the writ, by the proper officer, that he has attached the land, giving a description thereof by numbers, metes, and bounds, or otherwise, shall be a sufficient levy without going upon the land."

Calhoon & Green and R. Seal, for appellant.

WOODS, C. J. Appellee sued out two attachment writs against appellant on the same day, before a justice of the peace of Harrison county, alleging in one case an indebtedness of appellant evidenced by an accepted bill of exchange of January 6, 1888, for \$147.55, and in the other case an indebtedness of appellant evidenced by another bill of exchange, of December 27, 1887, for \$147.50, and both on the ground of non-residence of appellant. There was judgment at the return term for the amount

claimed in both cases. There was no return by the officer executing these writs showing whether the defendant therein had or had not been found. Indeed, the officer made no return whatever as to his execution of his process upon the defendant. There was no affidavit made by the plaintiff below setting forth defendant's post-office address, beyond the limits of this state, nor any affidavit stating an inability to ascertain such address. The levy of both writs, as shown by the officer's return, was a sufficient levy upon wild or unoccupied real estate, but was insufficient as a levy upon cultivated or occupied realty. A judgment was rendered, as has been stated, in both cases in the justice's court against Drysdale, the defendant below. Executions were issued upon these judgments, and the lands sold under them, and the same purchased by the Canning Company, the plaintiff in those proceedings, and deeds were made accordingly by the officer selling under the executions. The appellant thereafter exhibited his bill in the chancery court of Harrison county, praying a cancellation of these deeds as clouds upon his title. A decree *pro confesso* was taken against the appellee, and on final hearing the appellant's bill was dismissed without prejudice, and from this decree the complainant in the chancery court appeals to this court.

It is assigned for error that the justice of the peace, in the original suits, was without jurisdiction, and that its judgments were therefore void. It is asserted by appellant's counsel that both debts, evidenced by the separate bills of exchange, being due, and both aggregating a sum exceeding \$150, they could be the basis of but one attachment suit, and that such suit was triable only in the circuit court. While the aggregate of the two debts exceeds \$150, as stated by counsel, yet the amount of each debt or demand does not exceed \$150. This was clearly an instance of the creditor having two separate, distinct causes of action. There was not one cause of action made up of several items. It was not a case of cutting up one cause of action, whereby several suits were improperly made possible, by reason of thus dividing up the items in one original cause of action. There were two bills of exchange, accepted at different times, maturing at different times, and for different amounts, and they were indubitably payable at different times. The creditor might have sued upon both in one action in the circuit court, if he had so elected; but it is impossible to see why he should not be permitted to sue separately, in any appropriate form of action that would most surely and most quickly enable him to collect his debt, in any court having jurisdiction of each separate demand. We are of opinion, then, that the justice had jurisdiction of the suits. *McLendon v. Pass*, 66 Miss. 110, 5 South. Rep. 234.

It is also assigned for error that the levy, in each case, in the attachment suits, by the officer holding the writs, was a nullity; the return of the officer not showing that he "went to the house or land of the defendant, or to the person or house of the person in whose possession the same may

be, and then and there declared that he attached the same at the suit of the plaintiff.¹ Granting that the levy, as shown by the return of the officer indorsed on the writ, is of the vicious character claimed by appellant's counsel, as a levy upon cultivated or occupied land, yet it is good as a levy upon wild or unoccupied land, and the bill of complaint filed by Drysdale, the appellant, contains no averment that the lands in question were cultivated or occupied, and we must treat it, therefore, as a valid levy on wild or unoccupied land.

The contention of appellant touching the irregularity and invalidity of the publication and notice to the defendant, in the attachment suits before the justice of the peace, appears to be well taken. Section 2423, Code 1880, provides that "if the defendant can be found, the said officer shall also summon him to appear and answer the action." This requirement of law was wholly ignored by the officer, and his return on the writ wholly fails to disclose whether the defendant could be found in his county. There was a total omission by the officer to either summon the defendant, or show that he could not be found. In the affidavit for the attachment writ, the plaintiff below had stated under oath that Drysdale, the defendant there, was a non-resident, but neither in that affidavit, nor elsewhere in the record, does it appear that any showing was made as to his post-office address in the state of his residence. The proviso to section 2437 makes it imperative upon the attaching creditor to "file with the clerk his affidavit, if the affidavit for the attachment does not contain such statement, showing the post-office of the defendant, or that he has made diligent inquiry to ascertain it, without success;" and section 2472 makes the provision just quoted applicable to suits in attachment before justices of the peace. The flagrant disregard of these plain statutory requirements, designed to give a non-resident defendant notice of the pendency of an attachment suit against him, must be held to vitiate and nullify all subsequent proceedings in the causes. Without any former adjudications on this point, (and there are several in our reports,) it seems incredible, almost, that any sane suitor should begin proceedings under our attachment laws, and hope to win in a legal contest, in despite of his gross neglect of the simplest and plainest provisions of the statutes on the subject of attachments. From the record, as it appears here, the appellant was entitled to have the relief prayed in his bill.

Reversed, and decree here.

**NATCHEZ COTTON-MILLS CO. v. MULLINS
et al.**

(Supreme Court of Mississippi. May 26, 1890.)

DEATH BY WRONGFUL ACT—ACTION BY WIDOW.

Under Rev. Code Miss. 1880, § 1510, giving the widow of a person whose death was caused by the wrongful act of another the right to sue therefor, and providing that, where she has children, the amount recovered "shall be distributed as personal property of the husband," the widow, pend-

ing an appeal by defendant, may compromise the case by accepting a certain sum in satisfaction of the judgment, and such compromise is binding on decedent's infant children.

Appeal from chancery court, Adams county; W. R. Trigg, Chancellor.

Henry Mullins was killed by the explosion of a boiler in the factory of the appellant corporation, leaving surviving him his widow and two minor children. The widow brought suit against the appellant corporation, under section 1510 of the Code of 1880, to recover damages for the death of her husband. She recovered a judgment for \$6,000, from which the corporation appealed, said appeal operating as a *superse-deas*; but, before the appeal could be heard and determined by the supreme court, the widow compromised the case for \$1,000, and entered satisfaction of the judgment. The appellees, the two minor children of Mullins, filed this bill against the appellant corporation to fix a charge against said corporation for the sum of \$4,000, being two-thirds of the amount of the \$6,000 judgment compromised by their mother, claiming that the mother had no authority to release their said share of the judgment; that her compromise only went to her one-third share. The corporation demurred to this bill. Said demurrer was overruled, hence this appeal.

Rev. Code Miss. 1880, § 1510, is as follows: "Whenever the death of any person shall be caused by any such wrongful or negligent act or omission as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action, and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband or father, the person or corporation, or both, that would have been liable if death had not ensued, and the representatives of such person, shall be liable for the damages, notwithstanding the death; and the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of a child for the death of an only parent; the damages to be for the use of such widow, husband, or child, except that, in case a widow should have children, the damages shall be distributed as personal property of the husband. In every such action the jury may give such damages as shall be fair and just, with reference to the injury resulting from such death to the person suing; but every such action shall be commenced within one year after the death of such deceased person."

Martin & Lanneau and T. Otis Baker, for appellant. Proby & Clinton, for appellees.

CAMPBELL, J. The widow alone had the right of action, and she had the right to accept satisfaction, and discharge the defendant. Code, § 1510. Her children must look to her, and not to the defendant. A mother's love is a sufficient safeguard against improperly acquitting a defendant from liability, and the law in such cases as this has committed the interests of children to their mother. To her is com-

¹ Rev. Code Miss. 1880, § 2424.

mitted the right of action, and she alone may control it. *Stephens v. Railroad Co.*, 10 Lea, 448; *McNamara v. Slavens*, 76 Mo. 329.

Decree reversed, demurrer sustained, and bill dismissed.

CUDABAC v. STRONG.

(*Supreme Court of Mississippi. May 26, 1890.*)

SUMMONS—NON-RESIDENTS.

Rev. Code Miss. 1880, § 1857, providing that service of "summons" on a non-resident defendant "shall be in lieu of a publication of such summons, and shall authorize further proceedings against such defendant as if he had been duly summoned in this state," does not authorize a personal judgment against a non-resident so served; section 2467 providing that, on judgment by default against a non-resident who has been served as provided in section 1857, no execution shall issue except against the property attached in the suit.

Appeal from circuit court, Jackson county; S. H. TERRAL, Judge.

Action by H. M. Cudabac against J. C. Strong as assignee of certain persons. The provisions of the Revised Code of 1880, referred to in the opinion, are as follows:

"Sec. 1857. If such summons shall be served on such absent party by delivery to him, or, if a corporation, to some officer or agent thereof, of a copy thereof, at least ten days before the return-day, and if proof of such service shall be made by filing in the office of the clerk who issued it, such summons, with the acknowledgment of said defendant indorsed on or annexed to it that such summons was served on him, or the like acknowledgment by an officer or agent of such corporation made defendant, and proved to be subscribed by such defendant, or officer or agent of the corporation, by the affidavit of some one annexed thereto, or shown to have been served, by one who delivered such copy or knows of such delivery, and shall make affidavit of such delivery before some officer, in the state or county where such service was made, authorized to administer oaths, or before any such officer in this state who shall certify such affidavit of service, which shall be filed among the papers in said proceeding with such summons, or proved in open court, by parol or other testimony, to have been duly served on such defendant, and recited in a decree of said court to have been so proved, that shall be in lieu of a publication of such summons, and shall authorize further proceedings against such defendant as if he had been duly summoned in this state."

"Sec. 2438. Such publication of notice shall not be necessary if it shall be served on the non-resident defendant, and proof of such service be made, as provided for in case of non-resident defendants in chancery; but such proof of service of notice shall be as effectual as if such defendant had been served with a summons."

T. W. Brame, for appellant. C. H. Wood, for appellee.

WOODS, C. J. This was ejectment brought by appellant against appellee. The appellant had, prior to the ejectment suit, sued out an attachment against Danner, McMillan, and Robertson, who were

all non-residents of this state. The attachment writ was levied on certain lands of defendants, but not on the lands embraced in the ejectment suit. Notice was given to the non-resident defendants as prescribed in sections 1857, 2438, Code 1880. The defendants making no appearance in the attachment proceedings, a personal judgment was taken against defendants for the amount of Cudabac's demand; and a special judgment was likewise entered, condemning the lands levied upon to be sold to satisfy the debt due. The lands levied upon were accordingly sold; but, the proceeds of this sale failing to satisfy the judgment, Cudabac had writs of *fiel facias* subsequently issued, which were levied upon this unattached land and sold; Cudabac becoming the purchaser of said last-named lands at such sale, and receiving the sheriff's deed thereto. The consideration of this deed, and of the general judgment upon which it rests, opens the field of the controversy. The questions are: Did the court, in the attachment suits, acquire jurisdiction of the persons of the non-resident defendants, so as to authorize the rendition of a personal judgment against them? And was the general judgment rendered against them upon notice only, as prescribed in sections 1857 and 2438, a valid judgment?

It might be sufficient to say that section 2467 seems to have been overlooked entirely by counsel, and that this section, when brought to light, itself effectually disposes of the contention. This section distinctly declares that, in attachment suits in this state, "if the defendant shall not appear and plead to the action in pursuance of the notice, the court, on proof of publication thereof," or on proof of actual notice served as provided in sections 1857 and 2438, "shall give judgment against him by default, and award a writ of inquiry, if necessary; but, on such judgment by default, no execution shall issue, except against the property on which the attachment has been served," etc. And when we recall, in addition, the exposition of this section 2467 made by this court in *Tabler v. Mitchell*, 62 Miss. 439, there would seem to be left no ground for appellant's contention. Said Mr. Justice COOPER in that case: "The judgment against the defendants, though in form a personal one, will not support an execution against their general estate. Its operation is by the state expressly limited to the property attached. Code 1880, § 2467." The misapprehension of counsel has doubtless arisen from inadvertently confounding the mere notice of the pendency of the attachment suit required to be given the non-resident debtor with legal process, which, when executed, gives the court jurisdiction of the person. It cannot be that the legislature, by substituting the service of actual notice upon the non-resident debtor, in the room of the uncertain notice by publication in newspapers, with copies forwarded by mail to the defendants, meant to do more than provide a more sure and effective notice for the non-resident.

Section 2438, in its very terms, is a substitution, merely, of notice actually given

the non-resident for the far less satisfactory notice by publication. While the word "summons" is used in this section, in speaking of this substituted notice, and while the word "summons" is one of the recognized names given to legal process, yet it would do manifest violence to the plain purpose of the statute to hold that this substituted notice denominated by the statute, in general phrase, as a "summons," was designed to operate as legal process, and as legal process of such amazing vigor and potency as to have inherent in it extraterritorial force. To so hold would necessarily involve us in remediless conflict and confusion. And we are thus brought to observe, generally, that process from the courts of this state has no extraterritorial force. It cannot run into another state, and compel persons there residing to respond in person, and submit themselves to our tribunals. International law and comity between sovereign states forbid. As was said by Mr. Justice FIELD in *Pennoyer v. Neff*, 95 U. S. 727: "Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory, and respond to proceedings against them. Publication of process, or notice within the state where the tribunal sits, cannot create any greater obligation upon the non-resident to appear. Process sent him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability."

The grounds upon which courts claim and exercise complete jurisdiction over property of non-residents situated within their territorial limits rest upon wholly distinct foundations, viz., the inherent, indispensable, and indisputable power of the local tribunal to deal with all property within the territory within which the tribunal sits, without regard to its ownership. Jurisdiction over all property—that of non-residents and residents alike—is necessarily vested in the courts of the state within which the property is situated; but, to deal with property of non-residents, the local tribunal need acquire no jurisdiction over the person of the non-resident. The local tribunal may and must pronounce judgment against the property of the non-resident according to the law of its territory, but it can pronounce no personal judgment against the non-resident debtor until it has acquired jurisdiction of his person. This cannot be done by publication or other notice within the state, nor by notice, in any form, sent the non-resident debtor out of the state. But it is useless to enlarge; for these views are generally, not to say universally, maintained in all courts,—state and federal. We are of opinion, therefore, that the judgment of the court below was correct, and the same is accordingly affirmed.

SAVANNAH, F. & W. RY. CO. V. HARRIS.
(Supreme Court of Florida. May 19, 1890.)

CARRIERS — CONNECTING LINES — LIABILITY FOR LOSS OF GOODS.

1. In transportation of goods over connecting lines of railroad, when there is no special contract,

each road is only liable to the extent of its own line, and for safe carriage and delivery to the next road.

2. In an action against a railroad company for goods lost by it as a common carrier, the burden of proof is, first, on the plaintiff to show delivery and acceptance of the goods, and next the loss and value thereof. This shown, the burden is upon defendant to relieve itself of liability by showing legal contract exemption, or that the loss was occasioned by a public enemy, or by the act of God, or that the goods had in themselves elements of destruction which occasioned the loss.

3. Where goods to be transported by several carriers are lost or injured, and the last carrier is sued, it will be held liable, if it does not show that the loss or injury occurred on some preceding line, on the presumption that the goods delivered to the first carrier were also delivered to the last, and in the same condition in which they were started.

4. The plaintiff in this case delivered goods to a road in New York, which were put in a car, and were to be transported in the car over several roads to a point in Florida. The car was received by the defendant, and taken over its road to Jacksonville, an intermediate point, and there unloaded by defendant. When the next and last carrier made delivery at the point of destination, some of the goods were missing, and others injured. The evidence does not show that the lost goods were in the car when it was unloaded, or that defendant delivered them to the next carrier, but does show that some of the goods were injured when taken out. Held, that the presumption which applies to a last carrier, that the goods were delivered to it as they were started, applies to intermediate carriers, and to defendant in this case, and that, defendant having failed to show delivery of the lost goods to the next carrier, and that those injured were in the condition in which it received them, it is liable.

(Syllabus by the Court.)

Appeal from circuit court, Duval county:
JAMES M. BAKER, Judge.

Fleming & Daniel, for appellant. A. W. Cockrell & Son, for appellee.

MAXWELL, J. The action is by appellee against appellant for damages occasioned by the loss of goods, and injury to goods, while being transported from Charlotte, N. Y., to Buffalo Bluff, Fla. The bill of lading given by the New York Central & Hudson River Railroad was for one car of household goods and building material received from George J. Harris, with destination to him at "Buffalo Bluff, Fla., via Palatka, without transfer." It is unnecessary to consider the matters connected with the first count of the declaration, and the first, second, and third pleas, intended as defenses to that count. These relate to the claim of plaintiff that defendant became responsible for the loss and damage because it did not deliver the car to the next succeeding road running to Palatka, as the bill of lading required; and it is apparent from the record that the verdict of the jury in favor of plaintiff could not have been founded on that count, as this would have been directly against the evidence, under the charge of the court for defendant,—that, unless defendant had knowledge of that clause of the bill, it was not bound thereby. Whether that charge was correct is a question not involved in this appeal. But it was shown by the evidence that defendant was not informed of the directions of the bill of lading, and that it forwarded the goods to Buffalo Bluff, by a connecting line of steamers, from the terminus of its road to that

point, in accordance with the way-bill from an intermediate road, which did not contain the words "via Palatka, without transfer." Under the charge of the court, therefore, the jury could not have found for the plaintiff on the issues made from the first count, and the three pleas thereto.

The second count, resting somewhat on the bill of lading, we also pass by, as we think the real merits of the case are to be determined on the issues made under the third count, which is, substantially, as follows: That defendant received the carload of goods, undertaking to safely keep, transport, and deliver the same, but, not regarding its duty as a common carrier, acted so carelessly and negligently that by reason thereof the said goods and property of plaintiff were as to part wholly lost, and as to other part greatly damaged. One plea is that defendant safely carried the goods over its line, and delivered the same to the next carrier in the same condition as they were received; and another plea is that whatever injury and damage there was to said goods was caused by the careless and negligent packing of the same by the plaintiff. Issue was joined on these pleas; and the questions now to be considered are those which arose during the trial on the evidence, and the charges of the court connected with this part of the controversy. The evidence shows that the goods were delivered to the initial carrier in apparent good order, and that the car in which they were stored for transportation was received by defendant to be transported over its road without other contract than such as attached to one of the intermediate carriers between the initial and last carriers, and that the goods unladen from the car by defendant at Jacksonville, Fla., were forwarded to the point of destination as mentioned in the erroneous way-bill from another intermediate carrier. Some of the goods were lost, and others were damaged; and the recompense awarded by the jury to plaintiff for his loss and damage was \$866.75, \$87 of which was remitted by plaintiff. But the evidence does not disclose where the loss or damage occurred, except as to damage to building material, estimated at \$60; and some of that damage the plaintiff himself attributes to the People's Line of boats, to which defendant delivered the material to be carried to Buffalo Bluff. It appears, however, from the testimony of plaintiff, that, in an itemized estimate of his loss and damage, the aggregate amount is even greater than the amount of the verdict. So that the verdict may not have included this \$60, or the *remittitur* may have been intended to cover it, along with other items that made up the \$87. At any rate the record does not inform us otherwise; and, upon scrutinizing all the other items, we see none less likely to have entered into the verdict, or more likely to have entered into the *remittitur*.

In the absence of evidence to show where all other loss and damage occurred, we must resort to the rules which govern in such cases. The contract with the initial road, as shown by the bill of lading, was that it was "not to transport the goods

beyond the limit or terminus of its own road." Hence its liability would be discharged upon delivering the car to the next connecting road with the contents in as good condition as when received, and each succeeding road in the series over which the transportation was to be made would be discharged upon like delivery. As expressed by Justice FIELD in *Myrick v. Railroad Co.*, 107 U. S. 107, 1 Sup. Ct. Rep. 425: "The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach." The same court had previously said, in *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, that the "rule that holds the carrier only liable to the extent of its own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." See, also, *Knight v. Railroad Co.*, 9 Amer. & Eng. R. Cas. 90, and *Burroughs v. Railroad Co.*, 34 N. W. Rep. 875, 32 Amer. & Eng. R. Cas. 467, and note, 474. There was no special contract in the present case except that with the initial road, so that each of the connecting roads, on receipt of the car, was only responsible for its own default.

The rule as to the loss of goods is correctly stated by Rorer, we think, as follows: "In an action against a railroad company for goods lost by it as a common carrier, the burden of proof—*First*, is on the plaintiff to prove the delivery and acceptance of the goods to be carried; and, *secondly*, the loss, and the value thereof. This makes a *prima facie* case for the plaintiff. To absolve the defendant from such *prima facie* liability, the burden of proof is then changed to the defendant, and it devolves upon him to overcome plaintiff's testimony by a preponderance of contradictory evidence; or else, being unable to do so, the burden of proof then rests upon the defendant to show the loss to have been occasioned by the enemies of the public, or by the act of God. In default of such showing of either the one or other of these defenses, or of overcoming plaintiff's evidence, the liability rests upon defendant, unless the goods themselves contained in their nature elements of destruction occasioning their loss. In that case, this must be alleged and proven by defendant." Ror. R. R. 698. Defendant may also relieve itself by showing legal contract exemption.

It is shown by the evidence that the car was delivered to defendant's road at Jessup, (Ga.) and was transported thereon to Jacksonville. The loss of a portion of the goods, and the value of the same, is also shown; but where the loss occurred—whether on defendant's line or some other—is not shown. In such case, there being several carriers, and no contract ex-

cept with the initial one, the law is, if the last carrier be sued, that it will be held liable, on the presumption that when the car was delivered to it the contents were the same as when started by the first carrier; and this presumption applies also to the condition of the goods the car contained. See *Smith v. Railroad Co.*, 43 Barb. 225; *Dixon v. Railroad Co.*, 74 N. C. 538; *Laughlin v. Railroad Co.*, 28 Wis. 204; *Shriver v. Railroad Co.*, 24 Minn. 506; *Lin v. Railroad Co.*, 10 Mo. App. 125; *Leo v. Railway Co.*, 30 Minn. 438, 15 N. W. Rep. 872; *Railway Co. v. Culver*, 75 Ala. 537. The reason of the rule of evidence is founded upon the better means the connecting carriers have to ascertain where the loss occurred. In the nature of the business, the party employing the transportation is not expected to follow up his goods to see that each carrier makes proper delivery to the succeeding one; but his reliance is, and the duty of each carrier is, that the goods shall be delivered as received. If not delivered at the point of final destination, it is but reasonable that the last carrier should account for them, and bear the responsibility of loss, if not able to show it never received them. Public policy requires this, under the system of transportation over several lines of road, for the protection of those who engage in such commerce, because there is less hardship upon the carrier to trace the loss, it being ordinarily impracticable for the owner to trace it without great trouble and expense, and sometimes to the consumption of the value of the property lost. Commenting on the first three of the above cases, in a note to *Knight v. Railroad Co.*, 9 Amer. & Eng. R. Cas. 90, the writer aptly says that they "are based upon the soundest principles of public policy. When a shipper consigns his goods to a line of connecting carriers to be carried to the point of destination, he, of course, loses all sight of, and all control over, them. If an injury occurs, or a loss is occasioned, while *en route*, he has no conceivable means of proving in whose hands they were at the time of the loss or injury. It is therefore perfectly proper to shift the burden of proof on the carrier who is sued." In *Smith v. Railroad Co.*, supra, the doctrine is expressed as follows: "The general rule is that things once proved to have existed in a particular state are to be presumed to have continued in that state until the contrary is established by evidence, either direct or presumptive. Unless this rule is to be applied to goods delivered to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point, or in the hands of which company, the injury happened. But, give to such party the benefit of the presumption that the goods he has delivered in good order, in such case, continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burthen is then shifted upon the latter company of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company

can always make, much more easily and readily than the converse can be proved by the owner. This is in perfect harmony with a well-settled rule of law, as an exception to the general rule. The general rule, undoubtedly, is that the burthen of proof is always upon the party who asserts the existence of any fact which infers legal responsibility. But the exception is equally well established that in every case the *onus probandi* lies on the party who is interested to support his case by a particular fact which lies more particularly within his knowledge, or of which he must be supposed to be cognizant. If the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party."

The cases cited, except one, relate to the last carrier. Strictly speaking, the defendant in this case was not the last carrier; but, in the case of *Railway Co. v. Culver*, supra, it is held that the same presumption which applies against the last also applies to an intermediate carrier. And it would seem that, so far as the contents of a box or car are concerned, or the condition of those contents, the presumption which attaches to the last carrier must necessarily attach to each preceding one after the first; for there could not be such a presumption against the last carrier except through a continuity of presumptions against those preceding. The defendant, therefore, must be held to have received the car just as it left the point of original departure; and it stands in the relation of last carrier, according to the principle which binds the last, because by its action it was in position to know what goods were in the car when discharged, and the condition of those goods. The reason the last carrier is held liable in such cases is that it is supposed to know what it received and delivered. The same reason applies in this case to defendant. It received and discharged the car. It knew, or ought to have known, what goods the car contained, and what was the condition of those goods. Its obligation was to deliver the goods to the next carrier in like quantity and condition as they were received. Did it do that? There is nothing to show that it did. The strongest evidence for defendant that it did was that one of its agents broke the seal upon the car, took out what was found in it, and delivered the same to the People's Line of boats, alleged to be the next and final carrier. But this evidence fails to show what was delivered, or whether the lost goods were included in the delivery,—a fact peculiarly within the knowledge of defendant after opening the car and delivering its contents. The burden of proof was on defendant to show full delivery, having been brought to that duty by the presumption that on receiving the car for transportation all the goods were in the car. But we go no further as to the liability of intermediate connecting lines than is authorized by the circumstances of this case, which so nearly assimilate it to that of a last carrier.

As to the injury to the goods when taken

from the car, there is no dispute in regard to the broken state of a tool-chest. The other goods, according to some testimony for appellant, were not damaged; but this seems inconsistent with the labored effort to show that the goods were badly packed in the car, and is in conflict with the evidence of a witness for appellee, who received the goods for the People's Line. He says: "The goods were in very bad condition. They were broken up. The boxes were all smashed up, and a tool-chest was broken right in two." When asked where he first saw the broken furniture, he said: "If I am not mistaken, it was in the evening, and the damaged goods were in the car. They were badly smashed up. I don't think they were broken in taking out." It was the province of the jury to decide between the parties, in this conflict of evidence; and this court, in the absence of anything to show improper influence operating on their minds, will not disturb their finding.

The sum of the situation, then, is this: The contents of the car were delivered to the first carrier in "apparent good order," and the jury, in the absence of proof to the contrary, were authorized to presume that when delivered to defendant the contents were all still in the car, and uninjured. It was then the duty of defendant to show delivery in the same condition to the next carrier. It has not done this; and, having discharged the car, and being thereby in position to know what it did deliver, and having failed to show that, in making delivery to the People's Line, it delivered the goods that were lost, and that such as were delivered were in the condition in which it received them, the jury were further authorized to presume that the loss and injury occurred on its line, except as to that part of the injury shown to have been done on the People's Line. In this state of the case, we must hold that the defendant is liable.

It is unnecessary to consider the several errors assigned in detail, as, in the view we have taken of the case, they are all covered, and, in our opinion, are either without good foundation, or immaterial. The judgment in the case will be affirmed.

SOUTHERN EXP. CO. v. SEIDE.

(*Supreme Court of Mississippi. June 2, 1890.*)

CARRIERS—LIMITING LIABILITY.

A provision in a carrier's receipt that, if the value of the goods delivered is not stated by the shipper at the time of shipment, and specified in the receipt, the holder will not demand more than a particular sum for loss or damage, exempts the carrier from greater liability, only when the loss occurs without negligence on its part, and the burden is on the carrier to show absence of negligence.

Appeal from circuit court, Madison county; J. B. CHRISMAN, Judge.

Smith & Powell, for appellant. *F. B. Pratt*, for appellee.

COOPER, J. The appellee shipped by the appellant a small package containing two watch-cases, of the value of \$80, and the same were lost while in possession of the company. The appellee had been in the habit of shipping by the defendant com-

pany, and had in his possession a book containing the receipts usually given out by the company on the receipt of packages for shipment. On the day of the shipment the appellee filled out one of these receipts, the italicised portions being written by himself, and presented the same to the agent of the company for signature at the time he delivered the package. The receipt, as signed, was in the following words:

"Read this receipt.

"Southern Express Company, Express Forwarders."

"(Not negotiable.)

"(Domestic bill of lading.) *Canton, 8-24, 1888.*

"Received of *T. C. Seide* one pkg., valued at asked, not given, dollars, and for which amount the charges are made by said company. Marked, *N. J. Felix, 71 Nassau St., New York.* Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties, to complete the transportation.

"It is part of the consideration of this contract, and it is agreed, that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the dangers of railroads, ocean, or river navigation, steam, fire in store, depots, or in transit, leakage, breakage, or from any cause whatever, unless, in every case, the same be proved to have occurred from the fraud or gross negligence of said express company, or their servants, unless specially insured by it, and so specified on this receipt, which insurance shall constitute the limit of the liability of the Southern Express Company in any event; and if the value of the property above described is not stated by the shipper at the time of shipment, and specified in this receipt, the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for the loss of or damage to each package herein receipted for. Nor shall the said company be held responsible for the safety of said property after its arrival at its place of destination.

"And if the same is intrusted or delivered to any other express company or agent, (which said Southern Express Company are hereby authorized to do,) such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and, as such, alone liable; and the Southern Express Company shall not be, in any event, responsible for the negligence or non-performance of any such company or person; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability thereof of such other company or person. In no event shall the Southern Express Company be liable for any loss or damage, unless the claim therefor shall be presented

to them in writing at this office, within thirty days after this date, in a statement to which this receipt shall be annexed. All articles of glass, or contained in glass, or any of a fragile nature, will be taken at shipper's risk only, and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not, in any event, be liable for any loss, damage, or detention caused by the acts of God, civil or military authority, or by insurrection or riot, or the dangers incident to a time of war.

"Charge on value, p'd, 25 cts. For the Company,

"Freight, ———. LUCAS."

After the loss of the package, the company tendered to the appellee the sum of \$50, which it claimed to be the measure of its liability under the contract, which sum was refused by the shipper, and suit was brought for the full value of the property lost. The cause was submitted to the court, a jury being waived, and, the learned judge having rendered judgment for the full sum claimed by the plaintiff, the company appeals.

The controversy is, of course, in reference to the effect of the following clause in the receipt: "If the value of the property above described is not stated by the shipper at the time of shipment, and specified in this receipt, the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for the loss of or damage to each package herein receipted for."

Stipulations in contracts with common carriers of similar import with that under consideration have frequently been presented to the courts for decision, and it is very generally held that their effect is to exempt the carrier from a greater responsibility, only when the loss occurs without the negligence or fault of the carrier; but where the loss springs from negligence the full value may be recovered, notwithstanding the stipulation. *Express Co. v. Moon*, 39 Miss. 822; *Cole v. Goodwin*, 19 Wend. 251; *Express Co. v. Backman*, 28 Ohio St. 144; *Magnin v. Dinsmore*, 56 N. Y. 168; *Wescott v. Fargo*, 61 N. Y. 542; *Express Co. v. Stettaners*, 61 Ill. 184; *Express Co. v. Sands*, 55 Pa. St. 140; *Railroad Co. v. Abels*, 60 Miss. 1017.

The burden of proof was upon the defendant to show that the loss occurred without fault on its part, and this burden it failed to meet.

The judgment is affirmed.

BAUM V. PEARCE *et al.*

(Supreme Court of Mississippi. June 2, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

1. A deed of assignment for benefit of creditors, directing the assignee "to dispose of, for cash or otherwise, as is customary or according as the law directs, or shall be agreed upon by a majority of the said creditors, all of said property," etc., is not void for ambiguity, but will be interpreted to direct the assignee to sell for cash or on time, as is customary in cases of assignments, or as the law

directs in such cases, or to sell for cash or on credit, as a majority of the creditors may agree.

2. An assignment for benefit of creditors is fraudulent in law if the assignor, after the execution of the deed of assignment, retains possession and control of choses in action which are included in the deed; and his intention with reference thereto is immaterial.

Appeal from circuit court, Covington county; A. G. MAYERS, Judge.

Pearce & Co. made an assignment, generally, for the benefit of their creditors. It was in usual form, except as stated in the opinion. Appellant, Baum, sued out an attachment against Pearce & Co., seeking to avoid the assignment. On the trial the court refused to instruct the jury, on request of plaintiff, Baum, to the effect that, if Pearce held and controlled the notes stated to be held by certain creditors, and named in Schedule B to the assignment, after said assignment was executed, with intent to defraud and delay their creditors, or any of them, then the jury should find that the attachment was rightfully sued out; and the court gave an instruction to the jury, for defendants, to the effect that, if there was a mere mistake in regard to the notes, and that Pearce & Co. did not intend to defraud their creditors, then the jury should find for defendants. There was verdict and judgment in favor of defendants, from which Baum appealed.

Nugent & McWille, for appellant. A. C. *McNair*, for appellees.

Woods, C. J. The construction which we have placed upon the deed of assignment forbids our declaring it void upon its face. The deed of assignment, after conveying the estate to the assignee, directs him "to dispose of, for cash or otherwise, as is customary or according as the law directs, or shall be agreed upon by a majority of the said creditors, all of said property," etc. The wording is not precise, and the meaning is not free from obscurity; but we must give it such interpretation, if it may be done, as will not destroy the instrument. The maxim, *ut res magis valeat quam pereat*, is of force in this case of ambiguous interpretation, and must control. We take it the meaning is that the assignee may sell for cash or on time, as is customary in cases of assignments, or as the law directs in such cases, or that he may sell for cash or on a credit, as a majority of all the creditors agree. The phrase will bear this interpretation, and this will render the deed free from objection, and we therefore so construe its language.

The deed of assignment conveys, or purports to convey, the entire estate of the assignor, including the accounts, notes, and other choses in action of the assignor's mercantile firm, and refers to Schedule B, attached to the deed, as containing an accurate list of such choses in action. In this schedule, certain notes are mentioned as being held by A. J. Weems, John T. Hardie & Co., and the Meridian Fertilizer Company, as security for debts due them, respectively, by the assignor. On the trial of the plea in abatement interposed by appellees in the court below, it is shown by some of the evidence that these notes

named in Schedule B as being held by the creditors named, were in fact not held by them, but were held by Pearce, the assignor, and were retained by him, and controlled by him, at and subsequent to the execution of the deed of assignment. If this holding by Pearce, the assignor, had been satisfactorily established, then, without regard to Pearce's intention in so holding the notes, the deed of assignment was constructively fraudulent, and the jury should have been so instructed. In that state of case, the question of Pearce's intention was not decisive at all. The decisive test was, did or did not Pearce hold and exercise his will in the control of these notes, or any of them, after the deed of assignment had been executed? If he did, then the deed was fraudulent in law, no matter what Pearce's motive was, and the jury should have been so informed. A person cannot assign his property for the benefit of creditors, and yet hold and control it, even with the best intentions.

Reversed and remanded.

VICKSBURG & M. R. CO. v. BARRETT *et al.*
(*Supreme Court of Mississippi.* April 28, 1890.)

RAILROADS—RIGHT OF WAY—ESTOPPEL.

A grant to a railroad company of a right of way "not exceeding one hundred feet in width," with the right to use "so much land as the officers may deem necessary," is not an absolute grant of 100 feet; and the company having located its road, occupying a narrower strip, and having acquiesced for years in the occupation of the land bordering on the strip by other grantees, cannot eject them, and widen its right of way.

Appeal from circuit court, Hinds county; J. B. CHRISMAN, Judge.

Ejectment by the Vicksburg & Meridian Railroad Company against Tom Barrett and others. Judgment for defendants, and plaintiff appeals.

Nugent & McWille, for appellants. *D. Shelton*, for appellees.

COOPER, J. In March, 1837, Perry Cohea, then the owner of the land in controversy, and of several hundred acres of which it was a part, by deed granted to the Commercial & Railroad Bank of Vicksburg a right of way over said lands. The conveyance is of "a right of way and free passage over a certain tract of land containing about four hundred acres," describing the land, "not exceeding one hundred feet in width across said land, or over any part thereof, for the location and construction of a railroad from Vicksburg to Jackson; and full power and authority is given and granted to said company, their officers, servants, and agents, to construct said road over said land, using so much land as the officers may deem necessary, and to use said road for passage and transportation, or for any other purpose, so long as the charter of said company continues. And the said president, directors, and company, or their officers, agents, and servants, may enter on the land over which the route of said railroad may pass and lie adjacent, and cut, quarry, dig, and take away any wood, stone, gravel, or earth necessary for the construction and repair of said road." The company en-

tered upon the land under this grant, located its road, and completed its construction, probably in the year 1840. On the 11th day of April, 1837, Cohea conveyed to one Nichols a lot of land by metes and bounds, one of the calls being a stake on the line of the railroad. In the year 1841, he conveyed another lot of land adjoining and south of said road; and in the year 1842 he conveyed yet another lot so located, of which the land demanded in this suit is a part. In each of these deeds the metes and bounds are by direction and distance, and the north-eastern boundary of each lot is the line of the railroad at a distance of 12 feet 6 inches from the south-western iron of its track.

The contention of the railroad company is that it was granted a right of way of 100 feet wide by Cohea, that its road is located along the center line of this way, and that it is entitled to recover from the grantees of Cohea an easement over so much of the land as lies within this limit. The contention of defendants is that the south-western line of the right of way was fixed by the location of the road along the line 12 feet 6 inches from its iron, as above noted. The evidence shows that the earth from the drainage ditch of the company was thrown along the line claimed to be the true one by the defendants, creating a bank along which a fence was erected by the grantee of Cohea, certainly more than 30 years ago, and probably from near the time of his entry. On the demanded strip of land the residence and store of the defendant are built; and, though there have been some changes in their structure, it is clearly shown that for more than 30 years the land has been occupied by houses of a permanent character. The company has never, until within a short time before the institution of this action, informed the occupant of any claim by it of a right to go upon the premises.

The defendants contend that the company has no right of recovery—*First*, because the line of its right of way was fixed at the time of the location of the road along the line to which their occupancy extends; and, *second*, if this be not true, then that they have acquired title by adverse possession. We are satisfied of the sufficiency of the defense on the first ground. It is therefore unnecessary to consider the second. The conveyance from Cohea did not grant a right of way to the company 100 feet wide. The right granted was of a way "not to exceed in width one hundred feet," within which limit the officers of the company were to "use so much land as they may deem necessary." The way granted was not fixed by the deed as to place, quantity, or direction. It was until located a floating right, exercisable over any portion of the land within the limit of width specified. Action was required by the company to indicate and fix the way granted; and though it may be true, as contended by counsel for the company, that ordinarily or universally the road-bed of railroads is laid along the center of the right of way, such custom cannot control where the conduct of the parties touching the particular right claimed is shown to have been otherwise. None of

the conveyances from Cohea (one of them having been made in less than a month from the grant to the company) contain any reservation or exception of a right of way over the land granted in favor of the company. The conveyances are absolute and unqualified of the whole land described, bounded by a fixed line as the limit of the right of way. Under these conveyances the grantees entered and acted with reference to the whole premises as owners thereof. They built fences and houses, and in this most public and unmistakable manner demonstrated their purpose to hold exclusive possession of the whole of the lot. We must assume that the company would then have made the issue, and asserted its right, if it believed it to exist as now claimed. That it failed to do so is sufficient evidence of acquiescence by it in the line treated by its grantor as the boundary of the way granted. Washb. Easem. 281; Wynkoop v. Burger, 12 Johns. 221; Railroad Co. v. Houghton, 128 Ill. 233, 18 N. E. Rep. 301.

The decisions cited by counsel for appellant in which the user by the land-owner of a part of the right of way has been held not to be exclusive of the right of the railroad to extend its actual use and occupation, will be found to be cases in which the grant covered the land claimed by fixed lines, up to which a right was given, and not, as here, grants of so much land as the company may deem necessary, not to exceed 100 feet. In those cases the right claimed was to take as occasion might require possession of the land granted. The claim here is to extend a grant, the limits of which have been fixed by the parties, so as to include lands which might have been, but were not, deemed "necessary" by the officers of the company when it located its way under the grant. We find nothing in the conveyance by which authority to locate the way might be exercised more than once, and by the location then fixed the company must be concluded.

The judgment is affirmed.

MEMPHIS GROCERY Co. et al. v. TROTTER et al.

(Supreme Court of Mississippi. May 12, 1890.)

FRAUD—INJUNCTION.

One T., a merchant, drew \$17,000 from the bank, and visited his father the same day. The latter was a small merchant in a neighboring town. The next day T. made an assignment for the benefit of creditors. His property was attached and sold. His father settled with some of the creditors, and took judgments against T. Held that, in view of many circumstances connecting the father with the fraud of T., the sheriff would be enjoined from paying to the father on his judgments the money derived from the sale of T.'s goods.

Appeal from chancery court, Clay county; B. McFarland, Chancellor.

W. T. Trotter, one of the appellees, was a merchant in West Point. He became involved, and borrowed some money from his father, and continued his business. His father, W. E. Trotter, another appellee, also had a mercantile business at a little town near West Point; and the father bought goods from his son in West Point

for his own business, and bought a large quantity of goods within a short time just preceding his son's final failure in business. A few days prior to December 13th, and on December 13th, W. T. Trotter drew from the bank in which he deposited his money some \$17,000, and on December 13th paid his father a visit, and returned to West Point on December 14th, and on that day made an assignment for the benefit of his creditors. Many attachments followed, and the sheriff took charge of the property, which he sold by agreement of the creditors, and deposited the money in the bank. Early in January, W. E. Trotter, the father, made a proposition to settle with the creditors, he having purchased the attached property from the sheriff, which proposition was accepted by some of the attaching creditors, who transferred their claims to W. E. Trotter, and he took judgments at the next term of court against W. T. Trotter on these claims so transferred to him; the attachments having been sustained. This bill was filed by appellants to enjoin the sheriff from paying over the money in bank, derived from the sale of the goods, to W. E. Trotter, under his judgments above described, on the ground that said W. E. Trotter, acted in concert with his son, W. T. Trotter, in the fraudulent scheme perpetrated in reference to the assignment, etc. Much evidence was taken, some of which tended to show suspicious connection of W. E. Trotter with the fraud of his son. The chancery court dismissed the bill of the appellants, and decreed damages against them for the wrongful suing out of the injunction, from which decree they appealed.

F. M. Beall, for appellants. Barry & Beckett and Fox & Roane, for appellees.

COOPER, J. We find ourselves unable to concur in the conclusion reached by the chancellor on the facts of this case. It is possible that W. E. Trotter is not an accomplice in the unmitigated scheme of fraud concocted and executed by his son, but the probabilities are so strong against him that to act upon the assumption of his good faith would be a departure from the rule that fraud may be established by circumstantial evidence. The circumstances tending to show confederacy are too strong and numerous, and those supporting his good faith too few and inconclusive, to warrant a decree in his favor.

The decree is reversed, and a decree directed to be entered here directing the sheriff to pay to the complainants or their solicitors the sums due them, and interest, and costs of this suit in the court below and here, from the funds in his hands.

BUCKLEY et al. v. DUNN.

(Supreme Court of Mississippi. May 26, 1890.)

JUDGMENT CREDITORS—RIGHT TO DEBTOR'S LABOR.

A judgment creditor has no right to the products of his debtor's labor, which became as soon as produced the property of a third person, and it is immaterial that the debtor refused to make the contract to furnish the products directly, fearing that they might be subjected to the judgment debt, but procured the contract to be made by his wife.

Appeal from circuit court, Clarke county; S. H. TERRAL, Judge.

Appellee, Dunn, had a judgment against his son-in-law, one Oliphant. Oliphant had no property out of which the judgment could be made, and he, (Oliphant,) desiring to engage in getting out cross-ties for the railroads, and fearing that if he engaged in the business in his own name, and on his own account, that the product of the business might be subjected under Dunn's judgment, got his wife to make a contract with the two railroads to furnish them cross-ties on her account and in her name. The wife also contracted with appellants, Buckley & Son, to advance money and means for the accomplishment of the business. Buckley & Son advanced the money, and the cross-ties were delivered to the railroads, whereupon Dunn sued out writs of garnishment against the railroads, which answered, acknowledging indebtedness to M. E. Oliphant, the wife, and not to Oliphant, the husband, and alleging that Buckley & Son claimed the amounts on orders from the wife for the sums due. Buckley & Son appeared and contested the garnishments; they showed that the whole amount due from the railroads was due to them for advances made on the order of the wife, and set up their claim to the money paid in by the railroads. Appellee, Dunn, insisted that the contract in the name of the wife was a mere device and cover for the purpose of perpetrating a fraud; that the product of the business was in fact the property of Oliphant, the husband. The court instructed the jury to the effect that if the motive and intention of Oliphant, the husband, was to defeat his creditor, and the contract a mere cover for such purpose, then the verdict should be in favor of appellee, Dunn. There was verdict and judgment in favor of Dunn, from which Buckley & Son appealed.

Witherspoon & Witherspoon, for appellants. *Fewell & Brahan* and *T. A. Wood*, for appellee.

COOPER, J. Since the law undoubtedly is that creditors have no lien upon or right to the labor of their debtors, we are unable to perceive upon what principle the creditor can subject to his debt the product of that labor where, when it comes into existence, it is the property of another. The creditor cannot impute fraud to the transaction by which the debtor gives his labor to his wife, for the creditor has no legal or equitable right to that labor. If by his labor the debtor produces property which is his own, he may not give the property thus produced to the wife to prevent its being subjected to his debts. But this is because the law recognizes an equity in the creditor to be paid out of such property. It is quite a different proposition to assert that creditors have a right to the personal labor of their debtors, and that if the debtor gives that to another the creditor may complain as of a fraudulent scheme to defeat his demand.

It is perfectly clear that Oliphant refused to make the contract out of which the debt garnished arose because of the apprehension that that product of the contract

would be subjected to the appellee's judgment; it is equally certain as a principle of law that the creditor could not coerce him to make it or to perform any labor under it when made by the wife. It is impossible to change the nature of the thing done by epithets; Oliphant might lawfully have refused to make the contract to supply the cross-ties to the railroads, and so, also, he could lawfully give to his wife his labor and supervision in the execution of the contract made by her, and this whether the contract was made by her acting personally or by her acting through her husband as her agent. Calling what was done "a fraudulent device" or "cover" cannot change its nature nor the legal results that flow from it.

The verdict and judgment should have been for the claimant.

Judgment reversed and cause remanded.

GILLUM et al. v. CASE.

(Supreme Court of Mississippi. June 2, 1890.)

EJECTMENT—BILL OF PARTICULARS.

Under Code Miss. § 2491, requiring either party in ejectment on demand of the other party to file a bill of particulars, giving an abstract of the title under which he claims, and providing that in default thereof no evidence of such title shall be given, the bill, when filed, is an admission of record that the party claims under the chain of title therein referred to, and, where the bills of both parties set out a common source, plaintiff need not establish the chain of title back of such source.

Appeal from circuit court, Jackson county; S. H. TERRAL, Judge.

Ejectment by Harry Gillum and others against Mrs. M. A. Case. Judgment for defendant, and plaintiffs appeal.

T. S. Ford and *Robert Lowry*, for appellants. *C. H. Wood* and *Nugent & McWillie*, for appellee.

COOPER, J. By section 2491 of the Code, in reference to actions of ejectment, it is provided that, "after issue joined in ejectment, either party may demand in writing, of the other, a bill of particulars of his claim or title to the premises in question, which bill shall include a short abstract of such documentary evidences of title as the party may intend to give in evidence on the trial, * * * and in default thereof no evidence of such title shall be given on the trial." The plaintiffs in this action made demand of the defendant for a bill of particulars of her title, in response to which such bill was filed in the cause. The defendant also demanded a bill of particulars of the plaintiff's title, which was also furnished as required. The plaintiffs claim the premises sued for as heirs at law of Henry and Thomas Gillum. The bill of particulars furnished by the defendant showed that she claimed from the same parties, and also claimed under a tax-deed. On the trial the plaintiffs read in evidence the bill of particulars filed by the defendant, for the purpose of showing that both parties claimed under a common source of title, and, in effect, asked the court to instruct the jury that such evidence was sufficient to show that the defendant claimed under a common source

with the plaintiffs, and that, if the evidence showed that plaintiffs had the better title from such source, then they were entitled to recover, unless the evidence showed that the defendant had secured a title by adverse possession, or had title paramount under the tax-sale. This instruction the court refused to give, upon the ground, as we assume from the argument of counsel, that, notwithstanding the fact that defendant had filed the bill of particulars by which it was shown she claimed title under the common source, it was incumbent upon the plaintiffs to show a title in such source, the bill of particulars performing no function except to enable the defendant, if she should desire to do so, to introduce evidence of title as set forth in the bill.

In this the court erred. It is true the statute only declares that a failure to exhibit the bill of particulars when demanded shall preclude the party from giving evidence of title. But this does not control the effect of the bill when made and filed. It performs the office of pleadings, in that it informs the opposite party of the evidence he will be expected to produce, and is an admission of record that the party claims title under the chain of title therein referred to. Where such particulars inform the adversary that both parties claim under the common source, it is not incumbent upon him to show title in that source, since that is admitted. If, as the evidence for the plaintiffs tends to show, the lands in controversy descended to them as heirs at law of the Gillums, (the common source of title,) they are entitled to a judgment of recovery, unless the defendant gives some evidence of title from that source, or that they have title paramount thereto.

The judgment is reversed and cause remanded.

THOMAS V. BOARD OF SUP'RS, HOLMES COUNTY.

(*Supreme Court of Mississippi*. April 28, 1890.)

TAXATION—LIABILITY OF MORTGAGES—CONDITIONAL SALE.

A conveyance in the form of a deed contained the condition that the grantor might "redeem" the property within five years, on the payment of a sum equal to the consideration and interest, and provided that a failure to pay such sum when due, or to pay the interest annually, should operate to make the conveyance absolute; that until default grantor should retain possession of the property. On the question arising as to whether the grantee was assessable for taxes as a mortgagee, parol evidence showed that at the time of the conveyance the grantor was indebted to the grantee in the exact amount of the consideration named, to secure the most of which the latter held a mortgage on the lands conveyed; that he was also largely indebted to others; that this instrument was made under an arrangement to enable him to get out of debt; that the grantee thereupon released and surrendered all evidences of indebtedness against him; that neither afterwards considered any debt existing between them; that subsequently grantor gave grantee a quitclaim deed surrendering his rights to "redeem," and took a lease. *Held*, that the right of grantor was to repurchase only, and that grantee was not liable to taxation as a mortgagee.

Appeal from circuit court, Holmes county; C. H. CAMPBELL, Judge.

Hooker & Wilson, for appellant. *C. V. Gwin*, for appellee.

COOPER, J. This is a controversy between the board of supervisors of Holmes county and appellant, touching the liability of appellant to be assessed and pay taxes for the years 1884, 1885, 1886, 1887, and 1888, on the sum of \$46,071.05, which the board contends she owned as personal property during such years. The facts are that, prior to the year 1884, one Keirn was indebted to William Thomas, the husband of appellant, (who is now dead, leaving her his sole heir at law and distributee,) in a large sum of money, the payment of which was secured by a mortgage on a large body of lands in Holmes county. Keirn was also indebted to many other persons, whose debts were secured by mortgages on other lands. On the 17th of May, 1884, an arrangement was entered into between Keirn and Thomas, by which Thomas surrendered and canceled the notes he then held against Keirn, and assumed the payment of a note of \$6,181.25 due by Keirn to one Jenkins. The sum of the notes surrendered, and that of the payment of which Thomas assumed, was \$46,071.05. In consideration of this surrender of his debt by Thomas, and of his assumption to pay the debt to Jenkins, Keirn on that day executed a conveyance of a large quantity of lands, being the same lands before that time mortgaged to secure the payment of the notes above mentioned. The conveyance is in usual form in its recital of the consideration paid and the description of the lands conveyed, and then proceeds thus: "This deed is, however, conditional that the said W. L. Keirn shall have the right to redeem said lands at any time within five years from the date hereof, or before the title of the said Thomas has become absolute, by paying to said Thomas the sum of forty-six thousand and seventy-one dollars and five cents, with six per cent. interest thereon from date hereof. If the said Keirn shall fail to pay annually on the 17th day of May the accrued interest on said sum of \$46,071.05, then the title of said second party becomes absolute and perfect, and the said Keirn shall be barred of all further right of redemption, and the said Thomas and his heirs shall be entitled to the immediate possession and control of said lands, which it is agreed shall be hereby delivered to him and his heirs; and if said Keirn, at the expiration of said five years, shall fail or refuse to pay said sum of \$46,071.05, with any accrued interest that may be due thereon, or any part thereof, then the said second party shall be entitled to the immediate possession and control of the same, as his own property, and the said Keirn shall be barred of further rights therein. The said Keirn shall have the right to the possession of said lands until the failure to pay said interest annually occurs, or a failure to pay said sum of \$46,071.05, or any part thereof, as hereinbefore agreed; he, the said Keirn, keeping all the taxes and assessments against said lands paid off and discharged."

But little parol evidence was introduced

by either party, but Mr. Hooker, a witness for appellant, stated that, "before the execution of the deed, Dr. Keirn was indebted to William Thomas in a large sum of money, and to Jenkins and other parties. About the time of the execution of the deed a scheme was formed by which it was supposed that Dr. Keirn could be released entirely from debt, and save some part of his property. Mr. Thomas bought from Dr. Keirn the places described in the deed, and in payment thereof delivered up to him his notes, which bore 10 per cent. interest, and all evidences of debt, and released him from all obligations to him. This was a *bona fide* purchase, and not a loan of money. Dr. Keirn did not owe Mr. Thomas anything, nor had Mr. Thomas any claim which he could enforce against Keirn. The scheme fell through, and Dr. Keirn desired of Mr. Thomas the privilege of repurchasing the land within five years by paying the taxes on the land, and about \$2,700 annually. That Thomas could not have sold the land on account of the agreement held by Keirn." The fact appears, by a quitclaim deed made by Keirn to Mrs. Thomas, that, before the hearing of this cause by the board of supervisors, Keirn had surrendered his right of redemption, and taken a lease of the land for an additional term of years.

Conceding, for the purposes of this examination, the power of the board of supervisors to apply equitable principles to contradict the express language of a deed, and conceding its power to re-examine the subject of the liability of Mrs. Thomas to taxation on the property or debt notwithstanding the conclusions reached by the board in preceding years that she was not, we dispose of the cause upon its merits. Looking alone to the deed, we find some of its features to be those of a mortgage, and some those of a conditional sale. The release of the debt from Keirn to Thomas, in consideration of the conveyance, the absence thereafter of any personal obligation or duty on the part of Keirn to pay anything to Thomas; the stipulation making time of the essence of the right to reacquire the land; the fact that before the execution of the deed the relation of mortgagor and mortgagee had existed, and the evident purpose to change such relationship; the fact that by the change then made Keirn secured decided benefits, and that by such arrangement Thomas was put at serious disadvantage by surrendering notes then due and drawing interest at 10 per cent. upon which Keirn was personally responsible, and that to construe the instrument as a mere mortgage would add to the loss he has submitted to, — are circumstances tending to show that the contract was for a conditional sale, and not for a mortgage. On the other hand, the agreement of Keirn to pay a stipulated sum per annum as "interest" on the purchase price during the five years in which the conveyance reserved to him possession of the land; the fact that such right of possession was reserved; the fact that the deed reserved the right to redeem by repayment of the exact sum recited as the consideration of the conveyance; and the

use of the technical word "redeem" by the parties to describe the right reserved to Keirn, — are *indicia* tending to show that the conveyance was intended to be a mortgage, and not a conditional sale.

An examination of the authorities discloses that, while one or the other of such circumstances has in particular cases been powerful in determining the character of the instrument, each case was decided upon its own facts, and, where doubt existed on the face of the instrument, the court sought by the aid of extraneous evidence to discover and effectuate the intent of the parties. The authorities are collected in 1 Jones, Mortg. c. 7.

The testimony of Mr. Hooker, who is of counsel for Mrs. Thomas, and was familiar with the intention and purposes of the parties, is conclusive, in our opinion, of their understanding and design, and is supported by the evidence that, before the hearing by the board of supervisors, Keirn dealt with his right as one for repurchase only, and surrendered it to Mrs. Thomas. Taxes have been paid to the county on the lands, which, in our opinion, were the lands of Mrs. Thomas, and she should not have been assessed with the purchase price paid for them as so much money secured by mortgage on them.

The judgment is reversed, the action of the board directing the assessment vacated, and the assessment annulled.

HUNTINGTON v. BORDEAUX.

(Supreme Court of Louisiana. Dec. 2, 1889. 49 La. Ann.)

SHERIFF'S DEED—REGISTRY—APPEAL—JURISDICTION—DISMISSAL.

ON MOTION TO DISMISS.

1. The supreme court has jurisdiction over a controversy between a defendant, calling his vendor in warranty, in a petitory action, when the defendant avers in his answer that the property from which plaintiff seeks to evict him is worth more than \$2,000, and he asks judgment eventually against his warrantor for that sum.

2. A judgment rendered declaring a surety good and solvent, and allowing an appellant to furnish a new bond, cannot be reviewed on a motion made in the appellate court to dismiss the appeal taken from the judgment on the merits of the controversy.

3. Such first judgment remains undisturbed until reversed on appeal therefrom.

ON THE MERITS.

1. A sheriff's adjudication of real estate must be recorded in the conveyance office in order to bind third parties.

2. A transfer of the property thus adjudicated, by the defendant to a party, not notified of the adjudication by such registry, conveys the property to the purchaser.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

J. H. Ferguson and A. A. Ker, for appellant. H. R. Dufour and Octave Morel, for appellee.

ON MOTION TO DISMISS.

BERMUDEZ, C. J. The plaintiff moves a dismissal of this appeal, on the following grounds, viz.: (1) The value of the property in dispute is less than \$2,000 and this

court has no jurisdiction *ratione materiae*. (2) The bond furnished originally in the court *qua* was insufficient for a suspensive appeal, and said court was without power to allow a new bond.

1. The action is petitory in character. The petition does not state the value of the property, but the answer sets it at \$2,500. After asserting the validity of his title, the defendant called in his vendor in warranty, asking a judgment against him eventually for \$2,500. By its judgment, the lower court evicted defendant, and condemned the warrantor to pay \$1,200. The defendant did not appeal, but the warrantor has. The effect of such appeal, as far as the plaintiff is concerned, need not be considered presently, except to state that the plaintiff has an interest at stake, and therefore to seek the dismissal. The matter at issue between the defendant and the warrantor, appellant, on which the lower court passed, and which comes up by the appeal, is the amount claimed from the warrantor, namely, \$2,500. By the pleadings between the defendant and the warrantor, the case was made appealable, and the judgment on the issue between them could have been appealed from by either or both. The value of the property claimed is no factor in the examination of the first ground of the motion to dismiss. It may acquire significance on the merits of the controversy, but only if it be true that the plaintiff has a good title to the property; for then the defendant, being evicted, would be entitled to recover from his vendor at least the value of property paid to him. It is evident that as the pleadings stand, between the defendant and the warrantor, who is the appellant, this court could, circumstances justifying, render a judgment for the amount claimed by the former on his call in warranty from the latter, viz., \$2,500. The first ground is therefore untenable.

2. Having jurisdiction over the matter in dispute, the court would have authority to inquire into the merits of the second ground, relied on for the dismissal of the appeal, which relates to the insufficiency of the bond furnished originally, and to the lack of power in the judge to allow another one to be given in place. The record shows that the plaintiff and the defendant have, in a joint motion in the court *qua*, moved to dismiss the appeal granted, on the grounds of the insufficiency of the surety and bond, contending that, the original surety being insufficient in amount, the court had no authority to allow the warrantor and appellant to furnish another. The district court held that the surety was good, and that it had authority to act as it did. No appeal has been taken from that judgment. Its correctness cannot be tested by the motion to dismiss made in this court, and now under consideration. It will remain undisturbed until reversed on appeal. The motion is denied.

ON THE MERITS.

BERMUDEZ, C. J. This is a petitory action against one in possession. The plaintiff claims title through a sheriff's adjudication to a seizing creditor to whose rights

he was subrogated. He charges that the defendant claims title from one who acquired the property at a tax-sale; but that this sale is an absolute nullity, for several reasons, one of which is the insufficiency of the description of the property. The defendant denies, avers a good title in himself, but calls his vendor in warranty. The latter upholds the validity of his title, not only under the tax-deeds made to him by the collector, but under a transfer of rights to him by the owners of the property in the tax-deeds. There was judgment for plaintiff, citing defendant, condemning the warrantor to reimburse the purchase price received by him, and reserving certain rights. This judgment is brought up for review. The only evidence adduced by plaintiff to show title consists in the sheriff's return, which establishes adjudication to his author; but there is no proof whatever that any instrument of writing, not even a *procès-verbal*, was recorded in the conveyance office, so as to notify third persons that the defendant in the case had been expropriated, and that his title had passed to the adjudicatee. It appears that, subsequently, the same property was seized and advertised by the tax collector, for back taxes, and that it was by him adjudicated to the warrantor. Two deeds, duly recorded, were delivered containing a description of the property. Four lots were described in one deed and ten in another, all in the same square. In each act, the delinquent parties, wife and husband, in whose name the title stood, intervened, and, for a valuable consideration, ratified the sale, transferring all their rights to the adjudicatee. The alleged insufficiency of the description of the property in the advertisements of the tax collector, and in the deeds executed by him, is no factor in the case. The property claimed by the plaintiff is admitted by him, by this very suit, to be that in defendants' possession and adjudicated at the tax-sale to the warrantor; for he seeks the former's eviction from it, and the defendant and the warrantor admit the identity, insisting on their titles to the same. Premitting the question of the nullity charged of the assessments of the lots, in the proceedings and in the adjudication, the stubborn fact remains that the property, by its undisputed owners, was transferred to the warrantor, and by him to the defendant, who has since been in possession of it. The only question in the case is whether, at the time of this transfer, the purchaser had notice of the expropriation by the sheriff's adjudication. It is clear he had none, for the plain reason that nothing had previously been put of record, on the conveyance book, to show that expropriation and adjudication. The law distinctly provides that, in the city of New Orleans, it shall be the duty of the sheriffs to cause to be recorded in the conveyance office all judicial sales of real property made by them, (Code Prac. art. 697; Rev. Civil Code, art. 2265;) and that all sales, not so recorded, shall be utterly null and void, except between the parties thereto, registry to affect third persons only from the time of recording. Rev. Civil Code, art. 2266; *Ratford v. Wood*, 14 La. Ann. 117; *Moore v. Jourdan*,

Id. 416; Lyons v. Cenas, 22 La. Ann. 114. It is well settled that, in an action in revendication of real estate, in possession of another, the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary. Code Prac. art. 44. It is therefore ordered and decreed that the judgment appealed from be reversed; and it is now ordered and decreed that there be judgment rejecting the demand of plaintiff, and granting that of the defendant and warrantor: plaintiff and appellee to pay costs in both courts. A plaintiff, in a petitory action, against one in possession, can recover only on the strength of his title, and not on the weakness of that of his adversary.

Judgment reversed.

DURRUTY et al. v. MUSACCHIA.

(Supreme Court of Louisiana. April 7, 1890.
43 La. Ann.)

JUDGMENT AGAINST NON-RESIDENT—PARTITION.

1. The presumption of law that property bought during marriage in the name of either spouse is community property, attaches to purchases in the name of the wife, although the act contains all necessary recitals as to the paraphernality of the funds with which the price was paid.

2. A purchaser from a married woman of such property cannot be compelled to accept title until this presumption has been overcome by proper proof; and, when it appears that a judicial mortgage is recorded against the husband, the purchasers may require such mortgage creditor to be made a party.

3. If the mortgage creditor be an absentee, he may be properly brought into court through a curator *ad hoc*, the proceeding being substantially one *in rem*, having for its sole object to fix the status of the property, and to determine the validity of his apparent lien upon it, in order to enforce a contract respecting the same.

4. The decree properly allowed interest on the cash part of the price only from date of judgment, but from that date rightly allowed the same rate which had been stipulated for deferred payments.

ON APPLICATION FOR REHEARING.

1. A judgment against a non-resident, properly represented in a litigation by a curator *ad hoc*, involving the effect of a judicial mortgage inscription on real estate in this state, ought to be explicit, on its face, to that effect, to bind the absentees.

2. The act of 1878 authorizing the sale of property, owned in part by minors, at private sale, does not require the fulfillment of the prerequisites for a judgment in partition at public auction of property in which minors are concerned as co-owners.

3. The consent of the co-proprietor of age, and that of a family meeting on behalf of the minors, with the concurrence of the tutor, and the homologation of the proceedings by the court, authorize the sale of the property at private sale.

4. Interest exceeding 5 per cent. cannot be allowed on a sum actually due, in the absence of written evidence of an agreement to pay such.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

Buck, Dinkelspiel & Hart, for appellants. T. Gilmore & Sons, for appellees. George Denegre, curator *ad hoc*.

FENNER, J. The plaintiff, a married woman, with the authorization of her husband, sold to the defendant a piece of property, of which he refused to accept the title tendered, on the following grounds:

First. That the property having been purchased by Mrs. Durruty during mar-

riage, although bought in her name, and although the act fully declares that it was bought with her separate funds, is presumed to be community property, and that he cannot be compelled to take the title until that presumption is judicially rebutted. Our decision in Bachino v. Coate, 35 La. Ann. 570, certainly imposes upon the married woman, in such case, the duty, and upon the purchaser from her the right to require her, to rebut this presumption, and to rebut it contradictorily with those having a right to dispute her title; such as the forced heirs of the husband, if he be dead, and his judicial mortgage creditors. In this case a certificate of mortgage in the husband's name was produced, showing a judicial mortgage for a large amount recorded in the name of Leon Hernandez, who, it was shown, was an absentee residing in France. Thereupon a petition was filed making him a party and appointing a curator *ad hoc* to represent him, who appeared and filed answer in that capacity, and represented him on the trial. It is not disputed that the proof administered by Mrs. Durruty clearly and conclusively establishes every fact essential to maintain the paraphernality of her title and her full right to sell; but defendant claims that the judgment to that effect is not binding on Hernandez, because he was not legally made a party, and that the attempt to make him a party by substituted service on the curator *ad hoc* was not "due process of law." Reference is made to the decision of this court in Laughlin v. Ice Co., 35 La. Ann. 1184, and to the decisions of the United States supreme court in Pennoyer v. Neff, 95 U. S. 714, and sundry other cases. An examination of those decisions very clearly shows that this case is an exception to the general rule formulated therein, which applies only to actions strictly *in personam*. Thus Justice FIELD, as the organ of the court, expressly says: "Such services may be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the parties, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose." Pennoyer v. Neff, 95 U. S. 727. It is obvious, in this case, that the sole object of the proceeding as against Hernandez is to define the status of this property, to determine the validity of his apparent lien upon it, in order to enforce a contract respecting the same. He cannot be reached for personal service; and, unless he could be brought in by such substituted service, his mere absence would have the effect to place and keep this property out of commerce. We therefore hold that he was validly brought into court through service on the curator, and will be concluded by

the judgment. The character and responsibility of the gentleman appointed as curator forbid our attaching the slightest importance to the suggestion that he has neglected any duty due to his client. Although his answer was filed soon after his appointment, it may well be that he had communicated with the absentee, and was advised of his wishes, without which he would not have so acted; and, in every event, he is amply responsible.

Second. Defendant further objects to the validity of Mrs. Durruty's title, because derived in part from minors, whose title was not divested by proceedings conforming to the requirements of law. It was a private sale, made to effect a partition, under the special provisions of Act No. 25 of 1878. We have critically examined the proceedings, and find them to conform in every respect with the requirements of the act. The case of Succession of Dumestre, 40 La. Ann. 571, 4 South. Rep. 328, did not involve proceedings under, or purporting to be under, this act, and has no application here. The suggestion of defects in further proceedings in course of the partition after the sale to Mrs. Durruty, and her full compliance with the terms thereof, brings up matters with which neither she nor defendant have the slightest concern.

We consider that the decree of the court properly adjusts the rights of the parties as to the interest on the price. Defendant was not in default for non-payment of the cash portion of the price until the date of the judgment, and therefore owes interest from that date only. As the act stipulated 7 per cent. as the rate of interest on deferred payments, it is but just that he should pay that rate on the cash portion from the date of his default.

Mrs. Durruty died during the pendency of the suit, and her heirs were regularly made parties in her stead; but, by oversight, the judgment was rendered in the name of Mrs. Durruty. It is agreed by all parties that this clerical error shall be corrected in our decree.

It is therefore adjudged and decreed that the judgment appealed from be amended by substituting the names of Louise Marie Durruty and Marie Ursule Durruty as plaintiffs in the judgment for that of Mrs. M. C. Durruty, and that, as thus amended, the same be now affirmed, at appellant's costs.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. The defendant complains that there is error in the judgment herein rendered in this: that if it be true that the judgment binds Hernandez, made a party, it ought to show that fact expressly; that the formalities for the transfer of the property, as required by law, have not been observed, so as to bind the minors, from whom it was in part derived; that the judgment allows 7 per cent. on the portion of the price which was to have been paid cash, while it could allow the legal interest only, as there was no consent to pay more.

1. The ruling in *Flower's Case*, 23 How. 182, has no bearing in the instant case, and Hernandez is surely bound by the judgment against him, represented by a curator

ad hoc, to the effect that his judgment against Durruty, the husband, does not affect the property of Mrs. Durruty, the wife. The district court, however, ought to have made a decree in its judgment affecting, formally, Hernandez, and, as it has not done so, the omission can be supplied here; otherwise, in order to ascertain what the effect of the judgment here is, it would be necessary to consult the reasons which do not form part of the decree.

2. We held that the formalities for the sale of the property of minors at private sale had been observed, and deemed that statement sufficient to determine the issue on that point. In the case of *Bruhn v. Association*, *infra*, (decided this day,) in which the proceeding was a kindred one, we again held that a sale of property of which minors are part owners can take place without being preceded by a formal judgment, as is provided for in partition suits, for a sale at public auction. It is enough, where the co-proprietors agree, that the family meeting find the necessity or propriety of the sale as advantageous to the minors, and that, with the concurrence of the tutor, the court homologated the deliberations and order the sale for the price fixed by the family meeting.

3. The district court erred in compelling the defendant to pay 7 per cent. interest on the cash installments. In the absence of any written evidence of an agreement, the defendant can be made to pay legal interest only. Rev. Civil Code, arts. 1940, 2024. It is therefore ordered that our previous decree herein be amended so as to read as follows: It is ordered and decreed that the judgment appealed from be amended by reducing the interest on the cash portion from 7 to 5 per cent., and by declaring that the judgment of Leon Hernandez against Jean Honore Durruty for \$18,750, on the 1st of June, 1886, in the United States court, does not affect the property described in the petition, and forming the object of this suit, and that, thus amended, the judgment appealed from be affirmed, at appellees' cost; and it is further ordered that our previous decree, thus modified, remain undisturbed.

Rehearing refused.

BRUHN V. FIREMEN'S BLDG. ASS'N.
(Supreme Court of Louisiana. April 7, 1890.
42 La. Ann.)

PARTITION BY ACT OF THE PARTIES.

1. Act No. 25 of 1878 authorizes the sale of property held in indivision between minors and others at private sale, on compliance with the requirements therein contained, and sanctions the title passed to purchasers under such sales.

2. The proceedings in this case comply fully with the requirements of the act, and the title is approved.

3. While it is necessary that the proceeding should be conducted contradictorily with the tutor of the minors, if it appears that she participated therein, and approved the same, failure to cite her will be cured.

(Syllabus by the Court.)

H. P. Dart, for appellant. *Frank Zengel*, for appellee.

FENNER, J. Appeal from the civil district court for the parish of Orleans.

Plaintiff, having sold to defendant certain property, takes this proceeding to compel defendant to accept the title tendered, and to comply with the terms of sale. Defendant, admitting the sale, and his willingness to execute the same on receiving a good title, objects to the title tendered on the ground that plaintiff acquired under a sale for partition made in the matter of the Succession of Charles Hickey, in which minors were interested, and which proceedings were void because there was no citation to the minors, and because they did not in other respects conform to the requirements of law.

The sale under which plaintiff acquired was made in virtue of Act 25 of 1878, which provides: "When two or more persons, some or all of whom are minors, hold property in common, and it is the wish of any one of them, or, if a minor, represented by his tutor or tutrix, to effect a partition on the advice of a family meeting, duly convened according to law, to represent the minor or minors, said property may be sold at private sale for its appraised value. Said appraisal to be made and the terms of said sale to be fixed by the family meeting, and said proceedings to be homologated by the judge of probate of the parish in which said minor resides."

The property in controversy was inherited from Charles Hickey by his three minor children, and was under the administration of their mother and natural tutrix. One of the children, arriving at the age of majority, presented a petition to the court under whose authority the tutrix was administering, complying in all respects with the above act, and praying for the calling of a family meeting in behalf of the minors, co-heirs, to advise whether or not the property should be sold at private sale, and to fix its appraisal and the terms of sale. The family meeting was ordered and duly held, and, with the concurrence of the under-tutor, advised in favor of the private sale, and fixed the appraisal and terms. The tutrix of the minors and the major heir united in a petition to the court presenting the *procès-verbal* of the family meeting, and praying for its homologation, and for the appropriate order of sale. The court granted its order accordingly; and in pursuance thereof the tutrix and the major heir sold the property to plaintiff herein for a price exceeding the appraisal, which she duly paid, and received the title.

If Act 25 of 1878, above quoted, means anything, it certainly authorizes the sale of property in which minors are interested in indivision, in the manner here pursued, and the title passed to the purchaser by such a sale. We fail to discover any requirement of the act which has not been literally complied with. The act does not expressly require citation of the minors through their tutrix, but doubtless the necessity of making the tutrix a party is fully implied. In this case, however, the participation of the tutrix is established by the fact that she joined in the prayer for the homologation of the proceedings of the family meeting and for the order of

sale, and joined in the act of sale. As we said in Durruty's Case, ante, 555, (recently decided,) the purchaser, who has paid the price under such a sale, is not concerned with further proceedings in partition of the price between those interested therein. We think the title tendered is good.

Judgment affirmed.

YOUNG v. UPSHUR et al.

(Supreme Court of Louisiana. April 7, 1890.
42 La. Ann.)

NON-RESIDENT DEFENDANTS—REAL ACTIONS.

1. A citizen of the state of Mississippi, having instituted a suit, in the ordinary form, in a civil court in the state of Louisiana, against citizens of the District of Columbia, averring her title to an undivided half interest, in joint ownership with defendants, in a certain suit and judgment, the domicile of which is in the parish where the suit is brought, though pending on a writ of error from the United States supreme court; *held*, that an exception to the jurisdiction of the court, *ratione personarum*, tendered by a curator *ad hoc*, appointed to represent the absentee defendants, is not good; that substituted service of citation is effectual; and judgment rendered thereon will bind defendants as to the property to be specially affected thereby.

2. In such suit, judgment is evidently sought as a means of reaching such property, or of affecting an interest therein. It is therefore in the nature of an action *in rem*, in so far as it purports to enforce a contract in reference to a specific interest in property within the ultimate jurisdiction and control of the court of first instance; and final judgment, when rendered, will be binding on the non-resident defendants within and without the state.

(Syllabus by the Court.)

Appeal from district court, parish of Tensas; Young, Judge.

N. R. Young, for appellant. H. Tullis, for appellee.

WATKINS, J. The plaintiff, claiming to be the owner of an undivided one-half interest in a certain judgment rendered by this court, on appeal from the parish of Tensas, in the suit entitled "Mrs. Annie M. Upshur et al. vs. Mrs. Mary E. Briscoe et al.," by purchase from the plaintiffs therein, who are citizens of the District of Columbia, and which is still pending on writ of error in the United States supreme court, complains: *First*, that, in the notarial act of transfer, said plaintiffs, as transferrers, bound themselves not to interfere with her, as the transferee of an interest therein, in the conduct and management of said suit, in any manner; *second*, that said vendors and transferrers refuse to execute and comply with their agreement, and disavow their title so made, and, contrary to their obligation, are attempting to effect a compromise of the matters in litigation, in violation thereof, and to her great injury. Therefore she instituted suit in the parish of Tensas, and prayed for the judicial recognition and enforcement of said contract of sale, and her ownership of one undivided half interest in said judgment. The defendants being absentees in the sense of Rev. Civil Code, art. 3556, subd. 3, the court granted an order appointing for them a curator *ad hoc*, in pursuance of the provisions of article 56 and corresponding provisions of the Code of

Practice, upon whom substituted service of citation was made. The curator excepted to the jurisdiction of the court, *ratione personæ*, on the ground that defendants have not been cited personally, and have not been brought into court by any process of the court issuing against property of theirs within its jurisdiction. This exception was sustained, the suit dismissed, and the plaintiff has appealed.

The question is whether the proceeding constitutes judicial process, within the meaning of the fourteenth amendment to the federal constitution. The leading case is *Pennoyer v. Neff*, 95 U. S. 730. In that case the supreme court announced the governing principles to be that substituted service of citation "is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition, by process adapted to that purpose, or where the judgment is sought as a means of reaching such property, or [of] affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*." Page 733. Then, proceeding to specify what in that sense a proceeding *in rem* is considered to be, the court say: "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem*, in the broader sense which we have mentioned." As preparatory to the utterance just quoted, the court said: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners. * * * In other words, such service may answer in all actions which are substantially proceedings *in rem*; but where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose." Page 727. Within the "larger and more general sense" in which the court treated actions *in rem*, we think this action comes clearly. It is not an action *in personam*. Its object is to obtain judicial recognition and enforcement of a specific interest in tangible property situated in the parish of Tensas, in this state. The defendants are averred to be the plaintiff's vendors, and joint owners of the property in question; and she complains that they are about to dispose of same to her prejudice, and in direct violation of their contract. Evidently, judgment is sought for

the purpose of reaching the property in question, or of affecting an interest therein, by enforcing a contract respecting same, within the meaning of that opinion. This appears conclusive, in the light of the concluding part of it, in which the court was careful enough to announce that it was not their intention to say "that a state may not require a non-resident, entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts; * * * and that judgments rendered upon such service may not be binding upon the non-residents, both within and without the state."

On the face of plaintiff's petition it appears that, by virtue of defendants' sale to her of an interest in a judgment, they became joint owners thereof, and that their contract is enforceable in the courts of this state *quoad* that property. *Laughlin v. Ice Co.*, 35 La. Ann. 1185, is not a similar case. In that case we held that substituted service of citation was ineffectual for the purpose of subjecting a foreign corporation, unrepresented by an agent in this state, to a personal action sounding in damages, upon the simple averment that it owned property in this state. In that view we are still firm, and deem it perfectly consonant with the jurisprudence of this court, as expounded by our predecessors, and that the jurisprudence is consistent with the principles of *Pennoyer v. Neff*. *Dupuy v. Hunt*, 2 La. Ann. 563, was an action for the recovery of slaves, or their value, against two defendants,—one, a citizen of Mississippi; and the other, of Louisiana. The former was cited through a curator *ad hoc*, and he excepted on the grounds assigned here, and the court said: "If the absentee leaves his property without an administrator or agent, if it be attached at the suit of a creditor, or if an absentee becomes a necessary party to a suit between other persons lawfully in court, in furtherance of justice the law authorizes a curator to be appointed to represent him. There is then something on which the jurisdiction of the court is based, and the judgment rendered would be within the recognized and ordinary prerogatives of the judicial power." The principles stated in that case have been substantially followed in many subsequent opinions, and notably in *Peterson v. McRae*, 3 La. Ann. 101; *Jelks v. Smith*, 5 La. Ann. 674; *Ackley v. Lyons*, 6 La. Ann. 648; *Ferguson v. Thomas*, Id. 218; *Prindle v. Williams*, 9 La. Ann. 34; *Stephens v. Graves*, Id. 239. But in *Fleld v. Newspaper Co.*, 19 La. Ann. 36, a departure was taken; the principles announced in the quoted cases being recognized, but misapplied to a strictly personal action. In the more recent cases of *O'Hara v. Booth*, 29 La. Ann. 817; *Morris v. Bienvenu*, 30 La. Ann. 878; and *Fly v. Noble*, 37 La. Ann. 869,—those earlier cases were followed, and they are in keeping with *Pennoyer v. Neff*, to which our jurisprudence has been conformed. *McKenzie v. Bacon*, 38 La. Ann.

764; Laughlin v. Ice Co., 35 La. Ann. 1184; Heirs of McGee v. McGee, 41 La. Ann. 659, 6 South. Rep. 253; Durruty v. Musacchia, 42 La. Ann. —, ante, 555.

Our conclusion is that the case stated is one in which substituted service of citation is effectual, and that a judgment pronounced thereon contradictorily with the curator *ad hoc* will bind the absentee defendants *quoad* the property in controversy; and that the judge *a quo* incorrectly sustained the curator's exception, and dismissed the plaintiff's suit. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the suit be reinstated, and the case remanded for further proceedings according to law and the views herein expressed.

NEW ORLEANS GAS-LIGHT CO. v. CITY OF NEW ORLEANS *et al.*

(Supreme Court of Louisiana. Dec. 16, 1889.
43 La. Ann.)

CITIES—CONTRACTS FOR LIGHTING—INDEBTEDNESS.

1. A time contract between a municipal corporation and a gas or other lighting company, for a supply of gas or light for several years, does not evidence the contracting of a debt, within the scope and meaning of section 2448 of the Revised Statutes, if it appears that the gas or light to be furnished in the future is to be paid for from month to month.

2. A stipulation in the contract by which the city binds herself to make an annual appropriation out of her current revenues, in an amount sufficient to cover the provisions of the contract, is sufficient as a provision to meet the pecuniary liability to be thereby incurred, within the requirements of said section 2448 of the Revised Statutes.

3. In the absence of a special statutory limitation or restriction, the power given to the city of New Orleans to make contracts for lighting its streets, landings, etc., is sufficient to authorize a contract for more than one year for such commodity.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans: ELLIS, Judge.

Buck, Dinkelspiel & Hart, for appellant.
E. H. Farrar and Charleton Hunt, for appellees.

POCHE, J. Plaintiff brings this suit, in its capacity as a tax-payer, for the purpose of setting aside a contract made between the city and the Louisiana Electric Light & Power Company, in May, 1887, to light the city with electricity for five years, beginning on the 1st of January, 1888.

The grounds of attack to be considered on appeal are the following: (1) That the contract is null and void because it violates the prohibition contained in section 2448 of the Revised Statutes, which provides that "the police juries of the several parishes, and the constituted authorities of incorporated towns and cities, in this state, shall not hereafter have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted." (2) That the city of New Orleans had no power, in law, to enter into such a contract. The defense is prac-

tically a general denial, and the judgment on appeal rejected plaintiff's demand.

1. A statement of the principal features of the contract is necessary to a proper understanding of the grounds of attack. After the adoption of an ordinance on the subject, and after public advertisement calling for sealed proposals to light certain portions of the city therein designated, with electricity, for a term of five years, and the lowest bid having been made by the Louisiana Electric Light & Power Company, the contract was executed between the city and that corporation, containing numerous stipulations not necessary to enumerate in this opinion. After fixing the rates to be paid for each light to be established and operated under the contract, the following stipulation was agreed upon. "And the said city of New Orleans hereby binds and obligates itself to make and set apart in its budget of expenses, for each and every year during the continuance of this contract, a special appropriation sufficient in amount to cover the provisions of this contract, and to set the same aside, and to dedicate the same to the purpose aforesaid."

It would seem to us that a mere comparison of the language just transcribed with the terms of the prohibition contained in section 2448 of the Revised Statutes is the best, as well as the shortest, argument to show that the contract under discussion does not fall within the scope of the prohibition contemplated by the statutes. There is no stipulation or expression either in the contract or in the ordinance on which to ground the contention that the city thereby intended to contract a debt. The agreement imports no absolute and binding obligation on the part of the city to pay any sum of money for a consideration pre-existing or executed on the part of its obligee, which is of the essence of a debt. The obligation of the city for future disbursements in favor of the company is conditioned on the performance on the part of the latter of its part of the contract,—a fact to be ascertained, under the terms of the contract itself, from month to month. Although the eventual disbursements to be made by the city may amount to several hundred thousand dollars, it is certainly not correct to argue that the effect of the contract was to place it in debt to that amount. If, under the terms of the contract, the company furnishes and operates, in quality and quantity, the lights contemplated and agreed upon, and if payments are made therefor by the city from month to month, as stipulated in the contract, the city would certainly never be in debt to the company. Hence, we conclude that no indebtedness was contemplated to flow from, or was created by, the contract. These considerations find their support not only on reason and logic, but also on authority derived from adjudications of courts of last resort. *Weston v. Syracuse*, 17 N. Y. 110; *City of Valparaiso v. Gardner*, 97 Ind. 1.

Of course, in thus contracting, the city incurred pecuniary liability, just as a natural person becomes liable in purchasing goods or commodities, or in securing the privilege, by use or consumption, of any

needed object, thing, or commodity; and the liability becomes exigible from month to month, as the lights contracted for are shown to have been furnished and operated by the company. But the very stipulation which creates the liability is in itself a provision of the means of paying the same. As it appears from the stipulation hereinabove transcribed, the city obligates itself to annually provide in its budget the means of discharging its pecuniary liability under the contract for each ensuing year. How else could the city have possibly provided for the means necessary to pay for its annual supply of gas, or for any other needed and indispensable commodity, but out of its annual revenues, and by means of a budget framed in accordance with the positive mandate of the law? We know of no other mode, and we have been referred to none. It is useless to refer to or to analyze, for the purpose of distinguishing the difference existing in, the decisions quoted by plaintiff's counsel on this point of the case. They refer to bonds, notes, and other obligations,—evidences of indebtedness not part, but clearly outside, of annual expenditures of city revenues for necessary costs of municipal governments. They can have no possible application to a case involving a contract for lighting a city, and the mode of paying for the same. Hence we feel safe to conclude that the contract under discussion is not amenable to the prohibition contained in section 2448 of the Revised Statutes. *Cole v. City of Shreveport*, 41 La. Ann. —, 6 South. Rep. 688.

2. On the question of the alleged legal capacity of the city to make the contract herein assailed, the contention seems to be restricted to its want of power to make what is known in jurisprudence as a "time contract," or a contract for its supply of light for more than one year. The municipal authority to contract for a supply of light is derived from the charter generally designated as "Act No. 20 of 1882." Section 7 reads: "The council shall have power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution, as may be necessary and proper * * * to light the streets, wharves, landings, and public squares." That clause, of itself, contains no limitation or restriction to the power therein conferred in general and sweeping terms. But the argument is that the restriction is to be found in sections 63 and 64 of the charter. The first of these sections requires the council to meet in December of each year for the purpose of levying an annual and uniform tax, and of regulating licenses. The other clause has reference to the annual budget of revenues and expenses, and prescribes the time and mode of making and publishing the same. It is clear that neither can be fairly construed as importing or even inferring the prohibition contended for by plaintiff's counsel. It is evident that the contract under discussion was framed with special reference to the legal requirements contained in these very sections. By entering into a contract for more than one year for a commodity or other supply, the city council is not amenable to the charge that

it restricted its legislative power. The power to legislate, conferred upon the city by its charter, has reference to its authority to legislate for governmental functions, such as passing and enforcing ordinances to govern itself and others under what is known as the "police power;" and it is distinct from the power to contract, which is similar in its effects to the right of contracting as exercised by natural persons. Hence the rules of law, and the principles settled in jurisprudence, which prohibit a municipal corporation from legislating future restrictions to its own legislative power, are not applicable to a time contract entered into by such a corporation. These views find sanction and ample support from numerous decisions rendered by courts of last resort in our sister states on precisely similar questions. See *Indianapolis v. Gas-Light Co.*, 68 Ind. 396; *Weston v. Syracuse*, 17 N. Y. 110; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Water-Works Co. v. Atlantic City*, 6 Atl. Rep. 24. The rule as established by jurisprudence seems to be that, in the absence of special legislative prohibition or restriction, a municipal corporation vested with the general power to make a contract for the supply of gas, or for any other commodity, has the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise, including the power to make it for more than one year, if, by thus contracting, it believes that better terms or lower rates can be obtained. After a thorough examination of our legislation on the subject, and an exhaustive study of our own Reports, we find no law, reason, or authority which would justify us in removing the present case from the effect of this general rule.

Great reliance is placed by plaintiff's counsel on the decision in the case of *Garrison v. City of Chicago*, 7 Biss. 480, in which the court refused to enforce a time contract for gas made by the city of Chicago. But the law governing that contract affords an easy mode of distinguishing its leading features from the case now under discussion. That decision was considered in the *Indianapolis* case herein quoted, in which a time contract for gas also was judicially recognized as legal. We can make no better answer to the contention here than by quoting the following language from the supreme court of Indiana: "That case, relied upon by the appellant's counsel, does not seem to us to support their views. That was upon a contract made by the gas company with the city of Chicago to furnish the city with gas for ten years. At the time the contract was made, * * * the charter of the city contained a provision that no contract should be made by the city involving any expense, unless an appropriation was previously made to meet it; and the comptroller was required, in May of each year, to submit an estimate of the amount necessary to defray the expenses of the city for the current fiscal year. No such appropriation was previously made, and the court puts the case expressly on that ground, in the following words: 'The question to be determined is whether there

was a reasonable necessity on the part of the city council to extend the contract in controversy here, and which will now be mentioned, for ten years from its date; there being no appropriation made commensurate with the obligations of the contract."

We note the warning, by way of argument of plaintiff's counsel, against the danger of such power in the hands of the city council, and of the imminent abuse of the same. But, when the power is once shown to exist in the municipal corporation, courts are powerless to regulate its exercise, or to dictate what particular contract should or should not be made or justified. It was under that rule that this court declined to examine the wisdom or reasonableness of the contract assailed in the recent case of *Conery v. Water-Works Co.*, ante, 8, not yet officially reported. The necessity of restrictions to the contracting power of municipal corporations is of the province of the legislature, and not of the judicial department of the state government.

Judgment affirmed.

Succession of MOORE.

(*Supreme Court of Louisiana*. Feb. 10, 1890.
43 La. Ann.)

APPEAL—PRESUMPTIONS—SUCCESSIONS—SETTLEMENT.

1. When the record contains no note of evidence we will presume, in accordance with established precedents, that, in rendering judgment, the judge *a quo* proceeded upon proper evidence.
2. Parties are neither required to have their evidence reduced to writing, nor to see to it that a note is made of the evidence which is introduced.
3. The ascertainment of the disposable portion and of the *legittime* of the heirs are incidents of the settlement of a succession, and must be fixed before it is wound up, and its property turned over to the usufructuary or heirs.

ON REHEARING.

1. In order to determine the disposable portion of a succession and the *legittime* of the heirs, the amount of donations *inter vivos* is fictitiously added to the property belonging to the donor, at the time of his death. But if the property be held in community between the surviving wife and the deceased, and the donation be from the latter to the former, this fictitious addition of the amount of the donation must be made to the active mass of the community, and not to the donor's separate estate. The donation cannot change the character or amount of the respective rights of the spouses, in the matrimonial community.

2. In case the husband, as the head and master of the community, makes in favor of his wife, from the community property, an excessive donation, which is, on charges preferred by his heirs after his decease, reduced, and the excess ordered to be returned, *held*, that this excess must be returned to the active mass of the community, and not to the donor's separate estate.

(*Syllabus by the Court.*)

Robert J. Dugé, for appellants. T. J. Semmes and Mr. Legendre, for appellee.

WATKINS, J. Appeal from the civil district court, parish of Orleans.

On the 15th of June, 1888, Mrs. Agnes Jane Moore filed an account in the succession of her husband, John T. Moore, exhibiting a statement of the property of which her husband died possessed,—all of which was community,—of the amounts

paid in legacies, and expenses; and of the amounts proposed to be paid by the community to the spouses, respectively, and in the settlement of the separate estate of the deceased. She prayed that the account be confirmed, and that she be recognized as owner of one-half of said community property, in her capacity as surviving widow in community, and also as owner of one-third of the remaining one-half, under the will of her husband, subject to the future adjustment of the *legittime* of the forced heirs, when the time for partition shall arrive. She further prayed that she be recognized as the usufructuary of the remainder of the one-half of the property inherited by the forced heirs, and that her possession of all said community property, in her said capacity, be recognized. She caused Julia Moore, a major, and the minors Hickey and Flamagan, to be cited. The other heirs approved the account and demands of the petitioner, in their entirety. The cited heirs opposed the homologation of the account on the ground that it did not fix the amount of the disposable portion of the succession and property of the deceased, nor the respective shares of opponents; and in other particulars, requiring no mention. The prayer of the opposition is, "that the said Mrs. Agnes Jane Moore, individually and as executrix, etc., be ordered" to so amend her account as to conform thereto.

On the trial this opposition was rejected and disallowed, and the account homologated. The petitioner was recognized as owner of one-half of the community property, in her capacity as surviving widow, and of one-third of the remaining half, under the will of her deceased husband, "subject to the future adjustment of the *legittime* of the forced heirs, when the time for partition shall arrive;" and as usufructuary of so much of the remaining one-half as may be inherited by the forced heirs. Her right of possession of the whole was recognized as taking effect at the date of her husband's death. Opponents applied for a new trial, on the ground that the judgment rendered is contrary to law and the evidence; and, further, because the court erred in holding that the fixing of the disposable portion should be postponed until the time for making a partition shall arrive. The motion was to the effect that, under the law, and our recent opinion in *Succession of Moore*, 40 La. Ann. 531, 4 South. Rep. 460, in this succession, the amount of the disposable portion must be fixed now. For the purposes of this motion the entire record in that case was made a part of it. Opponents' theory is that they, as forced heirs of deceased, in that case sued for a reduction of the testamentary donations mentioned in their ancestor's will, and that it was therein decided that a reduction must be made, and how it must be made; and that the fact that their inheritance is burdened with a right of usufruct does not deprive them, as forced heirs, of the right of having the amount of their inheritance at once determined. The court held that, "the law and the evidence being in favor of the defendant in rule," it must be dismissed. Thereupon the opponents appealed.

1. The first question presented and urged on the part of the accountant and appellee is one of practice, and that is, whether, in the state of the record we have outlined, we can examine and revise the judgment appealed from. The statement of the appellee's counsel is, substantially, that the mortuary proceedings and proof in the succession of John T. Moore were not offered and filed in evidence on the original trial of the account, and that same were not considered by the judge *a quo* in determining the issues before him; and his contention is that, although they were considered on the hearing of the motion for a new trial, this appeal is prosecuted from that refusal, and nothing can be decided. On the other hand, appellants' counsel contend that the account and opposition were received and treated by the judge *a quo* as integral parts of the original suit for reduction, and all proceedings as parts of the record. That, on the trial of the rule for a rehearing, counsel for appellee objected to such record and mortuary proceedings being considered, and his objections were overruled; but he retained no bill of exceptions thereto. The record furnishes no solution of the question. It contains no bill of exceptions, and no note of evidence offered on the trial. The original record appears annexed to the transcript of appeal. The two cases cited by appellee's counsel as authority (*Brooks' Syndics v. Weyman*, 3 Mart., La., 16, and *Walton v. Insurance Co.*, 2 Rob., La., 562) are inapplicable. Those were jury cases, in which motions for new trials were entertained and refused before judgments had been signed, and appeals at once taken therefrom were dismissed, as a matter of course. But, in the instant case, a final judgment was rendered and signed before the appeal was taken, and the judge's ruling on the application for a new trial is receivable here, as any other incident of the case. The whole case is before us, and we must take cognizance of the record as we find it, and decide the issues presented. We must assume that the judge *a quo* had before him sufficient evidence to justify his undertaking to decide them, and intelligently to do so. This rule was approved by us in *Nugent v. Stark*, 34 La. Ann. 628, and by our predecessors in numerous cases. In *Simmons v. Howard*, 23 La. Ann. 504, they say: "We find no note of evidence in the record. In such a case we will presume the court *a quo*, in rendering its judgment, proceeded on proper evidence." *Bank v. Bringler*, 22 La. Ann. 118; *Smith v. City of New Orleans*, 24 La. Ann. 20; *State v. De Monasterio*, 26 La. Ann. 734; *Succession of Pilcher*, 39 La. Ann. 362, 1 South. Rep. 929. The parties were not required to have their evidence reduced to writing, or to see that a note was made of the evidence introduced. It was competent for them to have secured a statement of facts. Code Prac. arts. 602, 603; Hen. Dig. 80. But the record now before us stands in its place. The whole of it and the *mortuaria* are before us. The judge *a quo* passed upon it, and decided on the merits of the case, and "by reason of the law and the evidence" dismissed the opposition, as his decree recites. The is-

ssues of law, as well as of fact, are distinctly made. The appellee has not moved for a dismissal of the appeal, but has joined issue, and her counsel have presented us with an oral and printed argument, and demand an affirmation of the judgment appealed from on a hearing on the merits. Our affirmation of that decree would operate *res judicata* as to opponents' demands. *Granger v. Singleton*, 32 La. Ann. 398. In case we feel authorized to adjust the amount of the disposable portion, appellee's counsel concedes the sufficiency of the evidence in the record before us, and says "there is no error in the figures, as to values." If, then, the questions are such as we can decide, it is our duty to examine and decide them rather than turn opponents around to another action for the ascertainment of their rights. In any event they are entitled to that.

2. Appellee's counsel do not argue, orally or in brief, the question of opponents' right to have the amount to the disposable portion of the deceased's fortune fixed and determined now. At any rate the competency of the court to do so is not doubted by them. The questions presented in the account and the accompanying petition seem to necessitate the present determination of the amount of the disposable portion, the ascertainment of the reduction to be made of the legacies, and the fixing of the amount of the *legitime* of opponents, as forced heirs of the deceased. The accountant's petition demands, and the judgment awards to her, the ownership of one-half of the community property, as surviving widow; one-third of the remaining one-half, under the will of the deceased; and the usufruct of so much of the share of the deceased as may be inherited by all the heirs. The judgment also recognizes her right of possession from the date of the death of her deceased partner in community. Why should the amount of the *legitime* of the heirs be relegated to future adjustment, or deferred until the time for making a partition among the heirs shall arrive? It was certainly just as competent for the court to decide one question as the other. The heirs were quite as much entitled to have their rights and interests determined as the widow had. The Code declares that forced heirs can sue for the reduction of excessive donations, whether *inter vivos* or *mortis causa*, "on the death of the donor or testator." Rev. Civil Code, art. 1504. It also declares that actions "for the reduction of excessive donations" are prescribed in five years. Id. art. 3542. The death of the donor or testator is the date from which this prescription begins. It is therefore manifest that the law contemplated the institution of such suit, without reference to the usufruct of the surviving parent of the forced heirs; that such an issue is to be determined in the *mortuaria*, and before the succession of the deceased is wound up and the property surrendered into the possession of the usufructuary, and which cannot be done until the succession debts and charges are paid, including, of course, special legacies; and we conceive that the reduction of donations *inter vivos* must be likewise determined. Indeed, we deem

it very questionable whether the *utiles tempus* does not pass with the closing of the succession, and the transmission of the property to the heirs of deceased. For the survivor's usufruct is of property in kind, and not of a succession. The account under consideration carries as a credit the sum of \$10,000, being the amount of two special legacies the executrix has discharged, but it makes no mention whatever of the donation *inter vivos* of \$100,000 in United States government bonds in favor of the accountant. The effect of the decree is to recognize the surviving widow's rights of possession and usufruct of the property of the deceased, and her right of detaining those bonds in her possession until her death or marriage; and to relegate opponents to a future litigation, in partitioning the property, to settle their right of reduction. Clearly, such a course is impracticable, and not the one contemplated by law. We are of the opinion the reduction, if any, should be made now, and before the succession of deceased is closed.

3. There is no doubt of the fact that one of the objects to be attained by the contestation of the opponents in the Succession of Moore, 40 La. Ann. 531, 4 South. Rep. 460, was to obtain either the revocation or reduction of the donation *inter vivos* of \$100,000 in favor of Mrs. Moore. It is so stated in precise terms in our opinion in that case. For, say the court, one of the objects of this litigation is to have it judicially declared "that the donations of securities and cash made by the deceased to his wife, in New York and New Orleans, are nullities, and if not such, are excessive, and should be reduced to the legal quantum." They say the defense is "that the donations attacked are valid," and that the judgment therein appealed from held that they were simulated. The validity of those donations was maintained by that opinion, but it declares that "it is beyond all dispute that the plaintiffs who are forced heirs have, by the law, the right to bring an action in reduction." For, say the court, "it is manifest that, unless they enjoyed that privilege, the exercise of which is optional with them, the articles of the Code which prohibit excessive donation, when there exist forced heirs, would be dead letters,—nay, read out of the book altogether." The court concludes its examination of this branch of the case thus: "There is no proof in the record, that we have been able to discover, establishing the value of the bonds at the death of Moore, and there is no specific argument or prayer on the subject that can justify a decision, presently, of the question whether the donations exceed, or not, the disposable portion, so that this matter must be left open for future consideration, and determination in other proceedings." The donation to Mrs. Moore of \$9,835.57, which figured in that case, has been abandoned, and the donation of \$100,000 of bonds alone remains for discussion. It is evident that Mrs. Moore's counsel intended to obtain the homologation of a final account, and terminate her trust as executrix; for it has been frequently held that by this means only could she be thus

relieved. Succession of Frazier, 35 La. Ann. 382, and other cases. Her right to relief had to be determined, as a condition precedent to her possession as owner and usufructuary, being recognized. We think that the question of the reduction of the one hundred thousand dollar donation was correctly raised on the trial of the final account, and, being thus raised, it was such "other proceeding" as was contemplated in our former opinion, and within the option of opponents. As we said in Succession of Frazier, "These are all consecutive proceedings in the same judicial course, viz., the Succession of John Frazier;" so we may say in this that these are all consecutive proceedings in the Succession of Moore. On the main issue, appellee's counsel say in their brief, "there is no error in the figures as to values, but there is error as to the mode of adjustment." Page 2. Of the error in the mode of adjustment they say: "The donations were of community property, and came out of the community, and, therefore, only one-half is to be returned to the estate of the deceased. Dickson v. Dickson, 33 La. Ann. 1376." The principles of law applicable to collations to be made among heirs of an estate are not applicable here; and the question under consideration in the Dickson Case was that as to "collations to be made by the several heirs." On this question the court expressed the opinion, in Succession of Moore, that "the widow, not being an heir, cannot be required to collate, if the donations exceed the disposable portion." They further say: "It is because of that right of action that the law provides that, in determining the question of reduction, the property disposed of *inter vivos* must be fictitiously added to that belonging to the donor at the time of his death, and appraised at its value then. Rev. Civil Code, arts. 1235, 1505. It is also emphatically provided, in calculating the disposable portion, that all the property donated or bequeathed by the deceased must be included, whether given to the children, to relations, or to strangers. Id. art. 1234." That case furnishes a good illustration of that rule of law, because the widow claimed ownership of one-half of all the property, in her own right, and of the disposable portion, under the will, and as the usufructuary of the *legitime* of the heirs. The opinion is to the effect that neither question can be determined until the amount of the donations *inter vivos* is fictitiously returned into the succession, and that that could not be done until the value of the United States government bonds was ascertained. This has been done. The widow is, therefore, entitled to one-half; the heirs are entitled to two-thirds of the other one-half, as their *legitime*; the remaining one-third of one-half is the disposable portion, from which special legacies must be first paid, and to the residue of which the widow is entitled, as universal legatee, if it be in excess of donations, and, if it fall short of them, they must be correspondingly reduced. To arrive at a proper adjustment of the disposable portion, as well as of the *legitime* of the heirs, the value of the government bonds must

be fictitiously returned to the active mass of the community, so that from the whole a proper deduction can be made of the community debts and charges, and the net value of community assets ascertained. It can then be apportioned on the basis suggested above. Inasmuch as the proved value of the government bonds is shown to be \$126,000, we will take that as the correct amount to be fictitiously returned. The following is the proper computation, viz.:

Total assets of community inventoried	\$284,090 05
Value of bonds returned.....	126,000 00
	<hr/>
	\$410,090 05
Community debts.....	11,460 66
	<hr/>
Net community assets.....	\$399,609 89
Widow's one-half interest.....	199,804 69
	<hr/>
The net amount of deceased's estate is composed of one-half of community assets.....	\$199,804 69
And his separate estate.....	7,000 00
	<hr/>
Aggregating.....	\$206,804 69
Disposable portion of one-third.....	68,934 89
	<hr/>
The <i>legitime</i> of two-thirds.....	\$137,869 80

Of this sum each one of the nine branches are entitled to one-ninth, aggregating \$15,318.86, and to each of said nine heirs' share the usufruct of the widow attaches. These amounts are represented by cash, and property in kind, as stated in the inventory, and which, on settlement among the parties, at the termination of the usufruct, are to be restored in kind, at the original appraisement thereof. It is therefore ordered and decreed that the judgment appealed from be so amended as to fix the disposable portion at the sum of \$68,934.89; the amount of the *legitime* of the heirs at \$137,869.80; and the respective portions of the nine heirs, severally, at \$15,318.86. It is further ordered and decreed that, as thus amended, the decree of the judge *a quo* be affirmed, costs to be taxed against the succession.

FENNER, J., absent.

ON APPLICATION FOR REHEARING.

WATKINS, J. Appellants' counsel invite our attention to the fact that the donation *inter vivos* to Mrs. Gibbons, of \$5,850, is omitted from our calculation, and that its inclusion would make a difference in opponents' favor. They also insist that our opinion errs in returning the amount of the value of donation of \$100,000 of government bonds to the community, and claim that it should be returned to the estate of the donor, according to Rev. Civil Code, arts. 1504, 1505.

The section of the Code in which those articles are included treats of "the Reduction of the Donation whether *Inter Vivos*," etc., in general terms. In it no mention is made of separate or community property. The latter article reads thus: "To determine the reduction to which the donations, either *inter vivos* or *mortis causa*, are liable, an aggregate is formed of all the property belonging to the donor or testator at the time of his decease; to that is fictitiously added the property disposed of by donation *inter vivos*," etc.

What, then, is, or was, the property which belonged to the donor, John T. Moore, at the time of his decease? It is everywhere conceded and admitted that all of the property belonged to the community, except the sum of \$7,000, specified as his separate estate. Of course one-half only of the community property belonged to him at the time of his death, and formed a part of his succession. The community consists of the fruits and profits of the reciprocal labor and industry of both husband and wife, and of the estates they may acquire during the marriage. Id. art. 2402. This would be presumably the case as to the property of Mr. and Mrs. Moore, in the absence of proof to the contrary, and independently of any admission. Then it necessarily follows that the \$100,000 of United States bonds were community property at the time the donation was made. It cannot be seriously contended that the donation had the effect of converting them into separate property, for the purposes of reduction. If this be true, a donation by Mr. Moore to his wife of the whole of the community property would by the same process of reduction have converted it into separate property and divested her of her interest altogether; and *vice versa*. Nor does this contention rest on argument alone, for the Code provides that the husband "can make no conveyance *inter vivos* by a gratuitous title of the immovables of the community, nor of the whole, nor of a quota of the movables, unless it be for the establishment of the children of the marriage." Id. art. 2404. While this article primarily applies to strangers and third persons, yet it may be applied with equal propriety to a partner in community. While "the husband is the head and master of the community," and may dispose of it at will or alienate its effects by "an onerous title," he cannot divest his wife of her interest "by a gratuitous title." The effect of this provision of law is that the donation made by John T. Moore to his wife had the effect of conveying only the undivided community half interest in the bonds which he owned and no more. If, as counsel insists, the value of the bonds is fictitiously added to Mr. Moore's estate, and not to the community, the immediate effect of it would be to transpose from the wife to her husband's heirs \$63,000, without any donation or testamentary disposition to that effect. Had the donation been made to a stranger the rule would have been just the same. Had Mr. Moore made no donation at all, and the \$100,000 of government bonds remained on hand in kind, certainly they would not have been inventoried as his separate property at his death; then in what manner an excessive donation of them can convert them into separate property is not easily perceived.

The quotation counsel for opponents makes from page 641 of 40 La. Ann. and, page 465, 4 South. Rep., (Succession of Moore) announces no adverse doctrine. Its true meaning is: "The mass of the succession must be composed of the separate property of the deceased, of his share of the common property, and of his share in the value of the effects donated at the time

of his death." We have supplied a manifest ellipsis by adding the italicized words.

It was incorrect to have omitted from computation the amount of the donation to Mrs. Gibbons of \$5,850. We think it best that we should recast our calculation and include it.

Total assets of community.....	\$284,090 05
Value of government bonds.....	126,000 00
Donation to Mrs. Gibbons.....	5,850 00

Aggregating.....	\$415,940 05
Community debts deducted.....	11,480 66

Net community assets.....	$\frac{1}{2}$ \$404,459 39
Widow's one-half.....	202,229 69 $\frac{1}{2}$

Net amount of deceased's estate is composed of one-half of community assets of.....	\$202,229 69 $\frac{1}{2}$
His separate estate.....	7,000 00

Aggregating.....	$\frac{1}{2}$ \$209,229 69 $\frac{1}{2}$
Disposable portion one-third.....	69,743 23

The *legitime* will be \$139,486 46 $\frac{1}{2}$

Of this sum each one of the nine heirs will be entitled to one-ninth, or \$15,498.49, and to each of said nine heirs' shares the usufruct of the widow attaches. This calculation has slightly altered and increased the respective shares of the widow and heirs, and our decree must be altered so as to correspond therewith, but for this purpose a rehearing is deemed unnecessary. It is therefore ordered and decreed that our former decree be set aside and recast; and it is further ordered and decreed that the judgment appealed from be so amended as to fix the disposable portion at the sum of \$69,743.23; the amount of the *legitime* of the heirs at \$139,486.46; and the respective shares of the heirs at \$15,498.49. It is finally ordered and decreed that, as thus amended, said judgment and decree appealed from be affirmed, and that all costs be taxed against the succession.

FENNER, J., takes no part, not having participated in the original decision.

NEUGASS *et al.* v. CITY OF NEW ORLEANS.
(Supreme Court of Louisiana. Feb. 10, 1890.
42 La. Ann.)

MUNICIPAL CORPORATIONS—EVIDENCES OF INDEBTEDNESS—NEGOTIABILITY.

1. In the absence of express legislative authority, a municipal corporation has no power to utter unconditional obligations to pay money.

2. It may, however, issue evidences of liability, for consideration received; their payment depending upon contingencies, which must have happened before any right of action can accrue.

3. Certificates of indebtedness filled in the name of municipal creditors or bearer, by certain authorized city officials, are not unconditional obligations to pay, and are not negotiable or transferable instruments which pass title by mere delivery, particularly when the ordinance sanctioning their issue, and which is printed on the reverse thereof, requires, as a condition precedent for their utterance, that a receipt be signed therefor by the party therein named, and when such signature has not been furnished.

4. The manner in which the certificates left the city's possession, whether fraudulently or not, and the good faith of the holder for value and in due course of business, are no factors in the case.

5. Such instruments, even when signed for, previous to delivery by the city, are not obligations

to pay. They are simply evidences of transferable ownership, under the ordinance, and do not entitle the just owner to any money to be paid out of funds, when any, in the treasury.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

W. S. Benedict, for appellants. Carleton Hunt, City Atty., F. B. Lee, Asst. City Atty., and Walter H. Rogers, for appellee.

BERMUDEZ, C. J. The question to be determined in this case involves the right of the plaintiffs to recover from the city of New Orleans as holders of certain certificates of indebtedness issued by the comptroller and mayor, in the name of the city, under a certain ordinance, in favor of parties named therein or bearer, and which on their face purport to be evidences of liability; in other words, whether such vouchers can be assimilated to ordinary promissory notes, state or municipal bonds, and such as can be recovered upon by holders in good faith and for value, etc. Substantially, the answer is a denial of ownership in plaintiff and of the right to sue, and a declaration of the worthlessness of the instruments, and the assertion, under any contingency, of the right of settling up, equally destructive of the rights of plaintiff. From a judgment of dismissal plaintiffs appealed.

In April, 1881, and in June, 1883, ordinances Nos. 6968 A. S. and 347 C. S. were adopted by the city council of New Orleans, authorizing the issuance of certificates of indebtedness to certain creditors of the city, to be signed by the comptroller and the mayor. They are to the effect: (1) that any creditor of the city to whom an appropriation has been made, but in whose favor the comptroller cannot draw a warrant until there be money in the treasury, to the credit of the appropriate amount, not otherwise appropriated, shall be authorized upon demand to receive a transferable certificate of ownership entitling him or bearer to receive a cash warrant; (2) that the creditor shall sign a receipt therefor, stipulating that the cash warrant shall be claimed only on the surrender of the certificates, and the acceptance of the warrants shall be an acceptance of the conditions of the ordinance; (3) that the warrants shall issue strictly in the order of the promulgation of the appropriating ordinance; (4) that the certificate shall not novate or affect the nature of the claim, but shall be simply an evidence of transferable ownership; (5) that the certificate shall state upon its face the nature and effect of its issue, with numbers, dates, and names, and that upon its reverse the ordinance shall be printed.

Ordinance 374 C. S. contains the form of the certificate mentioned in it, and which reads as follows: "Office of the Comptroller. Certificate of Ownership of Appropriation. Issued under ordinance No. 347 C. S., approved 26th June, 1883. New Orleans, —, 188—. This is to certify that under ordinance No. —, adopted —, 188—, the sum of \$— has been appropriated to — for and on account of —, and the said — or the bearer hereof shall upon the surrender of this certificate,

and not otherwise, be entitled to receive in the order of the promulgation of said ordinance a cash warrant on the treasurer, or any fund in the treasury to the credit of the appropriate fund, and not otherwise appropriated. It is herein specially agreed to by the holder of this certificate that it bears no interest, and shall not novate, nor in any manner affect, the nature of the claim against the city under the ordinance referred to, but shall be simply an evidence of transferable ownership thereof; and whenever the ordinance, or that portion of it to which this certificate applies, is paid or canceled by being tendered and received in payment of taxes when authorized by law, then this certificate shall be surrendered to the office of the comptroller. —, Comptroller. —, Mayor." The certificates sued on are in that form, and bear on their reverse a copy of the ordinance. Naturally, the blanks are filled up.

The right of municipal corporations to borrow money, and to issue negotiable securities, has frequently been questioned; and, although judicial adjudications on the subject may have considered it from different standpoints, recognizing or denying it according to circumstances, it may now be admitted as settled that they can do neither without express legislative sanction, or irresistible implication. After reviewing all the authorities on the subject, Mr. Dillon says that he "regards it as the true doctrine that, as incidental to the discharge of its ordinary corporate functions, no municipal or public corporation has the right to invest any instrument it may issue, whatever its form, with that supreme and dangerous attribute of commercial paper which insulates the holder for value from equities which attach to its inception;" and he adds that "this point should be guarded by the courts with the utmost vigilance." Mun. Corp. § 126. "The consequences of recognizing such a power, in the extravagance it will stimulate, in the frauds it will engender, and in the ruinous indebtedness it will inevitably produce, are alarming to contemplate." Id. § 125, par. 2. Further on he says that, although warrants or orders negotiable in form may be made by the proper municipal officers, and in many states may be transferred by delivery or indorsement, and the holder may sue thereon, yet they are not commercial or negotiable paper in the hands of holders, which exclude inquiry into the legality of their issue, or preclude defense thereto. They are not bills of exchange. Section 487. "Such warrants or orders * * * are not intended to have the qualities of negotiable paper, but are instruments authorized for convenient use in conducting the current and ordinary business of the corporation, and as a means of anticipating its ordinary revenue. It would overwhelm municipalities with ruin to hold that * * * they protect an innocent holder for value from defenses of which he has no notice, actual or constructive. All holders of such warrants or orders, even when payable to order or bearer, stand in the shoes of the payee; and the rights and remedies are essentially different from those of the hold-

ers of authorized negotiable municipal bonds. Such is the sound doctrine, and such the authorities, almost without exception." Section 503.

In the case of *Mayor v. Ray*, 19 Wall. 477, it was said that vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes; but to invest such documents with the character and incidents of commercial paper, as to render them, in the hands of *bona fide* holders, absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal corporation into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, unless conferred by legislative enactment either express or clearly implied. Every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not lawfully issue for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that the validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose; and their acts cannot create an estoppel against the city itself, its tax-payers or people. Persons receiving it from them know whether it issued, and whether they receive it, for a purpose and a proper consideration. Of course, they are affected by the absence of these essential ingredients, and all subsequent holders take the same, and are affected by the same defect. This ruling is in perfect accord with what the same court had shortly before held. See *Police Jury v. Britton*, 15 Wall. 566. See, also, *Parsons v. Monmouth*, 70 Me. 262.

In this state, instruments of such character have been declared not to be commercial or negotiable paper. *Board v. Hernandez*, 31 La. Ann. 161; *State v. City*,¹ O. B. 51, fol. 289; *State v. Lusher*,¹ O. B. 50, fol. 571. It is therefore patent that, whatever may be the form of the certificates sued on, they are not negotiable and transferable, as is claimed by the plaintiff. A simple inspection of them suffices to justify this conclusion. They are instruments consisting of face and reverse, which must be read as one in each instance. Although they purport to be certificates of indebtedness in favor of creditors of the city, in whose favor an appropriation has been made by a designated ordinance, they are not unconditional obligations to pay money. They refer to the ordinance un-

¹ Not reported.

der which they were prepared, and which, printed on the back, forms part of them. They give the name of the creditor entitled to receive same, whose name must be on the city's books. They show that they cannot be altered unless the receipt mentioned in the ordinance be first given. They are simply, under the terms of the ordinance, evidence of transferable ownership. They do not call for money or presentation. They fix no time for maturity. They are merely convertible into a cash warrant, and subjected to other contingencies useless to specify. They are not indorsed by the party whose name they contain, or by any agent or transferee of his. They are not even conditional obligations to pay any amount. How, then, can it be claimed with any sincerity that they can be assimilated to ordinary notes and bonds?

For the purposes of this controversy, it is immaterial how they left the hands of the city officials who signed them,—whether fraudulently or otherwise,—and whether the plaintiff is or not holder in good faith, for value, and in due course of business. From the very language of the ordinance, which forms part of them, they could not have been altered by the city officers authorized to enact them, unless the parties to whom they accrued had previously signed therefor, as a condition precedent for delivery, a specific receipt, containing certain stipulations, as part of a new contract. There is no evidence that such receipt was ever signed by the parties named in the certificates, their agent or transferee, so that, even if the certificates were obligations to pay, which they are not, their emission to the creditor could have vested title in him only on his signature of the receipt; and, this formality having been imposed as a prerequisite by the ordinance printed on the back of the certificates, and forming part thereof, and not having been observed, the ownership of the certificates could not pass to plaintiff. To all intents and purposes, these certificates are, in legal contemplation, still in the possession of the city, subject to the order or receipt of such parties, their agent or transferee; so much so that if the city were to satisfy the demand of plaintiff, the original parties might have cause to complain, and to require another payment to themselves.

Surely the plaintiff in this case has no greater rights than the parties whose names the certificates bear. Conceding that those parties have either signed the receipt in question, or indorsed over the certificate in blank to the plaintiff, it does not follow that the plaintiff would be entitled to the money judgment which he seeks, for the obvious reason that the parties named in the certificates could not themselves have obtained it, inasmuch as, under the ordinance which forms part of the certificate, all that the creditor could claim would be a warrant on the treasurer to be paid out of the appropriate fund in the city coffers in the order stated in the ordinance. The demand is not for any such warrants; and, if it were, it could not be allowed, as there is no evidence that there is money in the treasury appro-

prated to the payment of the debt or claim for which the warrant would have issued.

Judgment affirmed.

BALL *et al.* v. BALL *et al.*, (two cases.
Nos. 10,547 and 10,548.)

(*Supreme Court of Louisiana.* March 3, 1890.
42 La. Ann.)

SUCCESSIONS—SETTLEMENT—REDUCTION OF DONATIONS.

1. It is too late, after a case has been taken up, the intervention read, without objection, as part of the pleadings, and the evidence heard and concluded, for a party to object to having the intervention passed upon for want of issue joined thereon.

2. In an action by forced heirs for reduction of donations, the disposable quantum is calculated exclusively upon the conditions existing at the death of the decedent.

3. If the debts due at the death exceed the value of the property found in the succession, there can be no disposable portion for the satisfaction of legacies; and no subsequent changes, however operated,—whether by increment in value of the property, or by extinguishment of debts,—can affect the case.

4. The demand for reduction can be urged by forced heirs alone. Executors, as such, cannot be heard to champion their rights.

5. All the matters at issue being dependent on the determination of the demand for reduction by the forced heirs, they will not be passed on until after such determination.

(*Syllabus by the Court.*)

R. C. Wickliffe and S. McC. Lamason, for appellants. W. W. Leake, for appellees.

FENNER, J. Appeal from the district court for the parish of West Feliciana. These cases were argued and submitted together; and, although not expressly consolidated, the view we take of them renders it proper to include them in one decision.

Dr. William Ball died in 1886, leaving a wife and six children. His estate was entirely community, and his children were his forced heirs. He left a will, and appointed his wife and his son Charles W. Ball as executors, who qualified and administered as such, and who filed a first provisional account in 1881, which was duly homologated. The will contained a legacy in favor of the decedent's brother, Immer W. Ball, which, however, the executors considered and treated as of no effect; and no claim was advanced in support thereof by the legatee during his lifetime. In the meanwhile the executors seem to have dealt with the estate as the property of the widow and children, and so administered and cultivated it, settling with creditors and paying all debts under compromises made with them. In 1886 the heirs of Immer W. Ball for the first time appeared in court, asserting the legacy to their father, and demanding that the executors should file a full account of their administration within a fixed delay, or in default thereof be condemned to pay to them the amount of said legacy. The executors resisted on the sole ground that under the terms of the will the legacy was not due and payable. Judgment went against the executors in the lower court, and was affirmed by this court. Ball v. Ball, 40

La. Ann. 284, 8 South. Rep. 644. On the filing of our decree in the lower court, the executors forthwith filed a provisional account, which was opposed on various grounds by the legatees; and the judgment on that opposition, from which all parties appeal, is the matter involved in the record No. 10,547.

After that judgment, and pending the suspensive appeal therefrom, the legatees obtained an order commanding the executors to file a final account, which was done. In that account they make a statement of assets and expenses, and propose to turn over the property and funds to the widow and heirs of the decedent, and add that the legatees are not placed on the account for the reason that to pay the legacy in favor of Dr. Immer W. Ball, or any part thereof, would infringe on the *légitime* of the heirs of William Ball. The legatees filed an opposition to this account, in which they objected to numerous items, and also demanded that their legacy should be placed on the account and paid. On the day fixed for the trial of this opposition, the forced heirs of William Ball filed an intervention, in which they join the executors in praying for the homologation of their account, and for a judgment reducing the legacy in favor of Immer W. Ball to the disposable portion, which they aver is *nil*, because, at the death of William Ball, his succession was insolvent. Citation was waived, and services accepted by opponents of the petition of intervention. From a bill of exceptions signed by the judge, it appears that when the case was taken up the intervention was read as part of the pleadings without objection, that the evidence was taken and closed, and that it was only when the case was about to be submitted that counsel for opponents objected to the court's considering the intervention, for the reason that it had not been put at issue. The judge sustained this objection, and rendered judgment ignoring the intervention. This judgment is the subject of the second appeal now under consideration, No. 10,548.

We think the judge erred in declining to pass on the intervention, under the circumstances of this case. The objection of opponents, however sound if timely urged, came too late. A similar question has already been passed upon by this court in a decision from which we quote: "On the trial of the cause * * * the plaintiff objected to the right of intervenor to have his intervention passed upon for want of an issue joined upon the same. We think this objection was ill taken. Article 393 of the Code of Practice certainly contemplates an issue upon an intervention. * * * But the plaintiff has chosen to go to trial without answering. His objection was only made after the evidence and argument were closed. There is no suggestion * * * that he was ignorant before going to trial of the existence of this intervention in the record." McCoy v. Sanson, 13 La. Ann. 456.

In this intervention the forced heirs of William Ball have exercised the right, guaranteed to them by law, of protecting their *légitime* from infringement, by de-

manding the reduction, within the disposable quantum of their ancestor's estate, of the legacies contained in his last will.

It is elementary that, in calculating the disposable quantum, reference is had exclusively to the conditions existing at the moment of the ancestor's death,—to the value of the property at that time, and to the debts then due by him. If the amount of the debts due at the death exceeds the value of the property found in his estate, there can be no disposable quantum left for the satisfaction of legacies. No such subsequent changes in the conditions, however operated,—whether by increment in value of the property, or by prescription or other extinguishment of debts,—can affect the case. All the commentators agree on this. See Baudry La Cantinière, Mourlon & Marcade, on article 920 et seq., of the French Code, corresponding to article 1502 et seq. of our Code.

If the estate of William Ball was insolvent at the moment of his death, his forced heirs have the right to require a reduction of the legacy in favor of Immer W. Ball to its full extent, and the opponents would be left with no interest in or claim against the estate, and with no standing in court to meddle in its administration.

Our judgment in 40 La. Ann. 284, and 3 South. Rep. 644, sustaining the validity of their legacy under the terms of the will, has no bearing as *res adjudicata* upon the present issue of reduction, which concedes the validity of the legacy, but denies its right to satisfaction out of the estate because exceeding the disposable portion. The right of reduction appertains exclusively to the forced heirs, and the action therefor can be brought only by them, or their heirs or assignees.

It did not lie in the mouth of the executors, as such, to raise such questions. As to them the legacy was valid until attacked and reduced by the forced heirs. Even if we should consider the fact that one of the executors was himself a forced heir as supporting his claim of reduction urged in his executor's account, it could only operate to the extent of his own interest. Therefore the demand for reduction can only be considered under the intervention. We find evidence in the record going to sustain the demand of intervenors by showing the insolvency of William Ball's estate at the time of his death; but, as the opponents offered no evidence on the issue, and as they perhaps relied on their objection to the intervention, which was sustained by the judge *a quo*, we do not feel inclined to shut them off from the opportunity of adducing evidence on this point, if they have any. We shall therefore remand the case for the purpose of a new trial upon the intervention. It is apparent that this issue involves the whole rights of opponents in both the appeals before us. If the demand of the intervening forced heirs shall be sustained, the opponents pass out of the case. The questions of law and fact involved in the accounts are intricate and difficult, resulting from the peculiar circumstances of the case, including an irregularity of administration, and giving rise to conflicting considerations of equity and law.

We deem it best to reverse both judgments, and to remand the cases to be retried together upon all the issues. It is therefore ordered and decreed that the judgments in both cases be avoided and reversed, and that they be remanded to the lower court for retrial according to the views herein expressed.

POCHE, J., concurs in the decree.

DOHAN'S HEIRS v. DOHAN *et al.*

(Supreme Court of Louisiana. March 3, 1890.
33 La. Ann.)

FRAUDULENT CONVEYANCES—PAROL EVIDENCE.

1. Parol testimony to show fraud or simulation in a sale of immovable property of an ancestor, to the prejudice of forced heirs, may, in a certain class of cases, be introduced; but such evidence never can be introduced by the heirs, without the consent of the adverse party, to show title in the ancestor to such property.

2. Testimonial proof is not admissible for the purpose of proving that a third person was interposed to receive or to be vested with the title to real estate, for the use of and instead of the intended vendee. Civil Code, arts. 2440, 2375.

(Syllabus by the Court.)

Wade R. Young, for appellants. Snyder & Tullis, for appellees.

FENNER, J. Appeal from the district court for the parish of Tensas. The property involved in this petitory action belonged, prior to 1849, to the succession of Samuel Rembert, which was opened and administered in the parish of Tensas. On January 6, 1849, the property was sold under order of court by the administrators, and was adjudicated to William Harris for \$11,000, part cash and part on credit, in notes executed by Harris. A regular title was executed to Harris, and duly recorded. In February, 1850, William Harris sold the property to Daniel J. Dohan and wife for \$11,000, by act of sale duly recorded. D. J. Dohan executed a mortgage on one-half the property in favor of E. Wooldridge, of which Michael J. Dohan became the owner, and which he foreclosed in 1877, and became the purchaser thereof at the sheriff's sale. The plaintiffs are the heirs of Rebecca J. Dohan, who was the widow of Samuel Rembert, and one of the administrators of his succession at the date of the probate sale to Harris. After said sale, in May, 1849, she married D. J. Dohan, and was one of the vendees in the sale by Harris to D. J. Dohan and wife. The plaintiffs, who are the forced heirs of Mrs. D. J. Dohan, bring this petitory action against M. J. Dohan, in which they aver, substantially, that William Harris did not buy, or intend to buy, at the probate sale for himself, but was simply a person interposed to take an apparent title, while the real purchaser was the mother, then Widow Rembert, who adopted such interposition as a method of evading the prohibition of the laws of Louisiana against the purchase of succession property by administrators. They further aver that, after her marriage to D. J. Dohan, the latter prevailed on their mother to consent that Harris, instead of conveying the entire property to herself, should convey one-half of it to her husband, Dohan; that

the husband paid no consideration for the conveyance; and that the title passed to him was, in reality, a disguised donation from the wife to the husband, in fraud of the rights of her children and forced heirs, and absolutely null and void, under articles 1752, 1754, Rev. Civil Code.

The plaintiffs claim by virtue of inheritance from their mother. The first step in their chain of proof must necessarily be to establish their ancestor's ownership of the property sought to be revindicated. They predicate her title exclusively upon the probate sale from the succession of Rembert to Harris, who, they say, was a person interposed to take the apparent title for the benefit of, and under the obligation to convey the same to, their mother. They produce no counter-letter from Harris, nor any other written evidence to prove that the apparent title of Harris was the real title of their mother. They seek to establish her title to this immovable property, and to destroy the title of Harris, now held by the defendant M. J. Dohan, by evidence exclusively parol. The defendant objected to the admissibility of such evidence, and his objection was properly sustained by the judge *a quo*. No fraud or error is propounded against the title to Harris. No attempt is made to annul it on the ground that it was passed *in fraudem legis*. On the contrary, plaintiffs necessarily affirm that title as a valid divestiture of the ownership of the succession of Rembert. It is not pretended that the sale to Harris was a fraud on the rights of plaintiffs or forced heirs of their mother; on the contrary, it is the sole basis of any rights they could have. The simple claim is that Harris bought as agent of the mother, and took the title in his name for her benefit. The case is not nearly so strong as several in which it has been decided by this court that, even under allegations that a person had been employed to purchase property as agent of another, which latter had paid the price, and that the agent had fraudulently taken title in his own name, parol evidence could not be received in support of such allegations or to destroy the agent's title. *Perrault v. Perrault*, 32 La. Ann. 635; *Hackenburg v. Gartskamp*, 30 La. Ann. 898; *Badon v. Badon*, 4 La. 166; *Muggah v. Greig*, 2 La. 593. In another case the court said: "Testimonial proof is not admissible for the purpose of proving that a third person was interposed to receive, or to be invested with, title to real estate or slaves, for the use of and instead of the intended vendee, especially where there is no charge of fraud or other ill practice, because the effect of such proof would be * * * to establish title to real estate or slaves by parol, contrary to the express provisions of the law." *Barbin v. Gaspard*, 15 La. Ann. 541. In another, it was held that, "where real property * * * is adjudicated to a purchaser at a public sale, and the title made in the name of that purchaser, parol evidence is not admissible to show simulation in the title, or an agency to make the purchase for the benefit of other co-heirs of the purchaser." *Fuseller v. Fuseller*, 5 La. Ann. 182; *Heiss v. Cronan*, 12 La. Ann. 213; *Linton v. Wi-*

koff, Id. 878. The same doctrine was emphatically reiterated in a recent case. *McKenzie v. Bacon*, 40 La. Ann. 157, 4 South. Rep. 65. These authorities conclusively sustain the judge in ruling out the parol evidence offered by plaintiffs, and this leaves their case without any support whatever. The wisdom of the rule is strongly illustrated by the very case here presented, in which parol evidence is invoked to upset titles nearly 40 years old, on the faith of which third persons have invested their money. Judgment affirmed.

Rehearing refused.

OTERI v. PARKER, Tax Collector.

(*Supreme Court of Louisiana.* March 3, 1890.
42 La. Ann.)

TAXATION—ASSESSMENT—COLLECTION—LIMITATIONS.

1. The charge by a tax debtor that the assessment of property situated in the city of New Orleans is illegal, null, and void, because it was made by a single assessor without the action or concurrence of a majority of the board of assessors, as the law requires, does not involve a mere matter of form which must be invoked during the time or limitation prescribed by law, but it involves a radical defect, which may be urged or set up whenever an effort is made to collect the tax based on such an assessment. But, if the record shows that the tax-rolls have been deposited in the office where the records of the parish are kept, the assessment will be presumed to have been correctly made, and the burden of proof is on the tax debtor to make out his charge of illegality.

2. The charges of illegality of an assessment on the grounds that the assessor failed to visit or examine the property assessed, that the assessment rolls had not been legally authenticated, that some of the property was not the tax debtor's exclusively, but that it was owned by him jointly with others, do not involve radical defects, but simply matters of form, which should be judicially invoked before the 1st of November of the year in which the respective assessments were made.

3. Article 211 of the constitution, which provides that "tax on movable property shall be collected in the year in which the assessment is made," cannot be construed as implying a prohibition from attempting to collect such taxes during the following or in a subsequent year.

4. The failure to collect such taxes in the year in which the assessment is made does not operate a remission of the same.

5. Vessels are subject to state taxation, like any other property, and as such are liable to seizure for taxes levied and due thereon.

6. A tax collector has no authority in law to seize for taxes property other than that which was assessed, without first complying with the provisions of section 54 of Act 85 of 1888. *Meyer v. Parker*, 41 La. Ann. 440, 6 South. Rep. 679, affirmed. (*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; D. D. RIGHTOR, Judge.

Gurley & Mellen, for appellant. *Walter H. & Wynn Rogers*, for appellee.

POCHÉ, J. Plaintiff resists the payment of state taxes levied against his property for the years 1884, 1885, 1886, 1887, and 1888, amounting, with interest and costs, to the total sum of \$3,604.60. For the enforcement of said taxes the defendant tax collector had seized, and was proceeding to advertise for sale, certain property of plaintiff, consisting mainly of the contents of a store stocked with fruits, and of fix-

ures, horses, and vehicles attached to said store, and also a certain steam-ship then moored at the port of New Orleans. Whereupon plaintiff sued out an injunction to restrain the defendant from further proceeding in the enforcement of the aforesaid taxes, on account of numerous illegalities in the assessment, and in the mode of collection adopted by the tax collector. The defense is a general denial, coupled with a demand of 20 per cent. statutory damages. From a judgment dissolving his injunction, with 20 per cent. damages, plaintiff appeals.

His contention presents the following points for discussion: (1) That the assessments are illegal, null, and void, because they were made by one single assessor, instead of being subjected to the action of the board of assessors in and for the parish of Orleans, as required by law; (2) that the assessments were not preceded by an examination by any one of the assessors of the property listed, as the law requires; (3) that the assessment rolls on which said taxes were levied were not legally authenticated; (4) that, under the requirements of the constitution, taxes on movable property must be collected in the same year in which the assessment is made, and that therefore the taxes levied in the years 1884, 1885, 1886, and 1887 cannot be collected in the year 1888, as attempted in this case; (5) that some of the property assessed as his was not owned exclusively by plaintiff, who was joint owner of the same with others, whose names do not figure in the assessments; (6) that the seizure of a vessel as herein sought to be effected is in the nature of a proceeding *in rem*, which is regulated by the rules of admiralty proceedings, which, as such, is beyond the power of a state officer, and beyond the reach and scope of state legislation; (7) that in violation of the constitution, and in disregard of the statutes regulating the mode of collecting state taxes, the defendant has seized property other than that which had been assessed, and on which the taxes were due.

1. Counsel for the state tax collector objected to the introduction of any evidence intended to show the illegality or insufficiency of the assessments, on the ground that suits to test that question should, under the law, have been brought before the 1st of November of each year in which the respective assessments had been made. The statutes invoked by counsel, which prescribe a limit of time for the action of tax-payers in the courts, touching the assessment of their property, have reference to suits to "test the correctness of such assessments;" and hence they cannot be construed as applying the same limit or restriction to actions or suits presenting questions of alleged radical defects in the assessments sufficient to operate the absolute nullity of the same. Of such a nature is the defect presented under the first heading of plaintiff's complaint, as hereinabove classified. If the assessments were made by a single assessor, without the action of the board, or of a quorum thereof, there has been no assessment, within the purview of the law. Hence it follows that the door was legally

open to such an investigation, and that evidence on that point was properly admissible. But the evidence offered is not sufficient to support plaintiff's allegations on this point. Plaintiff's main reliance is on the minutes of the board of assessors from 1884 to 1888, both inclusive, which are in evidence in the original; and which do not show affirmatively that the assessments of his property were passed upon by the board in any one of the years involved in this case. While it is true, as plaintiff contends, that in the parish of Orleans the assessment of all property liable to taxation must be made by the board, composed of seven assessors, or by at least four of them, it does not require that they shall keep minutes showing their action on each and every particular assessment. From the immense amount of taxable property contained in a city of 250,000 inhabitants, such a requirement would have necessitated a record so cumbersome that it would have been practically impossible, or at least absolutely unwieldy; and the law never requires impossibilities. The statutes under consideration must have been thus construed by the assessors, whose minutes show that a quorum, at least, met daily from the 1st of January of each year until the assessment had been completed. These minutes also show what action was taken by the board on all proposed assessments in which applications had been made for reductions, or in which other objection had been made by the tax-payers. Such entries were necessary in the interest of the complaining parties in cases which would subsequently reach the courts; but similar entries were not required by law, and were not necessary in all assessments which involved no discussion, and in which the report of each particular assessor met with no opposition or objection. In the absence of proof to the contrary, the entry of such assessments in the assessment book kept for each assessment district, coupled with the fact that the rolls had been deposited in the proper office, must justify the presumption in law that such an entry was the act of the board. Act 96 of 1882, §§ 35, 36. But the minutes kept by the assessors are not entirely silent on the subject, as argued by plaintiff. At the end of each assessment year, and at the last meeting of the board for that year, the minutes contain an entry in the following language, or in words to the same effect, to-wit: "The assessment rolls of the several assessment districts in the parish of Orleans having been filed with the recorder of mortgages, and then having no further business to transact, the meeting adjourned subject to the call of the president." Such entries afforded conclusive evidence of the fact that the entire assessment work was carried on under the supervision and control of the board, and that the assessment of each district had been subjected to its action within the requirements of the law. We therefore conclude that there had been an assessment of plaintiff's property for each of the years involved in this contest.

2. His second complaint, which presents the alleged omission of the examination

of the property listed by the assessor of the district, does not affect the existence *vel non* of the assessment, and is therefore a matter which could have been urged only by a timely recourse to judicial proceedings, preceded by a preliminary objection made to the board of assessors or standing committee on assessment of the city of New Orleans. Act 96 of 1882, § 27; Act 107 of 1884, § 9; Act 98 of 1886, § 27; Shattuck v. City of New Orleans, 39 La. Ann. 206, 1 South. Rep. 411; State v. Meyer, 41 La. Ann. 436, 6 South. Rep. 590; Coast Line v. Parker, 42 La. Ann. —, 6 South. Rep. 896.

3. The complaint that the assessment rolls were not legally authenticated does not, either, involve a radical defect; and it must, therefore, meet the same fate as the objection last disposed of. Act 96 of 1882, §§ 35, 36.

4. It is next contended that, as taxes on movable property must be collected in the same year in which the assessment is made, it follows that taxes levied on such property in the years 1884, 1885, 1886, and 1887 cannot be enforced in the year 1888. Such an argument would tender a premium to tax registers, and would soon strip the state of a very great part of her much-needed revenues. The reliance is on article 211 of the constitution, which reads: "The tax shall be designated by the year in which it is collectible, and the tax on movable property shall be collected in the year in which the assessment is made." The object of this provision was to authorize the collection of taxes on movable property with more celerity than that of immovable property, in view of the more perishable character of movable property, and of the facility with which such property may be removed, concealed, or otherwise disposed of to the detriment of the state's recourse therein for the collection of her revenue. But nothing in the article can be fairly invoked as the basis of an argument that such taxes are remitted or released if not collected as therein indicated. We are not disposed to consider plaintiff's contention on this point as serious.

5. The contention that some of the property assessed in plaintiff's name was not owned exclusively by himself, but owned by himself conjointly with others, involves only the correctness of the assessment, and cannot be urged at this time.

6. The sixth ground of complaint affects the mode of collection adopted by the tax collector, and is likewise untenable. The fallacy consists in assimilating the seizure of a vessel for taxes due thereon to a proceeding in admiralty. The right of the state to tax vessels is not contested, and it is settled that the right exists. Transportation Co. v. Wheeling, 99 U. S. 273. Now, as contended for by the plaintiff himself, to be hereinafter considered, the tax on any kind of property must be enforced by seizure of the property on which the taxes are due. Const. art. 210. It follows that a vessel on which a tax is due may be seized for such tax as any other kind of property, and by the same mode provided by law. Manifestly, such a seizure cannot be construed as a proceeding *in rem* to be governed by admiralty rules

of practice. In the case of *State v. Watts*, 7 La. 440, it was held that an action for partition between the joint owners of a vessel was not an admiralty proceeding. *A fortiori* does it not follow that the collection of a state tax levied on a vessel is not such a proceeding? In the case of *Arvill v. The Alabama Belle*, 20 La. Ann. 432, the question now under discussion was considered, and on abundant authority the rule was formulated as follows: "The admiralty jurisdiction depends on the nature of the contract, and is limited to claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation." The case of *The Moses Taylor*, 4 Wall. 411, which is the only authority invoked by plaintiffs' counsel in support of their contention on this branch of the controversy, involved the construction of a statute of the state of California which purported to authorize state courts to entertain actions *in rem* in the enforcement of maritime contracts, and hence the statute was annulled to that extent by the supreme court of the United States. Hence they are stripped of all assistance from that source, and the conclusion is that the point cannot be sustained.

7. But their next contention, which is their seventh point, is well founded. It is not contended on the part of the state that plaintiff, the tax debtor, has parted with, concealed, or disposed of any of the property assessed, which was all movable, and on which the taxes were due. Now, it appears from the record that the property assessed to plaintiff consisted of horses, mules, and other animals, of carriages and vehicles, of stock in vessels, of money loaned, of money in hand, and of merchandise and stock in trade, and that the property seized by the tax collector consisted of contents of stores, composed of fruits, furniture, including a safe, and horses and vehicles, and by a separate seizure, for the same taxes, a certain vessel named the *Pazatti*. It is therefore manifest that the seizure includes property other than that which had been assessed, and that the tax collector had made no effort to comply with the provisions of section 54 of Act 85 of 1888, which would be his only authority for seizing property other than that which had been assessed, and on which the taxes were due. The question as presented here came up before this court in the case of *Meyer v. Parker*, reported in 41 La. Ann. 440, 6 South. Rep. 679, in which it was said: "In this case, the collector, having seized other property than that assessed, and having shown no effort to reach and seize the property assessed, has not brought his proceeding within the exceptional case of the statute, and was properly enjoined from proceeding therewith." Under the provisions of article 210 of the constitution, as interpreted by the legislature in section 54 of Act 85 of 1888, and following the judicial exposition of both in the decision just quoted, we feel impelled to hold that the seizure by the tax collector, as made in this case, cannot be sustained.

In justice to the district judge, who took a different view of this part of the controversy, we must state that our decision in

the *Meyer Case* was read on the same day that his judgment in this case was rendered, and that, therefore, he had no opportunity of considering our conclusion on questions which are directly involved in both cases.

Our conclusions are, therefore, that the judgment of the district judge correctly maintained the legality and binding effects of the various assessments complained of by plaintiff, and in overruling the objection to the mode of seizure of the vessel, as falling within the rules of admiralty practice, but that it is erroneous in so far as it sustains the seizure of property other than that which was assessed without compliance with the provisions of section 54 of Act 85 of 1888.

The point made in argument, that the state and parish taxes had not been extended upon each of the rolls to be delivered to the recorder, has not been considered in this opinion, for the reason that it had not been made in the pleadings.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended as follows: The judgment is reversed in so far as it dissolves plaintiff's injunction, which is hereby maintained on the ground of non-compliance by the tax collector with the provisions of section 54 of Act 85 of 1888; and it is ordered that in all other respects said judgment be affirmed, at the costs of defendant on appeal.

Rehearing refused.

PAYNE V. HABBARD *et al.*

(Supreme Court of Louisiana. March 3, 1890.
43 La. Ann.)

MORTGAGES—CONSTRUCTION—RIGHTS OF CREDITOR.

1. A contract purporting to be a sale *à réméré*, which divides the price, which was for an antecedent debt, to be returned in two installments, and declares the forfeiture of the right to redeem on a failure to pay the first installment due, is pignorative in character, and an *antichrèste*.

2. The mortgage rights of the creditor are not destroyed by the pledge of the immovable to him, if they have been preserved on the property.

(Syllabus by the Court.)

Appeal from district court, parish of Concordia; YOUNG, Judge.

Luce & Lemie, for appellants. *Steele & Dagg*, for appellees.

McENERY, J. The plaintiff held a mortgage on the *Hermitage* plantation, the property of defendants, and proceeded to foreclose the same. While the property was under seizure, and about to be sold, an agreement was entered into between plaintiff and defendants, by which the latter gained two years' time, in annual installments, to pay the mortgage debt. The contract was made in the form of a sale *à réméré*. The defendant leased the property conveyed to plaintiff by them. The plaintiff also agreed to furnish the defendants supplies for the year. The defendants failing to pay for the supplies and the rent, the plaintiff proceeded against them by writs of sequestration, provisional seizure, and attachment. The defendants deny plaintiff's right to sue for the

rent, as he is not the owner of the Hermitage plantation. They contend that the contract entered into by them with plaintiff was not a sale of said plantation with the right of redemption, but a pignorative contract, by which the plantation was conveyed to plaintiff as security for the mortgage debt. He also prayed that, if the sale should be considered one *à réméré*, that it be declared null and void for lesion. The defendants also plead in reconvention, as damages, the sum of \$2,100. There was judgment for the plaintiff on his original, and for defendants on his reconventional demand, setting aside the sale for lesion. There was no evidence offered on the reconventional demand for damages, and it may be considered as having been abandoned.

We are without jurisdiction *ratione materię* of the principal demand, and will therefore confine ourselves to the interpretation of the contract, purporting to be a sale *à réméré*, entered into between the parties. The deed from defendant to plaintiff declares the price to be \$1,354.46. The vendors reserve the right to redeem the property on repaying the above sum, one-half on the 1st January, 1889, and the balance 1st January, 1890. In the default of payment on the 1st January, 1889, the right of redemption is to be forfeited. If the price had been payable at one time, or at different times, without forfeiture until the last payment, at which period in default of payment the right to redeem would cease to exist, the contract would have had all the essential features of a sale *à réméré*. The right of redemption is an agreement by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it. Rev. Civil Code, art. 2567. The price cannot be divided so as to forfeit the property and destroy the right of redemption on a failure to pay the first installment when due. The time fixed for the exercise of the right of redemption must be rigidly adhered to. It cannot be prolonged. Id. art. 2569.

The contract under consideration declared the forfeiture of the redemption on the failure of defendants to meet the first payment, a part of the alleged price due 1st January, 1889. If enforced, the plaintiff would get the property for one-half the price agreed upon, and thus the provisions of art. 2567, Id., defining the right of redemption, would be violated and destroyed. In this case the price agreed upon bears no proportion to the value of the plantation. The district judge thought it so inadequate that he set the sale aside for lesion. We think he was correct in his estimate of the value of the Hermitage plantation. We do not agree with him, however, in his construction of the contract. From the insufficiency of the sum stated as the price, and its being the mortgage debt with interest and costs, the peculiar feature of dividing the payment for the return of the price, and declaring the forfeiture on the failure to pay the first installment, we are of the opinion that the contract is pignorative in character, and the property was placed in the possession of the creditor for the purpose of securing

the debt due by defendant to plaintiff. It comes within the definition of our "*antichresis*." Id. art. 3176. The creditor took possession of the property as a pledge for a debt due him. He immediately leased it to the debtor, and thus reaped the revenues of the thing given to him in pledge. He could not become the owner on failure of defendants to make the first payment, and the clause to this effect in the contract is a nullity. He has the right, however, to have the pledged immovable, the Hermitage plantation, seized, and sold to pay his debt. Id. 3179. The amount due for rent, if collected, must be applied to the interest, if any is due the creditor; if not, then to the reduction of the principal. The plaintiff's mortgage on the Hermitage plantation, for the debt for which it was given to him in pledge, is not destroyed by it, and he can still enforce the same, if it has been reserved on the property. Id. art. 3181. It is therefore ordered, adjudged, and decreed that that part of the judgment appealed from, and over which we have jurisdiction, which decreed the nullity of the sale on account of lesion, be avoided and reversed. And it is now ordered, adjudged, and decreed that there be judgment in favor of the defendants, decreeing the contract entered into between plaintiff and defendants, by which the Hermitage plantation was delivered into the possession of the plaintiff to secure the indebtedness of \$1,354.46, to be a contract of pledge of said property to secure said sum, reserving to plaintiff the right to proceed under article 3179, Rev. Civil Code, to enforce the payment of his debt, or to enforce his mortgage right on said pledged Hermitage plantation, if the same has been preserved thereon. It is further ordered that the reconventional demand of defendants for damages be dismissed; the appellant to pay costs of appeal.

ON APPLICATION FOR REHEARING.

WATKINS, J. Plaintiff and appellant complains that our decree maintained the contract between him and the defendants as an *antichresis*, securing a mortgage debt of the latter to him of \$1,354.50; whereas, it should have been stated that the sum bore 8 per cent. per annum interest from the date of the contract, February 21, 1888. The applicant has misconstrued our decree. It explicitly states that the contract of pledge did not, in any respect, modify the previous act of mortgage. It was left in force, and plaintiff was permitted to select which of the two—the act of pledge or the mortgage—he would proceed to enforce. Both are held valid and binding as securities for the payment of one and the same debt. He must look to and rely upon those acts for the ascertainment of the extent of his rights, and the amount of his debt and its interest. Rehearing refused.

STATE v. MECHE *et al.*

(*Supreme Court of Louisiana.* March 17, 1890.
42 La. Ann.)

BURGLARY—EVIDENCE—DIFFERENT INTENT.

1. In a trial under an indictment for burglary under the provisions of section 850 of the Revised Statutes of Louisiana, as well as at common law,

the intent with which the entry was made is the essential ingredient of the crime charged. The offense is not complete without the felonious intent, without which it would be merely a trespass.

2. In general the intent may be presumed from what the offender actually does after breaking and entering. If he commit a felony, it may be fairly presumed that he entered for that purpose. But this, like other presumptions, may be rebutted.

3. Hence, in the trial of a charge of breaking and entering with intent to kill, the state is restricted to proof of that intent, and the accused cannot be convicted of any other felony.

4. In such a case the accused must be allowed to introduce testimony to show that his intent was anything else but that to kill, even if the intent was in itself unlawful and unjustifiable in law. The accused must be allowed to prove all the circumstances surrounding or characterizing his alleged intent. A partial explanation is not sufficient, and a ruling of the trial judge excluding evidence to show the real and whole intent is erroneous. The object of such testimony is not to justify or mitigate the offense charged, but merely to negative or rebut the presumption of the intent to kill.

5. The jury should be the sole judges of the effect of such evidence as going to show the real intent with which the entry was effected.

6. Under such a charge, if the evidence shows that the accused committed some other unlawful act, but not with the intent to kill, as laid in the indictment, he cannot be convicted.

7. In the absence of proof of intent to kill, or in case of proof negating such intent, there is no burglary.

FENNER, J., dissenting.
(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; LEWIS, Judge.

J. N. Ogden, Chas. W. Du Roy, K. L. Dupie, and The Attorney General, for the State. Thomas H. Lewis & Son, E. T. Veazle and Henry Cortellan, for appellants.

POCHE, J. Under an indictment of nine persons for burglary, five of the defendants were tried; and they are now appellants from the several verdicts rendered in the case, as hereinafter stated.

The indictment was framed in accordance with the provisions of section 850 of the Revised Statutes, which reads as follows: "Whoever, with the intent to kill, rob, steal, commit rape or any other crime, shall in the night-time break and enter, or having with such intent entered in the night-time, break a dwelling-house, any person being lawfully therein, and such offender being at the time of such breaking and entering armed with a dangerous weapon, * * * or committing an actual assault upon any person lawfully being in such house, any person present, aiding, assisting, or consenting in such burglary, or accessory thereto before the fact, by counseling, hiring, or procuring such burglary to be committed, on conviction shall suffer the punishment of death."

The appellants were tried separately as follows: (1) Charles Arabie and Arvlien, *alias* Blanc Beard, were tried together, were convicted as charged, and sentenced to the penitentiary for life; (2) Syphroyen Meche and Lastie Smith were tried together, were convicted under section 851 of the Revised Statutes, and sentenced to two years' imprisonment at hard labor; (3) Jerome Meche, who was tried alone, was

convicted under section 854, and received a like sentence of two years' imprisonment.

The charge against all the accused was that they "did feloniously and burglariously, with the intent to kill, in the night-time, enter and break the house of Jean Baptiste Dupl  chin, he, the said Jean Baptiste Dupl  chin, and his family, being lawfully therein; the said Syphroyen Meche [and other named accused] being at the time of such breaking and entering armed with dangerous weapons." Although the trials were held and conducted separately, and resulted in three separate and distinct verdicts, yet the means of defense invoked are the same in each case, and the leading bills of exception which it is proposed to examine in this opinion are similar. In his rulings in one case the trial judge, for the sake of brevity, and in order to avoid unnecessary repetition, refers to his reasons in one of the other cases, and *vice versa*. Hence it might prove more convenient to examine together the leading features of discussion, which apply alike to all three of the trials.

The fundamental complaint of all the appellants is in reference to the exclusion of evidence which they persistently sought to introduce for the purpose of explaining their intent in going to the prosecutor's house, and the motives which prompted their intent, as means to negative the charge of their having broken into the house with intent to kill. They also complain of the unwarranted restriction placed to their cross-examination of leading state witnesses, and of the resulting denial of their right to impeach or contradict the testimony of such witnesses on points and matters which were pertinent to the issue of their guilt or innocence of the charge brought against them.

By reference to the indictment, it will be noticed that the burglary with which the defendants were charged consisted of their breaking and entering the prosecutor's house in the night-time, they being then armed with dangerous weapons, with the sole and restricted intent to kill. They were not charged with the commission of any crime as a sequel or result of such entering. Hence it follows that the defendants would not be convicted of any other crime but that of breaking and entering, while armed with dangerous weapons, in the night-time, with intent to kill. The pivotal point in the case, as presented by the principal bills of exception, hinges, therefore, upon the proof of the intent with which the accused parties broke and entered into the house of Dupl  chin. This conclusion flows not only from the plain text of the statute as read into the indictment, but it finds ample support from the definition of "burglary" at common law, and in very respectable authorities, both from judicial utterances and from commentaries on the subject.

"Burglary," it is said, is "the name of a crime which consisted at the common law in breaking and entering into the dwelling-house of another in the night, with intent to commit some felony within the same, whether the felonious intent was executed or not. * * * The offense is

not complete without the felonious intent. A breaking and entering without this is only a trespass." Abb. Law Dict. verbo "Burglary."

Commenting on this subject in his work on Criminal Practice and Pleadings, Archbold says: "The intent to commit the felony * * * is an essential ingredient in burglary, without which it would be merely a trespass. * * * In general the intent may be presumed from what the offender actually does after the breaking and entering. If he commit a felony, it may fairly be presumed that he entered for that purpose. * * * *But this, like other presumptions, may be rebutted.* [Italics ours.] * * * If a man break and enter the house of another in the night, with intent to beat him merely, and in beating him he kill him, it is not burglary. Here the presumption would be that he intended to commit a murder, but the presumption is rebutted by showing what his real intent was at the time of the breaking and entry." Page 340.

In Rose. Crim. Ev. 365, 366, the same principle is illustrated as follows: "If it appear that the intent of the party in breaking and entering was merely to commit a trespass, it is no burglary, as where the prisoner enters with intent to beat some person in the house, even though killing or murder may be the consequence; yet, if the prisoner's intention was not to kill, it is still not burglary. *The intent must be proved as laid.* [Italics ours.] Thus, if it be laid with intent to commit one sort of felony, and it be proved that it was with intent to commit another, it is a fatal variance."

Bishop, in his treatise on Criminal Law, still further elaborates the rule which is construed as requiring proof of two intents as essential ingredients in both larceny and burglary. He says: "In larceny there must be—*First*, an intent to trespass on another's property; *secondly*, this not being alone sufficient, the further intent to deprive the owner of his ownership therein must be added. So burglary consists of the intent, which must be executed, to break in the night-time into a dwelling-house, and the further concurrent intent, which may be executed or not, to commit therein some crime which is in law a felony. In these and other like cases the particular or ulterior intent must be proved in addition to the more general one, in order to make out the offense; and *nothing will answer as a substitute.*" (Italics are ours.) See, also, Whart. Crim. Ev. § 431; State v. Bell, 29 Iowa, 316.

Applying these principles to the case at bar, it is clear that all evidence, whether offered by the prosecution or by the defense, tending to show or prove the real intent with which the offenders broke into the house of Dupl  ch  n, was competent, and therefore admissible, with this exception, however, that the state was restricted to proof that the intent was to kill. But, as to the accused, a wider field was open to them, as they were entitled to prove that their intent was anything else but that to kill, even if the intent was in itself unlawful and unjustifiable in law. In theory the principle is recognized by the

trial judge, who said in his charge to the jury: "Finally, it must be shown that the accused entered and broke with intent to kill. This intent must co-exist with the entering and breaking,—that is to say, the accused must be proved to have had this intent at the time of his entry and breaking; and your inquiring must be confined to that intent in ascertaining the guilt or innocence of the accused, in so far as this ingredient of the crime charged is concerned. Hence the only intent you are to consider is the intent to kill. You cannot legally convict the accused under the indictment for entering and breaking with intent to rob, to steal, to commit rape, or any other crime than the one charged, to-wit, the intent to kill." But the complaint of appellants is that, in each of the three trials, they were unjustly deprived of practical protection under the principle by the rulings of the trial judge in persistently excluding all proffered testimony tending to show the real, whole intent with which they entered the prosecutor's house. His rulings on that point were the subjects of numerous bills in each of the trials. In one of the bills the district judge makes the statement that the following facts had gone to the jury as part of the testimony given by the accused, testifying in their own behalf: "That they, or a majority of them, belonged to an unlawful organization called 'Regulators' or 'White Caps.' That they armed themselves with pistols and guns, and went in a body to the house of Dupl  ch  n about one o'clock. That all were masked except one, a comparative stranger in the neighborhood, named Falgout, totally unknown to Dupl  ch  n. That Falgout, a member of this body, representing himself to Dupl  ch  n to be a sheriff, induced him to open his window. That he demanded of Dupl  ch  n the woman, Fille. Upon being asked what he wanted of her, he said it was none of his business. That immediately thereafter Falgout jumped through the window of Dupl  ch  n's house, across his bed, and, presenting his pistol to Dupl  ch  n, ordered him not to move, immediately shouting to his confederates: 'Break!' 'Enter!' 'I hold him!' That a moment afterwards several members of the party, having secured an entrance into the house, caught and dragged the woman, Fille, out of the house. That about this time Dupl  ch  n, having secured possession of his gun, snapped it at the party who were engaged in dragging away the woman, Fille, in his yard. The gun having failed to fire first shot, he (D.) fired the second shot, which was almost simultaneously returned by the party having possession of Fille, resulting in Dupl  ch  n being shot down in his own house, and one of the accused being wounded in the leg. That immediately thereupon the accused fired some five or six shots in the house, after which they left."

Conceding *arguendo* that these acts of the accused justified the presumption that they had gone to that house with the pre-conceived intent to kill, it is undeniable that such a presumption could be rebutted. To that end was directed the effort of their counsel, in seeking to prove that

the defendants' real intent in going to that house was to break up a state of concubinage which had long existed between Dupléchin and the woman, Fille, under his own roof, in the midst of his own family, which included some grown daughters, which conduct had been a subject of scandal in the neighborhood to such an extent that some of the "Regulators" had been requested by a married daughter of Dupléchin to interfere in the matter. The means of accomplishing that end, according to the theory sought to be proved by the appellants, was to take the woman out of the house, and to chastise her. It appears from the bills of exception that the accused were allowed to prove that their object in going to the house was to chastise the woman, Fille; but when they attempted to prove, further, that their real and ultimate intent was to force her to leave Dupléchin's house, and thus to put an end to the state of concubinage between the two, their oft-repeated efforts in that line were persistently suppressed by the trial judge on objection by counsel for the state. It is quite apparent from the record that the judge's reiterated rulings on this point were predicated on a misapprehension of the object in view by defendants' counsel in introducing that line of evidence. In one of the bills he says: "During the whole course of the trial of Charles Arable and Blanc Beard, and also during the trial of the accused in this case, Syphroyen Meche and Lestie Smith, a persistent effort was made on the part of the counsel for the accused to get before the jury some evidence in regard to the alleged illegitimate sexual relations between Dupléchin and the woman, Fille. Various grounds have been alleged as a basis for the admission of such testimony, sometimes to show the feeling, bias, and prejudice of the witness, sometimes for the purpose of contradiction, etc., but the real and true purpose, in the opinion of the court, sought to be accomplished by its introduction, was to bring to the aid of the accused, in their defense, and in justification of the crime charged, race prejudice on the part of the jury. Granting that each of the questions propounded herein were answered in the affirmative, and even conceding that improper sexual relations existed between the prosecutor, Dupléchin, and the woman, Fille, it would not, either in law or justice, constitute either a justification or a mitigation of the outrage alleged to have been committed by the accused, and it is not admissible for such purpose." Not a word can be found in the record on which to rest even an inference that counsel for the accused had the remotest intention of justifying their clients, either for the acts which had been proved against them on the trial, or for the charge propounded against them in the indictment. No one can legally justify the acts which the accused themselves admitted on the witness stand to have perpetrated, even though they had been committed with the sole intent which counsel were striving all through the trial to prove or to show. That question was not in the case under the indictment as framed, or under the is-

sue joined between the state and the prisoners by the plea of not guilty. As the accused, in their testimony, admitted that, being armed with dangerous weapons, they had broken in the night into the house of the prosecutor on whom they had shot, in returning is fire, as they were leaving his premises, the only issue left for determination was the question of their intent in going to that house under the circumstances recited by the judge, and hereinabove transcribed.

The record shows that when the state witnesses were being examined in chief, some of them, who had turned state's evidence, had testified as to the intent of themselves and of their co-conspirators in going to that house. Others, such as the woman, Fille, had explained her purpose in being at the prosecutor's house that night. On cross-examination, counsel for the accused sought to question these witnesses touching the relations existing between Dupléchin and the woman in question. On objection from the prosecution in such instances, counsel for the defense urged some of the reasons attributed to them by the trial judge in the language just transcribed. The admissibility of those questions will be considered in another part of this opinion. But when defendants' counsel were examining some of their own clients as witnesses, and proposed to pursue that line of investigation, they invariably contended that the testimony which they thus sought to elicit was admissible "for the purpose of showing that the entry was not made with intent to kill, as charged in the indictment." According to correct rules of jurisprudence, under the charge as herein made, the door was wide open to the accused for evidence to show their real intent, and to prove that it was not to kill; and that right could not have been denied them even if they had killed Dupléchin when they shot at him. If his death had ensued, they might have been guilty of murder, and they might have been convicted of that crime under a proper charge; but, under the indictment presented in this case, they could not have been convicted of burglary if the proof had showed that at the time of entry their intent was not to kill.

Under the law as expounded by all the authorities, courts as well as text-writers, the accused in this case had the right to introduce proof of their real, full, and whole intent in going to Dupléchin's house; and, under the rulings complained of, they were allowed to offer but a partial explanation. It was their right to offer testimony to show that their real intent was to break up an alleged scandalous concubinage by taking out of the paramour's house, and chastising, the alleged concubine. But they were forbidden to show any other intent but that of taking out, with the intention of chastising, a woman merely named, but not otherwise described or connected by the testimony with the *res gestæ*. The admitted testimony, which was to the effect that the intent was to take out and chastise a certain woman, was not evidence, of itself, of the alleged original and controlling intent, which was to interfere with a reprehensible concubi-

nage. It is argued that proof of an intent to suppress a concubinage could co-exist with the ulterior intent to kill, as the killing of one or both of the participants would certainly have operated the most efficient suppression of the alleged evil. The proposition may be correct in the abstract; but the means of rebutting that presumption were at hand, through the rejected testimony, which was intended to show that the real intent was to suppress the concubinage, not by killing either of the parties to it, but by taking out and chastising the woman. Hence flows the legal necessity of admitting proof of the whole intent in its two component parts. The proof of intent was not entire by the restricted proof of the intent to take out and chastise the woman. It would not have been complete with the restricted proof of an intent to put an end to a scandalous concubinage. But by the admission of proof of both the concurring elements of the ulterior intent, as repeatedly announced by counsel for the accused, a rational though not a lawful intent would have thus been presented to the consideration of the jury, who could have determined whether it was or not sufficient to negative the alleged intent to kill as the motive, and at the time of entry. The rejected testimony was therefore, in law as well as in justice, admissible for the intended purpose; and the jury would have been the sole judges of its effect on the point in contention.

"The intent of the parties will be gathered from all the circumstances of the case," and is to be tested and determined by the jury. *Rosc. Crim. Ev.* 366. Dealing with a kindred subject, (page 24,) *Roscoe* says: "Where it is relevant and material to inquire into the conduct of rioters, what has been said of any of the party in the act of rioting must manifestly be admissible in evidence as showing their design and intention."

On the same subject, *Whart. Crim. Ev.* §§ 690, 691, contains the following language: "Declarations made by a defendant in his own favor, unless part of the *res gestæ*, or of a confession offered by the prosecution, are not admissible for the defense. * * * In any view, therefore, the extrajudicial, self-serving declarations of a party are inadmissible for him, with the exceptions hereinafter stated, as evidence to prove his case. It is otherwise when such declarations are part of the *res gestæ*. It is not, however, necessary that such declarations, to be part of the *res gestæ*, should be precisely concurrent with the act under trial. It is enough if they spring from it, and are made under circumstances which preclude the idea of design." The principles thus formulated were also authority for the state to interrogate some of the conspirators, who had turned state's evidence, as to their common design in going to Dupléchin's house, and the same rule should have opened the door to the counsel for the defense to pursue that line of investigation in their cross-examination of these same witnesses; but by his ruling the trial judge denied them that right.

This is the first error falling under the second ground of complaint of appeal.
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lants, as indicated in the beginning of this opinion. All the incidents embraced in the foregoing considerations apply to all three of the cases now on appeal, and enough has been said to justify the remanding of the three cases.

The following contention arose in the case of Arable and Beard and of S. Meche and Smith alone. It hinges upon the examination of the woman, Fille, who was not offered as a witness in the other or third case, which was the trial of Jerome Meche. It appears from bills reserved in the two first above-named cases that the woman, Fille, a state witness, having stated in her examination in chief that she had promised to the late Mrs. Dupléchin, during her last illness, to take care of her children, and that she was on the night of the incident at that house for the purpose of nursing one of those children, who was sick, was asked on cross-examination, in substance, whether she had not been Dupléchin's concubine for many years, and whether she had not had several children from him. On objection that cross-examination was promptly suppressed. The sole and manifest object of the prosecution in eliciting the statement just quoted from the woman was to negative the anticipated testimony on the part of the defense to show the existence of illicit relations between the prosecutor and the witness, and to prove that her presence at that house was due to entirely a different and to very laudable causes. It was clearly inadmissible as evidence for any other purpose. The state, herself having opened the door to that line of investigation, could not and should not have been allowed to close it to the defense.

This point is fairly and entirely covered by the decision of this court in the case of *State v. Claire*, 41 La. Ann. 191, 6 South. Rep. 129. To illustrate the principle under consideration, it is sufficient to quote only the following syllabus from that opinion: "On a trial for murder, the state having introduced evidence to prove malice and premeditation by the testimony of a witness from whom the accused had purchased a pistol a few days previous to the homicide, it is competent for the accused to interrogate the same witness with a view to show that, in making preparations for a combat, he was preparing for an anticipated attack to be made on him by another person not connected with the homicide on trial." Here, the state having attempted to prove a laudable purpose to account for the presence of the woman, Fille, at the house of the prosecutor, it was competent for the accused to interrogate her on the same subject with a view to contradict her, and to show that she was there for a very different purpose, and for the very reason which had prompted them in trying to take her out of that house, rightfully or wrongfully.

The record contains many and numerous other bills, but it becomes unnecessary to prolong this discussion. This opinion contains reasons amply sufficient to justify the following decrees:

1. In the trial of Charles Arable and Arvilleu, otherwise called "Blanc Beard:" For the reasons given in the above and

foregoing opinion, it is ordered, adjudged, and decreed that the verdict of the jury and the sentence of the district court rendered against the said Charles Arable and Arvilleu, *alias* Blanc Beard, be quashed, annulled, and set aside; and it is now ordered that said case be remanded to the district court for further proceedings according to law and to the views expressed in said opinion.

2. In the trial of Syphroyen Meche and Lastie Smith: For the reasons given in the foregoing opinion, it is ordered, adjudged, and decreed that the verdict rendered against the aforesaid Syphroyen Meche and Lastie Smith be quashed and set aside, and the judgment rendered thereon annulled, avoided, and reversed; and it is now ordered that said case be remanded to the district court for further proceedings according to law, and according to the views expressed in said opinion.

3. In the trial of Jerome Meche: For the reasons given in the foregoing opinion, it is ordered that the verdict of the jury in this case be quashed and set aside, and that the judgment herein be annulled, avoided, and reversed, and that the cause be remanded to the district court for further proceedings according to law, and according to the views expressed in the aforesaid opinion.

FENNER, J., (*dissenting*.) Appreciating the great importance of these cases, I have carefully examined every ruling of the judge *a quo*, and every one of the numerous bills of exception presented on the record. I agree with the majority in considering that the pivotal question in the case is that which is so denominated in the majority opinion, *viz.*, the admissibility of evidence to show the existence of immoral and scandalous relations between Dupl  chin, the owner of the house invaded, and a colored woman named Fille. Repeated attempts were made to get in such evidence in various forms and under different pretexts, which were all defeated by the judge, and the records bristle with bills of exception on the point. In one of these bills the judge states at length the circumstances of the case, and the grounds on which he based his ruling, and I deem it best to quote the bills almost in full.

The following question was propounded to a witness for the defense: "If you say you wanted to make Fille go away from the prosecutor's house, give your reasons for wanting Fille to go away from the prosecutor's house." The bill proceeds: "It was declared by defendants' counsel at the time that their reasons for asking this question were (1) for the purpose of showing that the entry was not made with intent to kill, as charged; (2) for the purpose of showing that the entry was not made with intent to kill, steal, rob, commit a rape or any other crime set out in the statute. But his honor, the judge, upon objection made, ruled out the question on the ground that Leoval Meche, one of the co-defendants, who had been placed on the stand before Jerome Meche, another of the defendants, was asked the following question: 'If you say you wanted to make Fille go away from the

prosecutor's house, give your reasons for wanting her to go away.' Whereupon the court ordered the jury to retire, and the question to be answered in their absence, for the purpose of determining whether it was admissible or not before it should go to the jury. The witness answered this question as follows, which was taken down in presence of accused and of all parties by the clerk of court: 'Blanc Beard told me Fille had fought with one of his [Blanc Beard's] sisters-in-law. Also because there was bad example in the house of Mr. Dupl  chin. That Fille cloistered herself with Mr. Dupl  chin, in the day-time, in a room in his house. Also that one of Mrs. Blanc Beard's sisters had told her, crying, that they were maltreated on account of Fille. Also Joseph Meche told him [witness] that Mrs. Blanc Beard told him that she would be glad if they would make Fille leave the place, on account of her sisters. Also Leoval Cormier told me he went to Mr. Dupl  chin's, and that he saw a large mulatto man in the house, playing with his daughters, and he understood Fille was the cause of the mulatto being there. He [Cormier] himself thought it was a bad example. Some of the crowd, perhaps, did not know these reasons, but most of them did.' It will be observed," proceeds the judge, "that the questions propounded to each of these witnesses are identical, and evidently asked for the purpose of eliciting the same kind of testimony as appears above. It must be evident that such testimony was intended rather for the purpose of appealing to the race prejudices of the jury than of showing want of intent to kill; that, considering the statements as true, they are inadmissible, either in justification or mitigation of the offense charged. It is composed entirely of hearsay, and would have inevitably led the court into an investigation of irrelevant matters well calculated to mislead the jury. In other words, this was the real purpose of asking the question. The circumstances attending the commission of the offense, as detailed by all of the accused themselves on the witness stand, are briefly as follows: That they, or a majority of them, belonged to an unlawful organization called 'Regulators' or 'White Caps.' That they armed themselves with pistols and guns, and went in a body to the house of Dupl  chin about one o'clock in the night. That all were masked except one, a comparative stranger in the neighborhood, named Falgout, totally unknown to Dupl  chin. That Falgout, a member of this body, representing himself as a sheriff to Dupl  chin, induced him to open his window. That he demanded of Dupl  chin the woman, Fille. Upon being asked what he wanted of her, said it was none of his business. That immediately thereafter Falgout jumped through the window of Dupl  chin's house across his bed, and, presenting his pistol at Dupl  chin, ordered him not to move, immediately shouting to his confederates: 'Break! Enter! hold him!' That immediately afterwards several members of the party, having secured an entrance, caught and dragged the woman, Fille, out of the house. That about

this time Dupl  chin, having secured possession of his gun, snapped it at the party who were engaged in dragging the woman, Fille, away in his yard. The gun having failed to fire the first shot, he fired the second shot, which was almost simultaneously returned by the party having possession of Fille, resulting in Dupl  chin's being shot down in his own house, and one of the accused wounded in the leg. That immediately thereupon the accused fired some five or six shots in the house, after which they left. In view of these facts, the court felt constrained to believe that the evidence sought to be elicited by this question was offered for the purpose and with the hope that the jury, acting under a sense of indignation at a supposed outrage upon the domestic relations of one of their neighbors, would, upon the impulse of the moment, forget the issues of the case, and justify the commission of the offense by an acquittal."

Under the foregoing statement, did the judge err in excluding the evidence offered? It is the plain and reasonable rule of law that, in criminal as in civil cases, evidence must be confined to the issue, and proof of collateral facts is not admissible unless clearly referable to and bearing upon the point in issue. "This rule," says Mr. Greenleaf, "excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, and the reason is that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and, moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it." 1 Greenl. Ev. § 52.

The points at issue in this case could not be more fairly and fully stated than they were by the judge *quo* in his admirable charge, when he said: "To convict the accused of the crime charged, the state must show (1) that the defendants did enter and break; (2) that the accused entered and broke a dwelling-house; (3) that such entry and breaking was done in the nighttime; (4) that there was some person lawfully in said house at the time of such entry and breaking; (5) that the accused were at the time of such entry and breaking armed with a dangerous weapon; (6) that the accused entered and broke with the intent to kill. You cannot legally convict the accused under the indictment for entering and breaking with intent to rob, to steal, to commit rape or any other crime than the one charged, to-wit, the intent to kill." It is readily apparent that the evidence excluded had no possible relevancy to any of the above points, unless to be to the last, to-wit, the intent to kill. If the matter in dispute had been whether or not the accused went to the house of Dupl  chin for the purpose and with the intention of taking out and whipping the woman, Fille, the evidence might have been germane to such an issue as tending to exhibit a motive for such intention, and to make it probable. But we do not understand there was any issue on this point. The recitals of the bill, as well

as the judge's statement, and indeed the whole record, and even the briefs of defendants' counsel, abundantly show that evidence of such intention was freely admitted, and that it stood substantially as a conceded fact in the case. The question was whether the admitted intention and determination to take out and punish Fille was accompanied with a co-existing intention to kill whoever might resist them in executing their purpose.

"It is immaterial," says Mr. Bishop, "in a criminal case, what motives may have operated on the mind of the accused person, or what may have been inoperative, provided the law's motives did or did not influence him. Suppose, then, a man has several intents, and in pursuance of them, together moving him, he does what the law forbids. The rule here is that if there are the intents necessary to constitute the offense, and intents not necessary, the latter do not vitiate the former, which in their consequences are the same as though they stood alone." Bish. Crim. Law, §§ 338, 339. Admitting, therefore, that accused went with the intent to take out and punish Fille,—an intent certainly unlawful,—yet, if that intent was accompanied by an intent to kill either Fille or any other person who might lawfully resist them in the accomplishment of that purpose, the crime charged would be established. The facts stated by the judge show that the accused masked, and armed themselves with dangerous weapons; that the first one who entered covered Dupl  chin with a pistol, and told his confederates to break and enter; that, while Dupl  chin was thus under threats of death, they did break, enter, and seize and carry off the woman, Fille; that when Dupl  chin, in the exercise of his legal right, and indeed of his manly duty, did resist by shooting at the invaders of his house, they fired at him, and shot him down. Now the jury was bound to determine what intent was evinced by such conduct. They had a right to consider whether covering Dupl  chin with a pistol did not mean a threat and an intention to kill him if he resisted, although he had the clear legal right to resist even to the extent of killing the intruders, especially when followed by the fact that, when later he did resist, they did shoot him down. In such a case, how could it possibly avail defendants, under any legal aspect of the case, to show that the reasons why they determined to commit the unlawful act of taking out and punishing Fille were the existence of shameful relations between Dupl  chin, a white man, and Fille, a colored woman; he keeping her as a concubine in the house with his white children to the scandal of the neighborhood, and to the injury of his family? I can discover no possible light which such facts could throw upon the question whether or not the purpose to remove and punish Fille was accompanied by the co-existing determination, evinced by the facts stated, to kill whoever might resist them in carrying out their unlawful designs. Indeed, it rather appears that the proof of such atrocious and scandalous relations as the motive of the crime would tend more to render probable, than to rebut, the inten-

tion and determination to carry out their purpose at all hazards, even though involving the sacrifice of human life.

I fully agree that the accused were entitled to prove their intention, and their whole intention, in breaking and entering the house; but the intention referred to means what they intended to do, and not the reasons or motives why they intended to do it, unless such motives were such as made the act lawful, which is not here pretended. The law deals with acts, and with intentions to act. When the majority opinion affirms their right to prove that their intention was "to break up the concubinage between Dupl  chin and Fille by taking out and whipping Fille," it presents a compound idea, embracing—*First*, the intent, viz., to take out and whip Fille; *second*, the motive for that intent, viz., to break up the concubinage. As the motive had no tendency to legalize the act intended, it was not admissible unless it tended to rebut or disprove the accompanying intent to kill alleged in the indictment. It is very clear that this motive is not in the slightest degree inconsistent with the intent to kill. On the contrary, if their motive was to break up the concubinage between Dupl  chin and Fille, the killing of either one or both would certainly be the most effectual and conclusive method of accomplishing that purpose.

I have wrestled vainly in the attempt to discern any legal or possible aspect in which such evidence could throw any light upon the question of intent to kill *vel non*. We are not here concerned with the sufficiency of the proof of intent to kill, or of the qualities which must characterize such intent, in a prosecution like this. The jury was fully charged that the intent to kill was absolutely essential, and that the breaking and entering must have been done with that intent, which imports that the intent must have existed at the time of the breaking, and would not be established by proof showing that such intent only originated out of the emergencies arising in course of execution of a different thing at first intended. The authorities quoted to that effect are good law, but I do not see their bearing on this case. If the accused had privately and secretly entered Dupl  chin's house to take out the woman, seeking to avoid conflict, and had made their demonstrations threatening his life, only because unexpectedly surprised by Dupl  chin, in such case the intention to be deduced from such demonstrations might be held as arising only subsequent to the breaking and entering, and therefore not within the purview of the statute. But here the hostile demonstrations were the first acts of the accused, done deliberately at the moment of entry, and certainly whatever intent the jury attached to them was an intent directly applicable to the entry and breaking.

The testimony excluded being in my opinion utterly irrelevant to any legal issue in the case, I feel bound to give my unqualified approval to the firmness and courage with which the judge *a quo* resisted every effort or device to bring it before the jury. The case belongs to a class of cases to which the reasons underlying

the rule excluding such irrelevant testimony peculiarly apply. In the language of Mr. Greenleaf, it would have "tended to draw away the minds of the jurors from the point in issue, and to excite, prejudice, and mislead them." 1 Ev. § 52. The opening of the door to evidence of this kind in such cases increases the difficulty, already great, of vindicating the law. I think the judge rightly concluded that the purpose, so persistently pursued, of getting in such evidence, could only be to appeal to a "higher law," in the prejudices of the jurors, under which they might, in violation of their oaths, acquit, however clearly satisfied that the accused were guilty of the crime charged in the indictment and denounced by the statute. It is the first duty of the judiciary charged with the enforcement of the legislative will, as expressed in the statute law, to discountenance and exclude all foundation for such appeal. Says Mr. Bishop: "A man cannot make the defense in court that there is a higher law than the one there administered, forbidding him to obey the law of the court, further than it may tend to shake the legal validity of the latter. Upon this point, Baron HUME observes, 'the practice of all countries is agreed.' The rule lies, necessarily, at the foundation of all jurisprudence." 1 Bish. Crim. Law, § 344. To admit such evidence at all is to give an implied sanction to the jury's weighing it as material to the case, and they are not likely to understand or be controlled by nice distinctions as to the purposes and effect to which it is to be confined.

I have scrutinized every bill in all the cases; and, though some of them may exhibit trifling technical irregularities in the rulings of the judge, the matters involved are trivial, and the errors too insignificant to affect the substantial merit of the case, or to justify interference with the verdict and sentence. I therefore respectfully dissent from the opinion and decree herein.

REBERT *et al.* v. DUPATY *et al.*

(Supreme Court of Louisiana. March 17, 1890.
42 La. Ann.)

SALE—GOOD-WILL—LEASE—COVENANTS.

1. In the sale of the effects in any business, where an itemized account is made, and a valuation is attached to each item, and no mention is made of the "good-will" of the business, evidence cannot be received to contradict the written act of sale so as to show that the "good-will" formed a part of the act of sale.

2. A stipulation in a lease of premises on which a certain business has been carried on, that the lessor will not pursue the same occupation in the same neighborhood, is a personal obligation of the lessor. If he sells property, a part of which is the leased premises, and the purchaser puts up buildings on the purchased property, opposite to the leased portion, and carries on the same business as that on the leased ground, the obligation of the original lessor, his vendee, does not affect him, and he cannot be injured, for this reason, from carrying on said business.

(Syllabus by the Court.)

Appeal from district court, parish of Assumption; W. GUION, Judge.

L. W. Folse & Son and Pugh, Pugh &

Marx, for appellant. W. E. Hovell, for appellee.

MCEENERY, J. Since the submission of this case, one of the plaintiffs, Hebert, has died, and the duly appointed and qualified administrator of his succession has been made a party plaintiff and appellant, in the place of said deceased, Emile S. Hebert. One of the defendants, Maxime Dupaty, kept a livery stable in the town of Napoleonville. He was a popular proprietor of the establishment, and did a thriving business. This fact induced the plaintiffs, Hebert and Damare, to purchase the outfit of the stable, consisting of horses, harness, and vehicles. The sale was perfected on the 9th of February, 1887. In the act of sale Dupaty leased the premises on which the stable was located for a term of five years to the plaintiffs, with privilege of renewal. The following clause is in the lease: "The lessor binds and obligates himself not to keep a public livery stable during the term of said lease, either directly or indirectly, within a radius of six miles of Napoleonville." Dupaty sold to Dugas, another defendant, certain property in the town of Napoleonville, which includes that leased by Hebert and Damare from Dupaty. Dugas sold this property to William L. Phelps, the last-named defendant. Phelps and Dugas are brothers-in-law. In the act of sale by Dupaty to Dugas, plaintiffs' lease is referred to, and it is stipulated, as an additional consideration for the sale, that the vendor, Dupaty, sold to Dugas, his heirs and assigns, the revenues of the lease during its duration, and all other benefits arising therefrom. Phelps has collected the revenues from the leased premises of the plaintiffs. These acts of sale and lease were recorded, and the parties all knew of the terms and conditions of the sale from Dupaty to the plaintiffs. Phelps erected, established, and conducted a livery stable directly in front of the stable of plaintiffs. They are rival establishments. This suit is brought to recover \$10,000 damages against defendants for the establishment and conducting of said public livery stable. In substance, the allegations in the petition are that Dugas and Phelps, having full knowledge, due notice, and being well aware of the lease of petitioner, and all of its stipulations, as well of the sale by said Maxime Dupaty to petitioners, etc., and that the said Dupaty, who was bound not to keep during the pendency of the said lease a public livery stable, either directly or indirectly, within a radius of six miles of the town of Napoleonville, went to the said Dupaty, and entered into a conspiracy with him, and they conspired together to crush and ruin the petitioners in their business of public livery stable, by erecting, establishing, and conducting the public livery stable on the premises purchased by said Phelps from Dupaty.

Testimony was offered and admitted to show that the "good-will" of the livery business carried on by Dupaty was also sold to the plaintiffs. It was admitted. The sale from Dupaty to plaintiffs

enumerates every item, with a valuation, sold to plaintiffs. Nothing is said in the act of sale of the "good-will" of the establishment. The evidence was inadmissible, as it added to and contradicted the written act of sale, in which there was no ambiguity or uncertainty. But, admitting that the good-will of the business was sold to plaintiff, it could not have any bearing in the case. The stipulation of Dupaty was not to keep a public livery stable within a radius of six miles of the town of Napoleonville. There is no evidence whatever in the record that he has done so, nor is there any evidence that he is in any way interested in the stable conducted by Phelps. The record fails to show that there was any collusion between the defendants to injure the plaintiffs. Dupaty was compelled to sell the property to pay a mortgage debt of \$2,000 upon it, which was past due, and for which a demand had been made upon him. Phelps had been conducting a livery stable at an undesirable locality, and availed himself of the opportunity offered to purchase the property from Dupaty, a part of which was leased to plaintiffs. He did not have sufficient means. His brother-in-law, Dugas, agreed to furnish him the money, and he sought advice as to the means of securing himself. He was instructed to purchase in his own name, sell to Phelps, and retain the vendor's privilege, and a special mortgage for the price. All the defendants, under oath, deny any intention to injure plaintiffs, and Phelps especially, except in a fair competition for patronage. No evidence is offered to contradict this.

The contention of plaintiffs that Dugas and Phelps, by purchasing from Dupaty, became bound as Dupaty was, not to keep a public livery stable within a radius of six miles of the town of Napoleonville, cannot be maintained. We do not see in what manner any process of reasoning can arrive at the legal responsibility of defendants as contended for by plaintiff. On this point in the case the opinion of the judge *quo* is exhaustive. In his opinion he says: "Dupaty did not stipulate that no livery stable should be kept on the balance of the property during plaintiffs' lease, but that he would not keep a livery stable himself, directly or indirectly, during that term. It was not a burden that he placed upon the property itself, but an obligation that he impressed upon himself. Viewing the obligation of Dupaty, therefore, as one entirely personal, it is a self-evident proposition that neither Dugas nor Phelps became in any manner bound to plaintiffs not to keep a livery stable, unless they contracted the same obligation by the terms and stipulations of the two sales of 28th of July, 1889. It is not to be presumed that Dr. Dugas or W. L. Phelps intended to assume this personal obligation of Dupaty when the plaintiffs themselves say the very object of Phelps in acquiring the property was to put up a livery stable upon it. Such an intention on the part of Dugas and Phelps is entirely unreasonable." There is no error in the judgment, and it is therefore affirmed.

STATE V. BADEN.

(*Supreme Court of Louisiana.* March 17, 1890.
42 La. Ann.)

LARCENY—INDICTMENT—INTIMIDATING WITNESS.

1. In an indictment for larceny, description of the thing stolen as "one beef, of the value of fifteen dollars, of the property of A. B.," is sufficient.

2. Proof of attempts by accused to intimidate a witness for the prosecution is admissible as tending to establish a presumption of guilt; and such admissibility is not destroyed by the fact that, on a trial for the crime of intimidating the same witness, accused had been acquitted.

(*Syllabus by the Court.*)

The Attorney General, for the State. R. P. O'Brien and W. A. White, for defendant.

FENNER, J. Appeal from the district court for the parish of Vermilion.

The indictment charged defendant with larceny of "one beef, of the value of fifteen dollars, of the property of A. T. Broussard." A motion to quash was made and overruled on the ground of insufficiency of description of the thing stolen. Indictments presenting precisely the same features have been frequently sustained in this state and elsewhere. *State v. King*, 31 La. Ann. 179; *State v. Carter*, 33 La. Ann. 1214; 2 Bish. Crim. Law, § 709; 2 Archb. Crim. Pr. & Pl. (Pom. Notes,) 1160, and numerous authorities there cited. *State v. Hoyer*, 40 La. Ann. 744, 4 South. Rep. 899, is apparently hostile, but it is perhaps distinguishable, and at all events does not purport to overrule the above authorities, which exactly cover this case.

The only other error assigned is presented on a bill of exceptions to the judge's ruling admitting proof that the accused had made threats to a state witness in order to prevent him from testifying in this case, to which accused objected on the ground that he had been tried on the charge of intimidating the same witness, and had been acquitted, and that the state was debarred from showing the commission of any other offense than the one on which he was then being tried. The defendant was not on trial in this case for intimidating the witness, and the evidence could have no effect in convicting him of such offense, to which his former acquittal would have been a bar. But we can see no ground on which such acquittal could operate as a bar to evidence offered simply to establish a presumption of guilt of the crime for which he was then being tried. *Non constat* that the evidence adduced had been heard on the former trial, or had been passed on by that jury. The defendant was entitled, and was allowed, to offer the record showing his trial and acquittal, and the whole went to the jury for what it was worth. This was not error. Judgment affirmed.

SNYDER V. NATCHEZ, R. R. & T. R. Co.

(*Supreme Court of Louisiana.* March 17, 1890.
42 La. Ann.)

CARRIERS—INJURIES TO PASSENGERS—TRESPASSERS.

1. The railroad company, for its convenience and that of shippers, constructed, at the termination of its track on Black river, an elevator, or platform-car, which was used in lowering and raising freight, on an incline track extending from

its depot, on the bank, to the water's edge; and the plaintiff's husband, having prepared for shipment a small cargo of fish, and placed same on the platform of the elevator, undertook to ride thereon, without defendant's consent, up to the station, when the wire rope by means of which the car was operated suddenly broke, while the car was ascending, and caused the injury and death of deceased. *Held*, plaintiff cannot recover, because the deceased was not a passenger, and no contractual, or quasi contractual, relations existed between him and the defendant; he being a mere stranger or trespasser on the company's property.

2. If a person, by his own solicitation or consent, is carried upon a vehicle or conveyance which is not used for the purpose of passenger carriage, there can be no presumption that he was a passenger, although the owner be a common carrier of passengers by other and different means of conveyance.

3. The carrier is not under the same degree of obligation, as to care and diligence, to guard against injuries to strangers, as he is in case of those against passengers.

4. His duty to the former is governed by the general principle of law that every one is obliged, upon considerations of humanity and justice, to conform his conduct to the rights of others, and, in the prosecution of his lawful business, to use every reasonable precaution to avoid their injury.

5. A railroad company has no right to inflict wanton injury upon a naked trespasser on its location and property.

(*Syllabus by the Court.*)

Percey Roberts and Steele & Dagg, for appellant. Connor & Connor and C. H. & J. H. Boatner, for appellee.

WATKINS, J. Appeal from the ninth judicial district, parish of Concordia. On or about the 1st of October, 1887, John A. Snyder received serious personal injuries, by means of a fall from a descending freight elevator of the defendant, at the western terminus of its railroad track on Black river, in the parish of Concordia; and from the wounds and bruises inflicted he suffered great pain and agony. One of his legs was subsequently amputated, and he thereafter died; and his widow, in her own right and as tutrix of the minor children of deceased, brought this suit for the recovery of \$20,000 as damages,—\$10,000 for the pain and suffering of the deceased; and \$10,000 for the loss of his love, society, and support. The jury awarded the sum of \$5,000, without interest, to the plaintiff, and, in this court, she has filed an answer, and prayed for an amendment of the judgment, so as to increase the allowance to \$10,000, with legal interest from judicial demand, the defendant having appealed. After pleading a general denial, the averment of defendant's answer is that it owns and operates a line of railroad, "and at its depot on Black river has erected a steam incline or elevator, which it uses, during a short portion of each season, in moving freight up and down the bank of said river, to and from steamboats, when the stage of water is very low; but defendant specially denies that said incline or elevator was constructed or intended for the purpose of carrying persons or passengers, or that persons or passengers were carried or permitted to ride on said elevator with the consent of the defendant company, or of its employees or agents; that said elevator was only supplied with a small flat-car, without

seats, railings, or other protection for passengers, and was understood to be a very dangerous place for persons to attempt to ride; and all persons were warned and strictly prohibited and forbidden to attempt to get on or ride on said car." It further specifically avers that the plaintiff's husband was not killed or injured through any fault, negligence, or carelessness of the company, its employes or agents; that the deceased was frequently at the said depot, and was well aware that all persons were strictly forbidden from attempting to ride on said car; was personally present on an occasion recently previous to the accident which caused his fatal injuries, and heard other persons ordered off the elevator by the company's employes; and, on that occasion, due notice was timely given, and before the elevator car started up the incline, warning all persons to get off, and other persons did get off, in compliance with the warning, but the deceased did not, and remained on the car; that at the time the deceased was a trespasser on the property of defendant, and guilty of most reckless carelessness, and contributed thereby to his own injury; and that, had he used ordinary care, and not exposed himself to unnecessary risk and danger, by persisting in riding on the said elevator, in violation of orders of the defendant's employes, the unfortunate accident would not have happened. The final averment is that there are suitable and convenient approaches to its depots and cars, for the accommodation of persons and passengers; its engineer, who was in charge of the elevator, was competent, careful, and faithful in the discharge of his duties; and the company used all possible care and prudence in the operation of their railroad and elevator, for the safety of the public and its employes.

Within the scope of these pleadings, a brief résumé of the facts will suffice. At the western terminus of defendant's road on Black river there is a depot on the crest of the bank, from which there is an incline track extending to the water's edge, a distance of about 210 feet. On this incline track a platform car was operated in receiving and discharging freight, by being lowered from the top of the bank, and drawn up again, by means of a wire rope, one end of which is attached to the car, and the other is passed around a revolving drum, by means of a small engine. The platform of this car is 18 feet in length and 8 feet in width. Underneath it is a frame, to which the trucks are attached, and whereby the platform is elevated to a height of $8\frac{1}{2}$ feet above the incline track at the end next to the river bank, and of 9½ feet at the rear or outer end, so that its horizontal position is, at all times, preserved, during the transit of the car up or down the bank. This platform is provided with no seats, caboose, or other accommodations for persons or passengers, and it has no railings or protectors of any kind adapted to the protection of passengers. The engine by which the elevator was moved up and down the incline was placed in position, on the top of the river bank, adjacent to, but not connected with,

the depot in any way, and the station of the engineer who operated it was also on the top of the bank. This elevator was owned and operated by the defendant, as an accessory of its railroad, in receiving and discharging freight, which had been transported on, or was intended for transportation by, its trains. It was not designed for passengers' accommodation or travel. For several years this railroad extended only 8 miles west of the town of Vidalia, on the west bank of the Mississippi river; but in 1886 it was extended 17 miles further, to Black river. After this extension was made, quite a considerable industry sprung up in that locality, in the way of the shipment and sale of fish, proving alike profitable to the fishermen and the railroad company. The fish are taken from boats, and thrown upon the platform of the elevator car, and the fishermen mount upon it, and put them in slatted boxes, and nail down the tops preparatory to their transportation. The car is then drawn up to the top of the river bank, and the boxes of fish are there transferred to the defendant's east-bound train for shipment. The deceased was engaged in this industry at the time the accident in question happened, and on the morning it occurred he and his associates had just completed the boxing of a cargo of fish, and were on the platform when the engineer of the elevator moved it slowly up the incline, in the usual manner, to a point within about 25 feet of the top of the bank, when, altogether without admonition to any one, the wire rope parted in twain, and the car ran rapidly down the track, coming in sharp collision with the bow of a steam-boat lying ashore, causing the deceased to be hurled with great violence against a hog chain, whereby his thigh was broken, and death resulted. Thus far there seems to be no practical difference of opinion among the various witnesses, who were interrogated, but there are several discrepancies: (1) As to whether the employes gave timely warning of the starting of the train; (2) as to the existence of an established custom on the part of the shippers and other persons to ride up and down the incline without protest on the part of defendant's employes and agents; and (3) as to the existence of defendant's orders and notices forbidding such use thereof.

In considering this case, it must be borne in mind that the elevator and incline formed no part of the railroad proper, but were entirely distinct and separate therefrom. They were operated independently of each other, though both were owned by defendant. The elevator was designed exclusively for carrying freight, and not for the transportation of passengers or persons; and the absence of notice or warning against its use for passenger traffic, if such was the case, did not have the effect of establishing between such persons as might use it and the company contractual, or quasi contractual, relations, as between carrier and passenger. In using the car as did the deceased, a presumption is raised against him of being an intruder or trespasser on the defendant's property without consent, and the burden is on

him to rebut it. The fact that the deceased had dealings with defendant does not prove that there existed between them the relations of master and servant. At most, their relations were those of shipper and carrier of freight. But, from the evidence, it is clearly established that the entry of the deceased upon the elevator platform was but voluntary and gratuitous, and done at his own risk and peril, even if it was not forbidden by the company and its employees expressly. But we think it is fully established, by a fair preponderance of the testimony, that the superintendent and other employees had expressly and repeatedly prohibited and forbidden persons and shippers from riding on the elevator; that the deceased was, only six months prior to the accident, employed as engineer of the company in operating the elevator, and as such had personal knowledge of defendant's orders and instructions in this respect; and his knowledge did not cease with his employment. Whatever may have been the custom and usage in this regard, it cannot be invoked by the heirs and legal representatives of the deceased, as he acted under his own personal knowledge of the company's disapproval of it, and its orders to the contrary. We think it also fully proven that, on this particular occasion, the engineer did give timely warning of his intention to start the elevator car. Though the deceased may not have heard the warning, he had a good opportunity to have done so, and other persons, similarly situated, did hear it, and heed it, too. A strong circumstance proving the theory that warning was given is that, after the car had ascended the incline a short distance, it was halted for a moment in its ascent, and two persons, who were on the platform, stepped off, and only the deceased and his brother remained until the rope subsequently broke, and the casualty occurred. This fact is admitted by all the witnesses, and there is no explanation of their conduct acceptable to reason, other than that they had received warning, and heeded it, and that the deceased and his brother did not.

At the time the elevator car was started, the deceased had completed the packing of his fish, and all that remained for him to do was to go up on the river bank to the depot, and obtain a bill of lading. But, if it had not been completed at the time of starting, it certainly had been at the time the halt was made, and his associates and assistants got off. The plaintiff's theory is this, quoting from her brief, at page 81, viz.: "It is clear that John A. Snyder, in mounting the car, and there filling, with fish, the empty boxes, and nailing them up, was not a trespasser nor a licensee, but was lawfully engaged in a business mutually profitable to him and the railroad company; was shipping his freight in the manner expressly authorized by the company, and was entitled to all the care due a passenger." During the course of the trial, her counsel requested the judge to so charge the jury, but the latter declined, and the former excepted. In support of their contention, counsel quote from the notes found at page 462, 1 Thomp. Neg., and which read as fol-

lows, viz.: "The general rule is that, to persons who are lawfully upon the track, engaged in labor, the railroad company owes a duty of active vigilance, and such persons have a right to become engrossed in their labor to such an extent that they may be oblivious to the approach of trains, relying, as they may, upon the performance of the duty imposed by law upon the railroad company with reference to them. A person having business with the railroad company—e. g., in loading or unloading freight—has a right to occupy a position designated by the company's agent, hazardous though it may seem, relying upon the company's diligence to protect him in such position. Such a person has a right to still presume that the railroad company will act in accordance with its duties, though it has once failed to do so." But the deceased was not engaged in any kind of labor on the defendant's track, and was not its employee; and, although he did have business relations with the railroad company relating to the shipment of freight, his sole duty was to box his fish, and place them on the platform. The contract of safe carriage, and delivery of the freight, on the part of the company, was complete, and its risk fully undertaken at that moment of time. No position was designated by the defendant for the occupancy of the deceased, while he was engaged in the preparation of his fish for shipment, and that situation only became hazardous when the car was started up the incline. He was notified that he was unauthorized to occupy that position any longer, and he could not any longer rely upon the railroad company to protect him. After due warning had been given, and the car had moved from its stationary position, and commenced its ascent of the incline, *quasi* contractual relations between the deceased personally and the defendant ceased *eo instanti*, and his continued occupancy of the platform converted him into a trespasser, taking the risk of his own safety, and not relying on the company's protection. Hutchinson on Carriers, in treating of "who [is] entitled to be considered as a passenger," says: "Every person being carried upon a public conveyance, usually employed in the carriage of passengers, is presumed to be lawfully upon it as a passenger; but if a person, by his own solicitation or by his own consent, is carried upon a vehicle or conveyance which is not used for the purpose of passenger carriage, and this be known to him, there can be no such presumption, although the owner may be a common carrier of passengers by other and different means of conveyance." Pages 447, 448; Reary v. Railway Co., 40 La. Ann. 32, 3 South. Rep. 390. In such a case, the contributory negligence of the injured party being shown, the railroad company is only liable if, by the exercise of ordinary care, it could have prevented the accident. But this liability has been interpreted as arising if, by the exercise of reasonable care on the part of the company, after its discovery of the danger in which the injured party stood, the accident could have been prevented, and was not; or if the company failed to discover the danger, by rea-

son of recklessness, carelessness, or inattention of its employes, when the exercise of ordinary care on their part would have led to the discovery of the danger, and averted the calamity. Such is the purport of a decision of the supreme court of Missouri, (*Harlan v. Railroad Co.*, 65 Mo. 22,) which Thompson considers to be the most complete statement of this doctrine he has met with in his examination of it. To the same purport are the following authorities: *Railroad Co. v. Norton*, 24 Pa. St. 465; *Heil v. Glandine*, 42 Pa. St. 493; *Railroad Co. v. Goldsmith*, 47 Ind. 43; *Railroad Co. v. Huffman*, 28 Ind. 287; *Railroad Co. v. Collins*, 7 Reporter, 153; *Railroad Co. v. Eaton*, 53 Ind. 310; *Railroad Co. v. Wolf*, 59 Ind. 89.

Mr. Thompson, in treating this question, says: "Under the rule, conceding the right of a free track to a railway company, in the event of an injury to a trespasser upon its line, it can be held liable only for an act which is wanton, or for gross negligence in the management of its line which is equivalent to intentional mischief." 1 *Thomp. Neg.* 449; citing *Carroll v. Railroad Co.*, 13 Minn. 30, (Gil. 18); *Green v. Railroad Co.*, 11 Hun, 333; *Herring v. Railroad Co.*, 10 Ired. 402; *Kenyon v. Railroad Co.*, 5 Hun, 479; *Donaldson v. Railroad Co.*, 21 Minn. 293. Various other authorities and text-writers have been collated to the same effect. In *Beach on Contributory Negligence* we find the principle announced thus, viz.: "But, on the other hand, it may be urged that a passenger voluntarily in a baggage-car, when he might just as conveniently be in the car provided for his transportation, is a *quasi* trespasser. He plainly has no business in that car, and towards trespassers a carrier is not bound to exercise that high degree of care and circumspection due to his regular passengers." Page 160. In *Pierce on Railroads* we find the rule formulated thus, viz.: "The company has no right to inflict wanton injury on persons who are unlawfully on its location; and, where human life and limb are concerned, that injury may well be treated as wanton, subjecting the company to damages, when, although able to do so, they neglect to arrest the engine, which they have good reason to believe it will, without an effort to stop it, result in injury to the wrong-doer." Page 330. In *Hutchinson on Carriers* the rule is thus carefully stated, viz.: "The carrier is not under the same degree of obligation as to care and diligence to guard against injuries to strangers as he is in case of those against passengers. His duty to the former is governed by the general principle of law that every one is obliged, upon considerations of humanity and justice, to conform his conduct to the rights of others, and, in the prosecution of his lawful business, to use every reasonable precaution to avoid their injury. But to his passengers is due the utmost care and diligence which can be bestowed by human skill and foresight, and, consequently, that which would be culpable negligence in the case of the passenger would not be necessarily so in the case of one to whom the carrier was under no peculiar obligation." Page 447. *Lott v. Railroad Co.*, 37 La.

Ann. 337; *Reary v. Railroad Co.*, 40 La. Ann. 32, 8 South. Rep. 390; *Railroad Co. v. Stout*, 17 Wall. 657. In *Patterson's Railway Accident Law* the rule is stated to be "that carriers of passengers are not answerable as insurers for the safety of their vehicles and appliances, but that they are liable only for such accidents as may happen from any defect therein which might have been prevented by the exercise of due care on their part; and that 'the duty to take due care, however widely considered or rigorously enforced, will not subject the [company] to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or directed,'" (page 234;) quoting from *Readhead v. Railway Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

This being the rule in reference to passengers, it is more liberal with regard to strangers and trespassers. We think the foregoing authorities are conclusive on this question; and, under the evidence recited, the act of the defendant was in no sense wanton. The accident was the result of the sudden breaking of the wire rope, of the latent defects of which its employes were apparently ignorant. Nothing in the situation or surrounding circumstances indicated a necessity for more care and caution than was exercised. The verdict and judgment appealed from are erroneous. It is therefore ordered and decreed that the judgment appealed from be reversed, and it is now ordered that the plaintiff's demand be rejected, at her cost in both courts.

Succession of LLULA.

(*Supreme Court of Louisiana*. March 17, 1890.
43 La. Ann.)

APPEAL—FILING TRANSCRIPT—DISMISSAL.

1. The failure to file a transcript of appeal seasonably, on a regularly obtained and perfected appeal, is equivalent to an abandonment of the same, and warrants the dismissal of another similar appeal, subsequently obtained.

2. The fact that the original record was lost or mislaid is no justification for such failure.

3. On a proper showing, the appellant could have asked for and obtained an extension of time, which was not done. The omission implies negligence and fault on the part of appellants, and abandonment of the first appeal, which authorizes the dismissal of the second one.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; *RIGHTOR*, Judge.

X. S. Benedict, for appellant. *A. L. Tissot* and *H. P. Dart*, for appellee.

ON MOTION TO DISMISS.

BERMUDEZ, C. J. The motion charges that the appeal was taken after a previous one had been obtained, perfected, and abandoned. It appears that a devolving appeal was asked on December 5, 1889, returnable on the third Monday of the same month, and the bond required was furnished; that the transcript of appeal was not filed within the legal delay; that, after the return-day had gone by, the same party sought and obtained another

like appeal, on January 6, 1890, returnable on the third Monday of the same month, and that the proper bond was executed. Under this last appeal the transcript was filed here on January 17, 1890. The appellant claims that the motion should not prevail, and avers that, under the first appeal, the transcript was not filed here, because the original record, needed for transcription, could not be found in the clerk's office below; that the fact is that, during the time when it could have been copied, it was in the office of one of the counsel for appellee knowingly, who apologized for its having been there in his office, and offered a waiver, which afterwards was delivered. On the other hand, counsel for appellee deny having given any consent in the premises. Affidavits and counter-affidavits from the clerk, and the lawyers in the case, have been submitted. We ought not, perhaps, to have examined them, but, after doing so, we are unable to infer from them any justification of appellant's course, particularly as there existed a plain and adequate remedy at hand. If the transcript under the first appeal was not ready for filing here on the return-day, the appellant ought to have made in this court a showing of the loss, or mislaying of the original papers, and an extension of time would have been allowed. This was not done. The omission implies negligence on the part of the appellant, and an abandonment by her of the first appeal, which warrants the dismissal of the second one. Appeal dismissed.

Rehearing refused.

METROPOLITAN BANK V. BOUNY *et al.*
(*Supreme Court of Louisiana.* March 17, 1890.
42 La. Ann.)

NEGOTIABLE INSTRUMENTS—PURCHASERS AFTER MATURITY.

1. He who takes a note past due acquires it burdened with all the equities to which it is subject.

2. A note, paid by its drawer shortly after it was issued, which falls into the hands of a third party, who disposes of it after its maturity, passes incumbered with such equities, although it bears indorsements by such party that interest has been paid on it to certain dates.

3. In the absence of proof that the payment of the note was extended before maturity by consent of parties, the transferee cannot be protected.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

Buck, Dinkelspiel & Hart, for appellant.
Ames & Villeré, for appellees.

BERMUDEZ, C. J. This is a suit against the widow and heirs of E. Bouny to hold them liable on his note of \$3,000, secured by vendor's privilege and special mortgage, dated November 14, 1885, and payable one year after date. The defense is payment or compensation, in the alternative. From a judgment in favor of defendants, the plaintiff appeals.

The contention is that plaintiff acquired the note after its maturity, subject to the equities between the drawer and the transferring holder at the time, and that, as the note was paid by the drawer after it

was issued, or, if not so paid, was extinguished by compensation against the transferee to the bank, the note has no existence, and the plaintiff cannot recover.

On the 14th of November, 1885, Emile Bouny purchased from H. L. Casey the property described in the petition; the vendor being represented by his agent, Mrs. Leontine Strang, wife of E. J. Strang. The sale was made on credit; the purchaser furnishing a note of \$3,000, payable one year after date. On the day of the sale, Mrs. Strang received a check of Emile Bouny for \$3,000 in payment of said note on the property, and a check of \$105 in payment of some furniture sold to Bouny. On the same day, two checks of Emile Bouny—one for \$3,000, and one for \$105—were presented by Mrs. Strang to the Branch Depository of the State Bank, and same was certified. The testimony of the book-keeper of said bank shows that said checks were paid. The book-keeper of the Louisiana National Bank testifies that on the same day Mrs. Leontine Strang made a deposit of \$3,105. J. V. Charpentier was the clerk of Emile Bouny. On the 18th of June, 1888, after the maturity of said note, Charpentier pledged same to the plaintiffs. Charpentier, on the 4th of December, 1885, purchased Bouny's business for \$24,000, payable \$200 per month.

After the death of Bouny, his widow collected \$5,024.85 on his life insurance, deposited the money for safe-keeping or for investment with Charpentier, who gave her his note for a like amount. The note sued on bears two indorsements, showing "Interest paid up to 14th Nov., 1886," and "to 14th Nov., 1887," signed by J. V. Charpentier alone. There is nothing to show when those indorsements were made, and that they were authorized by Bouny, or any one representing him or his succession. Had it been proved that the payment of the note had been extended, by consent of parties, before its maturity, the plaintiff would be protected, as an innocent purchaser before maturity, against the defenses now set up; but, in the absence of such proof of extension by consent before dishonor, the plaintiff must be dealt with, under the well-established rule of law, as having acquired after dishonor, incumbered with the equities set up by the defendant, which therefore must prevail.

Judgment affirmed.

Rehearing refused.

STATE *ex rel.* POCHÉ V. JUDGE TWENTY-SIXTH JUDICIAL DISTRICT COURT.

(*Supreme Court of Louisiana.* March 17, 1890.
42 La. Ann.)

APPEAL—FINAL ORDER—RECUSATION OF JUDGE.

1. A judgment overruling the recusation of the regular judge of a court is not in its nature interlocutory, but final.

2. Such judgment can be suspensively appealed from.

(*Syllabus by the Court.*)

E. N. Lewis, for relator. *E. M. Pugh*, for respondent.

BERMUDEZ, C. J. This is an application for a *mandamus*. The complaint is that

the defendant judge refuses to grant a suspensive appeal from a decree rendered by him, as judge *ad hoc*, overruling a plea of recusation, on the ground of interest, of the judge of the twenty-second judicial district, in a case in which the relator is plaintiff, and which the respondent judge was called on by the recused judge to consider and determine. The averments are that the decree thus rendered is a final judgment, and that, if it be not such, but a mere interlocutory decree, it is one which, if executed, would cause irreparable injury. It is therefore concluded that, in either case, a suspensive appeal lies. The judge *ad hoc* returns that the suspensive appeal was denied, because the recusation, being in the nature of a plea to the jurisdiction, could give rise only to an interlocutory judgment, which could not work irreparable injury, for the reason that the right of the relator to appeal from the final judgment on the merits involves that of review of all interlocutory decrees rendered in the case, and that the relator's application should be denied. In order to determine properly the question thus presented, it is essential to ascertain the nature and character of the decree rendered. It is clear that the decree is either an interlocutory or a final adjudication. It cannot be both. It must be either. As it is not the former, it is the latter. The question raised by the plea of recusation strictly does not appertain to the controversy between the litigants, and its determination can have no bearing on the issues presented by them on the merits of the suit. It does not grow from those issues directly or indirectly, although it arises and is presented in the progress of the case. It is in the nature of a proceeding for contempt, which, although it be taken in the course of the suit, does not form part of it, and is altogether independent from it. In *re Wood*, 30 La. Ann. 672. An interlocutory judgment is one which does not decide on the merits. It is either ancillary to, or executory of, the final and complete adjudication of the case. Code Prac. art. 538. A final judgment is that by which the rights of the parties at issue on the merits of the suit are adjudicated upon, and which may acquire the force of *res adjudicata*. Id. art. 539; *Cary v. Richardson*, 35 La. Ann. 505. The matter at issue, on the plea of recusation, in no way relates to the persons of the litigants, or to any subject involved in the controversy between them. It affects, not the court, whose jurisdiction is not attacked, but the judge of the court whose competency is assailed on the ground of interest. Whether the plea is well or ill founded is a question which can in no manner influence the judgment on the merits of the litigation, or on any subject growing out of the differences of the parties touching the same.

There is but one question raised, and it concerns the qualification of the regular judge. A judgment on that issue cannot be interlocutory, for such judgment would imply a final judgment *in futuro*. As the question raised, when once decided, is no more to recur, it follows that the judgment on it would be and is a final judg-

ment on that issue. If it were an interlocutory decree, it would not be appealed from suspensively, for the reason that the execution of it would not work an irreparable injury; as, on an appeal from the final judgment in the case, the ruling on the question of recusation could be revised, and, if found erroneous, would be avoided, and the case remanded for other proceedings. *Fields v. Gagné*, 33 La. Ann. 339. From this stand-point, the anomalous, and to some extent apparently discordant, views expressed by the previous courts and the present one, on kindred questions can well be reconciled and harmonized. While we consider it unnecessary to illustrate and establish this conclusion, we think that it is proper to state that the decision of the old court in *Jarreau v. Choppin*, 6 La. 133, is not authority to show that the refusal of the judge in that suit to transfer the case to another judge, he and the parish judge having recused themselves as having been of counsel, was viewed as an interlocutory decree, from which a suspensive appeal could lie. It was an exceptional case. The judge had not arbitrarily refused to transfer, but had declined the demand, because there existed then no law authorizing it. The supreme court did not hold that it was an interlocutory decree. It considered, on the contrary, that it was a final judgment of which the party it aggrieved could complain, as its effect would be to suspend the litigation indefinitely. It thought that it was a judgment capable of working an injury, and that it could be reviewed on appeal. It declined to dismiss, and maintained the appeal, holding, on the merits, that the issue presented a *casus omisus*, and affirming, therefore, the judgment appealed from. The error of the district judge consists in assimilating that case to one in which a plea to the jurisdiction of the court is filed. In this case no judgment could be rendered dismissing the suit, because of the competency of the judge, while in the case stated that sort of judgment could be rendered. It is therefore ordered and decreed that the restraining order herein made *in limine* be maintained, and that the alternative *mandamus* issued be made peremptory, and that, accordingly, the suspensive appeal asked be granted by the respondent judge *ad hoc*, on appellant's complying with legal requirements. *Mandamus* peremptory.

POCHE, J., recuses himself.

KELLER v. SHELMIRE.

(Supreme Court of Louisiana. March 17, 1890.
42 La. Ann.)

BOUNDARIES—ESTABLISHMENT BY STATUTORY PROCEEDINGS.

1. Where the parties are owners of contiguous estates, and where the only question to be determined is the boundary between the two, the action is one of boundary, and regulated by the provisions of title 5, bk. 2, Rev. Civil Code.

2. In an action of boundary, questions of ownership are not in issue, unless founded on a prescription of 30 years, and titles are referred only to establish boundaries, and not as affecting ownership.

3. Where parties derive from a common author,

the elder title must be first satisfied, and, when that title conveys a fixed quantity of land, the holder is entitled to take such quantity.

4. When an owner sells from a larger tract a fixed quantity of land, to be cut off from one side by a line thereafter to be fixed, the fact that he subsequently sells a part of the same land to a third person does not destroy his obligation to give the first purchaser his quantity, and to so run the lines as to give such quantity.

(*Syllabus by the Court.*)

Read & Goodale, for appellant. *Keman & Taylor*, for appellee.

FENNER, J. Appeal from the district court for the parish of East Baton Rouge. Although the plaintiff makes some effort to invest this action with the characteristics of the action of jactitation under his petition, converted into the petitory action by the pleading of defendant, it is, in substance, nothing more nor less than an action of boundary regulated by title 5, bk. 2, of the Revised Civil Code. The parties are owners of contiguous estates. Neither questions the title of the other. The only difference between them is as to the proper boundary line between the two, and that is the only question to be settled in this suit. This eliminates all questions of title, of registry, and of prescription, except the single prescription of 30 years, which, though pleaded by plaintiff, has not a shadow of foundation. The question is to be decided according to the actual titles, which neither party is permitted to dispute. *Rev. Civil Code*, arts. 825, 841, 843, 845, 852; *Andrews v. Knox*, 10 La. Ann. 604. Plaintiff alleges that a certain hedge was fixed as a boundary line between two places by special covenant between antecedent owners, the authors of the respective titles of himself and defendant, which has ever since been recognized as the boundary. Defendant specially denies this averment, and makes the counter-allegation that the line claimed by him had been long established, and recognized by antecedent authors of the respective titles. Plaintiff adduces no serious evidence in support of the special covenant fixing the hedge as the boundary. The evidence in support of defendant's counter-averment is very much stronger. The judge appointed a sworn surveyor to fix the limits, under article 833 et seq. of the Code, whose report fixed the line claimed by defendant. This report, though opposed by plaintiff, was homologated by the judge who rendered judgment accordingly. The parties derived from a common author, who owned the whole property. Defendant's title is the more ancient, being derived from a sale, by the common author, of 550 acres from the eastern end of the Neville tract, the western boundary, (the line in dispute,) to begin at a beech tree on a line marked "T & R," on an antecedent plat, and to be thereafter run by a competent surveyor. Plaintiff's subsequent title begins by a subsequent sale from the same common author, which conveyed 550 acres, more or less, and declared its boundary on this side to be by the Macaulay tract, which is that now owned by defendant.

Under the foregoing statement, if it stood alone, there could be no difficulty, under the Code, in fixing the line. The de-

fendant having the elder title, and receiving a fixed quantity of land, articles 847 and 849 would conclusively require that his title should prevail, and that a line should be so run from the beech tree, fixed as the terminal point, in such direction as to give him 550 acres of land. The only complication is that, at the time of the sale by the common author to Macaulay, the former owned a tract of 20 acres, which, under the general description contained in the title, would have been included in the 550 acres sold. The tract was separated from the rest by a public road. A few months after the sale to Macaulay, the common author made a sale of these 20 acres to a third person, who and his successors have ever since held and possessed the same without dispute. This did not diminish the common author's obligation to give Macaulay the full extent of the 550 acres conveyed to him; and as the sale of the 20 acres took place long before the subsequent sale to plaintiff's author, and as he was under this obligation at the time of said sale, we think the sale of so many acres, more or less, bounded by the Macaulay tract, meant the boundary to which Macaulay was entitled under the above facts, and under the titles as they stood at that date, which showed sales of 550 acres to Macaulay, and of 20 acres to a third person. There is strong evidence in the record to show that this was the understanding of the adjacent proprietors, both before and after the sale to plaintiff's first separate author, who was himself an heir of the common author, and familiar with all the circumstances. The testimony of such respectable and intelligent witnesses as Mr. Robert T. Young, Mr. McHugh, Mr. Chance, Dr. Mills, and others, who were directly connected with the transactions from the beginning, strongly confirms this view, and establishes the line claimed by defendant, allowed by the surveyor, and approved by the judge. The line claimed by plaintiff would cut off from defendant, not only the 20 acres, but more than 80 additional acres; while the line claimed by defendant gives him only 550 48-100 acres; and the fact that several titles in defendant's chain give him precisely that excessive fraction is confirmatory proof that the line must have been so fixed as claimed. On the whole, we think the judgment conforms to both the law and justice of the case.

Judgment affirmed.

Rehearing refused.

STATE V. JOHNSON.

(*Supreme Court of Louisiana*. April 7, 1890.
43 La. Ann.)

INDICTMENT—RESISTING OFFICER.

An indictment, under a statute, must set forth the particular facts and circumstances which, under the terms of the statute, are essential to constitute the crime charged.

(*Syllabus by the Court.*)

Appeal from district court, parish of De Soto; HALL, Judge.

J. C. Pugh and *The Attorney General*, for the State. *C. W. Elam*, for appellee.

FENNER, J. Appeal from the district court for the parish of De Soto. The state appeals from a judgment quashing the indictment. The act No. 11 of 1882 defines and punishes the offense of resisting or assaulting an officer of the state "while serving, or attempting to serve or execute, the process, writ, or order of any court." The indictment charged accused with "assaulting" and with "resisting" an officer of the town of Mansfield designated as a "constable, marshal, and peace-officer," he "being then and there in due and the legal execution of said office." Leaving out of view the question as to whether the town officer is an "officer of the state," within the meaning of the statute, it is clear that the indictment is fatally defective in not charging that the officer assaulted and resisted was then "serving, or attempting to serve or execute, the process, writ, or order of some court." The averment that he was engaged in "due and legal execution of his office" might well be satisfied by his engagement in performing other duties thereof not connected with the service of any process of court. "The indictment," says Bishop, "ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy." In other words, it should distinctly specify everything which enters into the offense." 1 Bish. Crim. Proc. § 509. "An indictment under a statute ought, with certainty and precision, to charge defendant with having committed or omitted the acts under the circumstances and with the intent mentioned in the statute." State v. Stiles, 5 La. Ann. 324; State v. Sheppard, 33 La. Ann. 1216. The indictment here was fatally defective.

Judgment affirmed.

RENCH *et al.* v. KEENAN *et al.*

(Supreme Court of Louisiana. April 7, 1890.
42 La. Ann.)

RIGHTS OF SURETY—MORTGAGES—PAYMENT—APPLICATION.

1. Suretyship evidenced in writing must be enforced, in the absence of documentary proof or unequivocal oral testimony destructive of the contract.

2. Charges that the surety was induced, by fraudulent representations, to obligate himself, must be established by irrefutable affirmative proof implicating the creditor, to upturn the otherwise unequivocal and absolute agreement.

3. Proceeds of a judicial sale must be applied to the payment of mortgage claims according to their respective ranks, to be ascertained by the dates of registry.

4. A surety has the right to compel the creditor to credit his claim with amounts which he has received, but improperly applied.

ON REHEARING.

The failure of the owner of a note secured by vendor's privilege on certain lots to aver and enforce expressly, amounts to a waiver of the same, in an action brought by him on the same note secured by a different act on the same and other lots, when he alleges only the second act, and has all the lots sold *in globo*. In such a case it is impossible to discriminate what portion of the proceeds of sale could accrue to the note secured by vendor's privilege on part of the lots.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; D. C. MONROE, Judge.

Harry H. Hall, for appellant. W. S. Benedict and H. C. Cuy, for appellee.

BERMUDEZ, C. J. The object of this suit is to recover a judgment against Keenan & Slawson, as drawers of a mortgage note of \$8,100, with interest and attorney's fees, and against Patrick Egan, as surety, for the same amount. The plaintiffs seek to have annulled certain conveyances of real estate made by Egan with a view to place the same beyond the reach of his creditors, to several parties who were made defendants. From a judgment in favor of plaintiffs, less a credit of \$550, all the defendants, save Keenan & Slawson, have appealed. The defense of Egan is that he was induced by fraudulent representations, made by one of the plaintiffs, to become surety on the note, and that, if he fail in establishing this, the note ought to have been credited, so as to be reduced to \$1,175.28. The other defendants were condemned on interrogatories on facts and articles, which, remaining unanswered, were taken *pro confessis*; but practically they do not defend themselves, their fate being linked with Egan's. There can be no doubt that Egan bound himself as surety on the note of \$8,100 sued on, but the conflicting proof adduced by him to show that he consented so to be on fraudulent representations of one of the plaintiffs was not deemed sufficient by the district judge to relieve him. In such cases, the best proof should be a written instrument, and, in default, evidence of equal import and efficacy, to say the least. It may be that Egan was induced as he says he was; but, as he bound himself, so must he remain, unless he shows unequivocally that he never was so, under circumstances which bind the party seeking to hold him liable.

The only serious question in the case relates to the credit claimed by Egan. The record shows that on June 14, 1884, Keenan & Slawson issued to the plaintiffs four notes, two for \$3,000 each, one for \$4,000, and another for \$8,100, payable at different dates, and secured by mortgage on ten certain improved lots of ground in New Orleans, the first three notes at the time, and the last note subsequently, indorsed by Patrick Egan as surety; the act of mortgage dated June 14, 1884, being recorded in the mortgage office on June 16th following. The two notes of \$3,000 each were subsequently paid. In August, 1887, proceedings *via executiva* were brought for the use of plaintiffs by Benedict in two notes of Keenan & Slawson, one for \$3,250, and another for \$1,390, claimed by him to be secured by mortgage on the same ten lots by act dated June 14, 1884, the same being recorded in the mortgage office three days later, *i. e.*, on the 17th. The lots were seized and sold, realizing \$15,000, which were distributed as follows:

City and state taxes.....	\$ 2,388 55
A vendor's note in capital, interest, etc.	1,170 55
Another like note.....	1,096 55
The notes sued on, \$3,250 and \$1,390, and interest.....	5,755 07
The \$4,000 held by plaintiff was credited with the difference.....	4,589 20
	\$15,000 01

There is no dispute by Egan of the propriety of the payment of the taxes of the vendor's notes, amounting, together, to \$4,655.65; but he contends that the balance of the price of adjudication, \$10,344.35, ought not to have been distributed as it was. He insists that this amount should have been prorated between the two notes of \$400 and \$8,100 held by Reusch & Co.; not a particle thereof to accrue to Benedict, as holder of the two notes of \$3,250 and \$1,390, sued on by him, for the reason that the mortgage by which these two notes were secured was inferior in rank to that by which the other notes of \$4,000 and \$8,100 were secured; and that, had this been done, this last note would have been reduced by \$6,924.74. In this he is undoubtedly correct. The act securing the Benedict notes was recorded on the 17th of June, 1884, while that securing the notes of Reusch & Co., one for \$4,000, and another for \$8,100, was recorded on June 16, 1884, one day previously. The proceeds of the sale ought to have been applied to the payment of the mortgage claims, according to their respective rank, to be ascertained by the dates of registry. Egan has a right to compel plaintiffs to properly credit the notes sued on. It is therefore ordered and decreed that the judgment appealed from be amended by reducing it to \$1,175.28, with interest as allowed, with 5 per cent. attorney's fees thereon and costs, and that, thus amended, said judgment be affirmed, at plaintiff's costs.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. While it is avowed that the note for \$1,390 ought not to have participated in the distribution of the proceeds of sale, it is pressed that the court erred in not allowing to the note of \$3,250 its share of the same. The pretension is based on the averment that the payment of this note was secured by vendor's privilege and special mortgage, on June 14, 1884, on five of the ten lots, and that the act was recorded on June 16, 1884. This act is not in the transcript. The certificate of mortgage, to which reference is made, does not identify the note, and supply the omission to establish either of those two things. When suit, *via executiva*, was brought to enforce payment of this note, and of the \$1,390 note, no allusion whatever was made to the vendor's privilege, and to the mortgage on the five lots. The two notes were sued on as two simple ordinary mortgage notes, secured on the ten lots, and the act of mortgage, showing the fact, was attached to the petition, ending with a certificate from the recorder of mortgages, showing its registry, not on the 16th, but on the 17th, of June, 1884. If this note was secured, as is now urged, the fact ought to have been alleged and proved, and prayer made that the privilege be enforced against the five lots by selling them separately, but nothing of the kind was done. No averment was made, and the ten lots were sold in block, *in globo*. Surely, if the owners of the notes had the rights presently claimed, things have been put by them in such a condition that it is impossible to discriminate what

portion of the proceeds should accrue to them. They have no right to complain. Rehearing refused.

CONERY *et al.* v. NEW ORLEANS WATER-WORKS Co. *et al.*

(*Supreme Court of Louisiana.* April 7, 1890.
43 La. Ann.)

RES ADJUDICATA—SECOND APPEAL.

1. A second appeal cannot be allowed from a judgment which had once been appealed in its entirety, and disposed of in all particulars and in all its legal effects and bearings.

2. In an appeal taken by motion in open court, all parties to the suit who are not appellants are appellees, and all are concluded by the judgment rendered on appeal.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; **MONROE**, Judge.

J. R. Beckwith and **Harry H. Hall**, for New Orleans Water-Works Co. **Carleton Hunt** and **W. B. Sommerville**, for City of New Orleans, appellant. **T. J. Semner**, **R. H. Brown**, **E. H. Farrar**, **E. D. White**, and **C. E. Schmidt**, for appellees.

ON MOTION TO DISMISS.

POCHÉ, J. A proper understanding of the grounds of the motion will be facilitated by a reference to the following pre-existing proceedings and incidents: The object of the original suit was to judicially annul a contract entered into in October, 1884, between the city of New Orleans and the water-works company touching the water supply to the city. In that suit the city and the company had been made co-defendants, and at first the city pleaded by exceptions and answer, praying for judgment against plaintiffs; its original answer having been filed in May, 1887. But subsequently the city shifted its position, and by means of an amended answer filed in November, 1888, it joined its litigious fate to that of plaintiffs, and it prayed for the nullity of the contract originally assailed by plaintiffs alone. In that answer the city prayed for leave "to join in the demand of plaintiffs herein; that the New Orleans Water-Works Company be cited according to law; and, after due proceedings, that there be judgment declaring ordinance No. 909, C. S., adopted by the late council of the city of New Orleans on the 23d of September, 1884, and signed and approved by the late mayor on the 26th day of September, 1884, and the alleged contract entered into before **Jos. D. Taylor**, notary, on the 3d of October, 1884, signed by **J. V. Guillotte**, late mayor, on behalf of the city of New Orleans, and **Albert Baldwin**, president, on behalf of the New Orleans Water-Works Company, null, void, and of no effect, and not binding in any manner on the city of New Orleans." By a decree rendered in the district court on the 6th of February, 1889, the contract between the city of New Orleans and the water-works company was declared null, void, and of no binding effect on the city of New Orleans. One of the clauses of the decree reads as follows: "It is ordered, adjudged, and decreed that the notarial contract entered into between the city of New Orleans and the New Orleans Water-Works Company on October 3d, 1884, be-

fore Jos. D. Taylor, and also ordinance 909, Council Series, adopted September 23d, 1884, on which the said contract purports to have been made, and also Act No. 56 of the Acts of the Legislature of the session of 1884, the provisions of which the said ordinance No. 909 purports to execute, are unconstitutional, null, void, and of no effect or validity." On appeal taken from that judgment to this court, the following decree was rendered on the 22d of May, 1889: "It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed and annulled; and it is now ordered that plaintiff's demand be rejected, the injunction issued herein dissolved and set aside, and the plaintiffs, tax-payers, pay costs of both courts." From that judgment writs of error were sued out, and lodged in the supreme court of the United States, by both the original plaintiffs, E. Conery, Jr., and others, and the city of New Orleans. Now, on the 5th of March last past there was filed in this court an appeal taken in the same case, and from the same judgment rendered in the district court on the 6th of February, 1889, by the city of New Orleans, by its mayor and by its treasurer and its comptroller, all separately complaining that there is error to the prejudice of the city of New Orleans in the judgment thus rendered and thus appealed from. The water-works company moves to dismiss this appeal on the grounds, substantially, that the appeal which has been disposed of by this court in the case had been taken from the entire judgment of the district court; that it had been taken by motion in open court, thus making all parties to that judgment parties to the appeal; that the city, in whose favor the judgment had been rendered, in fact and in law was an appellee before this court, and, as such, was bound by the decree here rendered, which disposed of all the issues covered by the judgment of the district court; and that the city is therefore stripped in law of the right of now appealing from said judgment, and that the present is really a second appeal from the same judgment.

The only difficulty in the case is to discover or ascertain the real nature of the relief which the city now seeks at the hands of this court, and to determine its true character as a litigant in the case. In the incipency of the contest the city was made a party defendant. It accepted the position at first, and it pleaded as a co-defendant with the water-works company. Later on it amended, or rather reversed and overturned, its former pleadings, and its prayer was for judgment in favor of the original plaintiffs, almost in the very terms in which the judgment of the district court was subsequently rendered. It stands to reason that the city did not appeal from that judgment; and on the trial in this court she assumed the position of an appellee, contending for the affirmance of the judgment there on appeal. This position was followed up by a brief of her attorney strongly advocating and supporting an application for a rehearing on the decree rendered by this court, which had reversed the judgment

of the district court; and by suing out a writ of error for the purpose of a reversal of the judgment by this court. Throughout the whole trial here she was considered and treated as a plaintiff and as an appellee. The following statement is to be found in one of the opinions read in the case: "At the incipency of the litigation the city was in fact and in law a party defendant; but in the progress of the litigation the city shifted her position, and now she has practically made herself a party plaintiff." But apparently the present proceedings present a new shifting of scenes; and from the petitions of appeal filed by the city, and by her above-named officers, it appears that she is now dissatisfied with or aggrieved by the judgment originally rendered in her favor, and almost in the very terms of the prayer of her amended answer. In this court no assignment of errors or other pleadings have been filed suggestive of the way in which the city has been aggrieved by the judgment which she now seeks to have reviewed. Recourse must therefore be had to the brief of her attorneys; and that conveys the information that the error of the district judge consisted in ruling out evidence which the city had offered below in support of the contention urged by the original plaintiffs. No suggestion is made anywhere that the judgment which was reviewed and reversed by this court was erroneous in any particular. The city has, therefore, not yet concluded to reshift her position of party plaintiff, and to resume that of a co-defendant, dissatisfied with the judgment rendered in her favor in the district court. The following statement in the brief of her attorneys contains the pith of her complaint, and suggests the only error which she desires to have corrected: "On January 10, 1889, the city of New Orleans offered evidence in support of its supplemental and amended answer. The same was objected to by Conery et al., and by the water-works company. The objections were sustained. Counsel for the city reserved the point in lieu of a bill of exceptions to the ruling of the court. *This ruling is to be submitted on this appeal, for reversal or affirmance.*" (Italics are ours.) The city is therefore in the attitude of a litigant who has won his suit below, where he has obtained all the relief which he then sought, and who now proposes to appeal for the purpose of correcting an alleged erroneous ruling made by the judge during the progress of the trial. The present appeal is avowedly not from the judgment rendered below, but simply from a ruling covered by a bill of exceptions. The appeal is not even from an interlocutory decree or judgment. And this attitude is taken in the face of an appeal previously brought up from the only final judgment rendered in the case, in which the city, as an appellee, could have suggested and obtained a review of the error now complained of. It is but natural that the city, who then stood upon a judgment totally in her favor, had no mouth for complaint, and would not have ventured to risk her dearly-bought victory by a remanding of the cause. She did not then, and she does

not now, complain of any error in the judgment which she seeks to bring up on appeal; and hence her position is still more untenable than that of the appellee contemplated by article 889 of the Code of Practice, which reads: "But if the appellee, on the appeal of the other party, neglect to pray that the judgment be reversed on those points which are prejudicial to him, he shall not afterwards be allowed to appeal, but the judgment shall remain irrevocable for or against him." In this case, the city, originally an appellee, has never suggested that the judgment rendered below was prejudicial to her on any point; and it must be borne in mind that she could not, from the simple fact that the decree was in her favor on every issue presented, and on every element of relief prayed for, in her amended answer, by which she had practically made herself a party plaintiff. Hence the city cannot fortify her position by the two decisions which she invokes in support of her right of appeal at this time.

In the case of *Poeyfarre v. Delor*, 6 Mart. (La.) 11, the defendant had appealed from a judgment condemning him to deliver possession to plaintiff of a house and lot, and the judgment was affirmed. To his demand for possession, plaintiff had joined a claim for damages, which had been ignored in the original judgment. After the affirmance of the judgment in his favor on the question of possession, plaintiff appealed from that part of the judgment which ignored his claim for damages. The right of appeal was recognized on the distinctive ground that that part or feature of the judgment had not been appealed from. Had plaintiff failed to appeal, the silence of the judgment on the question would, in law, have been equal to a rejection of his claim; and that judgment, becoming final, would have been a bar to a future action for the same damages. *Villars v. Falvre*, 36 La. Ann. 398, and authorities there cited. Hence the court correctly held that his only remedy was by appeal, a right which could not be affected by a previous appeal from a different and distinct feature of the judgment. The other case, that of *Bowman v. Kaufman*, 30 La. Ann. 1023, has no bearing on the question at issue, as appears from the following syllabus: "An appeal taken separately by one of two defendants, who have been condemned *in solido*, will not prevent the other from taking an appeal at a subsequent time within the legal delay."

The foregoing considerations are predicated on the hypothesis that in the previous appeal, in which the entire judgment was brought up, and was reversed *in toto* and in every particular, the city was before this court as an appellee, in whose favor, adversely to the appellant, the judgment on appeal had been rendered, and, as such, deeply interested in, and actively contending for, its affirmance. But that fact is now seriously denied by the city attorney, who says in his brief: "The city was not before the court, except that its attorney was heard in argument as any *amicus curiæ* would undoubtedly have been, and the interests of the city were in no manner considered and passed upon."

If this be true, by what right did the city obtain its writ of error before the supreme court of the United States? How could she complain of a judgment in which no interests of hers were considered and passed upon? But those questions are answered by the city attorney himself in the following passage taken from his brief, addressed to this court in support of the judgment then on appeal, not acting as an *amicus curiæ*, appearing therein with the leave and courtesy of the court, but presented as a matter of right, and signed in his official capacity in behalf of the city, in an earnest effort to preserve all the rights flowing from the judgment under discussion. The same counsel then said: "But the case at bar is in no other way whatever the case of *Conery et al.*, but on the contrary that of the city itself, of which they are only, like other people, individual citizens." "When, instead of associating itself with the water-works company, the city, on the contrary, denounced it; and when, instead of assuming the situation of co-defendant on the record with the company, the city assailed the action of the same as fraudulent and oppressive, and that of the late city government as *ultra vires* and collusive,—the functions in the suit, as actors or plaintiffs of record, assumed by *Conery et al.*, were clearly no longer demanded of them, and evidently passed to the city as the true plaintiff, whose position, obscured, as it had undoubtedly been, by the course of the late counsel for a time, is no longer now to be questioned. If these views are insisted upon here, it is because of their importance. It would be unworthy of the city to relinquish them; it would be contrary to good morals and correct public policy to do so; and it would be to diminish, if not to surrender, the just strength and character of the decision of the court in the case of *Handy*." And in an able and elaborate brief for rehearing in the same appeal, also signed in his official capacity, the learned and zealous city attorney concluded with the following earnest appeal for redress on behalf of the city: "In view of the premises, of the public importance of this litigation, of the instructions of the council that it should be pursued in behalf of the city, of the great pecuniary interests involved, of the sincere differences of opinion which have been developed in relation to it, of the close division in the court itself, and, finally, of the rights of the entire population of the metropolis which are involved, it is submitted that the granting of a rehearing will be for the benefit of justice, and for the general welfare. Respectfully submitted, [Signed] W. B. SOMMERVILLE, Assistant City Attorney. CARLETON HUNT, City Attorney."

The city was a party to the litigation and to the decree rendered. On appeal, she was an appellee, and, as such, was directly affected by the judgment rendered here, which reversed the judgment on appeal in all its parts, in every possible bearing, and in every effect which it could legally and possibly ever have. Under the showing made, these propositions rest on safe foundations of elementary law, which we

may be spared the trouble of quoting, even in this appeal, which stands without a precedent in our jurisprudence. The attempt made in the case of *Lacroix v. Menard*, 7 Mart. (N. S.) 345, was not fraught with as much difficulty on the part of the appellant as is offered in the motion now under discussion. The effort to bring up a second appeal from the same judgment was made in behalf of minors who were not parties to the proceedings. The judge *a quo*, not seeing his way clear through the venture, declined the order of appeal; and the would-be appellants sought the aid of the supreme court, where they met with no better success. Among other things, the court said: "This application, in truth, is to obtain an appeal from our judgment; not from that of the court which decided the cause in the first instance. We are of opinion we have no power to reverse our judgments in the way attempted here." It is clear that the language there used may with perfect propriety be applied to the effort now under discussion. See, also, *State v. Judge*, 12 Rob. (La.) 320; *Gillaspie v. Scott*, 32 La. Ann. 767. It is suggested by the city attorney that in the supreme court of the United States, in the matter of the writ of error herein referred to, counsel for the water-works company have sought, in certain pleadings, to take advantage of the failure of the city to have made herself an appellant to the appeal before this court, and that the present appeal becomes necessary for the proper protection of the city's rights before that exalted tribunal. With such a consideration we can have no possible concern; and we have not the power, and much less the disposition, to take cognizance of, or to interfere with, proceedings had or pending before that court. As suggested by the city attorney himself, "the supreme court alone will necessarily have to determine the effect of the appeal before it." But we must, and we do, take cognizance of all proceedings which occur in this court; and we find from our minutes of April 8, 1889, that on the appeal in this case argument was heard from "Carleton Hunt, Esq., on behalf of the city;" and from other records we find that on April 9th the city attorney filed in the same case a "brief for the city of New Orleans," and that on the 18th of November the same counsel filed in the same case the "brief of the city of New Orleans for a rehearing." From all of which we conclude, and we hold, that the city has had its day in court in this case, and that her present position is as untenable as it is adventurous and unprecedented. Of course, all considerations which go to the defeat of the right of the appeal of the city are equally fatal to the experiment made by its mayor and by its treasurer and its comptroller. It is therefore ordered that the present appeal be dismissed at appellants' costs.

HODGE v. STATE.

(Supreme Court of Florida. June 7, 1890.)

MURDER — INDICTMENT — EVIDENCE — INSANITY — WITNESS — IMPEACHMENT.

1. An indictment will not be quashed because it does not give the dimensions of a wound; nor v.780.no.22—38

will an indictment in a capital case be quashed where it charges that the accused, with an assault, etc., "with force and arms, at," "in and upon one M., feloniously, willfully, of his malice aforethought, and from a premeditated design to effect the death of M.," upon the ground "that the indictment charges the accused with both murder at the common law and under the statute." The words "feloniously, willfully, of his malice aforethought," may, if objectionable, be treated as surplusage.

2. A venire man stated that he had no bias against the accused, whereupon counsel for accused asked for reasonable time to procure witnesses to show the bias of the juror, but without stating how long it would require to procure such witnesses, their residence, or the facts to be proved by them. *Held*, that there was no error in refusing the request made by counsel for defendant.

3. An assignment of error which is so general and vague that the appellate court is in doubt as to what is meant by it will not be considered.

4. It is not error for the trial judge to propound leading questions to witnesses of tender years for the purpose of ascertaining whether or not the witnesses understand the obligations of an oath, and an objection to this mode of examination of the witnesses is frivolous.

5. Evidence was introduced to prove threats of the prisoner "to kill a man before sundown" on the day M. was killed. *Held* to be a matter to be given such weight by the jury as they, under all the circumstances, think it entitled to.

6. Continuous threats made by the prisoner against the deceased, continuing for several months down to within three weeks of the homicide, were properly admitted in evidence.

7. An objection that the court erred in overruling the objections to questions put to F. is too vague. The questions, and the objections thereto, must be pointed out; otherwise they will not be considered by the appellate court.

8. A witness was asked his conclusions or understanding of the conduct and intentions of the accused. *Held*, that the question was properly excluded, and that the witness should have been questioned as to the acts, etc., of the accused, leaving the jury to draw their conclusions therefrom as to his mental condition.

9. When a defendant brings himself within the rule in introducing evidence for the purpose of impeaching the credibility of a witness, it is error to exclude such evidence.

10. When witnesses for the defense were introduced, they were cautioned by the state attorney to tell the truth, and nothing but the truth. *Held*, that the state attorney had no authority to thus caution the witnesses, and that such remarks had a tendency to confuse witnesses, and to cast suspicion upon their evidence.

11. Upon the subject of insanity the trial judge charged the jury that, "when the defense of insanity is set up as an excuse for crime, burden of proof is upon the person alleging it, and he must prove it to the satisfaction of the jury, beyond a reasonable doubt; otherwise the presumption of the sanity of the prisoner will remain in force." *Held* to be error. When the defense of insanity is relied upon, and evidence is introduced which tends to overthrow the presumption of sanity, if, upon the whole evidence, the jury entertain a reasonable doubt of the sanity of the prisoner, they must acquit, regardless of whether it be adduced by the prosecution or the defendant, and that the accused is not required to establish his insanity beyond a reasonable doubt. But the jury are not to acquit the prisoner upon any fanciful ground that, though they believe he was sane at the time the act was committed, yet, as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal.

(Syllabus by the Court.)

Miller & Spencer, for plaintiff in error.
William B. Lamar, Atty. Gen., for defendant in error.

MITCHELL, J. Writ of error to the circuit court of Marion county.

On the 15th day of January, 1888, Hodge, the plaintiff in error, was convicted in the circuit court of Marion county of murdering his brother-in-law, Jesse J. Marlow, by shooting. Motions were made for new trial and in arrest of judgment, which motions were overruled, the accused sentenced to the penitentiary for life, and the cause comes before this court upon writ of error.

The first error assigned is that the court refused to quash the indictment. One of the grounds urged for quashing the indictment was that it did not give the dimensions of the wound which it is alleged killed Marlow; and the case of *Keech v. State*, 15 Fla. 608, and *Bishop's Criminal Procedure*, are cited as authorities to support this proposition. This objection is not well taken. In the *Keech Case*, Judge RANDALL, for whom we have the highest respect, in speaking for the court, says: "The dimensions of the wound, if it be an incised wound, are required to be stated by most of the authorities." We cannot give our assent to this conclusion. While saying that most of the authorities require such description of the wound when it is an incised wound, no authorities are cited in support of the proposition; and, upon examination of the subject, we find that the converse of the proposition is true, and that the decision in the *Keech Case* is in conflict with the great current of authorities, and in fact we have not been able to find any late case that is not in conflict with the decision in that case. The dimensions of a wound are not required to be stated in the indictment in any case. 2 Bish. Crim. Proc. § 518 et seq., and cases there cited; *Heard, Crim. Law*, 682; *Com. v. Woodward*, 102 Mass. 159, and cases cited; *Moore v. State*, 15 Tex. App. 1; *People v. Steventon*, 9 Cal. 273; *State v. Conley*, 39 Me. 78; *Rex v. Tomlinson*, 6 Car. & P. 370; *Dias v. State*, 7 Blackf. 20; *Lazier v. Com.*, 10 Grat. 708.

Another reason urged for quashing the indictment is that it charges the accused with both murder at the common law and under the statute. The indictment charges that the defendant, on, etc., "with force and arms, at," etc., "in and upon one Jesse J. Marlow, feloniously, willfully, of his malice aforethought, and from a premeditated design to effect the death of the said Jesse J. Marlow," etc. The statutory offense is correctly charged in the indictment, and we can see no objection to it; but, if the words objected to, "feloniously, willfully, of his malice aforethought," are not necessarily implied in those defining "murder" under the statute, they may, without the least prejudice to the accused, be treated as surplusage. But, as before stated, we can see no valid objection to the indictment upon the grounds urged by counsel for the accused, nor upon any other grounds. The conclusion we have come to in this respect is not in conflict with either the case of *Bird v. State*, 18 Fla. 493, or that of *Denham v. State*, 22 Fla. 664. The other grounds of the motion were properly overruled.

The third error assigned is that the court erred in overruling the challenge of the defendant to the *venire* men J. L. Miller and L. Bryant. The *venire* man Miller

stated that he had no bias against the accused, whereupon counsel asked for reasonable time to procure witnesses to show the bias of the juror, but without stating how long it would require to procure such witnesses, their residence, or the facts to be proved by them, thus showing an attempt to delay the trial of the cause without giving sufficient reasons therefor. The objection to the *venire* man Bryant was that he was summoned by Ferguson, a state witness; but the objection was not well taken, because each of the jurors summoned by Ferguson stated on oath that Ferguson had not spoken to them about the case of *State v. Hodge*, and the list of jurors summoned by Ferguson was furnished him by the sheriff, thus leaving no discretion to Ferguson whereby he could summon jurors prejudiced against the accused. The objection, under the circumstances, was frivolous.

The fourth error assigned is that the court erred in admitting the testimony of Dr. S. H. Blitch; but, as to how the court erred, the record does not show, only that the indictment did not give the dimensions of the wound.

The fifth error assigned is that the court erred in admitting the testimony of each of the other state witnesses, which is shown as objected to by the defendant. This objection is too general. It may apply to all or any two of the witnesses, leaving it for the court to learn, as best it can from the very voluminous and imperfect record before it, as to what evidence was admitted over the objection of the prisoner.

The sixth error assigned is that the court erred in asking leading questions of the witnesses Francis Johnson and Enoch James, and in holding that they were competent to testify. This objection was not well taken. The record shows that both these witnesses were of tender years, and that the questions propounded to them by the court were for the purpose of ascertaining whether or not they understood the obligations of an oath; and, their answers to the questions thus propounded to them showing that they each understood such obligation, there was no error in declaring them competent, and allowing them to testify. The objection to the mode of the examination of the witnesses, and to their being allowed to testify, was wholly frivolous.

The seventh error assigned is that the court erred in refusing to strike out the testimony of Enoch James as to the threats of Hodge. This witness, among other things, testified that, on the morning Marlow was killed, he saw the defendant not far from where Marlow lived, and that Hodge said that he was going to kill a man before sundown. He was cursing. "He did not call any name. He had his pistol. He was waving it over his head." We can see no objection to this testimony. This was a matter for the jury, under all the circumstances, to give such weight as they saw proper.

The eighth error assigned is that the court erred in admitting the threats testified to by Elijah Ferguson, and in overruling certain questions of defendant's counsel,

shown in the record, to said witness. There was no error in overruling the objection to the evidence of this witness. The record shows that Marlow was killed June 3, 1888, and the witness states that he had several conversations with Hodge about Marlow in January and February, 1888; the conversations being about some money Hodge claimed Marlow owed him, and about family troubles between himself and Marlow. In January he threatened to kill him. That he heard Hodge say at his (witness') table, in January, that he would kill Marlow. Could not tell how the conversation started, but thought by Hodge talking about his wife. That Hodge seemed to think that Marlow was trying to keep them apart, and that he went so far as to say he would kill the whole race of Marlows and Robinsons. Witness further stated: "Well, I think he said he was a good man to do with. The conversation took place in January, mostly at my house. Me and him was working together sometimes. We would talk about it very frequently. Yes, talking about killing Marlow, about his wife, and so on. Hodge was living with me in January. He thought the people, the Marlows, were interfering with his wife. I had a conversation with him in February, something of the same thing. It was about his wife. He made threats in February. He said, if he didn't quit bothering him and his wife, he would kill him. He said that Marlow was trying to keep his wife from going back to him. Jesse Marlow, yes, the deceased man. I heard Hodge express himself again when in Ocala. The time and circumstances,—I think it was about the 11th day of May, 1888. John Lang, Hodge, and myself were walking across the street here in Ocala. As we were coming across the street, we saw Jesse Marlow and his wife. She had been up to see Hodge's wife, and he says: 'There is that d—n rascal now. He has been up there interfering between me and my wife. If he has, I will kill him.' * * *" This evidence shows continuous threats made by the accused against the deceased for several months down to within three weeks of Marlow's death, and it was properly admitted for the purpose of showing the *animus* of the accused at the time of the commission of the act. Such evidence is always allowed to go to the jury. Its weight is for their consideration. *Dixon v. State*, 18 Fla. 631. The remainder of the eighth error assigned we will not consider, because it is so vague and general that the entire evidence of the witness would have to be looked to and examined to determine what is meant by this part of the assignment. If attorneys have errors they rely upon, they should point them out specifically; otherwise they will not be considered here.

The ninth error assigned is that "the court erred in overruling defendant's objection to the questions put to said Ferguson." What questions does this assignment refer to? If they are in the record, the court is required to hunt them up, instead of the attorneys pointing them out. They, if they exist, will not be con-

sidered. These observations apply also to the tenth error assigned.

The eleventh error assigned is that the court erred in sustaining the objections of the state attorney to the evidence of the witness Freymouth, and in refusing to allow the questions asked him by the attorneys for the defense to be answered. This witness was asked his conclusions or understandings of the conduct and intentions of the accused, instead of being questioned as to his acts, etc., leaving the jury to draw therefrom their conclusions as to his mental condition. The evidence was properly excluded. *Id.* 636.

The twelfth error assigned is that "the court erred in allowing the state attorney to interrupt the witnesses Freymouth and Stephens, and to examine him as to his means of knowledge of the reputation of John Q. A. Lang." We cannot tell from this language as to which of the witnesses it applies, but it makes no difference. The examination was rather out of line in such cases, but it was only for the purpose of testing the knowledge of the witness or witnesses before he or they were allowed to testify, and the accused was not injured by the examination as it was conducted.

The thirteenth error assigned is that the court erred in refusing to permit Freymouth and Stephens to testify as to the reputation of John Q. A. Lang among his neighbors for truth and veracity. The defendant brought himself within the rule in introducing evidence for the purpose of impeaching the credibility of Lang, and the court erred in excluding the evidence so offered for that purpose.

The fourteenth error assigned is that the court erred in permitting the state attorney to make the remarks set up in the twenty-fifth exception. The record shows that, when witnesses were introduced for the defense, the state attorney cautioned them to tell the truth, and nothing but the truth. The law confers no such authority upon a state attorney, and such remarks are calculated to confuse witnesses and to cast suspicion on their evidence.

The fifteenth error assigned is that the court erred in overruling the defendant's objections to the questions asked by the state attorney of J. J. Hodge. This is too general. The questions should have been pointed out. And the same applies to the sixteenth assignment.

The nineteenth assignment is that the court erred in its general charge to the jury, in giving the several charges then and there excepted to, as shown by the record. The trial judge charged the jury upon the question of insanity as follows: "As insanity is set up in the prisoner's defense, it is proper that I should instruct you as to the law on that subject; and I charge you that it is the law that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary shall be proved to the satisfaction of the jury, and, to establish the defense of insanity, it must be proved that, at the time of committing the act, the prisoner was laboring under such a defect of reason, from disease

of the mind, as not to know the nature and quality of the act he was doing, or as not to know what he was doing was wrong. The proof of insanity devolves upon the prisoner. In other words, when the defense of insanity is set up as an excuse for crime, burden of proof is upon the person alleging it, and he must prove it to the satisfaction of the jury, beyond a reasonable doubt; otherwise the presumption of the sanity of the prisoner will remain in force."

"I further charge you that, if you are satisfied from the evidence that, at the time of killing of Jesse J. Marlow, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, and as not to know what he was doing was wrong, then you must acquit him; and if you are satisfied from the evidence, beyond a reasonable doubt, that, at the time of the killing, he was not laboring under such a defect of reason, from disease of mind, as prevented him from knowing the nature and quality of the act he was doing when he killed the deceased, and as prevented him from knowing that what he was doing was wrong at the time of the killing, and if you are satisfied from the evidence that he did kill the deceased from a premeditated design to effect the death of the deceased, then you must find him guilty. And the court charges you that you must look to all the evidence in the case relating to alleged insanity of the prisoner in order to arrive at a safe and just conclusion in regard to the question of his insanity at the time of the killing; and, if you are satisfied beyond a reasonable doubt that the prisoner was insane at the time of the killing, you must acquit him."

This part of the charge was duly excepted to, and counsel for the plaintiff in error contend that it was erroneous, and cite the following authorities in support of the proposition: *Hopps v. People*, 31 Ill. 385; *Chase v. People*, 40 Ill. 352; *Polk v. State*, 19 Ind. 170; *Stevens v. State*, 31 Ind. 485; *Greenley v. State*, 60 Ind. 141; *Gueltig v. State*, 66 Ind. 94; *State v. Reddick*, 7 Kan. 144; *State v. Mahn*, 25 Kan. 182; *People v. Garbutt*, 17 Mich. 9; *Cunningham v. State*, 56 Miss. 269; *Newcomb v. State*, 37 Miss. 383; *Russell v. State*, 53 Miss. 367; *Wright v. People*, 4 Neb. 409; *Hawe v. State*, 11 Neb. 537, 10 N. W. Rep. 452; *State v. Bartlett*, 43 N. H. 224; *State v. Jones*, 50 N. H. 369; *State v. Pike*, 49 N. H. 399.

All the courts hold that the legal presumption is that every man is sane until the contrary is proved; but they differ as to whether this presumption is to be rebutted by evidence showing beyond a reasonable doubt that the prisoner was insane at the time the act was committed, or whether a preponderance of the evidence is required, or whether the burden is not shifted from the prisoner to the state whenever there is evidence introduced tending to establish the insanity of the prisoner.

The rule of evidence contended for in behalf of the accused is that when the defense of insanity is relied upon, and evidence is introduced which tends to over-

throw the presumption of sanity, if upon the whole evidence the jury entertain a reasonable doubt of his sanity, they must acquit, regardless of whether it be adduced by the prosecution or the defendant, and that the accused is not required to establish his insanity beyond a reasonable doubt; and in this we think they are correct, and that the charge of the trial judge, that the accused was required to prove his insanity beyond a reasonable doubt, was erroneous. In addition to the authorities cited upon this subject by plaintiff in error, see, also, *Wagner v. People*, 41 N. Y. 684; *State v. Crawford*, 11 Kan. 32; *Boswell v. Com.*, 20 Grat. 860; *State v. Marler*, 2 Ala. 43; *People v. McCann*, 16 N. Y. 58; *State v. Felter*, 32 Iowa, 49; *Meyers v. Com.*, 83 Pa. St. 131; *State v. Smith*, 53 Mo. 267; *People v. McDonell*, 47 Cal. 134; *O'Connell v. People*, 87 N. Y. 377; *Dacey v. People*, 116 Ill. 555, 6 N. E. Rep. 165. *Contra*, (authorities cited by the attorney general:) *Reg. v. Stokes*, 3 Car. & K. 188; *State v. Stark*, 1 Strob. 479; *State v. Huting*, 21 Mo. 476, 477; *People v. Meyers*, 20 Cal. 518; *State v. Spencer*, 21 N. J. Law, 202. The subject of insanity has given the courts much trouble. It is a subject upon which scientific experts—men who have made the subject a life-time study—differ widely in the conclusions they arrive at, from the actions of persons, as to whether they are sane or insane. One set of such experts, after hearing all the evidence in a case, will give it as their opinion that a certain person is insane, while another set, of equal respectability and skill, will give it as their opinion that the person is sane. To require the defense of insanity to be proved beyond a reasonable doubt is to require an impossibility, and hence the more humane and advanced rule on the subject, that if the jury, upon a consideration of the whole evidence, have a reasonable doubt as to the insanity of a man charged with crime, at the time of the act, it is their duty to give him the benefit of such doubt, and to acquit him; but the jury are not to acquit him upon any fanciful ground that, though they believe he was sane at the time the act was committed, yet, as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. *Boswell v. Com.*, 20 Grat. 860.

The other charges of the court were substantially correct.

The judgment of the court below is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

PHOENIX INS. CO. OF BROOKLYN v. BOWDRE et al.

(Supreme Court of Mississippi. May 5, 1890.)

FIRE POLICY—WAIVER—INSURABLE INTEREST.

1. A fire insurance policy stipulated that the assured, within 30 days after loss, furnish complete proofs thereof, accompanied by a builder's estimate of the value of the building. Held, that a general agent of the company having authority "to transact the business of insurance" within the state may, after a loss, bind the company by a pa-

rol waiver of those conditions, notwithstanding the policy provides that a waiver shall be void unless in writing, and indorsed thereon.

2. An insurance policy provided that, "if the interest of the assured in the property be other than an absolute fee-simple title, * * * it must be so represented to the company, and so expressed in the written part of this policy." The insured held title as *cestuvs que trustent*, and under a deed purporting to convey an absolute fee-simple title from the other *cestuvs que trustent*, and their beneficial ownership was sole and undisputed. Held, that their interest was equivalent to an absolute fee-simple title as contemplated by the policy.

Appeal from circuit court, Tate county; W. M. ROGERS, Judge.

Appellees, Bowdre and his brother, sued appellant to recover amount of fire insurance policy on their house, which was burned. The facts in reference to the title of Bowdre and brother to the property are these: One Merriweather, the grandfather of appellees and other brothers and sisters, left a will when he died in which he directed his executors to take the share of his estate going to his daughter, the mother of appellees and their brothers and sisters, and to purchase a home for the children of his daughter, upon which they should live until the youngest child was of age, when the home so purchased should be equally divided, by sale or otherwise, between said children. The executors, in compliance with the will, bought certain land, including that on which the house burned was situated, and paid for the same with the money coming to these children from the estate of their grandfather Merriweather, taking the deed to themselves as executors. The children, with their protector, went into possession of this property as a home. When the youngest child reached majority, they appointed one Ward with power of attorney to sell the land upon which they had lived, and which had been given them under the will of their grandfather. Ward sold the property, and appellees, Bowdre and his brother, bought the land on which the house burned was located, paying cash, and receiving the deed from Ward thereto; and the money received at this sale by Ward for all the property was paid by him to the parties entitled thereto, the children of Merriweather's daughter. The other points are sufficiently stated in the opinion. There was verdict and judgment against the appellant insurance company, from which it appealed.

Shands & Johnson and *W. R. Harper*, for appellant. *Oglesby & Taylor*, for appellees.

WOODS, C. J. The various defenses presented by the defendant corporation in the court below on the grounds of the overvaluation of the property destroyed, the vacant and unoccupied condition of the house when burned, the occurrence of the fire through the negligence of the plaintiffs, and the institution of plaintiffs' suit before resort was had to arbitration, have been abandoned, as we are led to believe. If mistaken in this, they must now be abandoned, when we declare them to be without merit. The two other defenses are these, viz.: (1) The failure of plain-

tiffs, for more than 36 days after the loss occurred, to furnish the defendant with complete proof of loss, including a builder's estimate as to the value of the property; and (2) the inability of the plaintiffs to show that they were the owners of the property in absolute fee-simple. Let us examine these propositions in order, and with some minuteness.

1. The plea going to the matter of the failure to furnish proof of loss complete, including the builder's estimate, is confessed, and sought to be avoided by an allegation of waiver as to the requirement of the policy touching the furnishing of the builder's estimate by one Hill, the agent of the defendant corporation at Senatobia, and the agent who made the contract for insurance with, and issued the policy sued upon to, the plaintiffs. There is a sharp and irreconcilable conflict in the testimony on this point. The evidence of one of the plaintiffs satisfactorily establishes a waiver by the agent, Hill; and the evidence of the agent, Hill, with equal distinctness, denies any waiver. This question of fact was submitted to the jury under fair instructions from the court, and the issue found for plaintiffs. There is left for our determination the sufficiency of the proof to establish the contention that Hill was not a mere local agent, with very narrow powers, but that he was a general agent, in a limited territory, clothed with powers ample enough to authorize him to do the particular act which it is alleged he performed on this occasion, viz., waive a part of the required proof of loss. It may be remarked at this point that the contention of appellant's counsel that there can be no parol waiver, by reason of the provision in the policy that such waiver shall be only by writing indorsed on the policy, is not maintainable. In *Association v. Matthews*, 65 Miss., 301, 4 South. Rep. 62, this court said that such parol waiver might be made despite such provision in the policy requiring it to be done in writing, and especially that such stipulation applies only to those conditions and provisions which relate to the formation and continuance of the contract of insurance, and are essential to its binding force while it is running, and does not apply to conditions which are to be performed after loss has occurred.

But was Hill the agent of the defendant corporation in such sense as made him capable of waiving the production of the builder's estimate in this case? It is distinctly shown by the record that, on February 24, 1888, Hill was "appointed by the Phoenix Insurance Company of Brooklyn, N. Y., as its agent for the transaction of the business of insurance in the state of Mississippi during the year 1888." Under this appointment, was Hill simply a solicitor of insurance,—a mere runner engaged in hunting up persons desiring or needing insurance? Or was he the agent of the company in that larger sense that made him stand for and represent the corporation in its dealings with those doing business with it? All that could be done by any officer of the company in the management of its accustomed business at Senatobia was clearly within the scope of Hill's

authority. Having constituted Hill "its agent for the transaction of the business of insurance in the state of Mississippi during the year 1888," the company had done more than create him a mere local agent with limited powers. It had conferred upon him authority which justified a person, in dealing with him, in regarding him as its general agent, and as authorized to waive a simple condition required to be performed by the insured after loss. But the controversy would appear to have been put an end to in this state by the opinion of this court in the case of *Rivara v. Insurance Co.*, 62 Miss. 728. Mr. Justice ARNOLD in that case said: "The powers of insurance agents to bind their companies are varied by the character of the functions they are employed to perform. Their powers in this respect may be limited by the companies, but parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations unless they had notice of the same. An insurance agent clothed with authority to make contracts of insurance, or to issue policies, stands in the stead of the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made."

We are clearly of opinion, therefore, that Hill was a general agent of defendant, and that he might waive the production of the builder's estimate. The jury having found the facts for plaintiffs, as already stated by us, and there being proof to support that finding, we conclude that on this branch of the case the contention of appellant is untenable.

2. Let us now consider the remaining ground of defense. The fourth condition in the policy of insurance stipulates that, "if the interest of the assured in the property be other than an absolute fee-simple title, * * * it must be so represented to the company, and so expressed in the written part of this policy." It appears that no written application for insurance was ever made by the assured, and one of the plaintiffs testified that he thought he represented orally to Hill that plaintiffs were the owners of the property. Leaving out of consideration, however, any effect this proof was legitimately entitled to, is the company's contention maintainable as an independent proposition in this case? In support of their position, appellant's counsel refer us to the outstanding legal title in the surviving executor of Merriweather, and to the supposed imperfection in the execution of the deed from Ward, the attorney in fact, to the plaintiffs, and insist that it is thereby shown that there is not an absolute fee-simple title in the appellees. By the insertion of those words in the conditions of its policies, can it be successfully maintained that the insurance company meant that every loss occurring under its policies in which the assured should be unable to show a

title indefeasible and good against the world—a title free from every defect, real or seeming, and on which not the smallest cloud rested—should be borne by the assured? To tolerate such an opinion would be equivalent to holding that the company had deliberately set a trap to ensnare the simple-minded and unwary. The contract of indemnity, in multitudes of cases, all over the land, would prove only a delusion and a snare to the victims of premeditated cunning. We cannot believe that any honestly directed and fair-dealing company will deliberately undertake the management of its business on such basis. What is meant, then, by the words "absolute fee-simple title," in this connection? It can only mean that the assured did not have a limited interest in the property, but that he claimed and held under a deed of conveyance, or other evidence of title, purporting to invest them with an estate in fee-simple. It can only mean that the assured had and held under a paper title conferring upon them this sort of estate, as contradistinguished from any limited and inferior one. The reason for this distinction is obvious. The insurer would not deal with, nor take the great risk of indemnifying against loss and damage, a mere tenant or leaseholder, or other person claiming and having only some qualified interest in the property; but this contract for indemnity will be made only with the person having the title,—the beneficial owner; the person having the absolute, *i. e.*, the vested, as opposed to the contingent or conditional, title. It was well said by this court in *Insurance Co. v. McGuire*, 52 Miss. 227: "Parties applying for insurance are not called on to settle questions of title with very great precision." We repeat and emphasize the remark here.

Applying these principles to the case at bar, we will see that plaintiffs are the sole, undisputed, beneficial owners of the property in question, holding under a conveyance purporting to invest them with an estate in fee-simple. The truth is, so far as this record discloses, plaintiffs are the only persons on earth having any sort of interest in, or claim of beneficial ownership to, the premises. There is at the utmost a mere naked legal title outstanding in one of the three surviving executors of Merriweather, and this executor is the mere trustee of the title for these very plaintiffs and their brothers and sisters, all of whom have conveyed their undivided interests to these plaintiffs. Will any one deny that plaintiffs might not, if thought necessary to protect their title, go into a court of chancery, and immediately have the naked legal title divested out of the trustee, and invested in themselves? The appellees are the real owners of the premises. They are the sole owners asserting title, and they must bear the total loss involved in the destruction of the building unless we shall hold the company liable. Substantial right and indubitable justice are in the views we have enunciated, and they must be upheld and enforced by an affirmation of the action of the court below.

Affirmed.

STATE v. PERIQUE *et al.*

(*Supreme Court of Louisiana.* April 7, 1890.
42 La. Ann.)

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESS.

An application for a continuance in a criminal case on account of the absence of a witness, unsupported by affidavit, cannot be considered.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. James; DUFFELL, Judge.

R. G. Dugué, for appellant. *The Attorney General*, for the State.

POCHÉ, J. The trial of Orter Perique, Jr., and Valsin Braud, on the charge of shooting with intent to murder, resulted in the acquittal of Perique, and in the conviction of Braud, who prosecutes this appeal from a sentence of 18 months to the penitentiary.

1. His first complaint is of the refusal of a continuance of the case on account of the absence of an alleged material witness. The record shows that the absent witness had been summoned by service made at his domicile, that the motion for continuance was not made in writing, and that it was not supported by an affidavit. It appears further from the bill that, when called by the district attorney to make the proper affidavit, the accused declined to do so; and his counsel argues here that an affidavit cannot be required in such cases, as "it may be against the interest of an accused person to disclose at the beginning of the trial, or before the trial, the facts which he intends to prove by an absent witness." In the face of an inflexible rule of criminal jurisprudence requiring such an affidavit as an indispensable condition of a continuance, the argument of counsel has at least the merit of vigorous freshness, and of ingenious originality. But, at this stage of jurisprudence, we cannot dare to drift from the safe moorings at which all the courts which are guided by the rules of common-law procedure have been anchored for several centuries. With a different rule, it would be a heroic feat for a prosecuting officer to force an accused, the essence of whose defense would be time, to a trial, under any circumstances.

Speaking of the required conditions of a motion for a continuance in such cases, Bishop, in his work on Criminal Procedure, says at section 951a, vol. 1: "If a witness is absent or sick, and not to be procured till a future day or term, he must make affidavit setting forth the name and residence of the witness; the facts which he is expected to prove; their materiality to his case,—as, for example, that he cannot prove them otherwise,—and their relevancy to the issue; why his presence cannot now be had, and the reasons to believe it may be had then; together with what will render apparent his own want of laches." Every one of the enumerated requisites of the rule has been the subject of some judicial interpretation even in our jurisprudence, in which it has been uniformly enforced as laid down by Bishop. In the following list of cases the application for a continuance was not entertained for the absence of the affidavit: *State v.*

Romero, 5 La. Ann. 25; *State v. Rountree*, 32 La. Ann. 1144; *State v. Crawford*, 41 La. Ann. 539, 6 South. Rep. 471. And in the cases hereinafter enumerated the motion was overruled on account of the insufficiency of the affidavit: *State v. Clark*, 37 La. Ann. 128; *State v. Redmond*, Id. 774; *State v. Landrum*, Id. 799; *State v. Duffy*, 39 La. Ann. 419, 2 South. Rep. 184; *State v. Bassenger*, 39 La. Ann. 918, 3 South. Rep. 55. Hence we conclude that this ground has no force.

2. The next complaint is too trivial to require more than a passing notice. As the case was tried by the judge, the accused invites our attention to errors committed by the former in summing up the evidence in the case. The request is couched in the following words: "Such being the case, we respectfully ask the court to consider whether it was just, arbitrarily, to disregard the testimony of nine disinterested witnesses, whose testimony had not been contradicted in a single material particular, who were on the spot at the time of the shooting, and saw it all, and who swore to a clear case of self-defense, and to believe in preference the adverse testimony of the four state witnesses, who were directly contradicted by the other nine." But the constitutional restriction of our criminal jurisdiction sternly forbids our invasion of that field of investigation. We can but refer counsel to article 81 of the constitution, which restricts our jurisdiction "in criminal cases to questions of law alone."

The record discloses no error to the prejudice of the appellant.

Judgment affirmed.

PARKER, Tax Collector, v. NORTH BRITISH & M. INS. CO.

(*Supreme Court of Louisiana.* April 21, 1890.
42 La. Ann.)

TAXATION—FOREIGN INSURANCE COMPANIES—GROSS RECEIPTS.

1. The power of taxation is derived from, and regulated by, the state constitution; and the legislature, in exercising such power, is bound to conform to the constitution.

2. The constitution contemplates two kinds of taxes, viz., property tax and license tax.

3. The tax imposed on the "gross receipts" of foreign insurance companies by section 10 of Act 76 of 1886 is not a license tax, but is levied, assessed, and collected as a property tax.

4. A tax on "gross receipts" is not a tax on the "capital" or "capital stock" of the corporation. It is an "income tax."

5. Whether or not the legislature may constitutionally levy an income tax, (which is not decided,) if it have such power, it would be an indispensable condition of its exercise that the tax should embrace the income of all; and it could not single out a particular and limited class of persons, and require them to pay an income tax, while exempting all others.

6. The claim here presents a distinct exercise of the taxing power, being levied as a tax, assessed as a tax, and claimed by the tax collector as a tax in proceedings applicable exclusively to the collection of taxes.

7. Different questions would be presented if the act merely required the foreign corporation to pay a certain percentage of its premiums to the state as the condition of a permissive license to enter and transact business in the state.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Harry H. Hall, for appellant. *Wm. Rogers*, for appellee.

FENNER, J. Act No. 76 of 1886 is entitled "An act in relation to insurance companies, corporations, associations, partnerships, and individuals of foreign governments doing fire, river, inland, navigation, or marine insurance business in this state, limiting publication or rendering of statements, determining capital subject to taxation, collection of same, penalties, and requirements." Various sections of the act deal with the terms and conditions on which foreign insurance companies are permitted to conduct business in this state, with various duties required of them in the conduct of such business, and with the estimation and fixing of the capital stock of such company as the standard in proportion to which the size of its risks is to be regulated in accordance with the general insurance laws of the state. Section 10 of the act then provides: "The capital * * * so determined and certified shall be subject to taxation the same as the capital of fire insurance companies organized under the laws of this state, to be levied, assessed, and collected, as prescribed by the laws of this state, at such place in this state as such foreign insurance company shall have its principal office: provided, however, that said capital has not been taxed and paid by the main agency or company in any other state. Then taxation shall be levied upon the gross receipts, less deductions governing companies organized under the laws of this state."

Under this section the defendant company was assessed for the years 1887, 1888, and 1889 on the gross amount of premiums received in this state. Having failed to pay the tax, the tax collector takes this proceeding, under section 54 of Act 85 of 1888, to compel the company, through its agent, to deliver up the property assessed, or so much thereof as may be necessary to satisfy the tax. The defendant denies its liability for the tax on various grounds, of which we only find it necessary to consider one, viz., that there is no valid warrant of law for the assessment and collection of the tax.

The state, in this matter, is undoubtedly exercising the power of taxation. This power is derived from, and regulated by, the constitution of the state. No matter who may be the subject, or what may be the object, of the tax, the state, in exercising this power, is bound to conform to the requirements of the constitution. That instrument makes no distinction of persons, and a tax which would be unconstitutional if levied on property belonging to citizens of the state is equally unconstitutional as against foreigners, whether individuals or corporations. The decisions of the supreme court of the United States holding that the states may impose such terms as they see fit as the conditions of their consent to permit foreign corporations, or corporations organized in other states, to enter and do business in a different state, without thereby violating the constitution of the United States, have no

application to this question. *Paul v. Virginia*, 8 Wall, 168; *Ducat v. Chicago*, 10 Wall. 410; *Doyle v. Insurance Co.*, 94 U. S. 535. These decisions only held that state laws of this character, though making discriminations against foreign corporations, did not conflict with those provisions of the federal constitution with reference to the privileges and immunities of citizens of different states, and the regulation of commerce. No protection of the federal constitution is invoked here.

The tax is resisted on the ground that it is without warrant under the constitution and laws of the state. The constitution contemplates only two kinds of taxes, viz., property taxes and license taxes. We are not prepared or required to say whether such a tax, if imposed, in proper terms, as a license tax, would be valid. It is not, and does not purport to be, a license tax. A license tax is not covered or contemplated by either the title or body of the act. The very proceeding taken by the state is one provided exclusively for the collection of property taxes; and under the terms of the pleadings, as well as under the assessment itself, it is claimed and denominated as a tax on property.

Then the question, simply stated, is whether a property tax levied on the gross receipts of a limited and particular class of persons, and not levied upon the gross receipts of any other class, is valid. The plain constitutional mandate that "all property shall be taxed in proportion to its value" would seem peremptorily to settle this question. If gross receipts be property subject to taxation, the gross receipts of all or of none must be taxed. It is vain to call gross receipts "capital." They are not capital or capital stock, and no legislative declaration can make them so. The only class of taxes under which this can possibly fall is that of an income tax.

It is not necessary for us to decide whether or not, under the constitution, the legislature has power to levy an income tax. It suffices to say that, if the legislature had such power, it would be an indispensable condition of its exercise that a tax should embrace the incomes of all persons not exempted; and, whatever power of classification the legislature might possess as to the subject-matter of taxation, that power could under no pretext be stretched so as to embrace the right to single out a particular class of tax-payers, and to require them to pay such a tax while exempting all others. This is what the legislature has attempted to do in this instance, and we are bound to hold that it cannot be constitutionally done.

As we have heretofore intimated, if this act merely imposed on the foreign insurance company the duty of paying to the state a certain percentage of its premiums received as a condition of a permissive license to transact business in this state, different questions would be presented. That would not be a tax, and would not involve the exercise of the taxing power. But the imposition here is levied as a tax, assessed as a tax, claimed as a tax, by the tax collector, under proceedings provided exclusively for the collection of taxes. It

is a distinct exercise of the taxing power, and must be governed by all constitutional requirements and limitations applicable thereto.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there be now judgment in favor of defendant, rejecting plaintiff's demand, at his cost in both courts.

CANDIFF et al. v. LOUISVILLE, N. O. & T. RY. CO.

(Supreme Court of Louisiana. April 21, 1890.
43 La. Ann.)

MASTER AND SERVANT—LIABILITY OF MASTER TO THIRD PERSONS—EVIDENCE.

1. A brakeman employed on a freight train in charge of a conductor has no implied authority to bind the company by a contract of passage, and his permission to a person to ride does not make such person a passenger.

2. If it be true, as stated by plaintiffs' witness, that defendant's conductor, on discovering that a car had been broken open, believing that it had been done by a certain person, coolly walked up to such person, as he was standing quietly at a station, saying and doing nothing, and shot him down without a word, such an act would be a murder, entirely beyond the scope of any employment or function of the conductor, for which the company could not be held responsible.

3. If, on the other hand, the conductor's statement be true, that the person shot was detected in having broken open one of the cars in the nighttime, and when discovered jumped out and ran, and refused to stop when halted, and was thereupon fired at and shot by an employee of the train, in such a case the criminal's joint and contributory fault would bar his recovery in a civil action for damages.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge.

Farrar, Jones & Kruttschnitt, for appellant. G. W. Campbell and R. K. Miller, for appellees.

FENNER, J. This is an action by a father and mother to recover damages for the killing of their minor son by a servant of the defendant company. The discrepancy between the facts alleged in the petition and those appearing on the evidence is very wide. The petition alleges that on May 6, 1889, their son "took passage from Point Houmas, La., on a train of said company, and duly paid his fare to the conductor of the train;" that at Burnside station, while the train was stopping, he descended from the train; that while thus being at said station an alarm was raised that a freight-car of the train was being broken open and robbed by thieves; that the conductor, brakeman, and other employees ran to said car to drive off and capture the thieves, and that the conductor, or one of the other employees, mistaking the son of petitioners for one of the thieves, shot him with a pistol, etc. The evidence discloses a very different state of facts. Plaintiff's case rests entirely upon the testimony of a single witness, a colored youth named Esteve, who is contradicted on nearly every important point by other witnesses, and who contradicts himself by inconsistent statements made at different times. His story is that he and the boy

Candiff got on top of a car of a freight train of defendant at New Orleans, to ride to Kenner; that they gave one of the brakemen of the train 15 cents to let them ride; that before reaching Kenner they called the brakeman, and, wishing to go further, gave him a dollar; that, when the train stopped at Burnside station, they descended to ease their limbs; that, as they were so quietly standing there, no alarm or excitement existing, the conductor came up to them, and shot Candiff, and then, putting his pistol at witness' face, accused him of breaking into the car, and ordered him to get back into the car. He says distinctly that there was no alarm or excitement, and that he heard nothing about a car being broken into until after the shooting.

It is very clear, under this statement, even if true, that Candiff and Esteve were not passengers. They were simply engaged in stealing a ride on defendant's train, with the corrupt connivance of a brakeman. The brakeman of a freight train has no implied authority to bind the company by contracts of passage. The train had a conductor, as Esteve admits he knew, who had charge of the train, and who alone, if anyone, could have accepted these parties as passengers. *Reary v. Railway Co.*, 40 La. Ann. 33, 8 South. Rep. 390; *Patt. Ry. Acc. Law*, § 209. But the brakeman denies the whole of Esteve's story. Says he never consented to their riding, and was not aware that they were on the car until just before the train stopped at La Place station, when he discovered them standing on the draw-heads between two cars; and that, at La Place, he ordered them off the train, and supposed they had left. The conductor says that when the train was stopping at Burnside, as he walked along, he heard talking in one of the box-cars; that, anticipating trouble, he stepped into the station agent's office, and borrowed a pistol, for self-protection; that he then walked to the car, and discovered that it had been broken open by cutting the seal and knocking off the cleat, and that some persons had been in the car; that it was night, and he could not see the persons; that, about that time, one of the brakemen came up; that then two men jumped out of the car, and started to run; that he told them to stop, and they did not stop; and that then the brakeman fired and shot one of them, who proved to be Candiff.

Whether we accept the version of Esteve or that of the conductor, it is plain that the railway company cannot be held liable. We have already said that the relation of carrier and passenger did not exist, and defendant's liability *vel non* is governed by the law of master and servant. If Esteve's version be true, the shooting of Candiff was as cold-blooded a murder as ever was committed. It presents the conductor as coolly walking up to a man standing quietly, doing and saying nothing, and shooting him down without a word. No stretch of the doctrine that masters are responsible even for the torts of their servants, when done within the scope of their employment, and in the exercise of the functions in which they are

employed, can make it cover such an act as this. Admitting that the conductor is charged with the duty of protecting the cars and contents confided to his care, and that acts done in execution of such charge are within the scope of his employment, and admitting that he supposed that Candiff had broken into the car, and shot him for that reason, in what manner was such shooting, under such circumstances, necessary or conducive to the protection of the property? If, on the other hand, we accept the conductor's version, we have the case of a man detected in the crime of breaking open a car in the night-time, who attempts to escape by running away, who, when ordered to stop by parties in charge of the property, refuses to do so, and who is then shot by one of said parties. It is not necessary to justify the act of the brakeman, or to decide whether or not it was within the scope of his employment, in such manner as to make the company responsible. It is very clear that, in such a transaction, the party detected in the commission of a crime, and shot while attempting to escape arrest, would be in a case of such contributory fault that the law would afford him no relief in a civil action for damages.

Counsel for defendant suggests the very apt analogy of a night watchman employed to guard a house. He detects burglars in the house, who attempt to escape, and, on their failing to halt when called to do so, he shoots one of them. Could the burglar shot be listened to in an action for damages? On the other hand, if the watchman discovered that a burglary had been committed, and, some time afterwards, seeing two persons standing quietly in the street, whom he supposes to be the burglars, he walks up to them and shoots one of them without a word, who proves to be innocent, would his employer be liable? These questions seem to us to answer themselves. It is therefore adjudged and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be now judgment in favor of defendant rejecting the demands of plaintiffs, at their costs in both courts. Judgment reversed.

A. M. PUTNAM et al. v. NEW YORK LIFE INS. CO.

M. S. PUTNAM v. SAME.

(*Supreme Court of Louisiana.* April 21, 1890.)

WIFE'S SEPARATE PROPERTY—LIFE INSURANCE POLICY.

1. A life insurance policy, in which a married woman is named as beneficiary, vests a complete title in her as separate paraphernal property, which cannot be pledged as security for the debts of her husband or of the community.

2. Same cannot be converted into separate property of the husband, or into a community asset, afterwards, by its surrender to the insurer by the insured, and the issuance to the latter by the former of a new policy, in which another and different beneficiary is named, without the consent of the former beneficiary is first legally obtained.

3. In case such substituted policy is only intended as a security for a previously existing in-

debtedness of the insured to such last-named beneficiary, and the recitals of this policy clearly indicate that it was issued in the place of a previously existing one, the company cannot be held liable therefor, having been adjudged liable for the full amount of the surrendered policy. In such case the bar of equitable estoppel does not apply so as to put upon the insurance company an unconditional obligation.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; VOORHIS, Judge.

Buck, Dinkelspiel & Hart and Semmes & Legendre, for appellant. *Henry C. Miller and W. S. Parkerson*, for appellee.

WATKINS, J. On the 5th day of January, 1852, the defendant issued a policy of insurance on the life of James M. Putnam for \$5,000, of which Mary S. Putnam, his wife, was named as beneficiary. Upon certain representations, that policy was by the assured surrendered to the company; and on the 29th of January, 1868, it issued a second policy, of exactly the same tenor as the former one, except in respect to the name of the beneficiary, which is stated in the latter to be Emmett Putnam, brother of the assured. The suit of *Amelia M. Putnam et al.*, widow and heirs of Emmett Putnam, substituted beneficiary, is brought on the policy of 1868, while that of Mary S. Putnam is brought on the policy of 1852; she being the surviving wife of the assured, and the first-named beneficiary. By consent, the two cases were consolidated and tried together, and on the trial there was judgment against the company and in favor of Mrs. Mary S. Putnam in one case, and in favor of the company and against Mrs. Amelia M. Putnam et al., dismissing their suit, in the other; two separate decrees having been rendered. From each one of those judgments, the losing parties, respectively, have appealed.

1. With regard to Mary S. Putnam, beneficiary in the surrendered policy, the facts appear to be as follows, viz.: As to her, the company's contract was complete in its inception, and never changed thereafter, with her consent. In law, this policy insured to her separate paraphernal benefit, though not separate in property from her husband, the insured; and its character of paraphernal property could not be changed to that of separate property of the husband or of the community without her consent, lawfully obtained. As such, it could not be placed as security for the husband's debts. To this effect there are many authorities. Succession of Kugler, 23 La. Ann. 455; Succession of Hearing, 26 La. Ann. 326; Succession of Clark, 27 La. Ann. 269; Succession of Rofenschen, 29 La. Ann. 714; Pilcher v. Insurance Co., 33 La. Ann. 322. This principle obtains, also, in the state of Connecticut. *Vide* Lemon v. Insurance Co., 38 Conn. 294. Also in New York. *Vide* Barry v. Brune, 71 N. Y. 262; Barry v. Society, 59 N. Y. 587; and Dutton v. Willner, 52 N. Y. 312. All the premiums were paid on this policy prior to the 29th of January, 1868, by James M. Putnam, the insured, and to that date it was kept in force. The tendency of the proof is to show that in 1868, and

prior to that date, James M. Putnam was indebted to his brother, Emmett Putnam, in the sum of about \$2,000; and, in order to secure its payment, the policy first issued, and just described, was surrendered, and another issued in its stead, in which Emmett Putnam is named as the beneficiary. The claim and contention of Mary S. Putnam are that, as to her, the policy of 1852 was unaffected by the attempted substitution of a new one, in 1868, without her knowledge or consent; and that she is entitled to recover of the insurer the full amount thereof, and without regard to the existence or non-existence of the substituted policy. In *Pilcher v. Insurance Co.*, 33 La. Ann. 322, the same question arose, and was decided in favor of the wife, as the beneficiary named in the surrendered policy; the court deciding that, as to her, the policy substituted was not a new one, but merely a continuation of the first one. In that case the point was made that, after the surrender of the old and the issuance of the new policy, payments of premiums were made by the assignees thereof, and for that reason she could not recover the whole sums insured. But we maintained her demand, holding that it mattered not that she herself had not paid the premiums after the substitution had taken place, because "it was not required that she should herself make the payments. Vitality should be preserved in the policy in her favor, no matter by whom the premiums were paid, as they were paid on a policy which, as to her, existed in her favor." The only case we have been able to find which is opposed to that theory is *Landrum v. Knowles*, 22 N.J. Eq. 594. The facts of that case were that the mother of complainants entered into a contract with an insurance company to insure the life of their father, and she paid the premiums annually up to the date she assigned the policy to a creditor of the insured, and subsequently the premiums were paid by the assignee. Upon the happening of the death of their father, the beneficiaries named in the first policy claimed the full amount of the insurance, on the ground that the policy issued for their benefit, and the gift was fully executed by their mother, and its revocation was beyond her power. The assignee contested their claim, insisting on his rights under the second policy. The court held the plaintiffs entitled to the full value of the policy up to the time it ceased to be kept alive by their mother; but, construing the assignment as an evident intention on her part to make no other payment of premiums, and the act as equivalent, in effect, to a forfeiture of their interest therein, it construed the payment of premiums by the assignees subsequently as the perpetuation of a right acquired thereby, and which fully vested in him, and recognized his demand to the extent of the value of the policy, less the interest of the first beneficiaries, as specified. But the doctrine of the *Pilcher Case* is founded in reason and on authority, and must control. *Burroughs v. Assurance Co.*, 97 Mass. 359; *Insurance Co. v. Weitz*, 99 Mass. 157; *Insurance Co. v. Burroughs*, 34 Conn. 305; *Chapin v. Fellowes*, 36 Conn. 132; *Lemon v.*

Insurance Co., 38 Conn. 294; *Insurance Co. v. Brant*, (Mo.) 1 Ins. Law J. 33; *Barry v. Brune*, 71 N. Y. 262; *Barry v. Society*, 59 N. Y. 589.

The general doctrine is formulated in *Bliss*, Ins. § 384, thus: "It will be perceived that in all these cases the principle is maintained that no person, other than the persons designated in the policy, can assign or surrender it, and that in such assignment or surrender all the persons must concur, or the interest of those not concurring is not affected." In *Barry v. Brune*, supra, a case almost parallel to the instant one, the court said: "It is clear that the old policies were the consideration of, and the inducement to, the new policies. The new policies could not have been obtained but for the possession and surrender of the old policies; and the premiums upon the new policies were paid, in part, by cash dividends due upon one of the old policies. Brune thus, by means of the possession of the old policies, which belonged to the plaintiff, and by using and surrendering them, obtained the new policies. The real substance of the transaction was a substitution of the new policies for the old, for the purpose of getting security which the old one did not give him. Under the circumstances of this case, both upon reason and authority, the substituted policies in equity take the place of the old policies, and the money payable thereon must go to the party entitled under the old policies. For this conclusion there is abundant reason and authority." Hence we take it to be perfectly clear that Mary S. Putnam, beneficiary in the surrendered policy, is entitled to recover against the insurance company.

2. Whether or not the widow and heirs of Emmett Putnam, also, ought to recover from the company, under the substituted policy of 1868, must depend, mainly, on a question of fact, rather than one of law; for it is plain that the defendant can be held but once liable, if it made but one contract of insurance, unless, as we determined in the *Pilcher Case*, it has, by its own act, attached to the policy "a new character and liability, and by mere change of date and name of beneficiary" given its validity to different parties, and thus created a double obligation on itself. In the instant case the defendant company issued a policy in 1852 on the life of James M. Putnam. In 1868 that policy was surrendered, and a new one issued, in all respects similar to the former; the only difference between the two being in date and name of payee. Premiums were paid on the old policy up to the date of its surrender, and on the new one after its issuance. The company did not exact or receive double premiums. On this statement, it is clear that the question of defendant's responsibility to the widow and heirs of Emmett Putnam must be determined on the principles of equity and estoppel. This is the contention of their counsel; for in his brief, at page 5, he says: "The New York Life Insurance Company, having issued the policy herein sued upon, is estopped from denying its validity—First, because, by issuing the policy as it did, it secured an advantage

to itself, in that it obtained by the transaction two parties who were interested in keeping the policy alive by the payment of premiums, whereas before it had only had one; *second*, in that, by issuing the policy, it asserted certain facts to be true, on the faith of which Emmett Putnam was induced to change his position."

(a) On the first proposition but little need be said, as it appears to us that there were just as many persons who had an interest in keeping the premiums regularly and promptly paid before the surrender of the old policy as after the issuance of the new one, viz., the insured and the beneficiary, though it was not perhaps the same interest.

(b) What are, then, the facts which the company, by issuing the policy of 1868, asserted to be true, "on the faith of which Emmett Putnam was induced to change his position?" It is not pretended that Emmett Putnam became the creditor of his brother James, the insured, after the substituted policy was issued in his name as beneficiary. It is not claimed that after the issuance of this policy Emmett Putnam permitted his brother James to increase his indebtedness to him by loans of money or otherwise. It is not contended that Emmett agreed with James to accept this policy in payment of a debt then due, or as a pledge or security for a debt secured by other pledges or securities which were released. No; the counsel of the widow and heirs says in his brief, on same page: "This policy was evidently given to him by James M. Putnam when Emmett Putnam was seeking to collect [a] pre-existing debt. When he received the policy, he desisted from any attempt to collect it; and during the twenty years which followed neither he nor his heirs took any steps to collect that debt. They had been led to believe by the Insurance company that they were perfectly secure; [it] having undertaken to pay to them the sum of \$5,000 upon the death of James M. Putnam." Upon this statement, it is manifest that the substituted policy was only intended or regarded by Emmett Putnam as a pledge for the security of the pre-existing debt of James M. Putnam; and hence neither he nor his heirs, "during the twenty years which followed," took any steps "to collect that debt;" and that the effect of the company's issuance of the substituted policy was not to induce action on the part of Emmett Putnam, but to superinduce inaction and delay on his part. It is not claimed, and the proof does not show, that James M. Putnam was solvent in 1868, when the new policy was issued, and became insolvent thereafter, and that Emmett Putnam, as a creditor of his, suffered injury thereby. The settled jurisprudence is that possession by a creditor of a debtor's goods, as collateral security for the debt, both interrupts and suspends prescription during the period of possession. Hence no prescription has run against Emmett Putnam's right of action against the succession of his brother. The fact of James feeling constrained to resort to such an expedient as he did, to secure his brother's claims, leads to an inference of his insolv-

ency at that time; therefore he could have sustained no injury. It is contended that Emmett Putnam paid premiums on the new policy, and this is cited to instance a change of his position. But this position is not supported by the evidence. It shows only that James M. Putnam paid premiums on the substituted policy for many years, and until after the death of Emmett Putnam; that after the latter's death his widow paid a part of the premiums for the years 1884, 1885, 1886, and 1887; the insured died in 1887. These payments were, for 1884, \$16; for 1885, \$53.18; for 1886, \$57.75; for 1887, \$51.25,—aggregating in amount \$172.87,—whereas the amount of annual premiums specified in the policy is \$112. It is manifest that the "regular dividends" due the policy-holder were not utilized, and the amount of cash em- ployed in the payment of premiums was correspondingly reduced.

Counsel further argues that the policy was a separate and distinct contract of the company, and that its promise was unconditional. An examination of the policy will show evidences to the contrary. Some of its recitals are as follows: (1) "And the said company do hereby promise and agree to and with the said E. Putnam, and his heirs, assigns, well and truly to pay the said sum of money to the said E. Putnam, deducting from all notes or credits for premiums on this policy; also old notes on policy of same number, unpaid at the time." (2) "And it is also understood and agreed by the within assured that the true intent and meaning hereof shall be the declaration made by or for the said E. M. Putnam in the application for said policy, or any part thereof, and bearing date the 5th of January, 1852, and upon the faith of which this policy is made, and which shall be found in any respect untrue, then this policy shall be void." These two paragraphs are sufficient for our present purpose. Instead of the new policy appearing on its face to be "a separate and distinct contract" of the company, it appears that "old notes [due] on premiums" on policy of same number were to be deducted from the amount assured in the policy, and that the declaration made by James M. Putnam in his application for a policy issued on his life, on the 5th of January, 1852, was the one on the faith of which the policy of 1868 was predicated, and the verification of which Emmett Putnam, as beneficiary of the latter, was bound by. These two clauses the two policies were separately bound together, and the new policy made to depend upon the former. Emmett Putnam and his heirs and assigns were fully notified thereby, and those recitals they are conclusively as the latter are suing for the enforcement of this policy. It is an entire contract and cannot be divided, for or against itself, but it must be taken in its entirety. One of the distinguishing features of the Pilcher Case was that the insured and the company were ascertained to have confederated together to make appear as though there had been a change on the part of the former in the p-

of premiums, and, consequently, the policy had lapsed; that thereupon a new policy, in appearance, issued, of which the assured and his assignees were the specified beneficiaries. When issued, this policy was assigned for value, and passed into the hands of the bank. These acts we considered and construed to be a fraud upon an innocent third person, who had parted with his money on the faith of a policy, containing no notice of its being a substitution, and whereby the company was estopped from showing the real state of the case, for its own relief and protection. The principle on which estoppel is raised in such a case is well stated by the New York court. They say: "Conduct of one party is an estoppel upon him only when it induces action in another which cannot be withdrawn from him without loss." *Waring v. Somborn*, 82 N. Y. 604; *Payne v. Burnham*, 62 N. Y. 72; *Brown v. Bowen*, 30 N. Y. 541. May on Insurance says: "To constitute an estoppel, there must be such conduct on the part of the insurers as would, if they were not estopped, operate as a fraud on the party who has taken, or neglected to take, some action to his own prejudice, in reliance upon it. Where nothing has been done or neglected by their authority, and where no act has been done or left undone by the insured in reliance upon the act or non-action of the insured, there can be no estoppel." Pages 771, 772. Like precepts are found in all text-books. 1 Greenl. Ev. §§ 22, 27, 207, 208; Bigelow, Estop. 369, 473; 6 Wait, Act. & Def. 701. These authorities are cited for the double purpose of showing their applicability to the Pilcher Case, and their inapplicability to this one.

Our conclusion is that the judgments appealed from are correct in principle, but that they are subject to a slight modification in favor of the widow and heirs of Emmett Putnam, so as to allow them the sums expended in the payment of premiums, with interest. It is therefore ordered and decreed that the judgments appealed from be so amended as to allow defendant in suit, Mary S. Putnam, a credit of the sum of \$172.37, with 5 per cent. per annum interest from date of judicial demand, with costs of appeal; and so to entitle the plaintiffs, Amelia M. Putnam et al., to recover of the defendant therein a like sum, with interest, and costs in both courts. It is further ordered that the judgments appealed from be in other respects affirmed.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. The judgment appealed from in the first case having been amended in favor of Mrs. Amelia M. Putnam, by allowing her \$172.37, for which she should have had judgment, the company was liable for costs in both courts; and the judgment appealed from in the second case, of Mrs. Mary S. Putnam, having been amended against Mrs. Mary S. Putnam, by reducing it by \$172.37, the company was entitled to costs of appeal, but remained liable to costs below. The costs were therefore correctly apportioned, and the complaint that they were not is ill founded. Rehearing refused.

MEYERS et al. v. MATHIS et al.

(Supreme Court of Louisiana. April 7, 1890.
42 La. Ann.)

RIPARIAN RIGHTS—CONVEYANCE.

1. A sale of property with a front on a certain street, extending between certain lines to the river, without guaranty of measurement, conveys *batture* or alluvion rights as effectually as if the land had been sold fronting on the river between the same lines to the street line.

2. The area conveyed would be the same, and the rights transferred and acquired identical.

3. Express mention in a deed, when the property fronts on the river, that the right of *batture* is sold with it, is surplusage. Without such declaration, the purchaser acquires the *batture* or alluvion rights.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

H. P. Dart, for appellant. *Moise & Cahn* and *Felix J. Dreyfous*, for appellee.

BERMUDEZ, C. J. This is a suit to compel the defendants to comply with an adjudication made to them of certain real estate in this city for \$11,700. The defense is that the title offered conveyed the lots as carrying the *batture* privilege or right of accretion, when in truth the plaintiffs have no right thereto, for the reason that titles of their authors to them make no conveyance thereof. From an adverse judgment the defendants appeal.

The property adjudicated, consisting of three contingent lots, is described as situated in a square bounded by Jena and Waters streets, Napoleon avenue, and the Mississippi river, having a stated front on Waters street, and extending in depth to the waters of the river, together with all rights of *batture* or accretion, whether the same is now formed, or hereafter to be formed, without any reservation whatsoever. These lots were sold to the company represented by the plaintiffs under the same description by Widow Seller, as universal legatee of her husband. The latter's title, derived from the Milloudons, contains a description of the lots as bounded by Jena and Waters streets, Napoleon avenue, and the Mississippi river, fronting on Waters street, approximate depth, without any guaranty as to measurement. The property thus sold measured, each lot, some 30 feet front on a depth of little more than 300 feet. Accretions have since formed successively and imperceptibly to the first quantity of soil, by which the river water-line was distanced by about 600 feet.

The right of the Milloudons to the *batture* at the time of sale is not disputed. The contention is that, as the deeds to Seller are reticent as to the right to *batture*, and merely mention the river line as a boundary, all the accretions since formed have not inured to Seller and his assigns; in other words, that the description given is an exclusion of land not described. It is admitted that other lots above the avenue, fronting on the river, were sold, at the same auction at which Seller bought, to various purchasers, and that all the deeds except Seller's contained an express mention of the right of *batture* being sold. Jena street and Napoleon avenue run perpendicular, apparently, to the

river. On Waters street, which runs parallel with, or in the same direction as the river, the levee existed at the time. Since, it has been removed therefrom, and built nearer the river, owing to the accretions subsequently formed between Waters street and the river, so that the land in controversy lies back of the old levee to the river water-line. The only question presented is whether the title made to Seller carried with it a right to alluvion soil *in posse*, which now constitute the 600 feet mentioned. The sale was by metes and bounds, as concerned the front and rear lines. Had the title to Seller described the lots as measuring so many feet front on the river between Jena street and Napoleon avenue, extending in depth to Waters street, on which the levee stood, there could have been little or no room for discussion; for it is settled beyond the possibility of doubt that the words "front to the river" "*frente al rio*," convey a riparian estate, and that under them the vendee is entitled to the river for his boundary. *Morgan v. Livingston*, 6 Mart. (La.) 216; *Municipality No. 2 v. Cotton Press*, 18 La. 259; *Livingston v. Heerman*, 9 Mart. (La.) 656; *Cambre v. Kohn*, 8 Mart. (N. S.) 576. The ruling in the last-mentioned case, invoked by the defendants, itself recognizes the correctness of the doctrine. In expounding the law the court said, however, that it is "not applicable to a sale made of a certain limited part taken from a whole tract of land, when at the time of sale the vendor held in full property another part between that sold and the river." In the more recent case of *Ferriere v. New Orleans*, 35 La. Ann. 209, it was held that where property was sold fronting and ending on the levee, and not on the river, the sale embraced all the rights of property which the owner had in the premises up to, but not beyond, the levee, and therefore that the vendor had not conveyed the *batture* accretion or alluvion right. This case is but a corollary of previous ones. The right to future alluvion formations is a vested right inherent in the property itself. "The portion added is not considered as new land. It is a part of the old which acquires the same qualities, and which belongs to the same owner, in the same manner as the increase by the growth of a tree makes part of the tree." *Cambre v. Kohn*, 8 Mart. (N. S.) 577; *Municipality No. 2 v. Cotton Press*, 18 La. 254; *Barrett v. New Orleans*, 18 La. Ann. 105. In the present case the sale is not of a certain limited part taken from a whole tract of land, and the vendor at the time of sale did not hold any other between that sold and the river. The sale was from the levee then in existence on Waters street to the river, and included not only the soil actually susceptible of possession, but, besides, all such other as might be subsequently formed in the course of time, *labentibus annis*, in addition, as an increment to that conveyed. It is to be observed that the measurement of the lateral lines is not fixed and determined with precision. It shows that it was not possible to do otherwise, precisely, because the probability of accretions had entered into the minds of both ven-

dor and purchaser. Hence it is that the act declares that the sale is made without guaranty as to measurement. The declaration is clearly indicative that the vendor was unwilling to be bound as selling a certain limited part which was not ascertainable, but designed to sell the property such as it was and might thereafter be in area. Such being the case, what difference is there between selling front to the river with a depth extending from it to a parallel or similar line, and selling front on such line with a depth extending from it to the river? In either case the superficies would be the same, and the rights to the *batture* alike. Under no conceivable contingency could the vendor pretend not to have sold the whole of it, and claim an inch of ground between the river and the street and the lateral lines, for the plain reason that, having divested himself of all title to the land comprised between the front and rear lines and the side limits, he could not be permitted to gainsay and repudiate his acts, and revendicate what had passed by his free volition from him, for due consideration. There is no force in the contention that because, at the time of the auction sale at which Seller acquired, other lots were sold to other purchasers with the *batture* right expressly mentioned, and because such right was not thus mentioned in his deed, he did not acquire it. The mention of the *batture* right as conveyed in the other titles was surplusage. The omission of it from Seller's title is innocuous. As the property sold to those parties extended to the river, as it did in Seller's act, the purchasers would have acquired, as Seller had, without such mention.

The conclusion is, therefore, that Seller acquired not only the soil *in esse* at the time he purchased, but also the right to the *batture* or alluvion soil susceptible of formation *in futuro*; that his rights passed to his widow as his universal legatee, and from her to the company now represented by the plaintiffs as commissioners; and that the title offered by them to the defendants is such that they are bound to accept.

Judgment affirmed.

STATE *ex rel.* CITY OF NEW ORLEANS *v.*
NEW ORLEANS CITY & L. R. CO.

(*Supreme Court of Louisiana.* April 7, 1890.
42 La. Ann.)

STREET RAILROADS—REPAIR OF STREETS—MAY-
DAMUS.

1. Act No. 138 of 1888, which authorizes *maydumus* proceedings to coerce specific performance of contractual obligations in certain cases, is not unconstitutional. It is a general statute, remedial in character only, divesting no vested right, and impairing no obligation of contract.

2. The want of necessary explanation on the part of an obligee, who imposed the conditions which were accepted, will not, when the terms employed are obscure or equivocal, aggravate the burden of the obligor, but the construction most favorable to the latter should be adopted; the more so, when the construction is in accord with the mode of execution of the contract by the parties.

3. A street is a space dedicated to public use, for the passage and circulation thereon of ordinary driven vehicles and animals, in cities and towns.

4. A neutral or middle ground is a strip of land extending between two streets or thoroughfares, which is not only not used, but prohibited from being used, as a street, and which, not being thus used, does not practically form part of the streets proper.

5. Under a contract by a city with a railroad company, giving a right of way, that the latter shall keep in good order and condition from curb to curb, the streets, intersections, bridges, etc., through which its tracks pass, it cannot be claimed that the company is under the obligation of keeping in such condition streets on which its tracks do not pass, and which extend along-side of, and border on, middle or neutral grounds dividing them, comprised between curbs or external lines, and which do not form part of thoroughfares on which vehicles usually circulate. The obligation exists only as to such streets and spots on which the tracks actually pass.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; KING, Judge.

Buck, Dinkelspiel & Hart, for appellant.
S. L. Gilmore, for appellee.

BERMUDEZ, C. J. The object of this suit is to compel by *mandamus* the defendant company, in specific performance of alleged contracts, to put and keep in proper condition the streets, etc., through which its tracks pass, within city limits. In its return the company substantially pleaded that the allegations of the petition are too vague, general, and indefinite; that the action is premature; that no proper demand was made to authorize the suit; that the act (No. 133 of 1888) under which the action is brought is unconstitutional, for several reasons, one of which is that it impairs the obligations of the contracts between the parties; that the charges preferred are unfounded; that it has always complied with all its obligations, and continues to do so, etc. From a judgment overruling the preliminary defenses and making the *mandamus* peremptory for specified purposes the company appeals.

In relation to the exceptions, it suffices to say that the petition clearly discloses a valid cause of action; that there was a proper demand for compliance; that the suit itself is a putting in default, if any was necessary; that the statute attacked is not special or local, but general and remedial only; that it divests no vested right, and impairs the obligation of no contract. It has already been invoked and twice enforced, (*State v. Railroad Co.*, 42 La. Ann. —, ante, 84, 226,) so that the contention is reduced to an interpretation of the direct and assumed contracts between the parties.

Under the terms of the contract, whereby the right of way was granted, the substantial obligation assumed by the purchaser, and which is of moment in this controversy, is that the company would keep in good order and condition, from curb to curb, the streets and bridges through which the tracks pass. The contention is not whether the company is or not bound to keep in such condition the streets, etc., on which its tracks pass, but rather whether the company is or not under such obligations, as to streets, etc., on which its tracks do not pass, and which border on the sides of the middle or neutral ground which separates them, and on

which its tracks are laid; such as the streets along-side the strip of ground between them, on Canal, Rampart, and Esplanade streets in this city.

The theory on which this action is predicated rests on the assumption that the neutral or middle ground forms part of the street, and that, the tracks of the company having been laid on it, they pass through the street itself; but the theory at once explodes when it is considered that the strip of ground does not form part of the street proper. A street is a space dedicated to public use, for the passage and circulation thereon of ordinary driven vehicles or animals, in cities or towns. Such was surely the meaning attached to the word before the time when street-cars were permitted to be run on the streets, and such it must have been in the contemplation of the parties when they entered into the contracts propounded upon. Indeed, the neutral or middle ground is not only not used, but is prohibited from being used, as a street, and, not being used thus, it cannot be treated practically as a part of the streets between which it extends. See Act 73 of 1876; *Marquez v. New Orleans*, 13 La. Ann. 320; *Correjoles v. Succession of Foucher*, 26 La. Ann. 362; *Tilton v. Railroad Co.*, 35 La. Ann. 1067; *Fayssoux v. Succession of Chaurand*, 36 La. Ann. 547; *Canal & C. St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 561, 6 South. Rep. 849.

The evidence shows that, in the exercise of the right of way purchased, the company did not lay its tracks on the side streets themselves, but on the space dividing them, which does not form part of them as a thoroughfare for the passage and circulation of ordinary carriages and vehicles. It also establishes that the city had never opposed such use of such ground, and has never called on the company to do any work on such double streets; but that such work has always been attended to by the city, at its own expense. The terms employed are clear and free from doubt, — were they obscure or equivocal the want of necessary explanation on the part of the obligee, who imposed the conditions which were accepted, should not render the burden more onerous; but the construction most favorable to the obligor should be adopted, the more so when the mode of execution justifies this course. *Rev. Civil Code*, arts. 1556, 1558, *Code Napoleon* 1162. A careful reading of the stipulation, coupled with the consideration of the interpretation placed upon it by the parties, forces the irresistible conclusion that the space which, in their intent, the company was to keep in good order and condition, is the route through and on which its tracks would pass, extending from curb to curb, or external boundary. No other reasonable signification can be placed on the agreement. It is therefore apparent that the company is not bound, under its tenor, to perform any work beyond the curbs or lines within which are comprised the neutral or middle grounds or strips of land, between the side streets, on which its tracks have been laid.

The proof shows in what respects the company has been derelict, as to the ordi-

nary streets, and, to some extent, as to intersections, bridges, and neutral grounds which constitute the route through and on which its tracks pass. The judgment of the lower court is correct, unless in that portion which makes the *mandamus* peremptory as to the streets and thoroughfares which extend on the sides and beyond the curbs of the strips of ground in question. It is therefore ordered and decreed that the judgment appealed from be amended by striking therefrom that portion which imposes on the defendant company the obligation of keeping in good order and condition the streets and road-ways on the sides of the middle or neutral grounds on Canal, Rampart, and Esplanade streets in this city, and by rejecting the demand in that respect, and that, thus amended, said judgment be affirmed, at appellee's cost.

Rehearing refused.

DA PONTE V. NEW ORLEANS TRANSFER Co. et al.

(*Supreme Court of Louisiana.* April 21, 1890.
42 La. Ann.)

TRANSFER COMPANIES—LOSS OF BAGGAGE.

1. A passenger on a railroad train, having arrived at the point of destination, enters into a contract with a transfer company, for an agreed compensation, to procure his baggage from the railroad company's depot, and haul it to his residence, and for that purpose surrenders his baggage checks. *Held*, that the transfer company is responsible to the passenger for the safe-keeping and delivery of his baggage.

2. Under this state of facts, contractual relations exist between the passenger and the transfer company, which the former may enforce by suit and sequestration.

(*Syllabus by the Court.*)

Henry L. Lazarus, for appellant. **F. Michinard**, for appellees.

WATKINS, J. Appeal from the civil district court, parish of Orleans. The claim of the plaintiff is that in October, 1889, while in the city of New York, he made a contract with the Pennsylvania Railroad Company for the transportation of himself and family, consisting of nine persons, over its road from that city to Cincinnati, and from thence to New Orleans, via the Queen & Crescent route; these two roads connecting, and constituting a through route from New York to New Orleans. His averment is that the contract for transportation of himself and family entitled him to transportation of his and their baggage from said point of departure to his place of destination, and the said railroad company undertook the safe carriage and transportation of himself, family, and baggage over its own and connecting lines; and therefore issued to him tickets for passage, and tags or checks for baggage, counterparts of the latter being at the same time attached to the several pieces of his baggage when it was placed in said company's possession and custody. Upon his arrival at the city of New Orleans, he contracted to pay to the defendant transfer company the sum of \$4.50 to procure his luggage at the railroad depot, and haul it to his resi-

dence in said city, and surrendered to said company the checks he had received therefor from the railroad company. His further averment is that said transfer company took charge of his said baggage,—the intrinsic value of which he fixed at \$5,000,—and hauled same to his residence, and within his grounds, but declined, and arbitrarily refused, to deliver same to him, (notwithstanding he offered to pay the compensation agreed upon,) on the pretext that there was due on the baggage an extra charge of \$49.20 for the transportation thereof by said Pennsylvania Railroad Company. He further avers that he refused and declined to pay said extra charge, and said transfer company persisted in its refusal to deliver his luggage otherwise, and against his protest removed same from his premises, and that he only recovered same by means of a writ of sequestration. On the trial there was judgment for the defendant, and the plaintiff has appealed.

While there is no question raised, on the part of the defendant transfer company,—the only party cited,—as to the character of the plaintiff's contract with the railroad company, the value of the property, the facts in reference to its possession of the baggage, or of its refusal and declination to deliver the same, yet its contention, in brief and argument, is that there is not now, and never has been, "any dispute as to the ownership of the property; and insists that when the plaintiff refused to pay the extra charge of \$49.20 it reconveyed the baggage to the depot, and delivered the checks to the railroad company, by whom same are held subject to his order; and that the plaintiff's right of action is against the Louisville & Nashville Railroad Company only. In the plaintiff's petition there is a distinct averment "that he fears that the New Orleans Transfer Company either directly, or through its agents and the Louisville & Nashville Railroad Company, having petitioner's luggage, and that of his family, and which your petitioner avers to be a tortious possession, without right or authority in law, may send the property out of the jurisdiction of the court during the pendency of this suit." His prayer is that the property be sequestered by the sheriff, it being in the possession of the New Orleans Transfer Company, or under its control, or in the possession of its agent, the Louisville & Nashville Railroad Company," and that he be decreed the owner thereof. The defendants' answer was a general denial.

Instead of the transfer company declining to issue the ownership, it puts same at issue by the answer. When the plaintiff ruled the transfer company to show cause why he should not be permitted to bond the property *pendente lite*, it made resistance, and defeated his application. On the trial, its counsel introduced and interrogated several witnesses in defense of plaintiff's pretensions, and obtained a judgment rejecting his demand. We think it is too late for it to insist that there is no issue with it, as to the ownership or possession, for us to try and determine. Upon plaintiff's arrival on the train, he made a contract, as alleged, with an agent of

the transfer company, for the delivery of his baggage at his residence, and surrendered to him his checks, and for which service he agreed to pay him the sum of \$4.50. Mr. Faust, one of the defendants' witnesses, testifies that he was, at the time, the manager of the transfer company. He states, using his own words: "I tried to explain [to Mr. Da Ponte] that it was a customary thing for the New Orleans Transfer Company to collect these charges; that the transfer company had no other interest than the delivery of the baggage; that we were simply the agents of the Louisville road, as well as all other lines running to New Orleans," etc. Notwithstanding this witness, as manager of the defendant company, admits that company's contract with the plaintiff, and that it was, in undertaking to transfer his baggage, the agent of the Louisville & Nashville Railroad Company, he confesses that he retained in the office of the company the plaintiff's checks for some time, and then surrendered them to the Louisville & Nashville Railroad Company. "Question. Where are the checks that were delivered by Mr. Da Ponte to the messenger of the New Orleans Transfer Company? Where are they? Answer. In the possession of the Louisville & Nashville Railroad. They were delivered to them." He states that they were afterwards returned, and remained in the office of the transfer company for some time. In order to recover possession of his property, plaintiff was compelled to give bond to the sheriff for a large sum. His checks were retained by the defendant or its agent, and have never been returned or tendered to him. Had the defendant set out the true nature of its engagement in its answer, disavowed any interest in the transaction, and surrendered the plaintiff's checks, or tendered them to him, in open court, it could have been exonerated entirely. But by the course it did pursue the controversy has been prolonged; judgment rendered against the plaintiff, who has been put to the expense of an appeal in order to secure the restitution of his property, or, what amounts to the same thing, the cancellation of his forthcoming bond. He is entitled to this relief at our hands. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that there be judgment in plaintiff's and appellant's favor recognizing plaintiff's ownership of the property, and maintaining his sequestration, at defendants' cost in both courts.

Rehearing refused.

WICKHAM *et al.* *v.* NALTY.

(*Supreme Court of Louisiana.* April 7, 1890.
49 La. Ann.)

APPEAL—JURISDICTIONAL AMOUNT—ATTACHMENT—CONFLICTING CLAIMS.

1. In an attachment proceeding, in which a third opponent claims the ownership of a specific item of property, the value of such property is the test of jurisdiction in case of an appeal involving the contested claim of such opponent.

2. In a similar proceeding, if a third opponent claims a privilege on the proceeds of the property

attached, the value of that property, and not the amount claimed therein under a prior lien or privilege, is the proper test of the appellate jurisdiction.

3. A party claiming a privilege for salaries due him as overseer cannot recover under proof that he was merely a laborer.

(*Syllabus by the Court.*)

Appeal from district court, parish of Concordia; Young, Judge.

Steele & Dagg, for appellants. *Luce & Lunie*, for appellee.

MOTION TO DISMISS.

POCHE, J. This complicated litigation began by an attachment sued out against defendant's property, subsequently followed by a second attachment of other property, consisting mainly of a stock of goods in a country store, of cotton, and of mules and horses. Numerous third oppositions were then filed by other parties, some of whom claimed the ownership of some specific items of the property which had been seized, and others claimed preference of payment over the attaching creditors for amounts due to them, respectively: (1) Mrs. Bridget Nalty claimed the ownership of some mules which had been attached as belonging to defendant; (2) J. J. Nalty claimed the ownership of some cotton, and of the contents of the store, of a lot of corn, and of farming implements, all of which had been attached as the property of the defendant; (3) Thomas Lynch claimed a privilege for unpaid salary due to him as a clerk in the defendant's store; (4) Fred Claiborn claimed a privilege for unpaid balance due him on his salary as overseer. Several other third oppositions were filed; but, as they are not involved in the present appeal, they need not be mentioned or described in this opinion.

The judgment below was as follows: (1) In favor of third opponent Bridget Nalty, recognizing her as the owner of the mules which she claimed; (2) in favor of third opponent J. J. Nalty for all the property which he claimed; (3) in favor of Thomas Lynch, allowing him the privilege which he claimed of certain goods recognized as the property of the defendant; (4) in favor of Fred Claiborn, enforcing his privilege on hay and corn decided to belong to the defendant. In other respects the judgment went against the defendant, fixing his indebtedness to plaintiff at the sum of \$2,370.84, and sustaining the attachments sued out against his property.

Plaintiffs have appealed, and the defendant moves for an amendment of the judgment so as to reject plaintiffs' demand. J. J. Nalty, one of the third opponents, prays, by way of amendment, for damages for the wrongful attachment of his property. The other third opponents move to dismiss the appeal in so far as it affects them, respectively, on the ground that the respective amount involved, as to them, are not equal to the lower limit of our jurisdiction.

As to the motion of Mrs. B. Nalty, it is admitted on the part of appellants that the aggregate value of the mules which she claims is less than \$2,000. Hence it follows that this court has no jurisdiction over

that part of the contestation which affects her claim. It is settled in our jurisprudence that the value of the property seized, the ownership of which is claimed by a third opponent, is the test of jurisdiction on appeal. *Meyer v. Logan*, 33 La. Ann. 1055; *Schlieder v. Martinez*, 33 La. Ann. 847. We must therefore decline jurisdiction of that branch of the case.

But a different rule applies to the motions made by third opponents Lynch and Claiborn, whose respective claims amount, each, to much less than \$2,000. They do not set up ownership to any specific item of the property attached, but they merely seek to enforce a ranking privilege on the proceeds of some of the property seized. Hence their cases involve a claim to a portion of a fund held by the sheriff for distribution; and in such cases the jurisdiction of this court is to be tested by the value of all the property attached which will furnish the fund to be distributed, and if that exceeds \$2,000, as is shown here, our jurisdiction attaches, without reference to the amount therein claimed. *Walsh v. Carrene*, 36 La. Ann. 199; *Renshaw v. Stafford*, 34 La. Ann. 1138. We therefore conclude that the motion of these opponents cannot prevail.

It is therefore ordered that the motion to dismiss the appeal, in so far as the interests or claims of Thomas Lynch and of Fred Claiborn are therein affected, be denied; and it is ordered that, in so far as it refers to the claim of third opponent Mrs. Bridget Nalty, the appeal herein taken be dismissed, at appellants' costs.

ON THE MERITS.

1. The claim of J. J. Nalty, as the owner of a country store and of other property hereinabove described, is resisted by appellants on the ground that this opponent's purchase of a certain store from his mother, the defendant herein, was a mere simulation intended to screen said property from the pursuit of the creditors of the defendant, who had been notoriously insolvent for more than a year previous to the pretended transfer to this opponent, and that the business which the latter had carried on since the simulated transfer, and the property thereby acquired, were in truth and in reality the business and the property of their debtor, W. F. Nalty. They rely on the evidence of a respite obtained from his creditors by the defendant, who had included in the schedule or statement the very store now claimed by his brother, the opponent, who was then notoriously impecunious, with no resources or income but his salary of \$25 a month as clerk in a country store, and absolutely without the means to purchase and carry on a store. There is a great deal of testimony in the record tending to show that the whole transaction was somewhat suspicious, and to justify the course of the attaching creditors in this case. But there is proof in the record to the effect that opponent's mother, who is shown to have had means in ready cash, and valuable property in Natchez, Miss., had loaned opponent the funds used in the purchase of the store, and in the purchase of goods to renew the stock therein, dwindled down

to almost nothing at the date of his purchase; and that she had also loaned to him the mules which she owned for the cultivation of some lands which he had rented, and which he cultivated in cotton and corn during the year 1888, from which he had produced the cotton and corn seized herein by appellants. These facts are positively stated in their testimony by opponent and by his mother, and their evidence is in part corroborated by disinterested witnesses. That evidence is not directly contradicted in the record, and is assailed by appellants merely on the ground of its improbability, and on the strength of some conflicting circumstances. But it cannot be discredited by the court on any other hypothesis than that of willful perjury on the part of the witnesses who gave it. Now the district judge, who heard and saw these witnesses testify, who is doubtless personally acquainted with them, and who, therefore, had a much better opportunity of testing their veracity than we have, believed them, and gave effect to their testimony. Hence we find no warrant to justify us in concluding and holding otherwise. As the opponent was in possession of the property, and in full control of the store and of its business, as shown by numerous bills and statements of merchants with whom he dealt, either in the consignment of cotton or in the purchase of goods, the burden of proof was on appellants; and they have failed to make out their case.

On the question of damages claimed by this opponent on account of the wrongful attachment, we find that the district judge entirely ignored that feature of the case, which must be construed as a rejection of the demand. Owing to the circumstances surrounding the transactions as hereinabove detailed, we are satisfied that appellants were not prompted by malice; and, as the record contains no testimony of the actual damages suffered by this opponent, we conclude with the district judge that no damages should be allowed in the premises.

2. The claim of Thomas Lynch is fully sustained in the record, and it was therefore properly allowed, both in the amount sued for, and as to the privilege claimed.

3. The claim of Fred Claiborn is not sustained by the record, which shows that he was not employed as an overseer, but merely as a laborer in common with others, of whom he was the foreman. But he did not superintend or oversee the labor, the working animals, and the general operations of the plantation, and hence he was not an overseer, within the scope and meaning of the textual provisions of the Rev. Civil Code, art. 3218. The argument of his counsel that his wages as a laborer are also secured by a privilege in the crop, and that he should now recover in that capacity, is not sound. He must stand or fall by his pleadings. He is in the legal attitude occupied by the third opponents in the case of *Scannell v. Beauvals*, 38 La. Ann. 217, who had originally claimed a privilege on a sugar-house, and on the acre of land upon which it stood, but who made out a claim to a privilege on machinery alone. The opponent here may be an-

swered in the language of the court in that case: "They ignored and abandoned the privilege they had, and set up and attempted to enforce a privilege they had not; and the penalty they suffer is the loss of what they might have secured, for they are now remediless." See, also, *Shakespeare v. Ware*, 38 La. Ann. 570.

We find no error in that part of the judgment which recognizes and enforces the moneyed claim of appellants against defendant, and sustains the attachment on so much of the property seized as was found to be his. The contention of his counsel to the effect that, under his contract of respite with his creditors, defendant had become their agent, and that, as such, he was not liable to the remedy of attachment, can hardly be serious. Carried to its full length, the argument might have subjected him to a prosecution for embezzlement.

It is therefore ordered, adjudged, and decreed that the portion of the judgment of which this court has not retained jurisdiction be amended by rejecting the privilege therein allowed to third opponent Fred Claiborn, and that his claim for a privilege be rejected, and that in all other respects said judgment be affirmed at the costs of appellants, save the costs incurred by the opposition of Fred Claiborn, which costs in both courts are to be taxed to said Claiborn.

Succession of SPARROW.

(*Supreme Court of Louisiana. April 7, 1890.*
43 La. Ann.)

ADMINISTRATORS—SETTLEMENT OF ACCOUNTS— RIGHTS OF CREDITORS.

1. The amount of commissions due an administrator of a succession is matter for determination on final account.

2. In case an administrator has made to a minor advances on its share or interest in the succession for purposes of subsistence, schooling, and maintenance, it is permissible for him to carry same into a succession settlement, and he is not bound to resort to an action against the tutor for settlement; the interest of the minors not having been liquidated, and separated from that of the major heirs.

3. In case an administrator improperly applies a sum to the debit of a succession creditor, and by judgment of the court it is withdrawn therefrom, and imputed to a different account, the former is necessarily increased by that much.

4. The major heirs of a succession having bound themselves personally, and to the extent of their virile shares therein, for debts contracted by the administrator with a third person, and a settlement of which is to be made in the succession, it is competent for such creditor to intervene in the proceedings and join the accountant, so as to speed the trial, and enforce the payment of his claim.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Carroll; R. R. WILLIAMS, Judge.

J. E. Ransdell and W. J. Wyley, for major heirs. *J. M. Kenedy*, for heirs of John Chaffe. *C. S. Wyley*, for minor heirs.

WATKINS, J. When this succession and the various contestants were last before this court, (40 La. Ann. 484, 4 South. Rep. 513,) quite a number of questions were adjudicated, and others left open for future

determination, and for that purpose the case was remanded to the lower court. They are (1) for the ascertainment of the amount for which the shares or interests of the two major heirs of Mrs. Sparrow are liable to John Chaffe & Sons, growing out of their written agreements touching the cultivation of the succession plantations by Edward Sparrow and Christo Chaffe, administrators, and the advances made and supplies furnished by said firm for the purpose of said cultivation; and (2) for the adjustment of any indebtedness of all the heirs of Mrs. Sparrow, for advances made to them by the succession, or by Chris. Chaffe, administrator. When the case went down to the court below, the administrator filed his fourth provisional account and three tableaux of debts,—one, of debts due by the succession; one, of debts due by the heirs to the administrator of the succession; one, of debts due to John Chaffe & Sons by Edward Sparrow, for which the two major heirs are responsible to the extent of their virile shares in their mother's succession. This last indebtedness was the subject of special mention and reservation in each of our opinions and decrees in this succession in 39 La. Ann. 696, 2 South. Rep. 501, and 40 La. Ann. 484, 4 South. Rep. 513. In those cases, all questions appertaining to it were definitely settled except that of its amount; and the object of this appeal is mainly for that purpose. The major heirs oppose the account and the first and last tableaux, and the tutor of the minors opposes the second tableau and the account on various grounds. On the trial the judge *a quo* approved and homologated the account and second tableau without any alteration, rejected the first one in its entirety, and amended the third so as to fix the total amount due John Chaffe & Sons at the sum of \$31,454.54, capital and interest, on the date judgment was rendered, January 9, 1890; the total amount of the proceeds of the crop of 1883, and the proceeds of the sale of Midland store, less the amount to be reserved from the latter with which to pay its creditors D. G. Tutt & Co. and Orr and Lindsley at the sum of \$20,835.85; and, after the latter had been deducted, the total amount of the net balance due that firm at the sum of \$10,618.69. The judgment fixed the amount of the one-third due by Mrs. Kate Foster at the sum of \$3,539.56, and that due by Mrs. Fannie Ashbridge at the same amount, and ordered the administrator to pay said sums, respectively, with legal interest thereon from date of decree to the intervenors, as the heirs of John Chaffe, and the successors in title of John Chaffe & Sons, out of their respective shares or interests in the succession. It further ordered the administrator to pay to said intervenors the said proceeds of the crop of 1883, on account of their claim against Edward Sparrow, as administrator of succession plantations. From this judgment all parties have appealed. In briefs, various points are argued, some of which have already been decided in our previous opinions, and others appertain to claimed items of increase or diminution of the aforesaid judgment.

1. Taken in the order stated, the first question presented for consideration is whether the administrator should charge himself with \$4,000 as the rental value of the succession plantations for the year 1888, or is \$3,500, as charged in the account, the full amount for which he is liable. The opponents objected to the introduction of any evidence on the question of the rental value of the plantations in 1888, on the ground that our opinion in 39 La. Ann. is *res judicata*. The judge *a quo* overruled their objection and admitted evidence, and opponents reserved a bill of exceptions to his ruling. We think the judge was right in so ruling. Our decree in 1887 could not include a question of rents in 1888. It did not, either in terms or effect, attempt to do so. We simply held "that, having made no effort to lease the plantations under his administration, he is liable for the rental value of the same during the time that he cultivated them for his own account, under the law." Considering the evidence, we fixed the rent of the three plantations "at the sum of \$4,000 per annum, subject to deduction for taxes levied thereon." At the same time we most distinctly recognized the right of an administrator to lease succession property, and by private agreement, after due notice, (39 La. Ann. 703, 704, 2 South. Rep. 605;) citing Succession of Richmond, 35 La. Ann. 858; Succession of Myrick, 38 La. Ann. 611. In this case the evidence shows that an effort was made to obtain a higher price for them, but that, after obtaining an order of court to that effect, and making public advertisement, \$3,500 was all he could obtain for the rent of the three plantations, mules, etc., appertaining thereto, and this sum he has collected, and charged himself with on his account. This is certainly all he is responsible for, and the court below correctly entertained that view, and homologated the account.

2. On the first tableau of debts there appear but three items. No complaint is made by any one of the disallowance of the item of \$964 in favor of Stevenson and May, and opponents' objection to which was that same had been previously allowed on a former account. (a) Of the second item, it being an amount (\$1,609.45) claimed as being $2\frac{1}{2}$ per cent. commissions on \$64,378.55, as the net value of the succession, the administrator says that he does not demand the payment now, but merely desires that the amount be liquidated and determined at this time, in order to prevent future litigation and additional expense. On the other hand, the opponents' contention is that this is matter for determination on final account. In the view of the opponents we concur. On the trial of annual or provisional accounts the questions are (1) what revenues or other moneys has the administrator received? and (2) what sums has he disbursed? On the trial of a final account the questions are (1) what property and values of all kinds passed under administration; and (2) has the administrator faithfully administered the succession, accounted for all he received, and is he entitled to a discharge? At this time the court will not examine and decide what amount

of compensation he is entitled to receive. This identical question was argued and decided when the succession was last before us, and we said: "The administration is not yet closed, and we do not think that the succession should now be taxed with the entire commissions. These are only properly exigible upon a final settlement, to be adjusted in the final account." 40 La. Ann. 492, 4 South. Rep. 518. We can discover no useful purpose that would be subserved by taking up and deciding the question of the administrator's right to commissions confessedly before they are exigible. *Non constat* that, when they become exigible, any opposition will be made to their allowance; or that something might not occur between the judgment and final account which would render their payment impossible. Altogether, we think it advisable that the whole matter should be postponed to the final account. (b) Of the third item, it being an amount of \$250, claimed by J. E. Ransdell, attorney for the administrator, as due for professional services rendered since the death of J. W. Montgomery, in June, 1888, the contention of the administrator being that his services have been valuable to the succession, and that of opponents, that they are covered by, and embraced in, the amount awarded in favor of the pre-existing law partnership of Montgomery & Ransdell, of which the claimant was a member, in our last opinion, (40 La. Ann. 491, 492, 4 South. Rep. 513,) after stating the amount claimed to be \$5,017.05, less the amount paid of \$900, leaving the balance of \$4,170.05, we said: "The fee of Montgomery & Ransdell was reduced to \$2,862, and, adding the \$900 already paid, made it \$3,762.75." "We have carefully examined the record, and considered the proceedings with special reference to making a just estimate of the services rendered by these gentlemen, and we think they should be allowed a fee of \$3,250, and deducting the \$900 received by them would leave a balance due them of \$2,350; this to include services rendered and to be rendered in the settlement of the succession," etc. This is plain enough, and entirely free of ambiguity; but counsel in brief cites us to the phraseology employed in our decree, and invokes it as being decisive of the question in his favor. It is as follows, viz.: "That the fee of Montgomery & Ransdell be fixed at \$3,250.00, subject to a credit of \$900 already paid, leaving balance of \$2,350 due." Hence he insists that the opinion, or, rather, the decree, did not fix the amount of fees of counsel for future services, and his claim is well founded. But we do not regard the word "due" as exercising control over the opinion and the remainder of the decree, as both the opinion and first part of decree fix the sum alike, viz., \$3,250, less \$900, leaving a balance of \$2,350. We can see no inconsistency between the statement in the opinion that this sum "to include services rendered and to be rendered in the settlement of the succession," and that in the decree of \$2,350 due. It may be questionable, or even illegal, if you will, for the full amount of attorneys' fees to be awarded before his services have been fully rendered and the

succession wound up; yet, if neither the administrator, heirs, or other creditors do not complain of such an allowance having been made, that is the end of the controversy. But, however that may be, we are not disposed to regard with favor an argument of that kind in behalf of an additional allowance. Having thus disposed of all the items which figure on the first tableau of debts, we find the judgment of the judge *a quo*, rejecting all, to be correct, and approve of his decree in that particular.

3. On the second tableau of debts there appear only three debts enumerated as being due by the heirs of Mrs. Sparrow to Chaffe, administrator, viz.: Amount advanced to Kate Foster, \$4,487.25; ditto to Fannie Ashbridge, \$2,105; ditto to minors Decker, \$4,018.84. The vouchers corresponding therewith disclose that these sums are made up of cash and drafts of the different parties on the administrator, which were paid by him during the years 1883, (latter part,) 1884, 1885, and 1886, and since. Neither of the major heirs opposed the amounts charged to them respectively, and hence the only question is with regard to the charges against the two minors, Mary and Kate Decker. Their tutor insists that it is not competent for the settlement to be made in the succession of their grandmother, on an administrator's account, but that it should be referred to him, as tutor, for allowance or rejection, and settlement thereof in the tutorship. He further contends that, as no debt can be made against minors in excess of their revenues, without the authority of a family meeting, (Rev. Civil Code, art. 350,) there is no legal reason for the enforcement of the administrator's demand against them. In our opinion in 39 La. Ann. 706, 2 South. Rep. 507, we expressed our views in regard to a part of this claim thus: "It appears from the record that, since his appointment, the present administrator has also furnished the means necessary for the maintenance and for the schooling of the minors, Mary and Kate Decker, and that, as they were without a tutor from August, 1883, to the latter part of 1885, the funds were intrusted to Mrs. Foster, who had kindly taken charge of the two minors. All these proceedings were irregular, and were carried on outside of the law; but they were manifestly prompted by laudable feelings, and considerations of fairness and of humanity, for which the administrator should not be made to suffer, if by any legal means he can obtain reimbursement. We therefore deem it our duty to reserve * * * the rights of the administrator to demand reimbursement of all sums advanced by him to the two heirs aforesaid, as well as for similar advances made to the minors, Mary and Kate Decker." An examination of the record discloses that all items prior to the 14th of July, 1887, were charged to Mrs. Kate Foster, and those subsequent to that date to C. S. Wyley, tutor. His opposition denies the correctness of only those items which are charged to Mrs. Foster, and which aggregate \$2,188.84; but it admits the receipt of the remainder, of \$1,830, and the liability of his wards

therefor. Hence it is clear that the whole question is remitted to this succession settlement, and that it is narrowed to the amount of money the administrator expended for their account. We can perceive no objection to this mode of proceeding, as the account and two of the tableaux concern the minors, and their interests are still united with those of the major heirs in the succession; and it is quite as much a matter of justice to the administrator that their liability to him for advance payments made on their inheritance should be adjusted in the succession, as payments so made to the major heirs. The proof fully satisfies us that Chaffe, administrator, made the advances stated in the tableaux, and that the shares or interests of the minors are liable therefor, there being no proof in the record to show that the sum expended excluded their revenues.

4. Before we undertake the discussion of the account of John Chaffe & Sons against Edward Sparrow, as administrator of the plantations of Mrs. Minerva Sparrow's succession, a brief view of its *status*, as it appears in our decisions, will be necessary. During Gen. Sparrow's administration of his wife's succession, between the date of her death, in December, 1879, and the date of his, in July, 1883, he conducted with that firm all of his financial transactions. On account of those dealings, that firm preferred against her succession a large claim, the correctness of which had been acknowledged by Sparrow just before his death. In July, 1883, Christopher Chaffe became administrator, and continued the administration and the affairs of the plantation, just as they had been managed by his predecessor. In 1885 he filed an account and tableaux of debts, on which the claim of his firm figured, at the debt of the succession, for the sum of \$27,466.68, as due at the date of Gen. Sparrow's death. They were opposed, and, on appeal, we held that the administrator must be considered and treated as having operated the plantations of the succession for his individual account, with the authorization of the major heirs; and, as such, responsible for the revenues thereof, and chargeable therewith. We also held that John Chaffe & Sons were not the creditors of Mrs. Sparrow's succession, but of Gen. Sparrow, as the administrator of the succession plantations, and that Mrs. Foster and Mrs. Ashbridge, major heirs, were bound, under their written agreements, each for one-third of that debt, to the extent of their respective virile shares in their mother's succession. On account of the mixed character of these transactions, and the peculiar relations of the parties, it was thought proper that this account of John Chaffe & Sons should be liquidated and settled in the succession, and contradictorily with Chaffe, administrator; therefore, it was ordered by the court that the administrator should apply the net proceeds of the 1883 crop (which was at that time standing at the credit of the succession) to the credit of John Chaffe & Sons. But, upon an examination of their accounts, it was ascertained to be a fact that in February, 1880, there was at the credit of Mrs. Minerva Sparrow with them

the sum of \$11,451.61, and that they held her mortgage notes for \$11,051.32; and that, instead of applying that sum to the extinguishment of said notes, they incorrectly imputed it to her credit on their account. We thought this to be illegal, and imputed that balance to the discharge of Mrs. Sparrow's notes, and gave her succession credit for the resulting balance of \$400.29. This resulted, of course, in a corresponding increase of John Chaffe & Sons' account by that amount when the cause went down to the lower court for a trial of the questions remaining in suspense, and, in pursuance of our express reservation, the administrator filed an additional account, and two tableaux of debts, on which the account of John Chaffe & Sons was restated, and the amount fixed at \$42,000, and one-half charged to each of the major heirs. These were opposed, and on the trial it was held by the district judge that no proof was admissible in reference to this account, and we decided that his ruling was erroneous, and again remanded the case for the purposes stated above, and directed the judge to admit the rejected testimony. On the return of the case to the lower court, the issues and pleadings were reformed, and disposed, as stated in the beginning of this opinion. (a) As stated in transcript and brief of John Chaffe & Sons, their account stands thus, viz.:

Balance due July 5, 1883.....	\$27,466 68
To amount paid on mortgage.....	11,451 61
" interest on last, to July 5th, 1883....	8,081 75
Aggregating	\$42,000 04

Opponents not only deny and vigorously resist this additional charge of \$11,451.61, with interest, but also the whole claim of John Chaffe & Sons. On the trial their counsel admitted that in the account there was erroneously charged, as a debit, the sum of \$2,974.51, and that that same was a debit of A. M. Ashbridge, the husband of one of the major heirs and opponents, and should be deducted. Said sum, with interest to July 5, 1883, aggregated \$3,733.52, and when credited on the account there was left a balance due of \$38,266.52. Originally there was also a personal debt of Gen. Sparrow charged up in their account, but the proof shows that, upon holding a conference with him upon the subject, same was credited back again, and completely eliminated therefrom. From what is recited in the preceding part of this paragraph on the subject, it is manifest that the sum of \$11,451.61, with interest, was correctly charged into the account again, and properly figures as an additional debit against Gen. Sparrow, because John Chaffe & Sons had improperly given him credit for just that amount of Mrs. Sparrow's personal funds, which were in their hands before her husband was appointed administrator of her succession. Having thus withdrawn that amount of credit, there must necessarily be a corresponding amount of the debit against Gen. Sparrow. We think the account has been correctly restated at the figures above given. The proof fully satisfies us of the correctness of the demand. All of the accounts are before us in the original, and to them are

appended the original depositions of the three members of the firm, which were taken in 1886, and have since that date been on file in the *mortuaria*, and have been previously submitted to this court for examination. Those witnesses were submitted to a rigorous cross-examination by the opponent's present counsel, who have failed to produce any counter-vailing evidence. They each testify to the correctness of each and every item of the accounts, and upon their uncontradicted evidence we feel warranted in approving and allowing it for the balance claimed of \$38,266.52, with legal interest from July 5, 1883. (b) Counsel for opponents, however, insist that the account of John Chaffe & Sons is not for strict plantation supplies, a large part of the advances made having been for Gen. Sparrow's individual uses, and that of the minors, and that they are not chargeable therewith. They point to Gen. Sparrow's certificate approving those accounts as confirmation of their charges. Indorsed upon a paper which is annexed to their accounts, and the accompanying depositions, is a certificate, in which he approves those rendered prior to the 4th of August, 1882, and in which it is stated that "the charges made therein for supplies furnished and advances made to enable [him] to carry on and administer said plantations are correct, and were used in that way, except that a *small part thereof*, not exceeding one-sixth, [if that much] was expended for the *necessary support of the heirs of Mrs. Sparrow*, and [were] *so expended by their request, and with their consent that the crops of the place should be used by me in the payment thereof.*" (Italics ours.) On that date the total amount of John Chaffe & Sons' account approximated \$21,000, and was only increased during the succeeding year by about \$6,000. But there is no proof as to the application of the last-named advances, and there is no question of opponents' liability for their proportionate shares of two-thirds of the \$21,000, under the very terms of the certificate which opponents invoke, although it might have been questionable under those of their original agreements. And we regard them equally bound for the amounts advanced to and consumed by the two minors, who had at the time no tutor, and were living in the family domicile. The major heirs, by virtue of their written agreements, came under a similar obligation to John Chaffe & Sons as Gen. Sparrow did,—even a greater one, because a large portion of the supplies and advances thus made was expended and used for their support, schooling, and maintenance, and that of their nieces, with their knowledge and acquiescence. Bound as they were to John Chaffe & Sons, and co-operating as they were with their father, in the management of the plantations of their mother's succession, they were bound to have been aware of the necessities of the minors, and must be held to have consented to and acquiesced in what Gen. Sparrow permitted to be done, and cannot be allowed to shield themselves from the full measure of their responsibility for his indebtedness on that account. (c)

Opponents specially disavow any responsibility for any obligation of Gen. Sparrow, arising out of his commercial enterprise in the way of a store on Midland plantation; and at the same time they resist the demands of D. G. Tutt & Co. and of Orr and Lindsley to be paid the amount of their respective claims from the proceeds thereof. It appears from the record that the store in question was situated on the Midland plantation, it being one of the three belonging to Mrs. Sparrow's succession, and from it advances of supplies were made to it, and to the two others, and the laborers and employes on each. This store was operated by the employes of Gen. Sparrow, and supplied by John Chaffe & Sons in great part. D. G. Tutt & Co. and Orr and Lindsley also furnished it, in part, and the claims presented are for advances made to it. This store formed an important ingredient in the administration of these plantations, and we think the district judge correctly treated the proceeds thereof as forming a part of the assets to be used in affecting a settlement of John Chaffe & Sons' account. In so doing, he could not, with justice or propriety, have disregarded the demands of other opponents for a share thereof. The judgment fixes the amount of the proceeds of Midland store at \$1,640.75, and deducts therefrom \$643.27 as the amount due D. G. Tutt & Co., and \$454.96 as the amount due Orr and Lindsley, and allows the balance of \$542.79 as credit on the account of John Chaffe & Sons. The sums due D. G. Tutt & Co. and Orr and Lindsley are not to be paid over to them, but are to be retained in the hands of the administrator for payment in due course of law. Under the circumstances, nothing else could have been done.

5. The next important question to determine is the amount of the net proceeds of the crop of 1883, which was produced on the succession plantations, partly under the administration of Edward Sparrow and partly under that of Chaffe. While it is true that Christopher Chaffe was a member of the firm of John Chaffe & Sons at the same time he was administrator of the succession, yet the proceeds of that crop stood to his credit as administrator on the books of John Chaffe & Sons, and were not under their dominion or control. For the purpose of facilitating settlement, and speeding the trial of the account, the heirs of John Chaffe, who departed this life in October, 1888, and the successors in title of John Chaffe & Sons, filed an intervention, to which the opponents excepted on various grounds. We are of opinion that the district judge properly permitted it to be filed, as it tended to subserve the purposes enumerated, and was in furtherance of the reservations made in our previous decrees.

The net proceeds of the crop of 1883 are stated in the tableau under discussion to be \$13,853.83, inclusive of the stock of merchandise in Midland store; and deducting this amount from the \$42,000.04, represented to be due John Chaffe & Sons, and there is remaining a balance in their favor of \$28,047.20. As before stated, the judgment appealed from increased the amount to

\$20,293.06, including the proceeds of merchandise in Midland store already considered. The decree does not furnish us any data on which this amount is ascertained, but a comparison made of the judgment with the items enumerated on the tableau shows that, in order to reach this estimate, the judge *à quo* must have necessarily rejected many of them. This seems to be conceded by counsel on both sides, in their briefs. Taking these admissions in to consideration, we will discuss the rejected items: (a) The "pay-rolls of J. A. Gary, \$700.08." The proof shows that Gary was manager on the Arlington and Hope-well plantations, belonging to the succession during the year 1883, and, as such, was charged with the settlement of the accounts of laborers, and the payment of their wages. For this purpose Chaffe, administrator, placed the necessary funds in the hands of an agent on the premises, who furnished the plantation manager, as needed, and he made payments to the laborers on pay-rolls, and they were in turn surrendered to the agent as vouchers. Every week the manager prepared pay-rolls, certified to their correctness, and from the agent received the requisite sum of money to make his settlements. These pay-rolls were offered and filed in evidence without objection, and other confirmatory proof was made of the expenditure of the money by the administrator, and that same was furnished by John Chaffe & Sons. The only objection urged in argument is that the quantum of evidence is insufficient to charge opponents. The testimony offered was, manifestly, all that was attainable. Gary was *non est inventus*, and after the lapse of six years it would have been an utter impossibility to have obtained the testimony of the laborers themselves. We think the proof of this item is ample, and that it was incorrectly disallowed. (b) Balance of salary of E. N. Davis, as overseer in 1882, \$1,481.96. It appears that Davis had been for several years general manager of the succession plantations while under the management of Gen. Sparrow, and, when Chaffe was qualified and took charge, he ascertained this balance to be due him on account of the previous year, and, not questioning its correctness, paid it from the proceeds of the 1883 crop. The general complaint made by opponents of this item is, not of its amount, but of the fact that, same having been an item of credit in favor of Gen. Sparrow in 1882, it could not be paid from the crop of 1883, as that alone is matter for our consideration. We think the proof is abundant of the amount being due, and of its having been paid by Chaffe, administrator. When he took charge of the succession it was at Gen. Sparrow's special request. He was not at that time advised, nor for several years thereafter, that the control and administration of these plantations did not constitute a part of his administration of the succession, and that of his predecessor in office. He had the impression that his administration was but a continuation of that of Gen. Sparrow, and doubtless supposed that any preferred claims on the crop like that of an overseer's wages could be with pro-

priety paid from the proceeds of the crop of 1882 or 1883, indifferently, as his services extended to both, though under different administrators of the same succession. Notwithstanding he was in error in this assumption, yet the management and superintendence of Gen. Sparrow continued until the 5th of July, 1883, or for one-half of the year, and he was the absolute owner of the whole of the crop of that year. There is no question of the fact that, under their written agreements, the major heirs were absolutely bound for all the legitimate and proper expenses of the cultivation of that crop, which Gen. Sparrow contracted, and for those of previous years. What justice is there, then, in the demand of opponents that John Chaffe & Sons and Chaffe, administrator, shall lose this sum, because it was not technically a debt of the crop of 1883, notwithstanding it is one for which Gen. Sparrow and they were legally bound? None. It is our opinion that this debt should have been allowed, and that the judge *a quo* erred in rejecting it. (c) Rent of 1883, \$2,000. Under our decree in 39 La. Ann., we held that the administrator, Chaffe, was chargeable with the rental value of the plantations of the succession, at \$4,000 per annum from the date of his appointment, and he, accordingly, charged himself with \$2,000, on his 1883 account, for one-half of the year 1883. Now his claim is that, having paid this sum for the account of Gen. Sparrow, and the heirs jointly, he is entitled to reimbursement out of the crop, for the net balance of which they are to recover credit. This is so manifestly just and correct that argument seems unnecessary to strengthen and support it. Had the crop of that year been equally apportioned between Gen. Sparrow and Christopher Chaffe, individually, his claim would have been unfounded. But this is not the case. The whole crop goes to the credit of Gen. Sparrow's account, and it must be charged with this part of the rent. This item was incorrectly disallowed, also. (d) Commissions for administrator of 2½ per cent. on proceeds of crop of 1883, amounting in gross to \$38,092.07, and aggregating \$972.30. While the administrator was put to large expense and trouble in the management of this property, he was not administrator *quoad hoc*; only a *negotiorum gestor*. His firm was the recipient of the crops, and sold them on usual terms. He was the administrator of the remainder of the succession property, and will be entitled to commissions as such on final settlement. Various other intermediate agents and assistants were in his employ, and engaged in the cultivation of the crop; yet it is not right for his services to go wholly unrewarded, and we think that his supervision and care of the crop for one-half of the year 1883 should entitle the administrator to some allowance, and we therefore fix his compensation at \$300, and to that amount his demand is reduced. (e) Vouchers Nos. 284 and 180 for the aggregate amount of \$191.32 were withdrawn by the administrator, and appropriate allowance was

made on the tableaux and judgment. (f) The judge *a quo* increased the debits of the administrator by charging him with \$733.33 for cotton seed of the crop of 1883, used in the crop of 1884, and for corn likewise employed, valued at \$996, the two items aggregating \$1,730.08. An examination of the evidence on the subject, leaves our minds in doubt. After the lapse of so many years, it is quite impossible for witnesses to testify with accuracy as to details of plantation expenditures; and it is equally as much so for courts of justice to render accurate judgments on their evidence. Hence, an appellate tribunal must, of necessity, rest its judgment on the opinion of the judge below, who knows the witnesses, and heard them testify. Therefore, we will not disturb his judgment in this particular.

This completes our record of the account and tableaux. There are some other matters adverted to in the oppositions, which we have not considered germane to provisional account, and have, for that reason, passed them by without notice; but we will fully reserve their right on the trial of the administrator's final account. The judgment must be amended, so as to conform to the views herein expressed.

It is therefore ordered and decreed that the judgment appealed from in the following particulars, viz.—*First*. So as to charge to and deduct from the amount fixed by the judgment as the net proceeds of the crop of 1883 the following, viz:

(a) The pay-rolls of Gary.....	\$ 700 08
(b) Balance of Davis' salary.....	1,481 96
(c) One-half 1883 rent.....	2,000 00
(d) Commission on 1883 crop.....	300 00

Aggregating.....\$4,482 04

—resulting in a net crop balance in the hands of Chaffe, administrator, of \$16,353.81 for the year 1883. *Second*. So as to fix the net balance of Edward Sparrow's indebtedness to John Chaffe & Sons, as of date July 4, 1883, at \$38,266.52, subject to a credit of the amount fixed herein above as the net balance of 1883 crop, whereby a final balance in their favor, and against Edward Sparrow, as administrator of the succession plantations from December, 1879, to July 4, 1883, is produced, of \$21,912.71, on which legal interest is to be computed from the 4th day of July, 1883, to date of payment. *Third*. So as to fix the amount for which each one of the shares or interests of the major heirs, Mrs. Kate Foster and Mrs. Fannie Ashbridge, respectively, are bound, at the sum of \$7,304.23, with like interest as last and from same date; that sum being one-third of the net balance due by General Edward Sparrow. It is finally ordered and decreed that these sums shall be by the administrator reserved out of their respective shares in the succession, on final settlement, and by him paid to John Chaffe & Sons. That in all other respects, the judgment appealed from be affirmed, and the costs of appeal be taxed against opponents and appellants.

Rehearing refused.

Succession of Cass.

(*Supreme Court of Louisiana*. April 7, 1890.
42 La. Ann.)

TUTORS—REMOVAL—ABSENCE FROM STATE—JURISDICTION.

1. Where the tutor and the minors permanently leave the state and acquire a residence in another state, the tutorship is ended.

2. In such a case the courts of this state have no jurisdiction of a suit to remove the tutor.

3. The domicile of the minors being that of the tutor, the jurisdiction in which the domicile is situated is charged with the appointment of the guardian and tutor.

4. If the minors own property in the state, in the absence of a guardian appointed at their domicile, the courts of this state have jurisdiction to appoint a tutor to administer said property.

5. Where the minors reside and have their domicile in the state, the permanent absence of the tutor from the state *de facto* vacates the tutorship, and it is not necessary to bring a suit to remove him from the tutorship. The judge can immediately appoint a tutor in his stead.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

W. S. Benedict, for appellant. *J. Bassich, Jr.*, and *J. Q. A. Fellows*, for appellee.

MCENERY, J. This suit was instituted in 1885 by John H. Wilberding, under-tutor, against C. L. C. Cass, natural tutor of his minor children, to have him removed from the tutorship. The case was placed on the dead docket, but revived in 1889. After the institution of the suit of July, 1885, the natural tutor permanently left the state, and acquired a domicile in Chicago, in the state of Illinois. When he left the state of Louisiana, he carried his minor children with him, and they have resided with their father at his new domicile since they were taken beyond the jurisdiction of this state. The natural tutor, Cass, filed an exception to the action when it was revived, alleging that he had permanently left the state of Louisiana, taking his children with him, and had acquired a residence in Illinois, and the court was therefore without jurisdiction to entertain the suit. There was judgment maintaining the exception, and the plaintiff has appealed.

The fact of the tutor, Cass, having left the state, and acquired a *bona fide* residence in Illinois, is fully established. As he took his children with him, the domicile of the father became the domicile of the children. The law places no restraint upon the movements of the natural tutor. He has the absolute right to remove from the state, and carry his children with him, and acquire a residence in another state. *Delacroix v. Boisblanc*, 4 Mart. (La.) 715. In changing residence from one parish in the state to another, the tutor does not lose his tutorship. The tutor is always within the same territorial jurisdiction, and does not lose it. The new domicile in the state of the tutor becomes necessarily the domicile of the minors. *State v. Judge*, 2 Rob. (La.) 418; *Bailey v. Morrison*, 4 La. Ann. 523; *Lyons v. Andrews*, 12 La. Ann.

685; *State v. Petit*, 14 La. Ann. 566. But where the tutor emigrates to another jurisdiction, and acquires a domicile there, he by those acts forfeits the tutorship under the law of Louisiana. By leaving the state permanently, and making his residence elsewhere, he ceased to be the tutor of the minors as though he had died. There is no necessity of a judgment removing him from the tutorship, and, if the minors reside in the state, it is the duty of the judge to appoint another tutor in his stead. *Rev. Civil Code*, art. 314; *Succession of Bookter*, 18 La. Ann. 157; *Bailey v. Morrison*, 4 La. Ann. 523. If a suit had been instituted by the under-tutor, some of the minors being still in the state, against the tutor, to remove him, for any of the causes specified in act 82 of 1880, amending article 305, Civil Code, and he had moved from the state permanently, in the interest of the minors still residing in the state, the suit for removal could be prosecuted to a final judgment. The act of changing domicile could not deprive the minors, who had never left the territorial limits of the state, of the protection of the jurisdiction which conferred the tutorship. So far as these minors still living in the state, and under the protection of its laws, are concerned, the jurisdiction of the court would be asserted in order to remove the tutor, and appoint another to take care of the persons and estate still within the territorial jurisdiction of the state. *Lyons v. Andrews*, 12 La. Ann. 685.

In the instant case the tutor had permanently left the state, and had taken all of his minor children with him, and their domicile is now in the state of Illinois. So far as the tutorship is concerned, it is absolutely ended in this jurisdiction. It makes no difference whether it was terminated before or during the pendency of the suit, as there is now no reason why the court should appoint a tutor to take charge of the persons of the minors. The courts in this state have no power to compel the father to return the minors to his former domicile, and there is no process they can issue that could bring them here, so as to be subject to this jurisdiction. The tutorship being ended by the permanent absence from the state of both tutor and minors, the courts here have no jurisdiction in the matter of the tutorship, so far as it relates to the custody and care of the minors. The domicile of the minors being that of the father, the natural tutor, the jurisdiction in which the domicile is situated is charged with the appointment of the guardian and tutor. The general administration of the minors' estate is confided to the guardian appointed at their domicile. As the minors own and possess property in Louisiana, in the absence of a guardian appointed at their domicile it may become necessary to appoint a tutor for special purposes of the property. *Harman v. McCawley*, 9 La. 567. When such a contingency arises, there is no doubt of the jurisdiction of the court to act in the matter, and appoint the tutor for this special purpose. Judgment affirmed.

JAMES V. MAYOR.

(*Supreme Court of Louisiana.* April 7, 1890.
41 La. Ann.)

**SUCCESSIONS—PARTITION—TUTOR AND MINOR—
SALE—MARKETABLE TITLE.**

1. The opening of a succession is an independent proceeding, which ought to be docketed under a proper title, and numbered and allotted, as required by the constitution, in the parish of Orleans.

2. Irregularities in such particulars cannot be claimed to have been acquiesced in by minors or their legal representatives.

3. A father cannot abdicate the tutorship of his children, although he be a non-resident tutor, where the interests of his minors in this state are involved in judicial proceedings, and he is present in the state.

4. The appointment of a stranger as dative tutor to such minors notwithstanding the recommendation of a family meeting is an absolute nullity.

5. Under the act of 1848, (Rev. St. § 3383,) guardians residing out of the state, but within the United States, have a right to represent the interest of their wards in this state.

6. An illegally appointed tutor cannot represent the minors in proceedings to effect a partition at private sale.

7. The property owned by minors in common with others, who are not co-heirs, can be sold to effect a partition at private sale under the act of 1878, amending and re-enacting that of 1869, only where the minors are properly represented by their tutor or tutrix, and on the authority of the court given on the recommendation of a family meeting duly convened.

8. Where a tutor owns property, in common with his minors, which he wishes to partition, the appointment of special tutors or of a special tutor is necessary where there exist opposite interests in the partition. The under-tutor may represent the minors eventually in such a case.

9. The ownership of minors cannot be divested unless all the forms of law have been observed, and, in cases of sale, unless the price was paid to one who had capacity to receive it, and to grant discharge therefor.

10. Although as a rule purchasers at judicial sales are not required to look beyond the order of sale, still they are bound, at their risk and peril, to ascertain that the court ordering the sale had jurisdiction over the matter, and that it had the right to exercise its discretion in the manner it did.

11. One who has agreed to purchase real estate cannot be forced to accept a title which is not unquestionably good, and which is suggestive of litigation; the less so where the persons who may have rights are not parties to the suit, and would not be concluded by a judgment adverse to their ostensible or contingent rights. This is so more particularly in cases in which minors are concerned.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; R. N. RIGHTOR, Judge.

Farrar, Jonas & Kruttschnitt, and *Bayne, Denegre & Bayne*, for appellant. *Alfred Goldthwaite*, for appellee.

BERMUDEZ, C. J. The object of this suit is to force the defendant to accept the title tendered him to certain real estate which he had agreed to purchase. His resistance is to the effect that the title offered is not good and valid, and such as he can be compelled to take. From an adverse judgment the defendant appeals.

It appears that James, the plaintiff, acquired the property in question in execution of a judgment compelling him to accept the title tendered him to the same,

and from which no appeal was taken. The record shows that J. M. Lewis married twice; his first wife dying leaving one child, and the second dying, leaving four children. During the community between him and his second wife, he acquired the property in question. He opened the succession of his first wife, and mortgaged his half of the property to secure the rights of his child by his marriage with her. After his second marriage, he had removed to Alabama, where his second wife died, and where he was appointed guardian of their minor issue. Subsequently, averring that appointment, and the interest of his children by the second marriage in the property, he instituted proceedings in the civil district court for the parish of Orleans for the recommendation of a family meeting on behalf of those children, having in view the sale of the property at private sale to effect a partition. The family meeting advised the sale, the proceedings were homologated, and the sale ordered. S. L. James having agreed to buy the property, but refusing the title tendered, Lewis brought suit against him before the same court. Finding that the title tendered was not such as James was bound to accept, but thinking that it could be perfected, the district court ordered that Lewis proceed to do what it thought should be done to accomplish that purpose, authorizing James to retain the amount due the child by the first marriage, and which was secured on Lewis' half of the property. Lewis then, by proceedings had in the suit against James to compel him to accept the title, procured, on the recommendation of a family meeting, on behalf of his children by the second marriage, the appointment of one Girdner, a stranger, as dative tutor to those children. An inventory was then taken, and afterwards a family meeting was convened to have the share of the minors in the property sold at private sale to effect a partition. Its deliberations were homologated, and the sale ordered. Then Lewis, joined by Girdner, filed a supplemental petition in the suit, alleging that the title had been perfected, asking that James be cited, and, after due proceedings, condemned to accept the title. James denied the validity of the title, averring that the proceedings under which Girdner had been appointed tutor were and are irregular, illegal, and void, for reasons stated. Judgment was then rendered, condemning James to accept the title, which he did, complying with the terms and conditions agreed upon. It appears that James subsequently offered to sell the property to Mayor, who agreed to buy it; but Mayor, considering that the title offered was not good, and not such as he was bound to receive, declined to accept it. Hence the present action against him to compel specific performance. From an adverse judgment, Mayor now appeals, as already stated. His defense is that all of the proceedings, of every kind and nature, had in the cause of Lewis v. James relative to the succession of his second wife, the taking of an inventory, the appointment of a tutor, the calling of a family meeting, are absolutely and radically null and of no effect, and

have not divested the interest of the minors in said property, and therefore the title tendered by James is not such as he can be lawfully compelled to take. In support of that defense, it is urged (1) that the succession of the second Mrs. Lewis ought to have been regularly opened and allotted, and that this was not done; (2) that the appointment of Girdner as tutor of the minors of the second marriage is absolutely null; (3) that the court had no power to convoke family meetings to advise with reference to the property of those minors who were non-residents.

It was quite irregular not to have opened the succession of the second Mrs. Lewis as had been that of the first, and as is usually done. The opening of a succession is a new and independent proceeding, which ought to be instituted, clearly and unmistakably, under a proper docketing by title and number. When thus opened, the matter ought to be allotted, as the constitution requires, to one of the divisions of the civil district court for the parish of Orleans.

However much the failure of an allotment may be waived or ratified by parties who are capable of acquiescing in and assenting to an irregularity of that kind, it cannot be claimed as a rule that a tutor, or an under-tutor, or minors who have no right to waive, have ratified the same. Such opening of the succession of Mrs. Annie Lewis did not take place. The proceedings had touching her estate were carried on under the cover of the title of the suit of *Lewis v. James* to compel the latter to comply with his promise to buy. This was not meeting the requirements of law.

But, conceding that the proceedings are regular, or that the succession was opened as it ought to have been, it is manifest that the appointment of Girdner as dative tutor to the minors is an absolute nullity on its face, for the plain reason that the father of the minors, who had been appointed their guardian in Alabama, was living, and in this state, at the time; that he could not abdicate the tutorship of his minor children even temporarily, and permit a stranger to be appointed as their tutor, and represent them in this state. Rev. Civil Code, arts. 253, 301. Under the provisions of Act No. 145, of 1843, p. 97, relative to guardians of minors residing out of the state, but within the United States, he had a right to represent them in this state, occupying to some extent the same position as if he had not been a non-resident guardian. Rev. St. § 3838. As co-owner for one-half of the property with his minors, to whom the other half belonged, he had a right to have the property partitioned by sale, if not susceptible of a convenient division in kind, and to institute proceedings for that purpose contradictorily with a special tutor or the under-tutor, if there existed any opposed interests in the partition. Rev. Civil Code, art. 1369; *Gassen v. Palfrey*, 9 La. Ann. 560; *Hagan v. Grimshaw*, 15 La. Ann. 394; *Succession of Young*, 23 La. Ann. 886; *Emmer v. Kelly*, Id. 763; *Peyroux v. Peyroux*, 24 La. Ann. 175. The act of 1878, (No. 25, p. 47,) which amends and reenacts Act 134 of 1869, p. 207, repealing all conflicting leg-

islation, authorizes the partition of property owned by minors and others, at private sale, only when the minors are duly represented by their tutor and tatrix, and where the authority of the court has been given on the previously obtained recommendation of a family meeting duly convened. As it is apparent that in the present instance the minors were represented neither by their guardian, nor by a special tutor or special tutors or under-tutor, it follows that, by the proceedings had, their title to one-half of the property was not divested, and therefore did not pass to James.

It may be worthy of notice that, although it is alleged that James complied with the judgment exacting specific performance, there is no proof in the record that the price paid by James was received by one who had authority to accept it, and to grant a discharge. *Abraham v. Lob*, 35 La. Ann. 877. The doctrine is surely well established that a purchaser at a judicial sale need not look beyond the order of sale, as a rule; but the protection is extended only where the court had jurisdiction of the subject-matter, and exercised powers vested in it by law. A probate court undoubtedly has jurisdiction over the persons and property of minors, but it could not exercise validly its powers to sanction the disposal of such property by one having no authority to represent the minors, and to receive the price, in case of sale. In such cases the purchaser is bound, at his risk and peril, to look behind the order of sale to ascertain whether the power exercised was one which could have been legally exercised. *Succession of Dumestre*, 40 La. Ann. 571, 4 South. Rep. 328. It is therefore apparent that, as James never acquired title to the half belonging to the minors, he could not convey any to Mayor, who had a right to exact a good and unquestionable title conferring undoubted ownership on him, and who cannot be forced to accept one which is, to say the least, most doubtful and clouded, under which future litigation would be imminent. He would be giving his money for property not transferable to him, and practically buying a law suit. *Bachino v. Coste*, 35 La. Ann. 570; *Beer v. Leonard*, 40 La. Ann. 847, 5 South. Rep. 257.

It becomes unnecessary to consider the last objection, touching the power of the court in any case to convoke a family meeting in behalf of non-resident minors. No judgment against defendant would bind the minors who are not parties.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that there now be judgment in favor of the defendant, rejecting plaintiff's demand, with costs in both courts.

ON APPLICATION FOR REHEARING.

FENNER, J. Both parties, plaintiff and defendant, in this case, agree to the granting of a rehearing in this case, in order that certain additional facts may be embodied in the record which they offer in the form of admissions, and ask us, on rehearing, to consider said admissions as part of the record, and to render a new decision on the case as thus made up, or, if

such cannot be done, to set aside our former decree, and remand the case in order that opportunity may be given to take testimony as to such additional facts. This court does not take testimony, nor does it consider cases made up by admissions of facts not presented in the court of first instance, whose judgment is brought up for review. This would be an exercise of original jurisdiction. But, considering the consent of parties as above stated, a rehearing is now granted; and, acting thereon, it is now ordered that our former decree be annulled and set aside except insofar as it reversed the judgment appealed from, and that the case be remanded to the lower court, to be there tried anew, and proceeded with according to law; appellee to pay costs of this appeal.

STATE *ex rel.* DUCOTE v. COCO, District Judge.

(*Supreme Court of Louisiana.* April 21, 1890.
42 La. Ann.)

CERTIORARI.—WHEN LIES.

The writ of *certiorari* is expressly intended for the purpose of bringing up a record in some pending suit in some subordinate court, so that a superior or the supreme court may, upon inspection thereof, determine whether or not there are any illegalities in the proceedings, whereby they may be rendered absolutely null and void.

(*Syllabus by the Court.*)

Demaine & Gouvillon, for relator.

WATKINS, J. Application for a writ of *certiorari*. The relator's complaint is that, in a certain civil suit instituted against him in a justice court of the parish of Avoyelles by Amanthe Ducote, judgment went in favor of plaintiff, from which he appealed to the respondent's court, and therein judgment was affirmed; that he prayed for a new trial without avail, and tendered an exception to the jurisdiction of the court *ratione materiæ*, which was overruled; that subsequently, at the suggestion of plaintiff's and appellee's counsel, the respondent judge amended the decree rendered by him, notwithstanding he had filed no answer to the appeal, and had asked no modification of the judgment appealed from.

The grounds on which he asks relief at our hands by way of *certiorari* are formulated thus: *First*, that the respondent, as judge of a court of appeal, was incompetent, for want of jurisdiction *ratione materiæ*, to try that cause, because the justice of the peace, as judge of the court of first instance, had none, as the action was one to test the right of possession of real property; *second*, that he did materially amend the judgment appealed from, notwithstanding the plaintiff neither appealed nor asked any amendment of the decree; *third*, that he amended and materially enlarged the judgment first rendered by him, several days after it had been signed and filed, and a new trial had been refused. His prayer is that the record be sent up in order that we may pass upon the alleged illegalities in the proceedings, and adjudge same to be absolutely null, and that he be required to proceed according to law.

The respondent returns, and the facts are, that suit was brought in a justice court for the possession of a small strip of ground which the plaintiff had leased to the relator, and to compel him to remove therefrom the improvements he had placed thereon during his tenure; that the order granted by the justice was that the defendant show cause why he should not clear the obstructions from, and vacate, the premises; that the defendant appeared, and filed an answer, in which he averred that he held and possessed the property under a lease, and prayed to be maintained in possession thereunder; that on these issues judgment was rendered in plaintiff's favor, requiring the defendant to remove the obstructions complained of, but it failed to award possession to either party; that the defendant alone appealed, and the case was tried *de novo* on the same issues by the respondent, and he affirmed the judgment appealed from; that when, subsequently, his attention was called to the fact that the affirmed judgment did not decree possession to the plaintiff of the property leased, and to which she was in law entitled, he amended the judgment in that respect; that the defendant and appellant made an application for a new trial, and, it being overruled, he tendered an exception to the jurisdiction of the respondent court *ratione materiæ*, on the ground first above assigned. This exception was overruled on the ground that the proceeding under consideration was brought, under the landlord and tenant's act, for the ejectment of a contumacious tenant, and that the magistrate, as judge of a court of first instance, had apparent jurisdiction, and that, as a cause on appeal from a magistrate court to a district court is therein *de novo*, the latter had jurisdiction also.

Without discussing the question of jurisdiction, it will suffice to say that we can discover no illegalities in the proceedings remediable by *certiorari*. As an appellate court, that of respondent had and exercised just the same power as that of the justice of the peace. *State v. Voorhies*, 41 La. Ann. 542, 6 South. Rep. 821. It matters not that the respondent was exercising appellate jurisdiction. It was the same jurisdiction that had been exercised by the court of first instance, only in a different way. The writ of *certiorari* is expressly intended for the purpose of ascertaining if any illegalities exist in proceedings whereby they may be rendered absolutely null and void. *State v. Recorder*, 30 La. Ann. 450; *State v. Judges*, 32 La. Ann. 1256. On the trial of such cause on appeal, it was competent for the respondent to hear all the evidence anew, and to determine the issues anew, by rendering judgment affirming, reversing, or amending the decree rendered by the justice of the peace. The respondent affirmed the judgment appealed from; but, upon suggestion subsequently made, that said decree did not award possession of the property to either party, he amended his decree *instantly*, and decreed the plaintiff entitled to possession. It is of this amendment that relators make serious complaint, but it is not well founded. The

ordinary rules applicable to appeals returnable to this court are inapplicable to appeals from a magistrate court to the district court, because the latter are "in the appellate courts *de novo*," and it is "sufficient for the party desiring to take an appeal to declare verbally such intention." (Code Prac. art. 1129. "The parties are at liberty to produce the same witnesses who were examined below, and the court may hear any new testimony." Id. art. 1136. The law does not appear to contemplate the filing of an answer by an appellee in such case; for it is provided by Id. art. 1134, that the justice of the peace "shall issue a citation to the appellee directing him to appear before the appellate court" simply. Hence his failure to answer the appeal, or to request an amendment of the judgment, is of no importance; and the respondent was authorized to amend the judgment in like manner as he could have been to amend a decree rendered by him in a suit tried before him originally.

There is no illegality in the proceedings. It is therefore ordered and decreed that the restraining order herein granted be set aside, and that the relief prayed for be refused, at relator's cost.

STATE V. HEIDENHAIN.

(*Supreme Court of Louisiana. April 21, 1890. 42 La. Ann.*)

NUISANCE—SMOKING IN STREET-CARS—ORDINANCE.

1. The ordinance adopted by the council of the city of New Orleans prohibiting smoking in the street-cars is constitutional and valid.

2. The police power delegated to the city in section 7 of the charter gives ample authority for the enactment of the ordinance.

3. There is much discretion left to a municipal corporation for determining what is a nuisance, and the exercise of this discretion will not be judicially interfered with unless the corporation has been manifestly unreasonable and oppressive, invaded private rights, and transcended the authority granted to it.

4. To determine what a nuisance is, is a question of fact.

5. The city council of New Orleans, to a certain extent, is vested with legislative authority; and it is vested with that discretion, within its authority, common to all legislative bodies. Within the exercise of this legislative discretion, it has authority to determine what is a nuisance, and to pass the necessary ordinances to suppress it.

(*Syllabus by the Court.*)

Henry Heidenhain, E. H. McCaleb, and Griault Farrar, for appellant. T. McC. Hyman, for the State.

MCENERY, J. The defendant appeals from a conviction by the first recorder's court of the city of New Orleans for a violation of ordinance No. 4,197, adopted January 2, 1890. For two distinct and separate violations of the ordinance, he was for each violation sentenced to pay a fine of \$25, or suffer 30 days' imprisonment. The ordinance is as follows: "Whereas, the custom of permitting smoking in the street-cars of this city is a most vile and objectionable one to the majority of our citizens, especially to the ladies, who are entitled to that courtesy and consideration due to their sex; and whereas, this alone, of all

the cities of the Union, allows such a discomfort to those of its citizens who ride in the public cars: Be it resolved that, from and after the promulgation of this ordinance, smoking in any street-car of this city is hereby prohibited, and shall hereafter be considered as a misdemeanor, and any one so offending, or any driver of a street-car who permits such an offense, shall be fined not less than \$5, nor more than \$25, or imprisoned not less than five days, or more than thirty days, recoverable by the recorder of the district in which the offense shall be committed. And be it further resolved, that one-half of any money thus recovered shall be the property of the party giving such information and testimony to the recorder as will lead to the conviction of the offender. Be it further resolved, that all laws or parts of laws in conflict with the above be, and the same are hereby, repealed. Adopted by the council of the city of New Orleans, January 2, 1890."

The defense is (1) the unconstitutionality of the ordinance; (2) that the city of New Orleans is without power or authority, under her charter, to pass such an ordinance; (3) that the ordinance in question is vague, indefinite, and insufficient in its terms, and does not define what acts shall constitute a violation or infringement; (4) that it imposes upon the drivers of street-cars duties and functions beyond the powers of the common council.

The ordinance does not deprive the defendant of personal liberty, nor does it invade any right of private property. Smoking is not made an offense, but it is prohibited only in a certain designated place.

The third and fourth grounds are without merit. The ordinance makes it specifically an offense to smoke in a street-car. The street-car drivers and the car companies are not complaining of the ordinance.

The several street-railroad companies have adopted the above ordinance as a part of their regulations, and prohibited smoking in all their cars immediately after the passage of the ordinance. When the defendant entered the car, there was conspicuously displayed a card notifying him that smoking was prohibited in that particular car.

A nuisance belongs to "that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage." Wood, Nuis. § 1. There is no doubt of the fact that smoking in the street-cars in the city of New Orleans had caused to a great majority of the people using them material annoyance, inconvenience, and discomfort. This is particularly so in the winter season, when the cars are closed. There is not only discomfort, but positive danger to health, from the contaminated air. The record establishes these facts. Smoking, in itself, is not to be condemned for any reason of

public policy. It is agreeable and pleasant—almost indispensable—to those who have acquired the habit; but it is distasteful and offensive, and some times hurtful, to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places. There are many other habits in manners and conduct which in some localities and places are not objectionable to the public, but when committed elsewhere may become offensive, and the subject of penal municipal legislation. Smoking may be classed among these subjects of legislation by the municipal corporation.

The police power delegated to the city of New Orleans in its charter gave ample authority to the city to maintain its cleanness and health; to maintain good sanitary conditions in the streets, public places, and buildings; to suppress all nuisances; and to impose a fine and imprisonment for the violation of ordinances enacted in pursuance of this delegated power. Section 7, Act 20 of 1882. The authority to abate nuisances is a part of the police power vested in all large and populous cities. To determine what is a nuisance is a question of fact.

The city council of New Orleans is, to a limited extent, clothed with legislative authority; and it is vested with that discretion within its powers common to all legislative bodies. Within the exercise of this legislative discretion, it has the authority to determine what is a nuisance, and to enact the necessary ordinances to suppress it. *Kennedy v. Phelps*, 10 La. Ann. 227; *Mayor, etc., v. Gerspach*, 33 La. Ann. 1011. Much is therefore left to the discretion of the municipal corporation in determining what is a nuisance, and the discretion thus exercised will not be judicially interfered with unless the corporation has been manifestly unreasonable and oppressive, invaded private rights, and transcended the power given to it. *Dill. Mun. Corp.* § 379. In the instant case, no private right, either of person or of property, has been violated or invaded. The city council, in passing the ordinance, did not transcend its powers. It had authority, under section 7 of its charter, to provide for the public health. It can therefore require in public places, theaters, halls, etc., that there shall be ventilation for a supply of fresh air; and, in order to preserve the public order and health, and under the general police authority in said section 7, it can compel the owner of public halls and theaters to provide means to prevent fire, and to provide fire-escapes in case of fire, and, in pursuance of the same power, it can, in order to preserve pure and fresh air in crowded halls, and to prevent fire, prohibit smoking in the same. The same authority and the same reasons apply in the prohibition of smoking in street-railway cars. It is essential to health and to comfort to have pure air in them as in any other crowded place.

The facts in the case of *State v. Bright*, 33 La. Ann. 1, have no application to this case. The former involved the question of the power of the city to punish a property owner for not keeping his sidewalks clean and in repair. This court decided that

there was no authority for the city to declare the failure to raise and repair the sidewalks a misdemeanor, and to fix a penalty to the same, as there was an absence of such authority in section 7 of the charter.

The city council had ample authority, under section 7 of the charter, to enact the ordinance under which the defendant was convicted.

Judgment affirmed.

WEIL v. ENTERPRISE GINNEY & MANUF'G Co.

(*Supreme Court of Louisiana. April 31, 1890.*)

MORTGAGES—SUBROGATION—PLEADING AND PROOF.

1. A party who claims the ownership of a note secured by mortgage, and a subrogation to the mortgage, by means of a purchase, must be held to his pleadings, and be denied the right of proving his right of subrogation by some other mode.

2. Payment of a note secured by mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party to whom he paid. The payment will extinguish the debt, and the mortgage given to secure it; and the claim for reimbursement will constitute the party who paid an ordinary creditor of him for whose benefit the payment was made. *Nicholls v. His Creditors*, 9 Rob. (La.) 476.

ON APPLICATION FOR REHEARING.

1. After pleading title by purchase, a defendant cannot be permitted, after judgment going against him, to set up title by subrogation. The less so where that theory was expressly repudiated originally.

2. Although legal subrogation may be claimed by an ordinary creditor who pays a creditor whose claim is preferable to his by reason of his privileges or mortgages, such subrogation cannot be allowed to one who does not assert it, but rests his title on a purchase not shown.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; **KING**, Judge.

Omer Villeré, for appellant. *W. S. Benedict* and *M. Voorhes*, for appellee.

POCHÉ, J. The real contest in this case is between plaintiff and the third opponent, and it hinges upon the alleged extinction of a mortgage and vendor's privilege originally securing two promissory notes on which plaintiff had sued out executory process of defendant's immovable property. The third opponent contends that the mortgage securing the note which he holds is the ranking incumbrance on the property seized by plaintiff, and he prays that executory process should issue on his note and mortgage, or, in the alternative, for payment by preference out of the proceeds of the sale provoked by plaintiff. The present appeal is from a judgment dismissing the third opposition.

A preliminary statement justified by the record will perhaps simplify the issues presented by the pleadings. It is clear that plaintiff and third opponent are both interposed persons, that *Charles Hernandez* is the real plaintiff, and that *A. J. Forstall* is the real third opponent. At the time that these proceedings began the former was the president, and the latter a member, of the board of directors of the defendant, and neither desired to figure in proceedings hostile to the company. Hence the interposition of third persons

was resorted to for the purpose of judicially determining their respective claims and rights. From this statement it follows that Weil is bound by every equity or reason which could affect Hernandez, and that Rareshide is to be affected by the same rule touching Forstall. *Johnson v. Weld*, 8 La. Ann. 126.

It appears that two notes secured by mortgage and vendor's privilege on defendant's property were to mature as follows: One, held by Edward Toby as agent of Price Butler, for \$1,000, fell due on March 19, 1887; and the other, held by the Citizens' Bank for collection, fell due on May 21, 1887. By an understanding between Charles Hernandez, who was then the president of the company, and the board of directors, and as the latter were without funds to meet payment, it was agreed that Charles Hernandez should take up the notes on his personal account. It then appeared that on the 19th of March, 1887, on payment of \$1,070, representing the capital and interests of that note, to Edward Toby, the latter delivered possession of the same to Hernandez. A similar transaction took place between Hernandez and the note clerk of the Citizens' Bank, who by request delivered the note to the agent of Hernandez without stamping it "Paid." These are the notes on which plaintiff herein sued out executory process in October, 1888. While he held the notes, Hernandez had agreed with the company to postpone payment thereon for one year. Under those facts, the pivotal question in the case is to determine whether Hernandez was subrogated to the mortgage rights of the original holders of the notes. Plaintiff's contention is that the transactions herein recited operated a sale of the notes by the holders, and a purchase of the same by Hernandez, while third opponent contends that it was not a purchase, but a payment which resulted in the extinction of the mortgage.

There is no doubt that the intention of Hernandez was to purchase the notes, and to keep alive as his guaranty the mortgage which secured them. But did he accomplish that object? Mr. Toby, who held one of the notes as agent, does not remember the details of the transaction. He only remembers that the note was past due, and that by request he brought it to the office of Mr. Hernandez, who handed him a check, and to whom he handed the note. But he remembers that he executed no subrogation in connection with the note. The note clerk of the Citizens' Bank is positive in his testimony that he did not sell the note, which he had no authority to do, and that, while he complied with the request not to stamp it "Paid," he is certain that he simply collected payment of the note,—he did not sell it. In his answer to the third opposition, plaintiff rests his ownership of the notes on a transfer of the same to Hernandez in due course of business. Hence he did not set up any right of subrogation under the provisions of paragraph 2 of article 2160, or of article 2161, of Rev. Civil Code. It therefore follows that his attempt to prove a subrogation by the act of the debtor, through resolutions of the

board of directors, should not have been countenanced, and that all proffered evidence for that purpose should have been rejected on the objections made by third opponent.

Under the issue as tendered by plaintiff himself, the restricted and sole question presented for solution was a purchase *vel non*. *Nicholls v. His Creditors*, 9 Rob. (La.) 476. The alleged recognition by the company of the mortgage rights of Hernandez as a result of his "taking up" the notes might have evidenced a new contract between Hernandez as a creditor, and the company as his debtor, but it could not be invoked as proof to characterize the transactions between himself and the late holders of the notes. Civil Code, art. 2160, par. 2. If, after obtaining possession of the note held by Toby, under the circumstances precisely as they are herein detailed, Hernandez had failed or neglected to obtain the note held by the Citizens' Bank, what would have been his position in a contest over the proceeds with the bank in the event that the same had not been sufficient to pay both notes in full? It is too clear for argument, at this stage of our jurisprudence, that he would have had no standing as a mortgage creditor to contest the right of the bank to be paid by preference. If, by his acquisition, he had obtained no subrogation of mortgage rights towards an unsatisfied contemporary mortgage, he could acquire none *quoad* a junior mortgage. His position is that described in the case of *Nicholls v. His Creditors*, 9 Rob. (La.) 476, in which the syllabus reads: "Payment of a note secured by mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party to whom he paid. The payment will extinguish the debt, and the mortgage given to secure it; and the claim for reimbursement will constitute the party who paid an ordinary creditor of him for whose benefit the payment was made." See, also, *Fort v. Bank*, 11 La. Ann. 708; *Hoyle v. Cazabat*, 25 La. Ann. 438; *Seixas v. Gonsoulin*, 40 La. Ann. 351, 4 South. Rep. 453.

Our conclusion is, therefore, that the mortgage which originally secured the notes sued on by plaintiff was completely extinguished on the 21st of May, 1887, and that third opponent's, then the junior, mortgage is now the ranking mortgage affecting the property of the defendant company.

It is therefore ordered, adjudged, and decreed that the judgment on appeal, in so far as it recognizes plaintiff's alleged mortgage, be annulled, avoided, and reversed, and it is now ordered that said mortgage be decreed extinct, and that the executory process predicated thereon be annulled and set aside, with recognition of the rights of third opponent to proceed in the enforcement of his mortgage; and it is further ordered that said judgment be affirmed in other respects at the costs of plaintiff and appellee in both courts.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. The ground upon which Hernandez, the real plaintiff, claimed to

be paid as a privileged and mortgage creditor, was that he had purchased the two notes,—that of \$1,000 from the Canal Bank, and that of \$800 from the Citizens' Bank. He contended that, as he had been authorized by the board of directors of the defendant company, and as he had invested his own funds in taking up the notes, he had acquired them. This court held that there had been no purchase; that, although Hernandez may have intended to buy, neither of the banks intended to sell, and so there was no transfer or cession by sale. In the application for a rehearing, it is now claimed by counsel for Hernandez that as he was a creditor of the company, and paid with his money, he was legally subrogated. This is an inadmissible shifting of position. In his original brief, counsel for Hernandez distinctly said that "the doctrine of payment with subrogation does not obtain herein, for no such intent is manifest from the evidence, but, on the contrary, a purchase as a personal investment by Hernandez with consent of defendant, and so satisfied." Page 6, No. 6. How can Hernandez, after thus peremptorily repudiating the theory of no subrogation opposed to him, and proclaiming that his rights flowed from a purchase made with the debtors' consent, now claim that he was a creditor and because such creditor was subrogated? Had Hernandez originally claimed that he was a creditor, before the acquisition by him of the two notes, or of the last one, quite a different case would have been presented; for it is distinctly provided by law that "subrogation takes place of right for the benefit of him who, being himself a creditor, pays another creditor, whose claim is preferable to his by reason of his privileges or mortgages." Rev. Civil Code, art. 2161, par. 1. This is so true that courts and commentators agree that such subrogation takes place even in favor of an ordinary creditor. Gilbert, p. 552, No. 3. The authorities there compiled are to the effect that the benefit of the legal subrogation established in favor of him who, being himself a creditor, pays another creditor, who is preferable to him by reason of his privileges or mortgages, can be claimed as well by a simple, ordinary creditor, (*chirographaire*), as by a privilege or mortgage creditor. See, besides, 2 Marcadé, 719; 2 Baudry, Lacantinerie, 723; 18 Laurent, 89; 3 Lassomblere, 304. If Hernandez could have thus claimed and shown, he has not done it. Litigants cannot be permitted thus to play fast and loose.

Rehearing refused.

SUCCESSION OF DUMESTRE.

(Supreme Court of Louisiana. March 3, 1890.
42 La. Ann.)

COMMUNITY—DISSOLUTION—DEBTS—SURVIVOR—HEIRS.

1. Notwithstanding the actual dissolution of a community of acquets and gains by the demise of one of the spouses, it has a fictitious existence subsequently for the purpose of liquidating the payment of community debts.

2. When the community is dissolved, the respective interests of the survivor, and of the heirs of the deceased, attach *eo instante*; and, if there

be no community debts, their rights of possession and dominion commence, and they therefore hold the property in joint ownership.

3. When the surviving member of a community subsequently dies, leaving individual debts unpaid, it necessitates an administration of her succession to institute suit for partition of the property held in indivision by it and third persons; and the heirs of the predeceased partner dying without debts are third persons, in that sense.

(Syllabus by the Court.)

Moise & Cahn, for appellant. *Chas. Louque and Jerome Meunier*, for appellee.

WATKINS, J. Appeal from the civil district court, parish of Orleans. Alexis Dumestre died in 1884, intestate and without debts, leaving as his survivors Blanche Dumestre, widow in community, and 10 children of the marriage, 8 of whom were minors. The widow was confirmed natural tutrix, and an inventory was taken which showed a total appraisement of over \$37,000. Taxes, burial expenses, court costs, and other expenses having been disbursed, the widow and tutrix filed an account showing the separate and respective interests of the spouses, and of the children; each one of the latter being entitled to \$1,525.53. As surviving widow, she took the necessary proceedings to have the shares of eight minors in the community property adjudicated to her, and she executed in their favor a special mortgage in lieu of their general mortgage, the tax interest of the two major heirs remaining undisturbed. In 1887 the widow died, leaving an estate of some \$25,000, much embarrassed with debts contracted subsequent to her husband's death. An administrator was appointed, and he brought suit against the two major heirs for a partition by licitation of the property, in which they had inherited from their father two-twentieths interest; the same not being susceptible of division in kind. A judgment ordering partition was rendered. A sale and adjudication were made. The purchaser declined to accept title, and, being ruled to accept same, and comply with the terms of adjudication, he has appealed from that decree.

In this court appellant's counsel states that "the proposition for the court to decide is, can an administrator of the widow in community sue the two major heirs for a partition of property which formed part of the community?" This proposition is not correct in point of fact, for we take it to be quite plain from the evidence that the property is not community property, but property held in indivision and joint ownership by the succession of Mrs. Blanche Dumestre, and the two major heirs of Alexis Dumestre. The community was dissolved by the death of the latter in 1884, and the effects which composed the partnership or community of gains were divided into two equal portions, between the wife surviving, and the heirs of the deceased. Rev. Civil Code, art. 2406.

In *Tugwell v. Tugwell*, 32 La. Ann. 848, we said that, when the community of acquets and gains is dissolved by the death of the wife, the respective interests of the surviving husband and the deceased wife attached at the moment of its dissolution to the property of the community, subject

to the payment of community debts. To the same effect is our opinion in *Glasscock v. Clark*, 33 La. Ann. 584; also in *Bartoli v. Huguenard*, 39 La. Ann. 411, 2 South. Rep. 196, and 6 South. Rep. 30; and in *Murphy's Heirs v. Jurey*, 39 La. Ann. 785, 2 South. Rep. 575. *Dickson v. Dickson*, 37 La. Ann. 915, involves the same principle.

The theory of the law is that a community of acquets and gains has, after the decease of one of its members, only a fictitious existence for the purpose of liquidation and settlement of community debts. But, as there were no community debts at the date of the dissolution of the matrimonial partnership by the death of Alexis Dumestre, the respective interests of Widow Blanche Dumestre and the heirs of Alexis attached to the community property at once and irrevocably, and thereafter continued to be property held in joint ownership by the widow and heirs; the former having acquired all the interests of the minors. The debts presently due are not those of the Dumestre community, but those of the succession of Widow Blanche Dumestre, contracted by her since the death of her husband, and for which the heirs of Alexis Dumestre are not responsible.

Having undertaken the administration of an estate burdened with debts, it was the first duty of the administrator to separate the interests of the joint owners so that he might reduce to possession the portion belonging to the succession under his control. This he is enjoined by the Code to do; for its injunction is, viz.: "If the deceased was in community or partnership with any one who has survived him, the curator of the vacant succession or of absent heirs is bound, immediately after his appointment, to sue for a partition, in order that the part which belonged to the deceased in the community or partnership property be ascertained." Rev. Civil Code, art. 1135. This article has no application to the matrimonial community as instituted under the Code, but it rather refers to such property as may be held in joint ownership or indivision by the deceased and some stranger or third person, and by adverse titles; for it is plain that if Alexis Dumestre were living the administrator would not be authorized, under that provision of law, to sue him for a partition of the common property, because the whole necessarily becomes subjected to administration by reason of the fictitious existence of the community for the purpose of the settlement of community debts. But Alexis, having died without debts, and his heirs having become seised *eo instante* of his estate, they occupy the position of strangers to an administration of the estate of Blanche for the purpose of the settlement of debts they do not owe, and for which they are in no way bound.

We think the administrator had the authority, and upon him the law had imposed the duty, to sue for the partition of the property which was held in joint ownership by and between the succession he represented, and the heirs of Alexis Dumestre, and that the title tendered appellant is good and valid.

Judgment affirmed.

v.7so.no.22—40

FACTORS' & TRADERS' INS. CO. IN LIQUIDATION v. LEVI et al.

(Supreme Court of Louisiana. April 21, 1890.
42 La. Ann.)

ILLEGAL ASSESSMENT—RIGHTS OF MORTGAGEE.

1. A mortgage creditor of a delinquent taxpayer, having taken executory proceedings in the foreclosure of his vendor's lien and special mortgage, and at public auction caused the mortgaged property to be adjudicated to him, occupies just the same relation to the assessment of the property for taxes as the mortgagee and tax-payer does. Such executory proceedings are in affirmation of the tax-payer's title, and as adjudicatee the plaintiff can assert no higher right than his mortgagor could have done; and the limitation which the law imposes upon the tax debtor's right of complaint against an alleged illegal assessment is binding on such adjudicatee.

2. The prescription of three years provided by article 196 of the constitution only applies to unrecorded tax-liens and privileges.

(Syllabus by the Court.)

W. B. Sommerville, for appellant. F. N. Butler and Chas. Carroll, for appellee.

WATKINS, J. Appeal from the civil district court, parish of Orleans. In 1877, the plaintiff, as a going corporation, made sale of a piece of city real estate to Abraham Levi for the price of \$22,000, of which \$6,000 was paid in cash, and for the balance the purchaser gave notes secured by mortgage and vendor's lien. During the year ensuing, Levi died testate. By the terms of his will and of the law, his surviving widow was recognized as the owner, in her own rights and as legatee, of the whole of the community property, less the shares of three heirs, of one-twelfth each, subject to the widow's usufruct during life. The will was duly probated, and Mrs. Levi placed in possession. Alleging the non-payment of the capital, and some of the interest installments of the debt, and the failure of the widow and heirs to pay the taxes assessed against the mortgaged property, the liquidating commissioners of the insurance company brought an ordinary action against them jointly, seeking judgment for its debt, and the enforcement of the vendor's lien, and mortgage securing same. Judgment was obtained. *fi. fa.* was issued, and a sale and adjudication of the property made to the plaintiff in the writ at the price of \$7,400; but the sheriff declined to execute a *procès-verbal* of sale because of the inscription against the property of certain tax liens, privileges, and mortgages. To clear the record of these incumbrances as impediments to the execution of a deed of sale, the plaintiff and adjudicatee proceeded by rule against the civil sheriff and the city of New Orleans to show cause why same should not be erased; and from a judgment making same absolute the city has appealed. The tax inscriptions are those of taxes assessed for the years 1882, 1883, 1884, 1885, 1886, 1887, 1888, and 1889, and aggregating in amount about \$3,500 in capital only. The objections urged to the assessments are (1) that they were made in the name of Widow Abraham Levi, who was not the sole owner of the property, the title thereto being jointly vested in Widow Abraham Levi and the then heirs of the deceased; (2) that the taxes, liens,

and privileges are prescribed, and the inscriptions are therefore void. An examination of the record fully bears out the correctness of the foregoing statement of facts, and we have for decision two questions of law, viz.: (1) The legality of the assessments; (2) The prescription of the taxes.

1. Confessedly, the plaintiff in rule is seeking to realize a community debt by the seizure and sale of community property in proceedings taken against the widow and heirs of the deceased partner in community, who bought the same, and executed a mortgage thereon for the price. In a recent case, we had occasion to say, substantially, that, notwithstanding the actual dissolution of a community of acquiescence and gains by the demise of one of the spouses, it has a fictitious existence thereafter for the purpose of liquidating and discharging community debts, and, as a necessary corollary of that proposition, that, although the respective interests of the survivor and heirs are ascertained and attach at the very instant of the death of the deceased, yet their rights of possession and dominion remain in suspense so long as there are community debts unpaid. *Succession of Dumestre*, 42 La. Ann.—, ante, 624. So, in this instance, the title of the property remained in abeyance during the several years in which the complained-of assessments were made, the rights of the parties being suspended by the non-action of plaintiff in the foreclosure of its mortgage. If it suited the convenience or pleasure of the corporation to indulge the mortgagee so that it might realize interest on its debt, it should not expect the city to lose her revenue on account of a possible defect in assessments on the mortgaged property, which was occasioned by the precarious condition of the title, and through its tardiness or delays. It is a fact in proof that the property was for each year assessed to Widow Abraham Levi. The taxes thus levied were regularly paid to the state for all those years, and those for the years 1881, 1880, and preceding years were annually paid to the city. The tax delinquents have thus, by very strong implication, ratified and acquiesced in the assessments as made.

In case of *Carter v. City of New Orleans*, 33 La. Ann. 816, we said of a somewhat similar assessment: "When the assessment made, with certain description and in a certain name, is valid either of itself or by reason of confirmatory action of the owner, publication and judgment in the same name, and with the same description, will be upheld, if otherwise regular. *Lane v. March*, 33 La. Ann. 554."

In *Reed v. Creditors*, 39 La. Ann. 115, 1 South. Rep. 784, we applied the doctrine of equitable estoppel to a tax delinquent who complained of the accuracy and sufficiency of assessments.

Desty affirms the principle that "the fact that a tax on land is assessed to one who does not own it affords no sufficient reason why the tax should be abated on the owner's appeal, it not being shown that the tax is excessive." 2 *Desty, Tax'n*, 628, 629; *Carpenter v. Town of Dalton*, 53 N. H. 615.

In *Shattuck v. City of New Orleans*, 39 La. Ann. 206, 1 South. Rep. 411, we enforced the provisions of a statute of 1884, which permitted a tax-payer to test the correctness of his assessment before the courts within a specified time, and held that a previous application to the standing committee on assessments was a condition precedent to his right of action, and its non-observance was fatal to his pretension.

In *Oteri v. Parker*, 42 La. Ann. —, ante, 570, we said of quite a similar objection to an assessment urged on the part of the tax-payer, viz.: "The contention that some of the property assessed in plaintiff's name was not owned exclusively by himself, but owned by himself conjointly with others, involves only the correctness of the assessment, and cannot be urged at this time;" i. e., the remedy pointed out in *Shattuck's Case* should have been seasonably applied, but it had been neglected and lost.

Taking this to be the established rule in respect to the tax-payer, can it be contended effectually that his mortgage creditor has any more serious ground of objection? No. The commissioners of the insurance company sue in affirmation of the tax-payer's title, and their petition contains an averment that they had defaulted in the payment of the taxes, as one of their causes of action. They claim to be the adjudicatees of their title at public auction, and demand a deed to the property, and to be placed in possession. They cannot assert any right as growing out of such adjudication which their mortgagors could not assert for themselves. The situation of the insurance company is not that of a third person asserting title to property under an expropriation for taxes illegally assessed, or a right of property adverse to the tax-payer, or of joint ownership in property condemned to sale for such taxes. It is to such cases that the authorities cited by plaintiff's counsel apply: *Sutton v. Calhoun*, 14 La. Ann. 209; *Marin v. Sheriff*, 30 La. Ann. 293; *Bank v. Lannes*, Id. 875; *Lague v. Boagni*, 32 La. Ann. 913; *Guldry v. Broussard*, Id. 925; *Stafford v. Twitchell*, 33 La. Ann. 520; *Le Blanc v. Blodgett*, 34 La. Ann. 107; *Davenport v. Knox*, Id. 407; *Denegre v. Gêrac*, 35 La. Ann. 953; *Maspereau v. New Orleans*, 38 La. Ann. 401. Had a sale been made in the enforcement of taxes levied under such assessments, the principle announced would not militate against the right of an adverse claimant or joint owner of an interest in the property to sue for the annulment thereof *pro tanto* on the ground of nullity in the assessment. It is simply and tersely expressed that property so assessed, having been sent to sale under executory proceedings foreclosing a mortgage, whereby the rights of ownership in all of the co-proprietors passed to the creditor, neither the delinquent tax-payer nor his mortgagee can dispute the right of the city to require the payment of taxes due as a condition precedent to the execution and delivery of a *procès-verbal* of sale to the purchaser. In this respect the judgment of the court *a quo* making plaintiffs' rule absolute is erroneous.

2. The prescription urged against the

tax-licens and privileges which interfere with the vendor's lien and mortgage of the insurance company is that contained in the 176th article of the constitution, and which is couched in the following language, viz.: "No mortgage or privilege on immovable property shall affect persons *unless recorded or registered* in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law, *except* privileges for expenses of last illness, and privileges for taxes, state, parish, or municipal, *provided* such privileges shall lapse in three years." (Italics ours.)

In *Davidson v. Lindop*, 36 La. Ann. 765, we had occasion to construe this constitutional provision, and held that the limitation of three years therein contained "only applies to the special privileges named when they are unrecorded" and void. "We understood the article to mean and to say that no unrecorded privilege shall affect third persons except the special ones mentioned, which, though unrecorded, shall have effect provided such [unrecorded] privileges shall lapse in three years." That interpretation is perfectly correct, and has never been questioned, on the contrary has been affirmed; and it is conclusively against the demand of plaintiff, because from the record it appears that the liens and privileges for city taxes have been duly registered or preserved as the law requires, and are not, therefore, within the terms of the proviso of that article. The judgment appealed from was erroneous in so far as it maintained the plaintiffs' plea of three years' prescription, and therefore it must be reversed in its entirety.

It is therefore ordered and decreed that the judgment appealed from be reversed, and it is now ordered and decreed that the demands of plaintiffs in rule be rejected, at their cost in both courts.

EXPOSITION RY. & IMP. CO. v. CANAL ST. E. RY. CO.

(*Supreme Court of Louisiana. April 21, 1890.*
43 La. Ann.)

CORPORATIONS—STOCK—SUBSCRIPTION—PAYMENT—GARNISHMENT.

1. Subscribers for stock of an incorporated company, whose capital is fixed at a certain sum, whose shares are limited to a certain number, and whose charter provides that payment shall be made as may be determined by the board of directors, cannot be compelled to pay until the whole capital has been subscribed for and the board has called for payment, unless it is shown that by their acts they have waived their rights in those regards.

2. A judgment creditor, issuing execution, and seizing in the hands of a garnishee, cannot champion and exercise against him any claim which the defendant could not legally have urged.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; *ELLIS*, Judge.

Frank N. Butler, W. S. Benedict, and F. B. Lee, for appellant. *T. J. Semmes & Legendre*, for appellee.

BERMUDEZ, C. J. This is an appeal from a judgment dismissing a rule traversing the answers of a garnishee, and releasing

the latter from liability. The plaintiff, having obtained a judgment for \$12,500 against the defendant company, issued execution, and under it garnished Joseph L. Harris, propounding interrogatories on facts and articles. In his answer to the fourth interrogatory, the object of which was to ascertain from him the amount of his subscription for shares of stock in the defendant company, and how much he had paid for them, the garnishee says that he never subscribed for the stock of the company, nor took any shares therein. That it is true he signed a paper purporting to be an agreement to subscribe for stock. Said paper was presented to him for signature by Mr. Minnegerode, but it was distinctly agreed and understood at the time this respondent signed the paper that said paper was not to be delivered to the defendant company, nor was it to become an operative agreement to take stock in the defendant company, unless and until other persons should subscribe the same, or a similar paper, so as to make the subscription to the enterprise a subscription of \$40,000, to be paid in cash; and also unless and until a contract should be entered into with Rogers, Balentine & Co., responsible contractors, to build the road, and take in part payment \$25,000 in stock of the company, which amount of stock, with the cash subscription, would make up a total amount of the capital stock fixed by the charter, to-wit, \$65,000. The respondent says that the conditions above mentioned were never fulfilled, and on 4th of December, 1884, Mr. Minnegerode, by letter of that date addressed to this respondent, informed him that he was at liberty to rescind his subscription, which this respondent did by letter of 8th December, 1884, a copy of which is annexed; and this respondent not only never participated in the affairs of the defendant company, but was really ignorant that it had organized or done any business under its charter. The respondent says that the capital of the company was fixed by the charter at \$65,000, and that in law it had no power to commence operations, or to bind by its acts any subscriber for stock, until and unless the whole amount of the capital stock had been subscribed; and this respondent avers that at no time was one-third of the capital stock of the defendant company taken or subscribed for, conditionally or otherwise. The letter referred to in the answer is as follows: "New Orleans, Dec. 8, 1884. C. Minnegerode, Jr., Esq.—Dear Sir: On my return, after a short absence from the city, I found your favor of the 4th inst., and in reply beg to say that, besides your own identification with the enterprise you have on hand, I was mainly induced to subscribe to same owing to Mr. Rogers' connection with the undertaking; therefore, in view of his withdrawal, coupled with the misfortunes of yesterday's newspapers publishing the failure of the concern, together with the fact of so short a time remaining in which to put the work through, I beg to accept your offer, and accordingly to cancel my subscription to the stock of your company, and remain, etc., J. L. HARRIS." The

charter of the company is dated 19th November 1884, and recorded 20th of that month. Article 9 is as follows: "The capital stock of the said association is hereby fixed at \$65,000, divided into 650 shares of \$100 each. All stock subscribed shall be paid for at such time and on such terms as the board of directors may determine: provided, that all such stock subscribed shall be fully paid for by the 1st of February, 1885." The subscription paper signed by Harris is as follows: "We, the undersigned, hereby agree to subscribe the amounts set opposite our names to the capital stock of the Canal Street and Exposition Railway Company, twenty-five per cent. to be paid in cash, and the balance in three installments, of twenty-five per cent. each, at intervals of ten days each after first payment.

J. L. Lyons, 25 shares.....	\$2,500 00
Samuel H. Kennedy, 25 shares.....	2,500 00
Warder Cumming, 10 shares.....	1,000 00
J. L. Harris, 25 shares.....	2,500 00
New Orleans Railway Supply Company, by John C. Febiger, 10 shares	1,000 00
John C. Febiger, 10 shares.....	1,000 00

From that list it appears that the number of shares which the parties who signed it agreed to subscribe for was 105, of the value of \$10,500. There is nothing to show that the party who presented the paper for signature had any authority from the company to solicit subscriptions; that the paper ever was delivered to the company; that the subscriptions were accepted by the company; that the company was authorized to proceed to business and levy assessments upon a partial filling up of its capital, and before its entire stock was taken up; that the board of directors ever determined to call for any payment of the stock subscribed for; that the garnishee has ever done any act from which it can be inferred that he has waived his rights to insist upon the fulfillment of those conditions precedent. If the party who presented the list for subscription represented the company, then what passed between him and the garnishee, and which is stated in the uncontradicted answer to the interrogatories and verified by proof, is binding on the company, as the whole constitutes one and the same transaction. If so binding, the company could have no recourse against the garnishee as a subscriber, and that which it could not do, the plaintiff in the writ, who stands in its shoes, cannot urge. The answer, which cannot be divided, justifies an exoneration. Code Prac. art. 356. The quoted article of the charter, coupled with the caption of the subscription list which followed it, irresistibly forces the conclusion that it never entered the mind of the subscribers to pay until the entire stock had been taken, and until the directors had called for payment. The contingencies not happening, no liability is incurred. As was quite well said in *Railroad Co. v. Gould*, 2 Gray, 277: "It is a rule of law too well settled to be now questioned that, when the capital stock and the number of shares are fixed by the act of incorporation, * * * no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been

taken. * * * This is no arbitrary rule. It is founded on a plain dictate of justice and the strict principles regulating the obligation of contracts." In *Manufacturing Co. v. Parker*, 14 N. H. 543; *Railroad Co. v. Veazie*, 39 Me. 571; *Sanford v. Handy*, 25 Wend. 475; and numerous other cases,—it was likewise held that the entire stock must have been taken before the subscriptions can be binding, or any legal assessments made. Also 1 Mor. Priv. Corp. §§ 137, 138, and notes. In a recent case, in which a kindred question was elaborately and thoroughly investigated, all the authorities having a bearing upon it having been critically examined, the New York court of appeals held in the same manner. *Bray v. Farwell*, 81 N. Y. 600—615.

Judgment affirmed.

Succession of LATCHFORD.

(*Supreme Court of Louisiana. April 21, 1890.*)

USURY—BUILDING ASSOCIATIONS—INSOLVENCY—SURETIES—DISCHARGE.

1. Where a person applies to a building association to build a house for him, and the association clears the title to the lot on which the building is to be erected by extinguishing the vendor's lien thereon, and builds the house on said lot, which is accepted by the applicant, who sells said lot and improvements to the building association, which afterwards, according to an agreement, sells the same property to the person for whom it cleared the title to the lot, and built the house, for the sum which it advanced on the property, with a premium thereon of 10 per cent. as the price, with a vendor's privilege and special mortgage retained, the contract is a legal one, and the premium of 10 per cent. is not interest, and is therefore not usury.

2. Where a party indorses a note, and the maker takes the benefit of the insolvent laws, and the holder of the note takes part in the proceedings, and votes for the discharge of the maker of the note, the indorser is released.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

Aug. Bernau, Buck, Dinkelspiel & Hart, and Howe & Prentiss, for appellant. *Henry P. Dart, Frank B. Thomas, B. R. Forman, and W. S. Benedict*, for appellee.

MCENERY, J. Mrs. Louise Latchford died in New Orleans on the 25th day of October, 1888. The administrator of her succession filed his final account, to which there were several oppositions. The succession property comprises a lot of furniture, a claim against the Germania Insurance Company, and a piece of real estate in the city of New Orleans. The last item is the principal portion of the succession, and from which arises the most serious oppositions. From the judgment of the lower court maintaining the opposition of the Mutual Loan & Building Association and Charles Francke, and the opposition of Germania National Bank to the claim of Joseph Horz, and the dismissal of the opposition of August Bernau, attorney, the administrator and the opponents Horz and Bernau have appealed.

The decedent sold to the Mutual Loan & Building Company of New Orleans, on the 21st of May, 1888, an unimproved portion of

ground in the second district of this city. The act of sale was passed before John R. Legler, notary public, and the price was \$750. The act was duly registered in the conveyance office of Orleans parish. This sale was the first step towards the consummation of a transaction which began by the decedent's application, dated New Orleans, April 16, 1888, addressed to the president and board of directors of the Mutual Loan & Building Company: "Gentlemen: I hereby make application for \$2,400 on the monthly payment plan, in accordance with your usages, rules, and regulations, for the purpose of erecting a cottage costing \$1,650, and \$750 to pay note due on the property, as follows: Canal, between Alexander, Murat, and Custom-House streets. [Signed] L. LATCHFORD, St. David and Custom-House,"—which application was accepted by the following written indorsement: "We, the undersigned members of the committee on building and real estate, respectfully report that we have carefully examined the premises above described, and approve the loan, with 10 per cent. added. [Signed] H. WELLMAN." This approval by the building committee was signed on the same day, or day after, the application was made. Previously, Mrs. L. Latchford had purchased the property in question from one Bergamini on the 29th of February, 1888. The note referred to in the application was a vendor's note given for the price to Bergamini. This note was taken up by the Mutual Loan & Building Company, with its own money, before it purchased the property. The company, being the holder of the note at the time the property was purchased by it, constituted that note the consideration mentioned in the sale. Having purchased the property, the company, on the 15th of May of the same year, entered into a contract with Otto Waither whereby said Walther contracted to build for said company the house contemplated by the application on or before the 1st of June, 1888, for the sum of \$1,650, the same to be built to the satisfaction of the company. The house was finished, and Mrs. Latchford occupied it. Her death occurred on the 25th of October, 1888, and she was intestate.

The Mutual Loan & Building Company was incorporated February 7, 1887, and its charter was amended February 8, 1888; the charter and amendments being by act before J. R. Legler, notary public, and duly recorded. The original charter was offered in evidence. In article 3 the objects of the corporation are declared to be for the building of dwelling-houses or other buildings, according to such ideas, plans, or specifications, for any person so desiring, and possessed by legal and valid title of a lot of ground within the city limits, and such person or persons to refund the price thereof to said corporation in monthly installments equivalent to 10 per cent. per annum of the principal, with 8 per cent. interest per annum on the deferred payments or unpaid principal; also the renting, purchasing, and sale of homesteads, and the loaning of funds on mortgage or other real-estate security in the city of New Orleans. The corporation is a stock corporation; the capital stock being \$50,-

000, divided into 2,000 shares of \$25 each. In article 1 it is given authority to hold, receive, lease, purchase, and occupy, under its corporate name, property both real and personal; to loan money on security; to make and appoint such officers, directors, and agents as the necessity and convenience of the corporation may require; and to make and establish such by-laws, rules, and regulations for the proper management of its affairs as may be necessary and proper; and to do and perform all other acts and things which may be requisite and necessary to carry out the objects and purposes of the corporation. In article 6 it is provided that, should any borrower from this company fail or neglect to pay his or her monthly installments at such times as the same may fall due, and as may be provided for in his or her contract, such unpaid installments shall become part of the principal, and bear interest at the same rate. Article 7 provides that all expenses of attorneys, notaries, architects, and recorders in making or canceling loans shall be paid by the respective borrowers before title is passed to them, and no title shall be executed until said charges are paid. Article 10 provides that any borrower shall have the right at any time to reduce said indebtedness by paying on account a sum of not less than \$10, and all payments of account of capital shall at the end of each borrower's current year be deducted from the principal, and the payments on account of the principal and interest shall thereafter continue without curtailment of the original time within which the loan was made payable. Article 2 of the by-laws creates the different committees necessary to carry on the business of the company, and among others a building and real-estate committee, whose duties are to examine all houses which are being erected by the company, and to see that they are built in strict conformity with the specifications. They shall also appraise any house or lot offered to the company. Article 7 provides that no real estate shall be purchased until the same has been appraised, and the purchase thereof recommended by the building and real-estate committee, and the title thereto approved by the attorney of the company. The president shall then, upon receiving from the applicant such sum as may be fixed by the board of directors upon the recommendation of the building and real-estate committee, buy the property in the name of the company, and thereafter, in due course, convey the same to said applicant upon such terms and conditions as may be fixed by the board of directors. Article 8, § 1, provides that any person who owns or may acquire a lot of ground can obtain a loan from the company for building purposes, if the said lot be acceptable to the company, provided he transfers to the company the said lot free of all incumbrances, and thereafter a sale shall be made to him, in due course, as provided in article 7, and after the building is completed.

After the house was erected, she, averring that she did not have enough money to pay the attorney's and notary's fee for the examination of the title, and the pass-

ing of the act of sale, requested that the property be not immediately retransferred to her. The property was to remain in the company's name until she refunded the amount borrowed, and the 10 per cent., but she had the right to demand the retransfer at any time subject to the vendor's lien of \$2,640. The company was ready to transfer it to her at any time after the completion of the house by the company. Her installments and interests fell due on the 18th of each month; and, when it was not paid, it was charged up and added to the \$2,640, and anything paid after that date was deducted from the total. The cost of erecting the house was \$1,650, and was paid by the company, making a total of \$2,400 paid by the company for account of Mrs. L. Latchford. It is a rule and regulation of the company to add 10 per cent. to the amount paid out, and there is a special agreement to that effect with Mrs. Latchford. The whole sum is then divided into 120 monthly installments, bearing interest at the rate of 8 per cent., payable also monthly, and forms the consideration or price at which the company agrees to sell to the borrower or purchaser.

At the time of Mrs. Latchford's death the real estate in the inventory was in the name of the Mutual Loan & Building Company. It was, however, inventoried as the property of Mrs. Latchford, and the following entry was made in the inventory after describing the property: "By an act before J. R. Legier, notary public, dated May 21, 1888, the late Mrs. Louisa Latchford transferred to the Mutual Loan & Building Company, of New Orleans, the said property, for the sum of seven hundred and fifty dollars cash. It appears, however, that the said sale of the property was made to said association for the purpose of securing a loan of money for the purpose of erecting a building on the above-described property, which was then unimproved, which sum of money originally amounted to the sum of \$2,640 less 10 per cent., to-wit, \$2,376, part of which amount of money, namely \$750, was used to extinguish a mortgage note resting on the property, so as to clear the property, and thus secure the loan by the company to Mrs. Latchford; and this \$750, so apparently paid to Mrs. Latchford, was never paid to her, but was used, as above set forth, to extinguish a note due by her so as to better secure the company. The above amount is subject to reduction by payments." The Mutual Loan & Building Company was not a party to this inventory. The administrator provoked an order of sale on November 20, 1888, requesting that the property should be sold on terms of one-third or more cash, and the balance in one or two years' credit at 8 per cent. interest, at the purchasers' option, secured by vendor's lien and privilege. The sale was asked to pay debts, and the Mutual Loan & Building Company was classed as a creditor for the amount of \$2,450. On the 26th of November, 1888, the administrator obtained a rule upon the Mutual Loan & Building Company alleging that, though apparently belonging to said company, the real property aforesaid

is verily the property of the succession, for the reasons set forth in the said inventory, and, referring to an order, previously rendered, directing a sale at public auction to pay debts, asked that the company show cause why the property should not be sold by the administrator of the succession. This rule was not tried, but on the 14th December, 1888, the following joint motion was filed in the said succession: "On motion of H. P. Dart, attorney for the Mutual Loan & Building Company of New Orleans, and of Aug. Bernau, attorney for P. H. Mentz, administrator of the succession of Louisa Latchford, and on suggesting to the court that both said company and succession claim title to the real property herein inventoried as belonging to the succession, and on further suggesting to the court that your honor has heretofore ordered the sale of the said property in order to pay the debts of the succession, and it is necessary that the said property be sold at public auction, and that the rights of the respective litigants on the proceeds of said property be hereafter determined, it is ordered that Ben Onorato, auctioneer, sell at public auction, on the terms set forth in the order of sale herein granted, on the 20th November, 1888, the real property herein inventoried, and that he have power to make title and sign all necessary deeds to the purchaser, and that, after deduction of the costs and expenses necessary for the sale of the property, there be turned over to said Mutual Loan & Building Company, the proceeds of said sale to the extent that said company lay claim thereto, to be held by the said company until it shall have been finally determined by this honorable court in a proper proceeding to be hereinafter brought by the administrator of the succession, whether the said company is and was entitled to retain the property or the funds realized by the sale of said property, or has or had any claim, lien, or privilege to or upon the same, or any part thereof, or whether the money thus ordered to be paid over and held by said company belongs to the within succession, or whether the succession has any claim, lien, or privilege to said money turned over to said company, or to any part or portion thereof. The whole without prejudice to the rights of either of the litigants, the movers herein, and with full reservation of the defenses, rights, etc., the object hereof being solely to sell the property aforesaid to prevent the destruction thereof, which is now in progress, owing to the same being now occupied, and the insurance being in jeopardy." A public auction was accordingly made, and the auctioneer filed his *procès-verbal* on January 19, 1889, showing that the property was adjudicated to D. L. Bergamini for \$2,700.

The administrator, in his account, allowed the Mutual Loan & Building Company the sum of \$2,300.90. This company opposed the account on the ground that, under its contract with the deceased, Mrs. Latchford, it was entitled to have the account amended, and to proceed thereon as a principal creditor for the amount of the proceeds of the real estate, to the amount

of \$2,564.42, with \$30 notary and attorney's charges, and 8 per cent. on the whole until paid. The Germania National Bank, claiming as an ordinary creditor, opposes the account on the ground that the Mutual Loan & Building Company has no privilege or mortgage on the real estate belonging to the succession. It also opposes the claim of Jos. Horz, and denies that he is a creditor of the succession. The opponent August Bernau asks that his fee of \$300 be increased to \$500. There is no opposition to the claim of Charles Francke. The administrator contends that the contract between Mrs. Latchford and the building company is usurious, as it added 10 per cent. premium to the capital invested by the company in the property of Mrs. Latchford, and that 8 per cent. per annum, payable in monthly installments, had been charged on the sum of \$2,640, when only \$2,400 had been invested.

The charter and by-laws of the company are in evidence. Mrs. Latchford, in contracting with the company, did so with reference to the same; and, as the contract was made in strict conformity thereto, they form a part of it. There is no allegation, nor is there any evidence, that there was any departure from the charter, or the rules and regulations of the company. Briefly stated, the contract was that the company undertook to build a house for Mrs. Latchford for a certain sum. In order to secure the company against prior liens on the property, according to its rules, it paid the vendor's privilege, and a special mortgage resting on the property. As a compensation for services rendered, the company added 10 per cent. to the capital it invested in Mrs. Latchford's property, the payment of the vendor's privilege, and the cost of the building. Mrs. Latchford agreed to sell the same, improved, to the company for the sum of \$750, the amount of the vendor's note paid by the company. The property was afterwards to be transferred to Mrs. Latchford, the price being the money so advanced for the clearing of title to the lot, and the cost of the building and the 10 per cent. added, the company to return the vendor's privilege and special mortgage, and give Mrs. Latchford 10 years in which to pay said price, in monthly installments, bearing 8 per cent. interest per annum. The company extinguished the mortgage note due by Mrs. Latchford for the purchase price of the lot upon which the building was to be erected.

It amounted to.....	\$ 750
The building erected cost.....	1,650
	<hr/> \$2,400
To this was to be added 10 per cent.....	240
	<hr/> \$2,640

—Which was the price Mrs. Latchford was to pay for the sale of the house and lot to her. The contract was legal. There is nothing in it contrary to law. Mrs. Latchford had a perfect right to sell to the company, and the company to again sell to her, for a price agreed upon. The company charged for its services in erecting the building, as a compensation for time,

labor, and skill, and its entire responsibility in the superintendence and construction of the same, a premium of 10 per cent., which was to be added as a part of the price to the amount invested. It was not charged for the use of money, or for the creditor to forbear in the prosecution of his claim, but was a brokerage paid or charged at one time for the services of a builder. In no sense can it be considered an interest paid to a creditor for the use of his capital for a specified time. Mrs. Latchford made several payments, which reduced the amounts she owed to the company to the sum of \$2,564.42.

For reasons satisfactory to Mrs. Latchford and the company, the property was not, according to the original agreement, sold to Mrs. Latchford. It seems the delay was at the request of Mrs. Latchford. At her death the property was placed upon the inventory in her succession. The legal title was in the company. It has never parted with its title to the property to the succession. The equitable title, however, was in the succession, as it had been in Mrs. Latchford; and the administrator, by complying with the terms of her agreement, could have had the title transferred to the succession. The company would, according to its rules and regulations, and the agreement or contract with Mrs. Latchford, have retrieved the vendor's privilege. The property was sold by consent of parties, the proceeds to remain in lieu of the property. The company, by this agreement to sell, did not waive any of its rights, nor did the succession of Latchford acquire any. If the succession of Latchford desires the ownership of the property, it must pay the price according to the terms agreed upon. Until this is done the building company has a right to hold the property as a security for the debt. As the property was sold by consent of all parties, and the title made to the purchaser by them, the judge *à quo* very properly rendered a decree so as to cover this judgment, and protect the purchaser against the succession and the building company.

Joseph Horz was placed on the account as an ordinary creditor in a note for \$1,553.54, with interest and costs of protest. H. Hamblock executed this note, which was indorsed by Mrs. Latchford. The claim was rejected on the ground that Hamblock had gone into insolvency, and had been discharged; the creditor Horz having been a party to the proceedings in the insolvency, and having voted for the discharge of Hamblock, thus extinguishing the debt, and releasing the surety, Mrs. Latchford. The *procès-verbal* of the insolvent proceedings was offered in evidence, and objected to by counsel for Horz, which objection was sustained. Subsequently the Germania Bank offered an amended opposition, to which objection was made by Horz' counsel. The amended opposition was allowed. In the original opposition the bank denied that Horz is a creditor of the succession for the amount for which he was placed on the account, or for any amount whatever. The supplemental or amended opposition of the bank alleges that, if Horz had ever been a creditor of

Mrs. Latchford, she had been retrieved by the discharge in the insolvent proceedings of Hamblock. The supplemental opposition was but an application by setting out the particular fact which destroyed the claim of Horz, which had been denied to exist. It was properly allowed. The *procès-verbal* of the insolvent proceedings was offered in evidence, and admitted under this amended opposition. It was properly received for the purpose of showing the fact that Hamblock had been discharged, and how the creditors voted in the proceedings.

Horz contends that there was a majority in number and amount in favor of the discharge without his vote, and that when he voted there was not a sufficient number and amount to grant the discharge of Hamblock, and therefore the discharge was unaffected by his vote. It is true that the discharge was not granted alone by Horz, and the other creditors could have granted the discharge against the vote of Horz; but he voted for the discharge, thus contributing to it. The discharge was the express will of all the creditors voting for it. It destroyed the debt as originally contracted, in holding the debtor personally liable; relieved him, and placed it upon the proceeds of the sale of his effects. The surety was discharged. *Lobdell v. Niphler*, 4 La. 294; *Brown v. Roberts*, 14 La. Ann. 259.

The attorney, Aug. Bernau, considering the amount of the succession, received a liberal fee, and it ought not to be increased.

Judgment affirmed.

STATE ex rel. NORES et al. v. JUDGES OF THE COURT OF APPEALS, THIRD DIST.

(*Supreme Court of Louisiana*. May 5, 1890.
42 La. Ann.)

APPEAL—JURISDICTIONAL AMOUNT—MANDAMUS.

1. A suit to annul a tax-sale for \$180 of property worth more than \$2,000, with a view to subject it to the payment of a sum exceeding \$10,000, has for its purpose the validity of the title to the property.

2. The result of a judgment in such a case can only be to recognize title to the ownership of the property in either of the claimants.

3. Such judgment would adjudicate upon a matter in dispute of a value exceeding \$2,000.

4. The court of appeals was right in refusing to take jurisdiction on the ground that it had none, *ratione materiae*, over the controversy. *Mandamus* does not lie to them.

(*Syllabus by the Court*.)

Application for a *mandamus*.

T. D. Foster and W. J. Burke, for relator.

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the respondent judges to take jurisdiction of, and determine on its merits, a case which they have declined thus far to decide on the ground that they have no jurisdiction over it, *ratione materiae*. The suit which the relators have brought, and which the district court dismissed, has for its object to annul a tax-sale of a certain plantation, under which the defendants hold, in order to subject the property to the payment of a large sum, due relators, said to be secured by vendor's privilege and special mortgage thereon. The tax-sale was for \$180. The

amount of the claim said to be thus guaranteed, and the value of the property, are far in excess, separately, of \$10,000.

The purpose of the suit is clearly to have the court to declare that property which exceeds \$10,000 in value still belongs to the succession of one Hayes because the tax-sales thereof to the defendants in the suit is a nullity for the many reasons alleged. The consequence of a judgment in that case would be to recognize title to the property either in the succession or in the defendant. The price, \$180, for which the property was sold at the tax-sale, is no more a factor on the question of jurisdiction than if the property had been the object of a gratuitous donation. It would be an easy way of securing property from such creditors. The matter in dispute is the title of the property, which is worth more than \$10,000; and the claims to which it is expected to subject it amount to more than that sum. It is clear that the judges of the court of appeals have ruled correctly in holding that they have no jurisdiction over the controversy, *ratione materiae*.

It is therefore ordered and decreed that the application for a *mandamus* be refused, at the cost of relators.

BREAU, J., recuses himself, having been of counsel.

BURAS et al. v. O'BRIEN.

(*Supreme Court of Louisiana*. May 5, 1890.
42 La. Ann.)

EJECTMENT—EVIDENCE.

Plaintiffs in this petitory action must depend on the strength of their own title. They have established no title either by conveyance or by accession or by prescription.

(*Syllabus by the Court*.)

E. Howard McCaleb, for appellant. Zacharie & Armstrong, for appellee.

FENNER, J. Appeal from the district court for the parish of Orleans. Plaintiffs, claiming title to certain sections of land designated as "sections 7, 8, and 9," bring their petitory action against defendant, alleging that he is in possession of a portion of said lands, to which he wrongfully and falsely sets up title. Defendant answers by a general denial.

There is no dispute as to plaintiffs' ownership of sections 7, 8, and 9. The question is whether the land occupied by defendant is embraced within those sections. The sections were established by a United States survey made in 1836 by Connelly, United States surveyor. We agree with the judge *quo* that Connelly's field-notes, taken in connection with the evidence in this case, sufficiently show that his lines towards the south only ran to a sea marsh bordering a sheet of water known as "West Bay," and that at that time the land now in controversy did not exist as dry land, but lay within, and was covered by, the water of West bay. The function of Surge, the surveyor appointed in this case, was simply to run out and define the lines established by Connelly. There is much confused and contradictory testimony as to errors committed by

Surge, which we need not discuss; but, when he runs the lines in such manner as to embrace within them the land in controversy, which then undoubtedly lay under the water of West bay, it is clear he runs lines which Connelly did not and could not have run. We take it, therefore, to be very certain that this land was not included within the lines of these sections as established by the original survey, and as patented to plaintiffs' authors by the United States.

Plaintiffs' claim of title by accession resulting from accretion seems to us equally unfounded. The evidence shows that, after the Mississippi river formed a new channel through what is called the "Jump," this land was formed by the deposits from its overflow as an island in West bay. Between the waters of West bay, and the southern line of plaintiffs' sections as established by the field-notes of Connelly, there was a stretch of sea marsh, which was ceded by the United States to the state of Louisiana under act of congress of 1849. Therefore the state, and not plaintiffs, was riparian proprietor on West bay, and no accretion there formed could benefit plaintiffs. Nor were plaintiffs riparian proprietors on the "Jump" in front of this land. The Jump runs north and south and this land lies south of plaintiffs' line running perpendicularly to the Jump.

Plaintiffs' claim of title by prescription has no merit. The evidence is confused, contradictory, and for the most part incomprehensible. It establishes no such certain and continuous possession as is necessary to support the plea. Defendant has been in possession for more than 10 years, and has been paying taxes on the land.

We can discover no ground for disturbing the conclusion reached by the district judge.

Judgment affirmed.

STATE V. GONSOULIN.

(*Supreme Court of Louisiana. May 5, 1890.*
43 La. Ann.)

PERJURY—INDICTMENT—VARIANCE.

1. In an indictment for perjury, it is sufficient to charge the materiality of what is sworn to.

2. It is a question for the jury to determine whether there is variance between the charges in the indictment and the proof offered to sustain it.

(*Syllabus by the Court.*)

Appeal from district court, parish of Iberia.

A. & C. Fontelleu, for appellant. The Attorney General, for the State.

McENERY, J. The defendant was indicted for perjury, and convicted, and sentenced to hard labor for one year. The defendant appealed, and relies for a reversal of the judgment upon a motion in arrest of judgment which is based upon the following grounds: *First.* Because the pretended false statement does not appear to be material upon the face of the indictment. *Second.* Because the deposition or assertion made by the accused was not material to the issue pending,—the pending issue being relative to the owner-

ship of a certain cow; and the fact that the accused swore that that cow bore the brand of Gabriel Gonsoulin in 1882 did not and could not mean that he swore that the said Gabriel Gonsoulin was the owner of the animal in question.

The bill of indictment alleges that "on the 16th day of the month of July, 1887, in the parish of Iberia aforesaid, in the Fourth ward of said parish, before A. FENELON DUGAS, a justice of the peace duly elected, commissioned, and sworn as such justice of the peace in and for said Fourth ward of said parish of Iberia, then and there holding his court in a certain cause wherein one Charles V. Broussard was the plaintiff, and one Homer Gonsoulin was the defendant, a certain plea and issue between the said plaintiff and the said defendant as to the ownership of a certain cow, the subject-matter of said suit, came to be tried in due form of law," etc., "upon which said trial one Horace Gonsoulin then and there appeared as a witness in said case, on the plea and issue aforesaid, and was then and there sworn according to law, and it then and there became and was a material question to know whether in the year 1882 the cow forming the subject-matter of said suit bore the brand of one Gabriel Gonsoulin; and the grand jurors do further present that the said Horace Gonsoulin, being so sworn as aforesaid, contriving and intending to prevent the due course of law and justice," etc., "falsely, corruptly, knowingly, willingly, and maliciously did dispose and swear in substance and to the effect following, that is to say, that in the year 1882 the cow forming the subject-matter of the aforesaid suit bore the brand of one Gabriel Gonsoulin." The indictment distinctly charges the materiality of what was sworn to. This is sufficient. 2 Bish. Crim. Proc. § 924. It is charged in the indictment that the brand on the cow of Gabriel Gonsoulin was a material fact to prove ownership.

It is a question for the jury to determine whether there is a variance between the averments in the indictment and the proof offered to sustain it.

Judgment affirmed.

SAGORY v. METROPOLITAN BANK.

(*Supreme Court of Louisiana. April 7, 1890.*
43 La. Ann.)

CONVERSION BY AGENT—EVIDENCE—NEGOTIABLE INSTRUMENTS.

1. Where an agent unlawfully disposes of the property of his principal, the accounts or statements made by the agent to his principal, in which the property figures as the property of the principal, are receivable in evidence as a part of the testimony to prove title to the property on the part of the owner.

2. Indorsements on a note past due, postponing the day of payment, do not revive the note, and invest it with the negotiability it possessed before its original maturity.

3. An indorsement, before its day of payment, postponing its maturity, must be considered as incorporated into it, and made part of it, so as to make the note payable at the date fixed by the indorsement, as though the date had been originally written in the note.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; **RIGHTOR**, Judge.
Buck, Dinkelspiel & Hart, for appellant.
H. L. Lazarus, for appellee.

MCENERY, J. Jules V. Charpentier, formerly a resident of New Orleans, and doing a notarial business in said city, held notes belonging to the plaintiff for collection, and had authority to renew the notes, to reinvest the principal and interest collected for his account. Some of these notes were transferred for his individual account and use by Charpentier to the Metropolitan Bank. Charpentier proved faithless in the trust confided to him, and fled the state. The plaintiff, learning that the defendant bank held some of the notes he had placed in the hands of Charpentier, brought suit for the same, claiming their ownership, and sequestrating them. The defendant company alleges that it acquired said notes for a valuable consideration, before maturity, in good faith. It denies that the plaintiff, Sagory, is the owner of the notes. The plaintiff only offered evidence as to the ownership of the notes. The defendant offered no evidence to rebut plaintiff's testimony, or to show that Charpentier was the owner of said notes, or that he had any authority to transfer them. Certain accounts or statements rendered to Sagory by Chiapella and his predecessors in the notarial business, with whom Charpentier intrusted his affairs, were received in evidence over the objection of the defendant. The heading to the extracts, made through several years, is: "Effects in the portfolio held for account of Charles Sagory by Jules Charpentier, New Orleans." In these accounts the notes in controversy figure as the property of Sagory. They were offered to show continued possession of the notes in Sagory; that they were in the hands of Bouny and his successor, Charpentier, and that they had accounted to the plaintiff for them as his property. For the purpose of proving ownership of the notes, the evidence was directly in the line of that proof, and was properly admitted.

The naked declarations of Sagory to Harris, a third party, of ownership, were properly excluded. Sagory unequivocally stated the facts which lead to the irresistible conclusion that he was the owner of the notes, and had never parted with title to the same, and that they were placed in the notary's custody only for the purpose as heretofore stated. His testimony is corroborated in all its essential features.

All the notes except two were indorsed after their maturity, excluding the day of payment. One note had no indorsement of this kind, but was transferred after it matured. The indorsements, after the note became due, extending the time of payment, did not have the effect of renewing them, and investing them with the negotiability they possessed before their original maturities had arrived. A party acquiring a note after it is past due with such an indorsement takes it subject to all the equities existing between the preceding parties to it. *Marcel v. Melliet*, 18 La. Ann. 223. Charpentier had no title to these notes. The defendant bank there-

fore acquired none, as it acquired after their maturities.

The E. G. Carter note was indorsed before the day of payment as follows: "mutual consent the payment of this is postponed until the 15th February Interest on same paid in advance that date." There are several other indorsements postponing payment until the note falls due. The indorsement on the note made before its maturity may be considered as incorporated into it, made part of it, so as to make the note payable at the date fixed by the indorsement, as though this date had been originally written in the note. 1 *Daniel*, Inst. § 151; *Morris v. Cain*, 39 La. 713, 1 South. Rep. 797, and 2 South. 418.

The defendant bank acquired the notes before its maturity, in good faith, and therefore protected in its title to said notes. Judgment affirmed.

BIRMINGHAM MINERAL R. CO. v. SMITH
(Supreme Court of Alabama. May 9, 1888.)

EMINENT DOMAIN—COMPENSATION—ADMISSIBLE EVIDENCE—VALUE BY OWNER.

The sworn assessment list furnished to the land-owner to the assessor, giving the market value in money of his land, as required by Code §§ 470-486, is admissible in a proceeding to condemn a right of way across the same land, although introduced at about the time the list was made, merely to discredit the land-owner's testimony in the condemnation proceeding, but as independent evidence of the value of the land.

Appeal from city court of Birmingham.
H. A. SHARPE, Judge.
Hewitt, Walker & Porter, for appellant.
W. C. Ward, for appellee.

CLOPTON, J. In a proceeding instituted by appellant to condemn a right of way over the land of appellee, and to determine the compensation to which he was entitled, the former introduced in evidence the assessment rendered by the late tax assessor, sworn to by him, in which the land in question was valued, and its value estimated at \$3,400 for the year 1888. Appellee testified that the tract of land was worth at the time the award of compensation was made, in December, 1887, by the commissioners appointed by the judge of probate, and at the time of the trial, \$1,000 per acre; the tract containing 34 acres. The valuation in the assessment was made on the 1st day of January, 1888.

The sole question in the case arising from the following charge given by the court at the instance of the appellee: "The assessment offered in evidence in this case can have no effect except to discredit the testimony of the defendant, Smith, as a witness in this case." The charge, in effect, declares that the land-owner's sworn valuation of his land for the purpose of taxation is not admissible as independent evidence of value in a condemnation proceeding, inasmuch as it limits its effect to the purpose of impeaching the testimony of the defendant. Such is the statement of the rule in 6 *Amer. & Eng. Cyclop. Law*, citing *Railroad Co. v. Henry*, 8 Ne-

where it is said that the estimate for taxation, though sworn to by the land-owner, "could have no weight in determining the value of the property in question, incompetent in fact for that purpose, though perhaps admissible to tend to contradict his testimony in chief." The elementary authors state the rule in varied and qualified phraseology. In *Lewis, Em. Dom.* § 448, it is thus stated: "The assessment of property for taxation being made for another purpose, and not at the instance of either party, and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings;" citing *Railway Co. v. Eddy*, 42 Ark. 527, and *Brown v. Railroad Co.*, 5 Gray, 35. In the first case, it was held not to be error to exclude from the jury the valuation of the land made by the assessor for the purposes of taxation on the ground that, being made for a different purpose, it is not a fair criterion of its market value; and in the second case the court says: "It is also questionable whether any valuation made for the special purpose of taxation, and that some years previously to the assessment of damages by the jury, could be a useful or proper aid to the jury in fixing the value of the land, or the damages sustained by the petitioner on the location of the road." We have fully mentioned these various statements of the principle for the reason that our attention has been called to them as sustaining the legal proposition of the charge, and for the further reason that, under our mode of assessment, we cannot adopt the rule as thus stated, though no case has been found expressly asserting the competency of the owner's sworn return as independent evidence of values.

By the revenue law, every person liable to taxation is required to render to the assessor all the items of property, and the value of each item, upon which he is liable to be taxed. From this list the assessor makes out the assessment, on which the tax-payer is required to subscribe an affidavit that the list returned by him to the assessor "contains a full and true statement of the property and other subjects of taxation with which he is chargeable, and of the value thereof." Code, §§ 470-498. The value to be stated is the market value in money. It is true the assessor is not bound by the owner's valuation, but may himself ascertain and determine the value according to his best judgment, from information, inspection, or otherwise; but the owner is required in the first instance to return a verified valuation. A universal rule is that the admissions and declarations of a party are admissible in evidence against him. On this rule it has been held that the declarations of the owner as to the value of the land are competent as independent evidence against him in condemnation proceedings,—as evidence bearing upon the value of the property. *Railroad Co. v. Ranck*, 78 Pa. St. 454; *Power v. Railroad Co.*, 56 Ga. 471.

In *Mills on Eminent Domain*, § 172, the author states the rule as follows: "The valuation made by the assessor for purposes of taxation is not admissible in evi-

dence, the determination of value having been made for a different purpose. Nor is the return made by the owner conclusive upon him, but is perhaps admissible to contradict his evidence in chief;" which implies that its admissibility is questionable.

That the valuation made by the assessor for purposes of taxation, in which the owner does not participate, is inadmissible, is unquestionably correct, on well-settled principles. But we are unable to discover any sound reason or principle on which it can be held that the owner's sworn valuation of the land, for whatever purpose made, is incompetent as independent evidence of value against him; why it should be regarded an exception to the general rule. The compensation to which he is entitled, or the amount of damages which he will sustain, is the question involved in such cases, and a material element of the damages is the difference between the value of the land before the right of way is taken, and its value after being taken. If his unsworn declarations and admissions are admissible against him, certainly his estimate of the value, made under the solemnity of an oath, is equally admissible as a declaration or admission. Such valuation is not conclusive upon him, but dependent for its weight upon the circumstances.

The court erred in giving the charge.
Reversed and remanded.

GEORGIA PAC. RY. CO. v. PROPST.

(*Supreme Court of Alabama. April 17, 1890.*)

PERSONAL INJURIES—NEGLIGENCE—ARGUMENTATIVE INSTRUCTION—SECONDARY EVIDENCE.

1. Parol evidence of the purport of printed rules for brakemen carried on trains was properly rejected when the absence of the printed rules was not accounted for.

2. The following charge was properly rejected as argumentative: "If you believe the evidence in this case, you are bound to believe that the defendant's servants in charge of the train were competent and fit to perform their respective duties, and you cannot consider arguments of counsel for the plaintiff to the contrary."

3. The following charge was properly rejected as argumentative: "In this case there is no complaint that any of the crew on the train were incompetent or unfit for the positions they occupied; and you cannot consider any testimony, or any arguments of counsel, bearing on that matter."

4. The fact that there was only one brakeman on a train of ten loaded cars, and that only one brake was applied while it was being let down a steep grade to make the coupling, in doing which plaintiff was injured, was sufficient evidence to go to the jury on the question of defendant's negligence.

5. Where issue was joined on an insufficient count, which had not been demurred to, and there was evidence to warrant a finding of its truth, the plaintiff was entitled to verdict and judgment thereon, and the judgment will not be reversed on a mere assignment of error.

Appeal from circuit court, Fayette county; S. H. SPRATT, Judge. For former reports, see 4 South. Rep. 711, and 3 South. Rep. 764.

The case as presented by the record on this appeal is, briefly, that the plaintiff was night watchman for the defendant, the Georgia Pacific Railroad Company, at Patton Mines, and had boarded the train the morning of the accident, voluntarily,

for the purpose, as he says his habit was, to go down to his home, at Millport, to get his breakfast. After boarding the train, plaintiff says he was persuaded by the conductor to take the place of a sick brakeman, by offering to him the pay of both brakeman and switchman. After reaching a station about 10 miles distant from Patton Mines, the plaintiff received the injury complained of while attempting to couple a box-car to a coal-car. Additional facts are shown in the opinion. The second and fourth charges are as follows: (2) "If you believe the evidence in this case, you are bound to believe that the defendant's servants in charge of the train were competent and fit to perform their respective duties, and you cannot consider arguments of counsel for the plaintiff to the contrary." (4) "In this case there is no complaint that any of the crew on the train were incompetent or unfit for the positions they occupied; and you cannot consider any testimony, or any arguments of counsel, bearing on that matter."

James Weatherby and McGuire & Collier, for appellant. *Nesmith & Sanford*, for appellee.

STONE, C. J. One of the defenses in this case was contributory negligence. In maintenance of that defense, it was attempted to be shown that one of the rules of running the trains of the defendant corporation was that car coupling should not be done with the hand, but with coupling-sticks kept on its trains for the purpose; that these rules were printed, and carried on its trains; and that plaintiff had knowledge of that rule, he having read the book of rules. A witness was asked if there was not such rule; and, on proof that the rules had been printed in book form, which was neither produced, nor its absence accounted for, the testimony was objected to, and he was not allowed to testify to its contents. It is contended for appellant that this question arose collaterally, and that therefore the rule requiring the production of the best evidence does not apply. 3 Brick. Dig. p. 439, § 486. We do not so regard the question. Plaintiff's negligence, contributing proximately to the injury complained of, was the issue raised by the pleadings; and any fact tending directly to establish it could not be regarded as merely collateral to the main inquiry. A knowing disregard of so wholesome a rule, and the adoption of one more perilous, would be negligence,—the leading factor in the defense set up. There was no error in rejecting this testimony.

This is the third appeal in this cause. 83 Ala. 518, 3 South. Rep. 764, and 85 Ala. 203, 4 South. Rep. 711. The first three counts of the complaint, as shown in the present record, have been heretofore passed on, and each pronounced sufficient. They are not questioned on this appeal. We have also held that when, in running a train on a railroad, one of the brakemen falls sick, thus reducing the force below the requisite standard for safely handling the train, "there must be discretion and authority somewhere to supply the place of

disabled or missing servants, and no one could exercise this power so well or so prudently as the conductor in charge of the train. We will therefore treat the plaintiff as the lawfully employed servant of the company." When the case was first before us, it was not questioned that one of the regular brakemen on the train was sick, and that plaintiff, Propst, was discharging the duties of brakeman at the request, or under the command, of the conductor. On the second trial the proof was much less full on the question of plaintiff's employment by the conductor, and we held that it was insufficient to prove the averment that he had been so employed. On the third or last trial the proof on this subject was much fuller, both by plaintiff and other witnesses introduced by him. It fully justified the submission of the question to the jury as one of the disputed facts to be passed on by them. When this case returned to the circuit court after the second reversal, a fourth count was added to the complaint, on which issue was joined without testing its legal sufficiency by demurrer. The last trial was had on the complaint containing four counts, and the defendant's plea of not guilty, and negligence on the part of plaintiff contributing proximately to the injury complained of.

The only errors assigned in this case are the several refusals of the court to give the charges numbered 1, 2, 3, 4, and 14, written out and asked by defendant.

Charges 2 and 3 were properly refused because they are argumentative, if on no other ground. *Cleveland v. State*, 86 Ala. 1, 5 South. Rep. 426; *Hussey v. State*, 86 Ala. 34, 5 South. Rep. 484; *Perry v. State*, 87 Ala. 30, 6 South. Rep. 425; *Railroad Co. v. Hall*, 87 Ala. 708, 6 South. Rep. 277; *Hughes v. Anderson*, 68 Ala. 280.

In charge 14 the court was asked to instruct the jury that they could not find for the plaintiff on the second count. The import of this charge, if given, would have been a declaration by the court that there was no testimony before the jury authorizing a verdict on that count. This count charges that plaintiff had sustained the injuries he complained of "by reason of defendant's negligence, carelessness, and failure to have upon said train a sufficient number of competent and skillful brakemen and servants to operate and manage the same." The testimony is that at the time of the injury only one brakeman was in fact on the train, that the train was being let down a descending grade in order that a box-car at the foot of the descent might be coupled to it, and that in attempting to make this coupling the plaintiff received his injuries. All the witnesses who speak on the subject testify that in backing a train to a stationary car for coupling purposes the movement should be slow and cautious. The engineer himself testified to this effect, and common knowledge and common observation go far to corroborate this view. The testimony tends to show that only one brake was applied to check the speed and momentum of the ten loaded cars; and both plaintiff and Ferguson, in their testimony, testify in substance that the movement of

the descending train was rapid, and that the concussion with the stationary car was very forceful. This testimony, if believed, tended to show that the violent concussion of the moving train with the stationary car was caused either by the defendant's negligence, carelessness, or insufficient number of skillful brakemen and employes, or by some one or more of these agencies; and we cannot say there was no testimony which authorized the jury to find for the plaintiff on the second count.

The fourth charge requested the court to instruct the jury that they could not find a verdict for the plaintiff on the fourth count of the complaint. The substance of the complaint set forth in that count is that "the said locomotive was moved backwards with such rapidity, and want of care and caution, [that] said standing car was hit with so much or unusual force and violence that the draw-heads attached were driven back, whereby plaintiff's arm was exposed, and caught between the bumpers or dead-wood, * * * which bruised, crushed, and permanently disabled plaintiff's right arm; * * * that the injury and wrongs aforesaid were suffered by reason of the engineer, who was an employe of said defendant, all of which wrongs and injuries defendant could and ought to have avoided by the exercise of reasonable care and diligence." It may be that this count is imperfect, and fails to set forth with sufficient particularity of averment a substantial cause of action. That could have been raised by demurrer, but it was not. Issue was joined on it; and, if there was testimony which authorized the jury to find its truth, the plaintiff was entitled to a verdict and judgment on it, which this court will not reverse on a mere assignment of error. It could only be cured, if at all, where there are good counts, as in this case, by a motion for a repleader made in the court below. *Mudge v. Treat*, 57 Ala. 1; *Irion v. Lewis*, 56 Ala. 190; *Ex parte Pearce*, 80 Ala. 195. What we have said in reference to the second count shows there was testimony on which the jury could find for the plaintiff on the fourth count.

The first instruction asked was the general charge in favor of the defendant. Our rulings in reference to the second and fourth counts are decisive of this question. Whenever the proof authorizes a verdict for the plaintiff on one or more of the counts in his complaint, it need scarcely be said the general charge in favor of defendant cannot be given.

Affirmed.

DECATUR CHARCOAL CHEMICAL WORKS v. MOSES.

(Supreme Court of Alabama. April 28, 1890.)

JUDGMENT LIEN—CONSTRUCTION OF STATUTE.

Act Feb. 28, 1887, (note to Code Ala. § 2894,) provides that, when a certified copy of the record of a judgment or decree for the payment of money is filed and registered in the office of the probate judge of any county, such judgment or decree "shall be a lien upon all the property of the defendant in such county which is subject to levy and sale under execution; and such lien shall continue for 10 years from the date of such registration." *Held* that, where a judgment creditor instructed

the clerk, the day after judgment was rendered, to withhold execution until further order, and the same day filed and registered a certified record of the judgment, the lien of the judgment was preserved paramount to that of a levy under a judgment obtained after such filing and registry.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Marks & Massie, for appellant. *Arrington & Graham*, for appellee.

STONE, C. J. The question in this case is, which of two executions had the paramount lien on certain goods and chattels, the property of the Montgomery Furnace & Chemical Company, a corporation; said corporation and chattels having their *situs* and place of business in Montgomery county, Ala? The Decatur Charcoal Chemical Works recovered a judgment in the circuit court of Montgomery county against the Montgomery Furnace & Chemical Company on June 18, 1888. At the request of the president of the Montgomery Furnace & Chemical Company, the attorney for the Decatur Charcoal Chemical Works instructed the clerk not to issue execution on said judgment until further orders. On the day the execution was stayed, June 19, 1888, the attorney for plaintiff obtained "a certified transcript of said judgment," and on that day had it "duly recorded in the probate court of Montgomery county, Ala., in full compliance with the law of this state, approved on February 28, 1887, entitled 'An act to provide for the registration and lien of judgments and decrees for the payment of money.'" After June 19, 1888, but during the same term of the court, the Montgomery Iron-Works, a corporation, recovered a judgment against the Montgomery Furnace & Chemical Company, and sued out execution, which was levied upon the said chattels of the Montgomery Furnace & Chemical Company. Before the sale under this levy an execution was issued on the said judgment in favor of the Decatur Charcoal Chemical Works, which was also levied by the sheriff on said chattels. The chattels or goods were advertised and sold under both executions. The proceeds of the sale were less than the amount of the two executions. The judgment in favor of the Montgomery Iron-Works had, in the mean time, become the property of H. C. Moses by transfer. The sheriff, having in his hands the money, proceeds of the sale of said goods and chattels, and each execution creditor claiming the paramount lien, reported the facts to the court from which the executions issued, and prayed the court's instructions as to the proper disbursement of the money. The court decided that Moses, transferee of the judgment recovered by the Montgomery Iron-Works, had the paramount lien, and was entitled to be first paid. The present appeal is from that judgment.

Under the provisions of the statute (Sess. Acts 1886-87, p. 99; Code 1886, p. 635, note) it was declared "that the plaintiff or owner of any judgment or decree rendered by any court of record for the payment of money may file in the office of the judge of probate of any county in this state a certificate of the clerk or register of the court

by which such judgment or decree was rendered, showing the court which rendered the same, the amount and date thereof, and the amount of costs, the names of the parties, and the names of the plaintiff's attorney, which certificate shall be registered by the judge of probate of such county in a book to be kept by him for that purpose, which register shall also show the date of filing, and the name of the owner of such judgment or decree. And every judgment or decree so filed and registered shall be a lien upon all the property of the defendant in such county which is subject to levy and sale under execution; and such lien shall continue for ten years from the date of such registration." Before the enactment of this statute, judgments were not liens under our laws, either on real or personal property. The lien attached only when execution was placed in the hands of the sheriff, and it extended only to property in the county in which the sheriff held execution; and if, after acquiring a lien by placing execution in the hands of the sheriff, a term of six months was permitted to elapse during which the sheriff had no execution, the lien would be lost. Code 1886, § 2894; 3 Brick. Dig. p. 451, § 36 et seq. In the absence of the statute approved February 28, 1887, there can be no question that the stay of execution ordered and granted in the case of the Decatur Charcoal Chemical Works would have had the effect of giving to the later judgment and execution a paramount lien on the goods, and on the money for which they were sold. This, on the principle that a party who thus wrests the process of the court from its legitimate purpose and office is conclusively presumed to intend thereby to favor and aid the judgment debtor; and such act is a fraud on a junior execution creditor which gives the latter a paramount lien. *Patton v. Hayter*, 15 Ala. 18; *Bank v. Broughton*, Id. 127; *Albertson v. Goldsby*, 28 Ala. 711; *Freem. Ex'ns*, § 206. What was the purpose of that statute, and has it changed the rule as to voluntary stay of execution by the plaintiff? There was a time when, under our statutes, judgments rendered by courts of record fixed a lien on the real estate owned by the defendant, if situated anywhere in the state of Alabama; and that lien did not depend for its creation or vitality on the issue of an execution, or the placing of it in the hands of the sheriff. It was a judgment lien. 1 Brick. Dig. 899. This principle had exceptions; suffering the judgment to become dormant being one of them. Another exception was that if the plaintiff in such judgment stayed execution, this act of his was constructively fraudulent as against a junior judgment creditor, and subordinated his lien to that of the latter. *Patton v. Hayter*, 15 Ala. 18. This continued to be the law, and this its interpretation, as affecting judgment liens on real estate, until the statute was changed by the adoption of the Code of 1852, January 17, 1853. Since that time the rule has prevailed as to both species of property which theretofore prevailed in reference to personality; that is, there was no lien until execution was placed in the hands of the sheriff, and the lien was con-

fined to the county in which it was so placed. 1 Brick. Dig. p. 900, §§ 147, 148. And this lien would be lost if there was a lapse of an entire term. Code 1886, § 2894; *Childs v. Jones*, 60 Ala. 352; *Mathews v. Insurance Co.*, 75 Ala. 85. So, if execution was stayed by order of the plaintiff, this gave to a junior execution not so stayed a paramount lien. Before the statute of February 28, 1887, if plaintiff in a judgment desired to secure a lien in any county on property owned by, or likely to accrue to, the defendant in that county, the only course open to him was to sue out execution, and place it in the hands of the sheriff of that county, and, by successive issues, to keep process in his hands "without the lapse of an entire term." Allowing such lapse to intervene was a loss of the lien to him; and if, after so placing or renewing his execution, he, by any positive act or direction of his, caused the execution to be suspended or held up, and during such suspension another execution on another judgment was placed in the hands of the sheriff for levy, this would have transferred the priority of lien to the execution last placed in the hands of the sheriff. Was it the purpose of the act of 1887 to place the lien of a recorded judgment on the same solid basis as that of a recorded mortgage, and that for a term of 10 years? And has a junior creditor with an execution no redress in such case? If so, it requires no stretch of imagination to suppose a case in which a falling debtor may secure to himself a very long term of enjoyment of his property, and keep his other creditors at bay, by the kind indulgence and favoritism of the one creditor who acquired the first lien.

In reply to this phase of the argument, it is urged that the junior execution creditor can coerce the holder of the older lien to enforce it, and thus secure to himself what may remain after satisfying the recorded judgment. Under what principle of law can the coercion be effected? The statute makes no provision for it; and, if we treat the question as a parallel to the right of a junior mortgagee against the senior, it furnishes no solution of the question. A junior mortgagee cannot compel the senior mortgagee to foreclose. *Kelly v. Longshore*, 78 Ala. 203. If the record of the judgment preserves a lien, notwithstanding the stay of execution, we can conceive of no very clear or safe remedy left to the junior execution creditor. He can, perhaps, sell the property subject to the older lien, but it need scarcely be said that such sale would not promise encouraging results, and complicating and embarrassing difficulties would probably arise, respecting the safe custody of the personal property so sold, until it might be wanted in satisfaction of the recorded judgment lien. The right of a junior mortgagee to redeem from a senior mortgagee, and then, tacking them together, to foreclose both mortgages, is an equitable principle, and, if not agreed to by the senior mortgagee, can only be enforced in equity. Can this equitable doctrine be applied to the adjustment of the statutory lien created by the registration of a judgment? We have indulged in these reflec-

tions for the purpose of showing what embarrassing inquiries will probably result from the interpretation contended for, namely, that a recorded judgment fastens a lien, which a stay of execution by plaintiff's order does not impair. But how can we escape this interpretation? The statute in express terms declares that a "judgment or decree so filed and registered shall be a lien upon all the property of the defendant in such county which is subject to levy and sale." It makes no mention of execution, and we cannot hold that execution in the hands of the sheriff was intended to be one of the conditions of the lien. To so hold would not only be in the teeth of the statute, but would show that the statute itself is redundant and meaningless; for, if execution in the hands of the sheriff is necessary to the lien, then registration is not necessary, for the execution gives the lien without the registration. We cannot give the statute any operation unless we hold that it was intended to take the place and have the effect of an execution in the hands of the sheriff, as an instrumentality of creating and preserving a lien, and we consequently so hold. *Muir v. Leitch*, 7 Barb. 341. The instruction not to issue execution cannot vary the question, for the statute clearly contemplated that there shall be no execution. It would be singularly absurd to hold that giving directions to do, or, rather, not to do, precisely what the statute contemplates shall not be done, works a forfeiture of all benefits secured by the statute; in other words, that giving directions to conform to what the statute contemplates, works a forfeiture of all benefit under it. It was by force of the statute that an execution in the hands of the sheriff operated a lien on the property of the defendant situated in the county. It is by virtue of the act of February 28, 1887, that registration of a judgment takes the place of that lien to some extent. A lien given by statute can be modified or taken away by statute. 1 Brick. Dig. p. 900, § 144.

The novelty, if not the intricacy, of the question presented, and the abuses and wrongs of which the act of February 28, 1887, may be made the possible instrument, have caused us to consider it more at length than may seem to have been necessary. Possibly the act is too sweeping in its terms. Possibly it would best subserve the end in view, and rob the statute of its power to oppress, if it should be made the duty of the plaintiff in the recorded judgment to proceed at once to enforce his judgment, whenever a junior judgment creditor has execution in the hands of the sheriff for levy and collection, with a provision that, if he fail to do so before such sale made, the lien of the junior judgment creditor will prevail over his. This, however, is a question for the legislature, not for us. In the case we have in hand there was no actual oppression, for the junior judgment creditor was not delayed in obtaining a sale of the goods levied on, both executions being in the sheriff's hands at the time of the sale. We need not and do not decide that there would be no remedy if the plaintiff in the older judgment should

fail to enforce his claim, after execution on the junior judgment was placed in the hands of the sheriff. Nor will we decide, if there had been such failure, which creditor would have had the paramount right to the money. *Campbell v. Spence*, 4 Ala. 543; *Bagby v. Reeves*, 20 Ala. 427; *Lancaster v. Jordan*, 78 Ala. 197. These questions are not before us. All we decide is that, on the admitted facts in this record, the Decatur Charcoal Chemical Works has the prior right, and is entitled to be first paid. Reversed and rendered.

MYERS v. CONWAY & Co.

(Supreme Court of Alabama. April 28, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RESERVATION OF EXEMPTIONS.

1. A reservation of "all legal exemptions" contained in an assignment for benefit of creditors renders it executory, and title will not pass as against an attachment until the debtor's right of selection of exempt property has been exercised.
2. Clerical errors in a judgment may be amended *nunc pro tunc*.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

On November 22, 1887, M. J. Mullane, who was doing business under the firm name of M. J. Mullane & Co., executed a deed of assignment to D. F. Myers as assignee for the benefit of all his creditors. This instrument was drawn in the usual form, with the following additional clause: "But the party of the first part, in making this assignment, reserves to himself any and all exemptions to which he is entitled under the laws of the state." On November 29, 1887, J. M. Conway & Co., the plaintiffs, caused an attachment to be issued on the stock of goods belonging to M. J. Mullane, and which had been assigned to Myers. Thereupon the said Myers demanded of the sheriff possession of said stock of goods; and, upon the sheriff's refusal to surrender the possession thereof, said Myers, as assignee, made his affidavit, filed a claim-bond, and interposed a claim to said goods as assignee. Upon the trial of the statutory claim suit, the court, after hearing all the evidence, gave the general affirmative charge in favor of the plaintiff in attachment, to which the claimant duly excepted. Judgment was rendered for the plaintiffs in attachment. The judgment entry, after condemning the said property to the satisfaction and payment of plaintiffs' claim, closes with the phrase, "for which execution may issue." This judgment entry was made February 14, 1889. On October 8, 1889, the plaintiffs moved to amend the judgment entry *nunc pro tunc* by striking out the words, "for which execution may issue," and inserting therefor the words, "if plaintiffs shall obtain judgment against defendant." The court granted the motion, and the judgment entry was so amended, against the objection and exception of the claimant. The claimant now prosecutes this appeal, and assigns the giving of the general charge for the plaintiffs, and the granting of the plaintiffs' motion to amend the judgment entry, as error.

A. A. Coleman and R. H. Pearson, for appellant. Mountjoy & Tomlinson and Garrett & Underwood, for appellee.

SOMERVILLE, J. The question is whether the assignment made to the appellant as trustee for the benefit of the creditors of the assignor passed the title of the goods before the levy of the attachment. The instrument is drawn in the usual form, with the addition of the following clause: "But the party of the first part, in making this assignment, reserves to himself any and all exemptions to which he is entitled under the laws of the state." It is shown that the merchandise went into the possession of the assignee before the levy of the appellees' attachment. Does the clause above stated render the contract executory, so as to prevent the vesting of an absolute title in the trustee? It may be admitted that the assignment is not rendered fraudulent by reason of the reservation of the assignor's lawful exemptions from the operation of the transfer. This exempt interest is one not liable to his debts, and no prejudice can arise to creditors by its retention, if effected in a mode otherwise unobjectionable. 1 Amer. & Eng. Cyclop. Law, 853, note 1, and cases cited; Shirley v. Teal, 67 Ala. 449; Alley v. Daniel, 75 Ala. 403. The point of difficulty does not lie in this feature of the case. It arises from the effect which is exerted upon the transfer of title by proof of the legal intention of the contracting parties.

We do not see any solid principle on which this case can be distinguished from that of Block v. Maas, 65 Ala. 211. There the goods in controversy were transferred to a purchaser by bill of sale. The reservation made by the vendor was in these words: "Reserving and excepting the amount of \$1,000 worth of said merchandise, * * * which is hereby selected by me * * * as exempt to me under the laws of Alabama, and which personal property to the amount of \$1,000 is not hereby conveyed," transferred, or assigned. This court held that the sale was executory, and the title of the goods remained in the vendor until the selection of the \$1,000 worth of goods had been made. "When the attachment was levied," say the court, "there was no individualizing the goods the vendor would select and retain from the goods which would pass to the vendee. There was not one article which the vendee could claim was his property, free from the right of the vendor to retain and hold it." There is no difference in signification and legal effect between the reservations respectively incorporated in these two instruments,—the one in that case, and the one in this. The one in this case "reserves" to the assignor any and all exemptions to which he was entitled under the laws of Alabama. "Reserve" means to keep, to hold, to retain. The declaration is that so much of the goods as the law exempted from debts should be taken out of the operation of the transfer,—should not pass by it to the assignee. This necessarily implied the power to select the designated amount from the bulk or mass assigned, just as the debtor could do in case of a levy on his property under execu-

tion or attachment. The language of the reservation made in Block v. Maas, 211, supra, stripped of its tautology means precisely this, and nothing more. It is equally true in both cases that there was not one article which the vendee or assignee could claim was his property free from the right of the vendor to select and hold it." This power of the assignor to put his hands on each and any article found among the transferred goods at his option rescues it from the transfer to the extent of \$1,000 worth in value. The goods, in this view, are the weak spot in the argument that vitiates it. It conclusively demonstrates an intention that the title shall not be complete—shall be exempt—until the exempted goods are segregated from the entire lot, or individualized by segregation.

It is in the power of the assignor to annex such conditions and qualifications to the transfer of his own property as he may see fit, taking the consequences of it upon the validity of the instrument. It is as said by SELDEN, J., in Jessup v. 21 N. Y. 168, "he annex an improper condition, the court must pronounce the assignment itself void. It cannot hold the transfer good, and disregard the condition, because that would be to take property from the assignor against his will. He having consented to pass his title only upon certain conditions, the transfer and the condition must stand fall together. If, therefore, the court holds the assignment, it must of necessity protect and enforce the terms and conditions upon which it is made." The condition annexed in the present case is a reserved right of the assignor to select exemptions, which by necessary implication attaches to the reservation itself, without which this reservation would be futile, and of no effect. This conclusion under the principle settled in Block v. Maas, supra, rendered the transaction executory until the selection was perfected. There was, in this view of the case, no error in the court's giving the general assignment charge for the plaintiffs.

The error in the judgment was corrected and was properly amended *nunc pro tunc* by the city court. Gray v. Raiborn, 40 Ala. 40; Parker v. Wimberly, 78 Ala. 40. Affirmed.

DENT et al. v. LONG et al.

(Supreme Court of Alabama. April 30, 1900.)

CONVEYANCE—UNDUE INFLUENCE—LAC

1. The validity of a conveyance is not affected by reason of having been obtained by undue influence and misrepresentations of a son, who was the actual purchaser thereof for valuable consideration neither participated therein nor had knowledge thereof.

2. A deed made two years before the death of a grantor will not be set aside for undue influence in an action commenced six years thereafter by her heirs, who had at all times been of her mental condition, when it appears that parties cannot be placed *in statu quo*.

Appeal from chancery court, Baldwin county; COBBS, Chancellor.

Hewitt, Walker & Porter, Henryson, and Rice & Wiley, for appellants; Smith & Lowe, for appellees.

CLOPTON, J. On April 2, 1879, Eliza Dent and W. B. W. Dent executed to B. M. Long a conveyance of the lands mentioned in the bill, situate in Walker county, Ala., upon the expressed consideration of \$6,000. Eliza Dent died in June, 1881. Appellants, who are her children and heirs, by the bill, seek the rescission of the contract of sale, and cancellation of the conveyance, on the alleged grounds that Mrs. Dent was mentally incapable of making a contract, and that her mental deficiencies were unduly acted upon by W. B. W. Dent, her son, who, the bill alleges, was subject to the control and influence of Long, and was his agent or instrument in procuring the conveyance. The specific allegations are substantially that Long caused Dent to be arrested on a criminal charge, who, having received information while under arrest, in the custody of the officer, that his mother, who lived in Newnan, Ga., was in a dying condition, and that he must hasten to Georgia if he expected to see her alive, went to Long and informed him of his distressing condition. Long, seeing the opportunity to obtain the lands which he had long desired, proposed to Dent to arrange for him to go to Georgia, by suspending the criminal prosecution and becoming surety for his appearance, if he would procure from his mother a conveyance of the lands to him in consideration of \$5,000, taking in part payment certain lands in Carroll county, Ga., owned by Long; and, if Dent would also convey the land which he owned, he would surrender all the claims he had against him, and permanently suspend the prosecution. Dent went to Georgia, represented to his mother his arrest and prosecution, and urged her to come to his relief by making the conveyance, being the only mode by which he could escape conviction and disgrace; and also that Mrs. Dent, with a mind so enfeebled by old age and sickness as to be unable to contract intelligently, and a will so impaired that she could not resist the appeal of her son, was thereby induced to execute the conveyance.

The testimony is very voluminous, covering 870 pages of transcript paper, and conflicting in many respects. A critical review of it would unnecessarily extend this opinion, and serve no useful purpose in the decision of other cases. We shall therefore be content to state our conclusions. While the opinions of the witnesses greatly vary as to the mental condition of Mrs. Dent, a variance probably produced by her physical and mental condition at different times, it does not appear from the evidence that at the time of making the conveyance she was mentally incapable to contract. The facts of calling upon Mrs. Wood, one of the complainants, to witness the deed, of informing Joseph H. Dent, another of the complainants, several hours afterwards, of what she had done; of giving him the notes which Long had given for the unpaid purchase money, saying that if she kept them W. B. W. Dent would get them from her; and telling, some time afterwards, the witness Clark, who is unimpeached and uncontradicted, though Mrs. Wood was present, that she had sold

her land in Alabama, assigning as her reason that the lands in Alabama were remote, yielded no income, and she had to send money to pay the taxes, while those in Georgia, which she received in exchange, were near, and would yield an income,—manifest that she understood the character of the transaction, and comprehended the nature of the conveyance and the consequences which would ensue. In order to prove undue influence, complainants rely entirely upon the testimony of W. B. W. Dent, who testifies that he told his mother that he was under arrest, and that his only chance to escape criminal prosecution was to consummate the trade proposed by Long. If he made such statement, he stated what was manifestly untrue. It is true that Long caused him to be arrested in February, 1879, for selling mortgaged property. Waiving a preliminary examination, he was placed under bond to appear at the circuit court to answer to an indictment. Long was not a surety on his bond, but the evidence establishes that the circuit court convened on the first Monday in March, and continued in session only one week, during which time Long made strenuous efforts to procure the return of a true bill. The grand jury failed to find an indictment, whereby Dent and his sureties were released by operation of law. On the day succeeding the adjournment of the grand jury, he left for Georgia, of his own accord, without any arrangement or understanding with Long concerning the purchase of the lands. He was not under arrest, and no criminal prosecution was pending at the time of making the conveyance. If Mrs. Dent was unduly influenced to sign the conveyance, it was induced by exciting the maternal instincts, which naturally move in sympathy for a dissipated and wayward son, and by creating apprehension of his and her disgrace from a supposed pending prosecution. There is no evidence except the testimony of W. B. W. Dent, which is impeached and contradicted in several material respects, that such influence was exerted through the agency of Long, or that he knew of it, or was privy thereto, or had any connection therewith; and he testifies that he did not know, and had no notice, of the representations, and had no connection with them. The validity of a conveyance is not affected by reason of having been obtained by undue influence of this nature, exerted by a son for his selfish purposes, when the purchaser for valuable consideration does not participate therein, and has no notice thereof. *Moog v. Strang*, 69 Ala. 98; *Moses v. Dade*, 58 Ala. 211. When Dent left Georgia to go to Alabama, to take charge of the lands, in 1874, his mother gave him a power of attorney, authorizing him to act as her agent, generally, to dispose of the crops, and manage the place as he deemed proper, and to sell the place, making bond for title, but not to make a deed, which she reserved to herself. Under this power of attorney he signed his mother's name, by himself, as agent, to notes on which Long was his surety, and they were paid by him, and sold a part of the lands, the notes of the purchaser being turned over to Long when he bought. Such authority imports

confidence, and it is not pretended that the power of attorney was obtained by undue influence. A conclusion that the deed to Long was obtained by fraud and undue influence is not clearly authorized by the evidence.

There is not a fact or circumstance satisfactorily proved casting suspicion on the *bona fides* of the conveyance as between Mrs. Dent and Long. The ground of impeachment is that she relied and acted on the false statements of her son. The evidence shows that a fair and full consideration was paid, consisting of about 300 acres of land in Carroll county, Ga., the surrender of all claims against W. B. W. Dent, amounting to about \$1,100, and two notes given by Long for the balance of the purchase money, payable, respectively, November 1, 1879, and March 1, 1880, aggregating \$6,000. The proof abundantly shows that the lands in Alabama were not worth at that time exceeding \$5,000, the present increased value being attributable to the subsequent building of rail roads running through the lands, mainly induced by Long's efforts; and the weight of the evidence is that the lands in Georgia were of value greater than the amount at which they were estimated in the trade. No injury resulted to Mrs. Dent. Independent of these considerations, the delay in filing the bill is, under the circumstances, fatal to the right of complainants to rescind. When a party is invested with the option to rescind a contract, promptness of action on his part is requisite. A contract obtained by fraud and undue influence may be rendered valid by ratification after the removal of such influence, or after the discovery of the fraud, and the right to rescind may be lost by a failure to disaffirm it within a reasonable time after such discovery, or by long delay in asserting the right, thereby raising a presumption of acquiescence, which, under some circumstances, may become conclusive. A transaction impeachable at the time of its consummation becomes unimpeachable if the party, with full knowledge or notice of all the material facts, does anything tantamount to a recognition of the contract as existing and binding, or which is inconsistent with its repudiation, or if he remains silent, and abstains from impeaching it for a considerable time, so that the other party is reasonably induced to suppose the transaction is recognized, and is permitted to deal with the subject-matter under such belief. 2 Pom. Eq. Jur. § 965. Though a party has the right to determine whether or not he will rescind a contract, so long as he has made no election, if, while considering, the position of the other party is materially affected or changed, or innocent third persons have acquired intervening rights in consequence of his unreasonable and unexplained delay, he will be precluded from exercising his right to rescind. *Clough v. Railway Co.*, L. R. 7 Exch. 28. Mrs. Dent lived more than two years after making the conveyance. In the mean time she expressed her satisfaction with the trade, collected the notes given by Long, and used and improved the lands she received in exchange, and without complaint or expression of dissatisfaction

continued in possession and enjoyment of the fruits of the contract, thereby recognizing its existence. It appears from the evidence that after the transaction W. B. W. Dent was rarely at home with his mother, and it seems that any undue influence which had existed had been removed. The bill was filed March 3, 1887. If it be said that she continued to grow weaker mentally, and that the undue influence still lingered, the complainants, after her death, deliberated and abstained from instituting proceedings, because of Joseph H. Dent's opposition, who did not think there existed sufficient ground upon which to base a suit until the discovery of W. B. W. Dent's arrest in the latter part of 1886. They supposed, to use the language of the bill, that Mrs. Dent "had been led to do an improvident act by reason of her weak mental condition, and her affection for her son." The lands in Carroll county were sold by her administrator as the property of her estate, and at the sale some portions were purchased by some of the complainants, and others by third persons. They are not in a condition to restore the lands received from Long. Unless the parties can be put *in statu quo*, which cannot be done when a portion of the property has been disposed of, a court of equity is reluctant to rescind a contract, and will do so only when clear and strong equity compels it. During this time complaints knew the mental condition of Mrs. Dent. The only matter which they claim to have subsequently discovered is that W. B. W. Dent, at the time of the conveyance, was under arrest at the instance of Long. This, we have shown, is utterly disproved; consequently is not a fact, the ignorance of which excuses the delay. With knowledge of the mental condition of Mrs. Dent, of her affection for W. B. W. Dent, and his capacity to influence her, knowing of the execution of the deed, and that it was procured by him, and suspecting there was something wrong, some of the complainants became purchasers of the Carroll county lands, and the proceeds of the sale were distributed among them all. By such conduct, dealing with the property as belonging to the estate of Mrs. Dent, they ratified the transaction with Long, and in the mean time two railroad companies have acquired the right of way over the lands, and Long has put improvements thereon of value from fifteen to twenty thousand dollars. Upon the facts disclosed by the record, the objections to a rescission of the contract and cancellation of the conveyance are insuperable. *Wood v. Craft*, 85 Ala. 262, 4 South. Rep. 649; *Kern v. Burnham*, 28 Ala. 428. Affirmed.

PECK *et al.* v. SPENCER.

(Supreme Court of Florida. June 6, 1890.)

CONTENDED ELECTION—EXPENSES—INJUNCTION.

1. The bill alleges that complainant has caused a suit to be instituted in the name of the state of Florida, upon complainant's relation, against B., to test the alleged election of B. as mayor of the town of D., and that complainant is a tax-payer of the town, and, with the other tax-payers of said town, is interested in having the funds of the town

applied exclusively for legitimate purposes; and that the town council of D. have authorized B., acting mayor, to employ counsel at the expense of the corporation to defend said suit. *Held*, that the allegations of the bill are sufficient to grant preliminary injunction upon.

2. An application for rehearing upon an order to vacate an order dissolving an injunction, under rule 90, equity practice circuit courts, must be by petition; but when such application is upon motion, and there is no objection to the mode of the application in the lower court, and the objection is first made in the appellate court, the objection comes too late. A failure to object at the proper time was a waiver of the objection.

3. It is not error after a bill has been filed and temporary injunction granted, and an order granted vacating the order granting the injunction and without refileing the bill, to grant an injunction upon the bill as originally filed, the bill still being on file, and the case being still under the control of the court.

4. An application of the funds of a town, derived from taxation, for purposes beyond the purview of municipal grant, is a wrongful appropriation of the funds held in trust for the tax-payers and people to pay the legitimate expenses of the town, and is null and void, and resident tax-payers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the corporation, or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay.

(*Syllabus by the Court.*)

Appeal from circuit court, Volusia county; JOHN D. BROOMS, Judge.

Doggett & Buckman, for appellants.
Hamlin & Stewart, for appellee.

MITCHELL, J. On the 3d day of January, 1889, the appellee filed his bill in the circuit court of Volusia county against the appellants, and, among other things, the bill alleges, (substantially:)

That an election was held in and for the town of Daytona, July 24, 1889, at which a mayor, councilman, and treasurer were to be elected, and that the complainant and one Courtland Buckman were candidates for the office of mayor of said town, and that the election so held was illegal.

That the complainant has caused a suit to be instituted in the name of the state of Florida, upon complainant's relation, against the said Buckman, to test the legality of said election, and that the complainant is a tax-payer in said town, and with the other tax-payers thereof is interested in having the funds of the town applied exclusively for legitimate purposes.

That the town council of the said town have authorized the said Buckman, acting mayor, to employ counsel at the expense of the corporation to defend said suit, and threatened suits against the councilmen and treasurer of said town.

The prayer of the bill is for an injunction restraining said town authorities from expending the funds of the town in defending such suits.

Upon filing the bill and affidavits, a preliminary injunction was granted as prayed.

Afterwards, on September 16, 1889, upon motion of respondents and affidavits filed by them, the injunction was dissolved. On the 17th day of the same month, upon motion of the complainant, and after hearing argument, the court granted an order vacating the order of September 16th dissolving the injunction, and rein-

stating the injunction. On the same day (September 17th) solicitors for respondents filed their objections and exceptions to the granting of the order vacating the order dissolving the injunction, and granting the injunction.

The objections and exceptions to the rulings of the court were:

That the bill sets up no title to such relief in the complainant.

That it is not properly sworn to.

That this court has no jurisdiction of such matters.

That there is no reason for the interference of a court of equity herein, or the granting of such a writ.

That the bond is too small.

This motion was overruled, and respondents appealed, and have filed the following assignment of errors:

(1) That the judge erred in permitting the filing of the bill in said cause.

(2) That the judge erred in entertaining said cause, and in granting the restraining order of September 2, 1889.

(3) That the judge erred in granting the order of September 17, 1889, vacating the order previously and solemnly made by him on the 16th day of September, 1889, dissolving the restraining order granted by him on September 2, 1889.

(4) That the judge erred in refusing to grant the motion of September 17, 1889.

(5) That the judge erred in receiving, filing, and approving the paper called an "injunction bond," on September 17, 1889.

(6) That said judge erred in granting the restraining order of September 17, 1889.

(7) That said judge erred in refusing the motion to dissolve the restraining order granted on September 17, 1889.

As to the first assignment of error. We are unable to comprehend the reasoning of counsel for appellants in their contention that the court erred in allowing the bill filed, because, under the statute, the bill had to be filed before the granting of the injunction, and the judge could have known nothing of the bill before it was filed, and could therefore have committed no error, as he had no control over the bill until it was filed.

Second. We see no error in granting the preliminary injunction. There is enough in the record, we think, to show that before the restraining order was granted the bill had been filed, and that the allegations of the bill were sufficient to grant the order upon. It is urged that the bill was not properly sworn to, the affidavit being upon information and belief, but this is not tenable. The affidavit is "that Champlin H. Spencer, hearing the bill read and knowing the contents thereof, swears that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true." All the allegations of the bill are upon the knowledge of the complainant, except as to the alleged illegal appropriation of the town funds, and as to this allegation complainant filed the affidavit of R. B. Woolseley, and what purports to be a transcript of the record of the proceedings of the town council of Daytona, showing that the said council had appropriated the sum of \$200

to defend the suits against the town authorities, for the purpose of showing the information upon which he based his information and belief in regard thereto. And the affidavit, when coupled with this evidence, is in strict compliance with the statute in such cases.

It is contended that the court below erred in granting the order vacating the order dissolving the injunction upon mere motion.

Rule 90, equity practice in the circuit courts, requires all applications for rehearing to be by petition; and, as the application in the case under consideration was upon motion, if the respondents had objected in the court below upon the ground that the application for rehearing was upon motion, instead of petition, the objection would have been decisive of the case. But this objection was not made in the court below, and in failing to make the objection at the proper time the respondents waived it. The objection comes too late when, as in this case, it is made for the first time in the appellate court.

It is further contended that the court erred in granting the injunction, after the order of the 16th of September, 1889, dissolving the injunction, without again filing the bill; but in this we do not agree with counsel for appellants. A bill has been filed, it was still on file, and the case was still under the control of the court; it had not been finally disposed of; and there was, under the circumstances, no error in the court treating the bill as filed.

As to the alleged illegality of said election, we express no opinion; that question cannot be raised by injunction.

There is but one other question to be considered, which is, did the court below err in granting the order prohibiting the application of the corporation funds to the payment of the expenses of said suits? We think not. It is contended for counsel for appellants that municipal corporations have the right to sue and be sued, to employ counsel to bring and defend suits, to protect its officers, and to indemnify them against acts done in the discharge of their duty; and cite *McClell. Dig. 247*; *Smith v. Mayor, etc.*, 18 Cal. 531; 1 Dill. Mun. Corp. § 98; *Pike v. Middleton*, 12 N. H. 278; *Fuller v. Groton*, 11 Gray, 340; *Sherman v. Carr*, 8 R. I. 431; *Briggs v. Whipple*, 6 Vt. 95.

This contention is partly correct, and it is supported by the authorities cited. The right of a corporation, when it is interested, to sue and defend suits, is indisputable, and that municipal officers will be protected so long as they keep strictly within the discharge of their duties is equally true; but all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. 1 Dill. Mun. Corp. § 55. And now, admitting the right of corporations to sue and to defend suits, and to protect their officers in the lawful discharge of their duties, to be correct, still, where did the town council of Daytona derive their powers to appropriate money in the defense of contested elec-

tions in the result of which the corporation had no pecuniary interest whatever. Such power is not given in its charter either expressly or by reasonable implication. These contests are personal to the corporation and can have no interest in the result, and an appropriation of any one of the parties the expenses here be put to is without legal authority.

An ordinance making an appropriation of the funds of a town or city, derived from taxation, for purposes wholly beyond the purview of municipal grant, is a wrongful appropriation of the funds held in trust for the tax-payers and people to pay the same. Such an appropriation is an ultra vires act, null and void. Resident tax-payers have the right to invoke the interposition of the court of equity to prevent an illegal disposition of the moneys of a municipal corporation, or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay. 10 Amer. & Eng. Enc. Law, and numerous authorities there. *Lanier v. Padgett*, 18 Fla. 842; *Cottrell v. County Com'rs*, 6 Fla. 610; *Murphy v. City of Jacksonville*, 18 Fla. 318.

The judgment of the court below is affirmed.

ATKINSON V. WHITNEY et al.

(Supreme Court of Mississippi. June 2, 1890.)
SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—CONSIDERATION—APPRAISEMENT.

1. A contemporaneous written agreement between the grantee named in a trust-deed in the mortgage, that, in default of payment by the grantor of the sum secured, he will purchase the land at a price to be fixed by appraisement, made by the parties, and signed by the grantor, is binding on both if acquiesced in by the grantor, not signed by him.

2. Acquiescence will be deemed sufficient in such a case where, after default in the payment of the debt, both parties join in the selection of appraisers, as provided in the agreement, and the grantor after appraisement tenders a deed for the balance due above the debt secured.

3. The performance of the conditions of a contract, and acquiescence therein by the party thereto who does not sign it, is a sufficient consideration for its enforcement against the other party who does.

4. In the absence of fraud, an appraisal will not be disturbed for overvaluation.

5. A failure to survey a body of land does not make the appraisement of "\$5.50 per acre" void for uncertainty where the contract provides for described the tract as containing "680 acres or more or less."

6. An error in reporting the name of the land in the statement of appraisement will not vitiate it where the right land was properly described and described therein.

Appeal from chancery court, Pike county; McLaurin, Chancellor.

Appellant, Atkinson, was a merchant, and the appellees owed him a debt which was only partially secured. Atkinson, in order to be fully secured, and to obtain some further advances, offered to release the debt he held on the personality of the appellees, and have the appellees execute a deed of trust for a large body of land belonging to Mrs. Whitney. Mr. Whitney replied that he did not think his wife would agree to incu-

the land, lest they should be unable to pay the debt, and the land be then sacrificed at forced sale. Atkinson then proposed to execute an agreement to the effect that, if the Whitneys would give him deed of trust on the land of Mrs. Whitney if the debt should remain unpaid, (i. e., if the appellees should be unable to discharge the deed of trust when due,) instead of selling the land at forced sale, each party should select an appraiser, who should go upon the land and appraise its value, and he (Atkinson) would take the land at such appraisement, paying to appellees the difference, if any, between the debt due him, and the value of the land as appraised. If the two appraisers selected could not agree, a third appraiser should be selected by the two. The appellees executed the deed of trust to secure Atkinson, and at the same time Atkinson gave them an agreement, signed by himself alone, to above effect. Default was made in the payment of the debt, and each party to the deed of trust selected an appraiser, but for some reason no result was reached; and two other appraisers were selected, as agreed, who went upon the land under the agreement, but, being unable to agree upon the valuation per acre, they chose an umpire or third appraiser, and two of the appraisers agreed to a valuation of \$5.50 per acre for the land, and so reported to the parties, —one of the appraisers refusing to agree to this valuation,—whereupon appellees, the Whitneys, executed and tendered to Atkinson a warranty deed, in accordance with the agreement, to the land, and demanded of him the difference between their debt and the value as fixed by the appraisers: the appraised value being greater than the amount of the debt. Atkinson refused the deed, and directed the substituted trustee to advertise the land for sale under the deed of trust, claiming that the agreement signed by him was voluntary, and without consideration. Thereupon the Whitneys exhibited a bill (which was demurred to, the demurrer sustained, and an amended bill filed by leave of court) praying, after stating the above facts, an injunction to restrain the trustee from selling under the deed of trust, alleging their willingness to stand by the agreement, tendering a deed to the land, and asking for a personal decree against Atkinson for the difference between the debt due him, and the appraised value of the land. There was a decree in accordance with the prayer of the bill, from which Atkinson appealed.

Calhoun & Green and W. P. Cassidy, for appellant. *Nugent & McWille, Lamkin & Lumkin*, and *S. E. Packwood*, for appellees.

Woods, C. J. We think it unnecessary to follow the counsel for appellant in their argument upon the minor propositions involved in the case and discussed in briefs of counsel, respectively.

1. In the absence of any pretense of fraud in the appraisement, but on the simple averment that the appraisers put an overvaluation upon the lands, we must decline to enter upon that field of inquiry and speculation. The appraisers admittedly

behaved honestly and fairly, and we cannot disturb their simple appraisement of the lands. The proofs taken on this point were wholly unnecessary; but, having carefully considered them, we have no hesitation in saying that they strongly support the correctness of the appraisement, if that, indeed, had stood in need of any support.

2. The various grounds of complaint set up and relied upon as to the mere manner of the "parol submission to arbitration" by the parties, as the matter is called by appellant's counsel, are untenable, for the reason that, whatever the rules governing submission to arbitration, this case can be in no way affected thereby, inasmuch as this was in no proper sense an arbitration, but simply an appraisement of the value of the lands by persons mutually selected for that purpose. There is nothing in the agreement which provided for the selection of the appraisers which required their appraisement in writing, or which necessitated the production of witnesses before the appraisers, or made necessary service of notice upon the parties of the time when the appraisers would go upon the land, as directed in the agreement of the parties, and appraise the property.

3. The appraisement of the lands was not void for uncertainty by reason of the appraisers not having had the plantation actually surveyed, and the exact number of acres ascertained. The number of acres as shown by the legal subdivisions enumerated in the descriptions of the place in both the trust-deed made by appellees and the agreement signed by appellant, is clearly shown; and the fact that the tract of land is said to "contain 680 acres, more or less," may not be held as making uncertain the quantity shown to exist. Here, as in any conveyance of lands, the meaning of the words "more or less" is that the parties shall run the risk of gain or loss, and, if the quantity of land shall prove greater than that sold, the seller shall be loser, and, if the quantity shall prove less than that sold, then the buyer shall prove loser; but in either event the parties shall abide by their contract. And therefore 680 acres was the correct quantity in the present case, and its appraisement at so much per acre was not objectionable, much less void, for uncertainty.

4. The lands actually appraised were the lands enumerated in the deed of trust and the agreement to appraise. These lands were the property of M. A. Whitney, as was well known to the parties to the contract. M. M. Whitney owned no lands, but he was the head of the family residing on this plantation; and the statement of the appraisers that their appraisement was of the lands of M. M. Whitney was inadvertence, in the insertion of the initials of the husband instead of those of wife. The proper lands were properly appraised by the proper men, and we shall not hold the action void because of this immaterial inadvertence in writing the name of the owner.

But, without going further into these minor questions, we now direct ourselves to the consideration of the two propositions on which the contention rests, viz.:

(1) That the agreement, Exhibit A to the amended bill, being a contract for the sale of lands, and not being signed by appellees, is not enforceable against them, and cannot be enforced against appellant; and (2) that the agreement, Exhibit A to the amended bill, was a voluntary agreement on the part of appellant, and without consideration to support it, and therefore it is invalid. Let us examine them in order, and see if they, or either of them, are maintainable.

On the first proposition, we are warranted in declaring that there is much direct evidence, and strong supporting circumstances, tending to show that the deed of trust executed by appellees, and the agreement signed by appellant, made Exhibit A to the amended bill, were executed contemporaneously, and were made to evidence one contract, and that each was executed in consideration of the execution of the other. Appellees bound themselves to secure appellant in a large debt, for which appellant had little or no security, by signing and executing the deed of trust on Mrs. Whitney's plantation; and, on his part, appellant bound himself to see that the plantation was not sacrificed at a forced sale, by agreeing to unite with appellees, after condition broken in their deed of trust, in having the lands fairly appraised, and himself purchasing them at such appraised value. It is true the appellees did not sign the agreement, Exhibit A, but they have in every other possible way signified their consent and adhesion thereto. They have joined appellant in having the lands appraised; they have, in writing, accepted the action of the appraisers as binding upon them; and they have executed the proper conveyance to the lands, and tendered the same to appellant in every method open to them. The agreement was accepted by appellant, and his acceptance evidenced by his signing the same on the day he delivered it to appellees. The acceptance of appellant has since been evidenced in writing and by solemn deed, and we do not see why the contract is not enforceable against appellant on this state of facts. This was, in effect, a contract by which appellant agreed, in a certain event, to take appellees' lands at a price to be fixed by appraisers. The event having happened, the appraised value of the lands having been fixed, and the appellees now tendering their deed to the property in accordance with the contract, we are of opinion that the contract is enforceable against the appellant, the person who signed the written agreement, and the person sought to be charged in this suit. In this important particular the case of *Marqueze v. Caldwell*, 48 Miss. 23, seems directly in point.

(2) The consideration of the remaining proposition, to-wit, that the agreement signed by appellant is without consideration, and therefore void, may be regarded in the light of what has just been hereinbefore said, for much of that remark is pertinent here also. The contention here will be made more clearly to appear if we shall say that appellant maintains that there is a want of mutuality of consideration in the making of the agreement, Ex-

hibit A. Putting out of sight, for the present, the idea of the oneness of contract as evidenced by the two deeds signed by appellees, and the mutual consideration shown by the two parties taken together, let us see if appellant's position will be defensible. We will now assume a written agreement signed by appellant, and delivered by him to appellees, and the same retained and acquired by appellees until the time had arrived which it was necessary to take steps to execute the agreement, though not signed by appellees. When the time for the execution of the agreement arrived, and it indisputably made certain that appellees not only signified their purpose to stand by the agreement, but we find they have actually executed it, so far as execution at all depended upon their action and action. After condition broken in the trust-deed, they promptly signified their inability to pay the debt, they joined with appellant in the appointment of the appraisers, they accepted the action of the appraisers as final and conclusive, and they made and tendered the proper deed of conveyance to the lands to appellant. The consideration in the agreement on the part of appellees was the performance of certain acts by them, and these acts we find they at once and promptly performed, when the necessity for their performance. The familiar illustration in the books meets the requirements of this case. If A. promise B. to pay a sum of money if he will do a particular act, and B. does the act, the promise upon becomes binding, though B. at the time does not promise to do the act, the performance invests the contract with a consideration, and this relates back to the making of the original promise. *Train v. Gold*, 5 Pick. 380; *Railroad v. Graff*, 27 Iowa, 99; *Marqueze v. Caldwell*, 48 Miss. 30, already cited.

The decree conforms to these views, and is affirmed.

HARPER V. RUDD.

(*Supreme Court of Alabama*. April 1887.)
WIFE'S SEPARATE ESTATE—RIGHTS OF HUSBAND—MORTGAGEE.

1. Where a wife owning a horse purchased by her husband made several exchanges thereof, the last of which he receives a mule, and of which any paper evidence of title is received by either husband or wife, the title to the mule is in the husband, and the wife cannot assert her equitable rights as against the mortgagee.

2. Neither can the wife assert title to a mule by six years' adverse possession as against her husband, as, under the statutes in force before the passage of the married woman's act of Feb. 28, 1887, adverse possession could not be maintained between husband and wife; and, as the legislature has since provided that the mule continued to be in the husband's possession after the passage of that act, the possession thereof likewise be considered to be in him, and he cannot maintain trespass against the mortgagee for his seizure of the mule after Act Feb. 28, 1887, though it be conceded that thereunder he may hold property adversely to her husband.

Appeal from circuit court, Coffee county; J. M. CARMICHAEL, Judge.

This action was brought by Mrs. Nora Rudd, the wife of W. E.

against S. B. Harper, to recover damages for the alleged tortious taking of a mule, several head of cattle, hogs, etc., and was commenced on the 12th day of December, 1889. The defendant claimed the mule under a mortgage executed to him by said W. E. Rudd on December 21, 1885, and another mortgage dated April 9, 1887; and he had taken possession under a writ in doctine against said W. E. Rudd after giving the statutory bond. Under the rulings of the court in the charges given and refused, the plaintiff had a verdict and judgment; and these rulings, to which exceptions were reserved, are here assigned as error.

W. D. Roberts and J. D. Gardner, for appellant. *J. E. P. Flournoy and H. L. Martin*, for appellee.

MCLELLAN, J. This is an action in trespass, prosecuted by a married woman, for the wrongful taking of certain chattels, and among other things a mule, which are alleged to have belonged to the corpus of her statutory separate estate. The assignments of error involve only questions relating to the said mule. It seems that the plaintiff, a good many years ago, owned a horse. Commencing with this horse, her husband made from time to time as many as five exchanges, in the last of which, from 9 to 12 years since, he received this mule. In none of these transactions was any paper evidence of title given or received by the plaintiff or her husband. On this state of facts, the title to the mule was never in the plaintiff. *Pollak v. Graves*, 72 Ala. 347; *Kennon v. Dibble*, 75 Ala. 351; *Meyer v. Cook*, 85 Ala. 417, 5 South. Rep. 147.

It is insisted, however, that title was perfected in the wife by more than six years' adverse possession on her part as against her husband. The position is wholly untenable. Under the statutes of this state of force nearly the entire period relied on, to ripen possession into title, as well as under the common law, the husband was entitled to the possession of the wife's chattels. His possession was hers, and *vice versa*; or, rather, the possession as between them was a unity. Whatever may be the true rule under the act of February 28, 1887, in this regard, it is certain that prior thereto adverse possession could not exist between husband and wife while the marital relation continued. *Bank v. Guerra*, 61 Cal. 109; *Mauldin v. Cox*, 7 Pac. Rep. 804; *Hendricks v. Ransom*, 53 Mich. 575, 19 N. W. Rep. 192; *Bell v. Bell's Adm'r*, 37 Ala. 536. The legal title being, therefore, in the husband of the plaintiff, the possession of the chattel in December, 1887, when the alleged trespass was committed, will be referred to the title, and held to be in him, despite the concession that, under the statute then of force, the wife might have a possession with her husband. *Scruggs v. Land Co.*, 86 Ala. 173, 5 South. Rep. 440. Neither the possession, nor the legal title coupled with a right to immediate possession, being in the plaintiff when the cause of action accrued, she cannot maintain this action. *Dunlap v. Vandergrift*, 80 Ala. 424.

Several of the rulings of the trial court to which exceptions were reserved are not in harmony with the view we have taken of the law applicable to the facts. The judgment below is therefore reversed, and the cause remanded.

MERCHANTS' & PLANTERS' NAT. BANK v. RICE et al.

(*Supreme Court of Alabama*. April 30, 1890.)

PARTNERSHIP—WHAT CONSTITUTES.

Where a widow succeeds to the ownership of her deceased husband's mercantile business, conducted in the name of her husband and another, but in which the other, as between themselves, was not a partner, being a mere employee, receiving as his compensation one-half the profits, not exceeding \$100 per month, the fact that she furnished the other with money to be invested in merchandise as a help in disposing of the broken stock on hand, in collecting outstanding accounts, and in winding up the business, does not create a new partnership between her and him, nor authorize him to incur a debt binding on her.

Appeal from circuit court, Montgomery county; *JOHN P. HUBBARD*, Judge.

Assumpsit by the Merchants' & Planters' National Bank against Mrs. Mattie J. Rice and Alexander Wilson, as partners under the name of Rice & Wilson. The jury returned a verdict against Wilson, but in favor of Mrs. Rice, and plaintiff appeals.

Graves & Blakey and Brickell, Semple & Gunter, for appellant. *A. A. Wiley*, for appellee.

STONE, C. J. A mercantile business of several years' duration was conducted in the city of Montgomery in the firm name of Rice & Wilson. The entire capital of the firm was furnished by Rice, and was his property. Wilson allowed himself to be held out to the world as a partner, but as between themselves he was not a partner. He was not directly interested in the profits and losses. 2 Brick. Dig. p. 300, §§ 25-27. He was a mere employee, his compensation being one-half the profits, not to exceed \$100 per month. The firm did its banking business with the appellant, which bank had its *situs* in Montgomery. Rice died May 30, 1887, leaving a surviving widow, Mattie Rice, who succeeded to the ownership of his entire estate; and she became the administratrix. Wilson continued the business in the name of Rice & Wilson until the entire stock of goods was sold to Stone, December 31, 1887, seven months after the dissolution of the partnership by Rice's death. *Espy v. Comer*, 76 Ala. 501; *Vincent v. Martin*, 79 Ala. 540. No understanding or interview is shown to have been had between Wilson and Mrs. Rice in reference to a continuance of the business, or in what name it should be continued, until the latter part of November, 1887. Wilson and another witness, Vandiver, testify that about that time one or more interviews were had with Mrs. Rice with reference to money to be furnished by her to carry on the business, and promote the sale of the goods on hand; and Wilson's testimony tends to show that she furnished \$2,000. These witnesses characterize this negotiation, and subsequent furnishing of the \$2,000, as

looking to a formation of a partnership between her and Wilson. Wilson's testimony tends to show that the furnishing of the money by Mrs. Rice consummated the agreement for a new partnership between her and himself, which, he alleges, Vandiver, the other witness, had negotiated. He says no partnership was agreed on with him, and Vandiver testifies that no terms of partnership were agreed on between him and Mrs. Rice.

Conceding everything the testimony of these two witnesses tends to prove, and ignoring the entire effect and tendency of all opposing testimony, we think the following is the only rational interpretation it is susceptible of: Mrs. Rice sought the counsel of Mr. Vandiver as to what course she should pursue in reference to the mercantile business, the ownership of which had devolved on her by the death of her husband. She expressed a desire to have it wound up speedily. After looking into the business, Mr. Vandiver advised against closing it at that time, telling her it would be detrimental to her interest, and that she could not then part with the services of Mr. Wilson safely. The firm had considerable outstanding dues, and had merchandise, the sale of which would be facilitated and hastened by replenishing the stock with articles of prime necessity in that line of trade. He advised her to furnish \$2,000 to be invested in meat, corn, and oats, which would sell readily for cash. This, he said, would preserve the trade and business of the store so as to enable Wilson to sell the other goods, and would aid him in collecting the unpaid dues. If it was added that the business should continue in the same name, Rice & Wilson, that is of no significance. Such course is not unusual in winding up a mercantile firm dissolved by the death of one of the partners. It did not, and could not, tend to show that she consented to substitute herself as a partner in the place of her deceased husband, and thus form a new firm. The goods were hers, the uncollected dues were hers, and any loss sustained in disposing of the one, and in realizing the other, would be her loss. The implications might be different if Wilson had owned any interest in the stock in trade. Giving the largest interpretation to the testimony of Vandiver and Wilson, and conceding that Mrs. Rice knowingly and intentionally furnished the \$2,000, to be invested in meat, corn, and oats, as a help in disposing of the broken stock on hand, of collecting the unpaid dues, and of winding up the business,—and this is the whole scope of their testimony, when properly interpreted,—these facts neither separately nor collectively tend to prove that she entered into a new enterprise,—a new partnership. They would authorize Wilson to employ the money for the purpose for which it was furnished, but they would not authorize him to create a debt binding on her. It did not and could not constitute a partnership; and, it should be added, there is no testimony that Mrs. Rice was ever informed that she was represented, or held out to the public, as a member of the firm.

Tested by the construction we have given plaintiff's testimony, there was no error in the court's several rulings. In fact, if no testimony had been introduced for her, and the general charge had been asked in her favor, it ought to have been given. Affirmed.

LOUISVILLE & N. R. CO. v. KELSEY.

(Supreme Court of Alabama. May 5, 1890.)

RAILROADS—KILLING STOCK—PROXIMATE AND REMOTE CAUSE—DAMAGES.

1. The plaintiff shipped a stallion with other horses in a freight-car of the defendant, and to insure necessary ventilation left the side door open, nailing some strips of board across the opening. The slats were kicked off, and the stallion escaped uninjured, and, after wandering some distance, strayed upon the track at another point, and was run down and killed by defendant's train. *Held*, that the plaintiff's negligence resulting in the liberation of the animal was not the proximate cause of the injury, and would not preclude a recovery.

2. The measure of damages in such a case is the value of the horse, and is not limited by the terms of the shipping contract, which stipulated that, for any injuries resulting from a failure of the company to perform its conditions, "the amount claimed should not exceed, for a stallion or jack, \$300."

3. Where a horse is run down and killed by a train of cars, the burden is upon the railway company to show freedom from negligence, under Code Ala. §§ 1144, 1147.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

This action was brought by R. W. Kelsey against the appellant corporation to recover damages for the killing of a fine, blooded stallion belonging to the plaintiff by an engine and train of cars belonging to the defendant, and which was alleged to have been caused by the negligence of the defendant's agents and servants in the management of the train. The accident occurred on the 27th February, 1889; and the action was commenced on the 17th day of April, 1889. The pleas were not guilty, and contributory negligence; and there were several special pleas which stated the facts constituting the alleged contributory negligence. It appeared on the trial, as the bill of exceptions shows, that the plaintiff's stallion, with nine or ten other horses and mules, was shipped in a car over the defendant's road from Decatur to Montgomery, the plaintiff himself accompanying them. The animals were placed in a flat box-car, in which there was only one small window; and in order to afford ventilation the sliding doors on the side of the car were left partially open; several slats being nailed across the opening. The stallion was fretful and unruly, and before reaching Cullman it was discovered that some of the slats were loose, having been kicked off by the animals, or worked loose by the motion of the cars, and they were again fastened. The train had left Decatur about dark on the 26th February; and on reaching Birmingham, after midnight, it was found that the stallion and three of the mules had escaped from the car. The plaintiff procured a hand-car, and went back up the railroad track in search of them. He found the place at which the

stallion had jumped from the car, and followed the tracks through the fields, and for several miles along the public road until it intersected the railroad track; and the tracks showed that he then ran up the track for nearly a mile, when he was overtaken and killed by a train from behind. The contract for the transportation of the stock, which was one of the defendant's printed forms with the blanks filled up, contained a stipulation or condition that in the event of injury or damage "the amount claimed shall not exceed, for a stallion or jack, \$200;" but the evidence adduced on the trial showed that the stallion "was worth from \$1,000 to \$1,500."

On these facts the court charged the jury: "(1) That, if the plaintiff's horse was injured by another or different train of cars than that on which he was being transported, the plaintiff would have the right to recover the value of the animal, though it might exceed \$200. (2) That, if the horse was found injured under such circumstances as reasonably satisfied the jury that he was killed by another train than that on which he was being transported, the burden was on the defendant to show that the injury was not caused by negligence." The defendant excepted to each of these charges, and requested the following, with other charges: "(1) The jury cannot in any event return a verdict for plaintiff for more than \$200. (2) The burden is on the plaintiff to show, not only that the horse was killed by the defendant's locomotive or cars, but that the injury was negligently inflicted. (3) If the jury believe from the evidence that the horse escaped from the car by reason of plaintiff's failure to securely bar or tie him in it, and that such failure was negligence on his part, then, if the jury find these facts to exist, the escape of the horse was due to plaintiff's negligence; and, if such negligence prevented the defendant from performing its contract to deliver said horse to plaintiff at Montgomery, plaintiff cannot recover in this case." The charges given, and the refusal of the several charges asked, are assigned as error.

Jones & Falkner, for appellant. *A. A. Wiley*, for appellee.

McCLELLAN, J. 1. Assuming it to be a fact that the stallion, for the negligent killing of which this action was brought, escaped from a train of the defendant company through the negligence of the plaintiff, we are unable to see any such relation of cause and effect between that fact, and the subsequent injury to the animal by another and different train of the defendant, as would avail the defendant under the plea of contributory negligence. The uncontroverted evidence is that the horse escaped unhurt from the car in which he was being transported, went thence a half mile in an easterly direction into a public road, and thence along said road for three miles back to the railroad, at a point where the public road crosses the track. "At this point the horse turned up the track of defendant's said railroad, and went north about one mile, and the tracks of said horse showed that it was running this distance north on the railroad track;"

and at this point, about one mile from the railroad crossing, the horse was struck by the locomotive and cars of the defendant, constituting a train which was going north, and killed. Under these facts, if the escape of the animal was due to the want of due care and diligence on the part of the owner, his negligence was not the proximate cause of the injury, and will not defeat his right to recover damages which he has sustained thereby. In principle, it must be wholly immaterial whence the escape was effected,—whether from the inclosure of the plaintiff, or from the cars of the defendant, where it was the plaintiff's duty to keep the animal securely; nor is it important whether the escape was negligent merely, or affirmatively permissive. However the horse came to be at large, the mere fact that he was allowed to go at large was not the direct, moving, and proximate cause of his death; and the fact of negligence *vel non* in allowing him to be at large is one with which the jury had no concern, since no determination of that issue could have defeated recovery on the one hand, or increased plaintiff's damages on the other. It was a matter beyond the issue, in other words, and the court properly refused to submit it to the jury in any form. *Railroad Co. v. Williams*, 65 Ala. 74; *Railroad Co. v. Jones*, 71 Ala. 487; *Railroad Co. v. McAlpine*, Id. 545.

2. The animal having escaped from the cars, and being at large, the rights of the owner in him, and to be compensated for injuries done to him through the wrong and negligence of others, were precisely the same as if the contract of shipment from Decatur to Montgomery had never existed, and the horse had never been on the defendant's train. The measure of damages was the full value of the property destroyed. That the plaintiff had agreed in the contract of a freighting to claim only \$200 for any injuries that might result to the property from any failure of the railway company to discharge and perform the duties imposed upon it by that contract can exert no influence whatever in determining the amount of the damages to which the plaintiff is entitled for an injury in no wise connected with, or growing out of, the contract, and which the plaintiff seeks to recover in an action not upon, or for a violation of the terms of, the contract, but for an entirely independent wrong and injury. That the plaintiff in that contract, and for the purposes thereof, agreed that \$200 was as much as the animal was reasonably worth, afforded some evidence, to be taken in connection with the circumstances under which the contract was entered into, of the value of the horse; and for this purpose it was admitted by the trial court. The court below very properly, we think, declined to accord to this contract any other operation in the case than as furnishing some evidence of an admission on the part of the plaintiff to the effect that the animal was of less value than that claimed in this action. For this purpose it was competent, but it did not estop the plaintiff to claim as damages whatever the jury, on all the evidence, should find to be the real value of the property.

3. It being shown that the animal, while on the railroad track, was killed by a train of the defendant, the burden was on the defendant to acquit itself of the charge of negligence made by the complaint; and the rulings of the court to this effect were free from error. Code, §§ 1144, 1147; *Railway Co. v. Hughes*, 87 Ala. 610, 6 South. Rep. 418; *Railroad Co. v. Williams*, supra.

Affirmed.

WESTERN RY. OF ALABAMA V. MCCALL.

(*Supreme Court of Alabama*. April 30, 1890.)

COMPLAINT—AMENDMENT—CHANGE OF SOLE DEFENDANT.

An amendment of a complaint which proposes to change the name of the sole defendant from the "Atlanta & West Point Railroad and Western Railway of Alabama, a foreign corporation," to the "Western Railway of Alabama Company," a domestic corporation, is so radical a departure that the supreme court will hold it a violation of the rule that there can be no change of the sole party defendant by amendment.

Appeal from circuit court, Lowndes county; JOHN MOORE, Judge.

Harrison & Ligon, for appellant. *Girard Cook*, for appellee.

MCCLELLAN, J. The present suit was instituted against "Atlanta & West Point Railroad and Western Railway of Alabama, a foreign corporation, incorporated under the law of the state of Georgia, and doing business by its agents in said county of Lowndes, state of Alabama." An amended complaint was filed by leave of the court, in which, by amendment, it was proposed to change the corporate name of defendant, so as to make it read "The Western Railway of Alabama Company," and to sue it as a domestic corporation, incorporated under the law of the state of Alabama. Railroad charters are not public statutes of which we can take judicial notice. We cannot judicially know that there is or is not a railroad company incorporated under the laws of Georgia known as "Atlanta & West Point Railroad and Western Railway of Alabama Company." Nor can we know judicially that there is or is not a railroad company incorporated under the laws of Alabama known as "The Western Railway of Alabama Company." Corporations are entities, artificial persons, capable of suing and being sued, and, like natural persons, have names by which they are known. When they are parties to litigation, they should be designated by their corporate name. But a slight departure would be immaterial, provided they would be readily recognized by the name used. The departure in this case is so radical—a substitution of an Alabama corporation having an expressed name for a Georgia corporation having another and distinctly different name—that we feel bound to hold that it is a change of the sole party defendant. This cannot be done, as our decisions have uniformly held. *Railroad Co. v. Davis*, 66 Ala. 578; *Railroad Co. v. Mallon*, 57 Ala. 168; *Leaird v. Moore*, 27 Ala. 326. The motion to strike the amended complaint from the file should have been granted.

There are probably other errors in the record, but we need not consider them. The judgment of the circuit court is reversed, and the cause remanded.

MILLIGAN *et al.* v. ALABAMA FERTILIZER Co.

(*Supreme Court of Alabama*. April 28, 1890.)

ATTORNEY AND CLIENT—RELATION—EVIDENCE.

The defendant sent a claim to a mercantile agency for collection, instructing them by letter that they or their attorneys were authorized to make any arrangements deemed by them necessary to a prompt collection thereof. Subsequently the attorney of defendant notified the plaintiffs, the attorneys in whose hands the claim was placed by the agency, of a settlement thereof, and directed a surrender to the debtor of the papers in their hands. Held, that this evidence did not show an employment of plaintiffs by defendant, and that defendant was not liable for the services performed.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

This action was brought by A. L. Milligan & Son, suing as partners, against the Alabama Fertilizer Company, to recover compensation for professional services rendered by plaintiffs as attorneys at law in the collection, or attempted collection, of a claim against one J. B. Harper. The complaint contained only the common counts, and the only plea was the general issue. On the trial, as appears from the bill of exceptions, the plaintiffs offered in evidence the deposition of M. E. Milligan, a member of their firm, with several letters annexed as exhibits; and the defendant offered no evidence. Milligan testified, in substance, that the claim against Harper, amounting to about \$5,000, was sent to plaintiffs for collection in September, 1888, by R. G. Dun & Co., a commercial agency in Montgomery; that they had no communication with defendant in reference to it; that they performed professional services in attempting to collect the claim, specifying them, the reasonable value of which was \$75, the amount claimed in the complaint; that in October, 1888, they were notified by A. T. London that the defendant had made a settlement with Harper, and were instructed to turn over all paper in their possession to him, and that they did so. In answer to one of the cross-interrogatories, he stated: "I was engaged by R. G. Dun & Co., agent for Alabama Fertilizer Company, as will be seen from Exhibit B, to collect Harper's indebtedness to said fertilizer company. R. G. Dun & Co. gave specific directions as to the course to be pursued, and these directions were strictly followed." Exhibit B is a letter from the defendant to R. G. Dun & Co., dated September 26, 1888, and in these words: "We have received yours in regard to the claims transferred to us by J. B. Harper, and placed with you for collection. You or your agents, or attorneys authorized by you, have authority in our behalf to make any arrangement with Mr. Harper which you may deem advisable or necessary in order to secure the prompt collection of the claim. In case of the refusal of Mr. Harper to do anything, please let us know at once, as we wish to take immediate action in the courts." On the

request of the defendant, the court charged the jury that, if they believed the evidence, they must find for the defendant. The plaintiffs excepted to this charge, and they here assigned the same as error.

Sayre, Stringfellow & Legrand, for appellants. *Tompkins & Troy*, for appellee.

McCLELLAN, J. It appears to be well-settled law that, with respect to a claim placed in the hands of an attorney by a commercial agency such as that of *R. G. Dun & Co.* for collection, the claim having been delivered to the agency by the creditor for the purpose of collection, the attorney is the agent of the collecting company, and not of the owner of the claim. *Hoover v. Wise*, 91 U. S. 308; *Bradstreet v. Everson*, 72 Pa. St. 124; *Lewis v. Peck*, 10 Ala. 142; *Stephens v. Badcock*, 3 Barn. & Adol. 354. And it follows, of course, that, the attorney being thus the agent of the agent, and not in privity with the principal, the owner of the claim cannot look to him for compensation of his services. *Cleaves v. Stockwell*, 33 Me. 341; *Hill v. Morris*, 15 Mo. App. 322.

We do not understand these propositions to be controverted in this case, but it is insisted that there was some evidence which tended to show that the attorneys were employed, not only by the mercantile agency, but also by the owner of the claim which the attorneys received from the agency, and for the value of their services rendered in their efforts to collect which they now prosecute this suit against the original principal, and hence that the court should not have given the general affirmative charge for the defendant. If there was such evidence, however weak and inconclusive it may have been, it should, of course, have been submitted to the jury; and the charge was erroneous. The sole inquiry is, then, was there such evidence? It seems that, after the claim had been received by the appellants, the creditor, the Alabama Fertilizer Company, through its own attorney, made a settlement of it with the debtor. This, we take it, it had a right to do, being responsible to the collection agency for whatever services it had rendered in the matter according to the terms of the contract between them. The attorney for the fertilizer company, after making the settlement at Geneva, Ala., called on appellants, who resided there,—the office of the agency being in Montgomery,—and notified them of the settlement, directed them to turn over to the debtor all papers in their possession relating to the claim, and informed them their services would no longer be required. The settlement of itself avoided the necessity for all further service on the part of the collection agency or their attorneys. The terms of the settlement required that these papers should be turned over to Harper, the debtor. Whether the appellants might have retained them until their fees were paid, is a question which does not arise in this case, and which we need not decide. However that may be, nothing, it seems to us, was more natural than that the defendant's attorney, without thereby in any manner committing his client to the employment of appellants, or recogniz-

ing that there existed such an employment, should, in the absence of any other representative of the collection agency, have notified them of the settlement, that there would be no further necessity for their services, and requested the papers to be turned over. We are unable to give to these facts any other significance than would have attached to them had they transpired between defendant's attorney and the Montgomery officers of the agency. We find in them no tendency to establish an employment of the appellants by the appellee, even leaving out of view the consideration that defendant's attorney, presumably, was without authority to bind his client to the employment, or to make admissions which would be competent evidence of such employment.

The other matter relied on as affording an inference that appellants were the attorneys of appellee—the letter of September 26, 1888, from the fertilizer company to the agency—has, we think, no such tendency. On the contrary, it shows that the defendant looked alone to the collection company as its agent, and referred to the appellants as the agents or attorneys of the latter.

There is no error in the record, and the judgment is affirmed.

HAGGERTY v. ELYTON LAND CO.

(*Supreme Court of Alabama*. April 20, 1890.)

SPECIFIC PERFORMANCE—BOND FOR DEED—LACHES.

1. A bond for deed, stipulating that the erection of certain improvements within six months is the principal consideration of sale, and that a failure so to do will work a forfeiture, must be strictly construed, and inexcusable neglect to make the required improvements for two years is a good defense to a bill by the heirs of the purchaser for specific performance.

2. The performance of such a condition is not waived by permitting the property to be taxed in the purchaser's name, and buying it at tax-sale, nor by a failure to re-enter as on condition broken.

3. A delay for 14 years to bring an action for specific performance is not sufficiently excused by a general averment of ignorance, without distinct allegations of specific facts showing good reasons therefor.

Appeal from chancery court, Jefferson county; **THOMAS COBBS**, Chancellor.

The bill in this case was filed on the 27th day of May, 1889, by James Haggerty and his sister, Mrs. Nancy McNeelis, brother and sister of Mike Haggerty, deceased, as his sole heirs at law, against the Elyton Land Company, and sought the specific performance of a contract between the defendant and said decedent for the sale to the latter of a lot in the city of Birmingham, on 18th February, 1872, on terms specified in the bond for titles executed by the defendant. The chancellor sustained a demurrer to the bill on the following grounds: (1) That the erection of improvements on said lot by Mike Haggerty, as specified in the bond for title, was a condition precedent to any right on his part to a conveyance; (2) that complainants' demand is stale; (3) that their right is barred by the statute of limitations; (4) that they have been guilty of laches. The chancellor's decree is appealed from, and is here assigned as error.

Sample & Little and Lea & Greene, for appellant.

CLOPTON, J. The appeal is taken from a decree sustaining a demurrer to the bill, which is brought by appellants, as the heirs at law of Mike Haggerty, deceased, for the specific execution of a contract of sale, made February 18, 1872, by which the defendant, the Elyton Land Company, sold to decedent lot numbered 8, in block 60, in the city of Birmingham. The bond which the company gave Haggerty, and which is the only evidence of the contract, recites as the consideration the sum of \$175, and the agreement on the part of Haggerty "that he will erect, or cause to be erected, upon the lot or parcel of land hereinafter described, and by or before the 18th day of August, 1873, improvements of not less value than \$800." The condition of the bond is as follows: "Now, if, upon the erection and completion of improvements as herein stipulated, the said Elyton Land Company causes to be made or makes to the said Haggerty, his heirs and assigns, a good and sufficient title, with covenants of seizin and warranty, to the aforesaid lot or parcel of land, and containing the reservations and conditions hereinafter stipulated, then this obligation to be void; otherwise, to remain in full force and effect. The erection and completion of the aforesaid improvements being the principal consideration and inducement for the sale aforesaid, it is expressly understood that, if the said improvements are not erected as herein stipulated, then and in that event said Haggerty is to forfeit all money or moneys paid upon said lot, and also all right and claims upon materials furnished or work done for or upon said improvements, and said lot and improvements and materials shall become the property of the said Elyton Land Company, and this bond shall be null and void."

Few are the classes of cases in which a court of equity as emphatically insists upon the maxim that he who seeks equity must do equity as in cases of the specific performance of contracts. The party who seeks the specific execution of a contract is bound to show a substantial performance, or readiness and offer to perform, on his part, all that is required of him by the contract. Failure in any material respect furnishes a full defense to the suit. This principle is applicable to a contract for the sale of land, by which the vendee can become entitled to a conveyance only on the erection and completion of certain improvements thereon. When the stipulation is of such character as to constitute a condition precedent, the court has no power to vary the terms of the contract, if fairly entered into, nor, unless under special circumstances, relieve against the consequences of its non-performance. Unless the vendee substantially performs the condition, so as to entitle himself to a conveyance of the legal estate, his equitable interest in the property does not become perfect, or such as will be enforced. *Rives v. Toulmin*, 25 Ala. 452; *Whiting v. Gould*, 2 Wis. 404; *Wells v. Smith*, 7 Paige, 22.

Complainants' counsel contend that the

agreement to erect and complete the improvements is a covenant, constituting part of the consideration for which the vendor contracted, and that, having received the pecuniary part of the consideration and the agreement, the entire consideration has been paid; and the vendee, having taken immediate possession, the performance of the condition is subsequent to the vesting of an estate or interest, on the waiver of which, complainants' right to a conveyance arises. In support of this contention, the case of *McDonald v. Land Co.*, 78 Ala. 382, is cited. In that case, the bond for title was substantially the same as the present, in form and substance. The bill was filed to enforce a vendor's lien for the damages resulting from the breach of the agreement to erect improvements. We held that the agreement, constituting the consideration other than the amount agreed to be paid in money, if the vendee was *sui juris*, must be regarded as taken as payment, with the legal right to damages on breach; and that the same rule obtains when the vendee is not *sui juris*,—as, in that case, a married woman,—and not responsible personally. In order not to be misunderstood, we said: "As the complainant took the agreement as part consideration, with a legal right of action to recover possession, although having none for damages, and with the defensive protection against specific performance, it must be regarded as payment *pro tanto*;" clearly intimating that, though the agreement did not form a foundation for a vendor's lien, it would be available as a defense, if the vendee sought specific performance. No set phrases or precise words are requisite to make a condition precedent or subsequent. Whether the one or the other must be determined from the intention of the parties, ascertained from the terms of the contract and the existing circumstances, so far as may be disclosed to the court. If the performance of the condition necessarily precedes the vesting of the estate, it is precedent; and subsequent, if apparent that the parties intended the estate should vest, and the vendee perform after having taken possession. Parties competent may make their contracts as they deem proper, if no rule of law is violated, and it becomes the duty of the court to interpret and enforce them as made. An agreement that the land sold shall be improved to a reasonable extent does not violate any rule of law. By the contract of sale, an equitable interest vested in Haggerty, and, in respect to the forfeiture of this equitable interest,—that is, of the money consideration paid, and the materials furnished and work done upon the improvements,—the condition may be regarded as subsequent. By the express terms of the bond for title, he did not, and could not, become entitled to a conveyance of the legal estate, except by performance of the condition. As to this it is precedent. The equitable estate and possession were intended to be irrespective of the legal title.

As a general rule, equity does not regard the time of performance of the essence of a contract for the sale of land; but the parties may make it an essential part by

express stipulations, or it may arise by implication from the nature of the subject-matter, and the object of the vendors. In *Tilley v. Thomas*, L. R. 8 Ch. 61, the lord chancellor, defining the meaning of the rule, said: "A court of equity will, indeed, relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract either for completion, or for the steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that, in equity, time is not of the essence of the contract." The contract expressly stipulates that the improvements shall be erected and completed before a specified day. It was evidently very important to the defendant that the improvements should be promptly made, so as to induce others to purchase and improve. We think that it was the intention of the parties to make the time of performance of the essence of the contract. This is more manifest from the recital in the bond that the erection and completion of the improvements were the principal consideration and inducement for the sale of the lot. In such case, if there be default in performance at the day specified, without sufficient excuse or acquiescence or waiver, the court will not interfere to relieve the defaulting party. The bill alleges that Haggerty remained in Birmingham a year or more after the expiration of the time fixed for the completion of the improvements, at which time he left the state without taking any steps whatever to perform the condition, leaving the taxes for the year 1874 unpaid, certainly knowing the lot would have to be sold for their payment, and died in 1876, three years after the specified day. This conduct indicates an intention of abandoning the contract, and authorized the defendant to infer that he had abandoned it. But, whether he intended abandonment or not, his inexcusable negligence in the non-performance of the contract would bar his right to a specific execution. In *Taylor v. Longworth*, 14 Pet. 172, STORY, J., says: "And even when time is not thus expressly * * * of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period, been a material change of circumstances affecting the rights, interests, or obligations of the parties, in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust." Also, in *Gentry v. Rogers*, 40 Ala. 442, the purchaser having been notified by the vendor two years before the day fixed for payment of the purchase money that he repudiated the contract, and having delayed to file his bill for nine months after that day, and having shown no excuse for the delay, it was held that the

laches, in connection with his failure to show a valid excuse for his omission to tender performance in full on the specified day, was sufficient to deprive him of the right of relief. On these principles, Haggerty himself would not have been entitled to a decree for specific performance at the time of his death; consequently, his gross omission to perform the condition disentitles complainants to the relief, who succeed only to his rights. But, were this otherwise, they have not shown reasonable diligence; the excuse for delay, as alleged, being their ignorance of his interest in the lot until within a few months past, nothing having been found among Haggerty's papers after death disclosing such interest. The bill was filed May 27, 1889, —16 years after the day fixed for the completion of the improvements, and 18 years after Haggerty's death. The case made by the bill being *prima facie* offensive to the rule in equity against the enforcement of stale demands, it is incumbent on complainants to positively and distinctly aver the facts and circumstances which excused the delay. A mere general averment of ignorance is insufficient. They must show why so long ignorant, and when and how they first came to a knowledge of the facts. *Scruggs v. Land Co.*, 86 Ala. 173, 5 South. Rep. 440; *James v. James*, 55 Ala. 525; *Merritt v. Brown*, 21 N. J. Eq. 401; *Brink v. Steadman*, 70 Ill. 241. The amended bill alleges that a relative of Haggerty owned the adjoining lot, and furnished him with the money with which to pay for the lot in question. No excuse is shown why inquiry was not made of him. By reasonable diligence they could have ascertained years ago the facts they are now possessed of. To decree specific performance, and divest defendant of the legal title, after such lapse of time, during which no steps whatever towards the erection of improvements have been taken, and after defendant has lately put improvements upon the property, would be inequitable.

We have not overlooked the insistence of complainants' counsel that defendant waived performance of the condition. This insistence is founded on the allegations of the bill that defendant suffered the lot to be assessed for taxes as Haggerty's property from year to year after the time fixed for the performance of the condition, and in 1875 purchased it at a tax-sale as his property, and did not re-enter it as on condition broken during his life-time. The averment that the defendant admitted to the relative above alluded to that performance of condition had been waived is not the averment of a waiver, but of what may be regarded mere proof. His equitable interests vested in him the incidents of ownership, and made it his duty primarily to pay the taxes, while he had possession. The bill further avers that the lot had been unoccupied and without inclosure until a few months before the filing of the bill, when defendant erected a building thereon, and also that defendant had paid the taxes since 1875. It may be that failure to re-enter was acquiescence in the omission to erect the improvements by the specified time, but cannot be regarded as a waiver altogether of the per-

formance of the condition. The waiver of such condition, "to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition." 6 Wait, Act. & Def. 714. The facts alleged in the bill are insufficient to constitute a waiver. Affirmed.

LOUISVILLE & N. R. Co. v. GILMER.

(Supreme Court of Alabama. May 6, 1890.)

CARRIERS — DELIVERY OF FREIGHT — SUFFICIENCY OF EVIDENCE.

1. A car-load of bricks was consigned to plaintiff at "Cloverfield Sta." There was no station agent or side track there, and no one was upon the ground to receive the bricks. After waiting a few minutes, during which the locomotive whistle was repeatedly sounded, the car was carried to a station a mile beyond, and left upon a side track. Held that, since the loaded car could not be left upon the track, it was the duty of the company to unload and leave the bricks upon the ground, and, the freight having been prepaid, plaintiff was entitled to recover their value.

2. The fact that, on the following day, certain tenants of plaintiff asked at the station if plaintiff's bricks had come, and unloaded and placed them upon the ground, was not sufficient, in the absence of other proof of authority, to show that they received them as his agents.

Appeal from circuit court, Lowndes county; JOHN MOORE, Judge.

Jones & Falkner and Watts & Son, for appellant. *Girard Cook*, for appellee.

MCCLELLAN, J. A car-load of brick was shipped by appellant's line of railway on December 14, 1886, from Montgomery, consigned to appellee at "Cloverfield Sta.," as appears by the bill of lading. What manner of place Cloverfield was, does not appear, except that the residence of appellee was within 250 yards of it, and the railroad company had no depot, warehouse, agent, or even side track there. The car containing the brick was promptly transported to the point of consignment on the morning of the 14th, but the consignee was not there, nor was any other person there to receive the goods, though it was shown that he had persons there for that purpose each of the two preceding days, when defendant's local freight train passed. After waiting from five to ten minutes, during which the engine whistle was repeatedly sounded without any one appearing to receive the brick, the train moved on to Morganville, one mile beyond Cloverfield, a regular station of the road, having a depot, agent, etc., and there side-tracked and left the car containing plaintiff's brick. It further appears that, "a few hours after the said car with the brick had been left on side track at Morganville, some negroes, who were tenants on plaintiff's plantation, which extended to Cloverfield, came to Morganville, and asked the depot agent at that place if Mr. Gilmer's brick had come; and, on being pointed out the car on which the bricks were, the said negroes unloaded the car, and put the brick on the ground." Gilmer was not at home on that day, but two days afterwards he went to Morganville, and refused to re-

ceive the brick unless they were sent to Cloverfield. This the defendant refused to do, and thereupon Gilmer brought suit to recover the value of the brick upon failure of the common carrier to deliver them to him according to the contract of shipment.

The main inquiry in the case, as it is presented on an exception to the affirmative charge given for the plaintiff, involves a consideration of defendant's duty as to delivery at Cloverfield, in the absence of the consignee, or any person representing him, under the peculiar facts of the case. There was no depot, brick could not be stored. There was no agent in whose charge they could have been left. There was no side track, hence the car could not be left there, only delivery possible, therefore, was to unload the brick, and leave them upon the ground in care of no one, and even without notice to the consignee, or making identification by which he might afterwards come to a knowledge of the fact, and take possession of them.

A delivery is, to say the least, most unusual and extraordinary. No case involving its like is to be found in the books, far as an exhaustive examination discloses. Yet we think that just this manner of delivery was authorized and required, and would have been justified by the facts of this transaction, and the contract of affreightment entered into in view of the facts. It must have been in the contemplation of both parties that the brick should be unloaded at Cloverfield, the train waited, since leaving the car on the main and only track was the question. Ordinarily, it is the duty of the railway companies to unload from its cars, and place them in the hands of the consignee for delivery to the consignee, when there is an omission to do this generally for the latter's convenience and benefit. In a case like this, where not only necessary to a delivery to the consignee, but also to the conduct of the carrier's other business, that the car should be discharged from the car, is no doubt but that it is the carrier's duty, and not that of the consignee, to load the consignment from its car. The only purpose to be subserved in the presence of Gilmer on the arrival of the train containing the brick was one of delivery alone to him, and which he could not refuse himself, or not, without failing in his duty he owed the carrier. If he chose to waive this benefit, and take such risk as he was involved in his property being unprotected, and without marks of identification, even he had the right to do so. He did waive this right to be present at the arrival of the consignment, and consented to take all the risks incident to any kind of delivery that could be made at Cloverfield, when he became bound by the bill of lading which provided for delivery at a point where it could only be effected by unloading the car on the ground where the train waited. The principle involved is the same as if there had been a depot at Cloverfield, but no depot or agent, at Cloverfield. In that case a good delivery would have been made by leaving the car at

side track in the absence of Gilmer, or any representative of his, and without any notice to him. This court has settled the doctrine that this latter mode of delivery is effectual, and acquits the carrier, because it was the only mode of delivery within the carrier's power to make, under a bill of lading to a point where it had no agent or depot; and the same consideration leads to a like conclusion here. The fact, therefore, that Gilmer was not present to receive the brick did not relieve the defendant from its duty to deliver them at that time and place by leaving them on the ground. The risk of such a delivery was Gilmer's, not the carrier's. *Railroad Co. v. Wood*, 64 Ala. 167.

Notwithstanding defendant's failure to deliver the brick at Cloverfield, if the plaintiff subsequently received them at Morgansville, he thereby waived performance of the contract as to delivery at the former place, and lost his right of action for the carrier's default in that behalf. If there was any evidence in the case, therefore, tending to show that delivery was accomplished at Morgansville, the general charge for plaintiff should not have been given. We have no doubt but that the action of the negroes in unloading the car, and stacking the brick on the ground, amounted to a delivery to Gilmer, if they were his agents. The question on this part of the case, then, is simply whether there was any evidence from which the jury might have legitimately inferred that they acted for, and by authority of, the plaintiff. There is no proof of such authority. On the contrary it appears that, on the two preceding days, Gilmer had expected the brick to be delivered at Cloverfield, and that he was not at home on the 14th, and could not then have authorized the negroes to receive the brick at Morgansville. There is nothing in the fact that they were his tenants which went to show he had authorized them to receive the consignment. The only remaining fact is that they did an act which was without authority, unless they had a right to represent Gilmer. Agency cannot be proved in this way, which is no more than to assume the act to be authorized from the fact that it was performed. *Reynolds v. Collins*, 78 Ala. 94. The jury had no right to look to this fact as a basis for the inference of agency. The charge did not withdraw any evidence from the jury which it was proper for them to consider, and it was free from error.

It was in evidence that the freight charges were paid in advance. The plaintiff was therefore entitled to recover the value of the brick at Cloverfield on the day they should have been delivered. *Railroad Co. v. Humphrey*, 9 Amer. & Eng. R. Cas. 331, note 334; *Railroad Co. v. Wood*, 72 Ala. 451.

The judgment of the circuit court must be affirmed.

ECHEOLS v. LOUISVILLE & N. R. Co.

(Supreme Court of Alabama. April 28, 1890.)

CARRIERS—LOSS OF GOODS—MEASURE OF DAMAGES—EVIDENCE.

Though the measure of damages in an action against a common carrier for failure to deliver

cotton which it has undertaken to transport is the value of the cotton at the point of destination, with interest from the time it should have been delivered, less freight charges, yet evidence of the value at the point of shipment is relevant to the inquiry as to value at the point of delivery; and the carrier cannot complain that the proof of value is confined to the place of shipment, as the presumption is that the value there is less than at the point of destination.

Appeal from city court of Decatur; MORRIS A. TYNG, Special Judge.

Wert & Speake, for appellant.

MCCLELLAN, J. The trial below was had before a special judge without jury, and this appeal brings under review his findings of fact, and the judgment rendered thereon. Acts 1888-89, p. 321. The action was against a common carrier for an alleged failure to deliver to consignees, in Memphis, Tenn., a certain bale of cotton delivered to it for carriage at Hartsell, Ala. The evidence showed that the cotton was the property of the plaintiff, and that, though received by the railway company for carriage to Memphis, it was never in fact shipped, but was lost from defendant's shipping platform at Hartsell. The value of the cotton at Hartsell was fully proved, but there was no direct evidence of its value at Memphis. On this ground, because of the failure to adduce any direct evidence of value at the point of destination, the court found for the defendant, and entered up judgment accordingly. This was clearly erroneous. It is unquestionably true that the measure of damages in an action against a common carrier for failing to deliver goods which it has undertaken to transport is the value of the goods at the point of destination, with interest from the time they should have been delivered, less freight charges. *Railroad Co. v. Gilmer*, ante, 654. But it is equally well settled that evidence of value at the point of shipment is relevant to the inquiry as to value at the point of delivery. *Foster v. Rodgers*, 27 Ala. 602; *Ward v. Reynolds*, 32 Ala. 384; *Railroad Co. v. Wood*, 72 Ala. 451. And, in the absence of other evidence, the defendant carrier cannot complain of the proof of value thus confined to the place of shipment, as the presumption is that the value there, especially of such an article of commerce as cotton, is less than at the point of destination. *Railroad Co. v. Sloan*, 39 Ga. 636; *Railroad Co. v. Mason*, 11 Lea, 118.

Whether, under the facts of this case, the true measure of damages, in any event, would not be the value at point of shipment, as the property was there lost, *quære*. See *Lakeman v. Grinnell*, 5 Bosw. 625.

The judgment of the city court is reversed, and the cause remanded.

MCCURDY *et al.* v. MIDDLETON *et al.*

(Supreme Court of Alabama. April 29, 1890.)

RES JUDICATA—CROSS-DEMANDS—REFERENCE.

1. Plaintiff, as administrator, seeks to enforce a vendor's lien for an unpaid balance of purchase money. The evidence on a former appeal showed that a number of items sought to be offset as credits

pro tanto, under a plea of payment of the plaintiff's claim, were cross-demands, and, there being no evidence of an agreement that they should be treated as payments, they were declared to be independent cross-claims. On the second trial, on the same evidence, they were adjudged barred as cross-demands by the statute of non-claim, and a referee was directed to ascertain the amount due on the claim in suit. *Held*, that this was not such an adjudication as to preclude further inquiry into the character of the items by permitting the introduction of additional testimony before the referee.

2. A chancellor has authority to set aside the report of a referee *ex mero motu*, and order another reference, with different directions as to the taking of an account, or for the purpose of receiving additional evidence, not at variance with the principles settled by the decree.

3. Upon sustaining an exception to the report of a referee going to a single item of the account, which should have been, but was not, allowed, the chancellor may make the correction, thereupon state the account, and render a decree accordingly, without further reference.

4. Under plea of payment, evidence of an agreement that an item in the nature of a cross-demand should be credited as a payment *pro tanto* is competent, and will sustain a decree allowing the item to be credited on the claim in suit.

Appeal from chancery court, Lowndes county; FOSTER, Chancellor.

For statement of facts, see report of decision on former appeal, 2 South. Rep. 721.

Girard Cook, for appellants. W. R. Houghton, for appellees.

MCCLELLAN, J. When this case was in this court on a former appeal, it was held that the claims of Mrs. A. W. Middleton against the estate of her vendor, R. F. Simonton, for the amount received by him in excess of his share of the proceeds of crops in which they were jointly interested, and for \$200 paid by her to Wiley as his contribution to the wages of the latter, who was employed in their joint planting venture, were, on the evidence then in the record, mere cross-demands or independent set-offs, and in no sense payments on the land debt due from Mrs. Middleton to Simonton. McCurdy v. Middleton, 82 Ala. 131, 2 South. Rep. 721. The case being reversed and remanded, a decree was rendered in the court below on August 30, 1887, adjudging that said cross-claims were barred by the statute of non-claim as debts against the insolvent estate of R. F. Simonton, complainants' intestate, and for that reason could not be set off against the purchase money sought to be recovered by the bill. It was further decreed that complainants were entitled to have the reversionary interest in the land described sold to pay the balance of purchase money due therefor, and it was referred to the register to ascertain and report to the next term of the court the amount of purchase money so due and unpaid. On the reference had under this decree, the defendants appeared, and were denied the right to introduce additional testimony tending to show that the item of \$200, above referred to, was in fact a payment on the debt in suit, and not merely a set-off against the claim of complainants. This action was excepted to; and, on the coming in of the report, while the exception was not in form allowed, the matter was again referred to the register to ascertain the amount of purchase

money due, and all parties were allowed on this reference "to re-examine the witnesses who have heretofore been examined by deposition or before the register." On this reference, Wiley was re-examined, and his testimony tended strongly to show that R. F. Simonton had agreed to apply the \$200 in controversy to and in payment *pro tanto* of the land debt owed by Mrs. Middleton. The register, however, again declined to allow defendants a credit for that item. Upon the coming in of this report the chancellor set it aside, allowed a credit for the \$200 item, and entered up a final decree for the balance, with interest. From that decree this appeal is prosecuted.

We do not understand that either this court, or the chancellor in his decree of August 30, 1887, finally determined that the items relied on by the defendants as payments were not payments, but only cross-demands. This court determined that on the evidence then in the record, and which was before the chancellor on the first hearing of the cause, these items were set-offs, and consequently that the chancellor erred in crediting them as payments on the debt claimed by the bill. On the same state of evidence, when the cause again came on to be heard in the court below, the chancellor, following the opinion of this court, and assuming that the items were mere cross-demands, decreed that, as such, they could not be allowed in ascertaining the balance due, because they, not having been presented to Simonton's administrators, were barred by the statute of non-claim. The question is whether this state of adjudication precludes all further inquiry into the question of whether these items were in fact payments. It may be conceded that, on the first reference after reversal, the register had no authority to take additional testimony on the point, because the decree of reference did not authorize him to do so. But we do not question but that it would be competent for the chancellor, upon the coming in of the report, to set it aside *ex mero motu*, order another reference, and remodel the directions to the register thereon to any extent not inconsistent with the equities settled by the former decree. Lang v. Brown, 21 Ala. 179. And it was therefore entirely competent for the chancellor to set aside the report even in the absence of, or after overruling, specific exceptions to it, and to order another reference upon different directions as to the taking of the account, or for the purpose of affording an opportunity for the introduction of additional evidence, provided the "principles settled by the decree, what may be termed the equity of the bill, are not thereby varied." Cochran v. Miller, 74 Ala. 50; Nunn v. Nunn, 66 Ala. 35; Marshall v. McPhillips, 79 Ala. 145.

Nor can it be doubted that, upon sustaining an exception to the register's report which involves only the determination that a single item of credit, certain in amount and date, not allowed, should have been allowed, and hence necessitates, to the correction of the amount as reported, only a simple calculation, it is proper for the chancellor to make the calculation, state the account, and render a decree ac-

cordingly, without again referring the matter to the register. *Chambers v. Wright*, 52 Ala. 444.

These considerations eliminate from the record before us all questions except those which go to the propriety of allowing a credit for the item of \$200 on the pleadings and evidence, as the case stood when the decree ascertaining the balance due, and ordering a sale of the land for its payment, was rendered.

And first as to the pleadings: The answers of each of the defendants set up and rely upon full payment of each and all the purchase-money notes. Under each of these answers, and in response to their averments, it was clearly competent to make the proof of payment which was made as to the item of \$200. The amendment allowed to the answer and cross-bill of S. C. Marks, since the former appeal, was manifestly made to meet the case which, according to the opinion of this court, was then presented by the proof. But, in presenting this item in the light of a set-off or independent demand, the averment is made in the alternative, and without in any sense abandoning the original allegation of payment. So that the answers of all the defendants at the time of the last decree contained allegations of payment under which it was competent to prove the payment of the \$200 in the manner shown by the evidence of Wiley on the last reference; and to these allegations, thus proved, the decree appealed from is directly responsive. Of course, if this sum was a payment on the last purchase-money note, its application thereto extinguished it as an independent demand against Simonton. It could not, therefore, be presented against his estate, and the statute of non-claim has no application.

It only remains to be considered whether the action of the chancellor in allowing this item as a payment *pro tanto* is sustained by the evidence. We think it is. Wiley is the only witness on the point. He testifies that Simonton instructed Mrs. Middleton to pay him (Wiley) the \$200 which Simonton owed him for that year, and agreed to credit her notes with that amount. His evidence is positive and unequivocal to this effect, and we cannot see that it is in conflict with his first deposition on the subject. The most that can be affirmed as lending color to the suggestion of discrepancy between his first and his last statements on the subject is that he stated on his former examination, in reference to a written statement containing many items—among them the \$200—purporting to be a list of payments on the purchase-money note in question, that he could not say whether the items embraced in the statement were the last payment on the note or not, but that he would not have receipted the statement as the last payment, as he appeared to have done, unless it had been true. He did not on that examination testify separately about the \$200 item; and, we repeat, his testimony then is not inconsistent with that upon which the chancellor acted. Taking his last statement in connection with other facts in the case, all of which are consistent with it, and give it probability, we

concur with the chancellor in crediting this item as a payment on the purchase-money note.

The decree is affirmed.

ALFORD V. ALFORD.

(*Supreme Court of Alabama*. Jan., 1890.)

Appeal from probate court, Etowah county; J. N. TALLMAN, Judge.

Petition by Nancy Alford for the appointment of commissioners to set apart a homestead in the land of which her husband, Jefferson Alford, died seised. Her selection, as shown by the petition, consisted of two parcels, separated by another parcel about half a mile wide. A demurrer to, and a motion to dismiss, the petition, were sustained, and petitioner appeals.

James M. Aiken and Dortch & Martin, for appellant. *John H. Disque*, for appellee.

STONE, C. J. The judgment in this case is affirmed, on the authority of *Jaffrey v. McGough*, ante, 333, (at the present term.)

PARMER'S ADM'R V. PARMER.

(*Supreme Court of Alabama*. Nov. Term, 1889.)

MORTGAGE—ABSOLUTE DEED—PLEADING.

1. A bill which alleges that complainant, having a perfect equity in land, procured the holder of the legal title to convey it to defendant, to secure a debt which complainant owed to defendant, who then agreed to convey the land to complainant on payment of the debt, and that afterwards defendant took possession of the land, states facts showing that the conveyance to defendant was intended as a mortgage. *Distinguishing Mosely v. Mosely*, 5 South. Rep. 732.

2. A bill to redeem a tract of land in the possession of the mortgagee, and for an accounting for the rents and profits, where complainant owns but an undivided half interest in the land, and the mortgage binds only his interest, is not demurrable because it seeks broader relief than complainant is entitled to.

Appeal from chancery court, Butler county; JOHN A. FOSTER, Judge.

Richardson & Steiner, for appellant. *Stallings & Wilkinson*, for appellee.

MCCLELLAN, J. The case made by the averments of the bill is substantially this: H. A. Parmer, the complainant, and Susan Parmer, his wife, held a perfect equity in the land in controversy, the legal title being in Mrs. Allen. The complainant was indebted to W. K. Parmer in the sum of \$610, and for the purpose of securing the payment of this sum he procured a deed to be made by Mrs. Allen to W. K. Parmer, and took from the latter an agreement to convey the land to him (H. A. Parmer) upon the payment of said debt. This was in 1873. Three years afterwards, that is, in 1876, complainant and his wife continuing in the possession in the meanwhile, W. K. Parmer entered without the consent of H. A. Parmer, or his wife, the other tenant in common, and has since held the premises. In 1884, the present bill was filed by H. A. Parmer and Susan Parmer against W. K. Parmer, and was subse-

quently amended by striking out the name of Susan Parmer as complainant, and making her a defendant; and, W. K. Parmer having died, the cause was revived against his representative and heirs. The bill proceeds on the theory that the deed from Mrs. Allen to W. K. Parmer, made at the instance of the complainant, conveying land to which he and his co-tenant had an equitable title, and intended solely to secure the payment of the debt, is in truth and in fact only a mortgage in equity; and the prayer is that it be declared an equitable mortgage; that defendants be decreed to account for the rents and profits received while in possession; and if, upon such an accounting, any balance be found due, that he be let in to redeem; the alleged deed be canceled, etc. The demurrers set up the defense of staleness of demand; the statute of limitations of 10 years; and the further special defense that the bill shows complainant had only an undivided half interest in the land, but seeks to redeem, not only that interest, but the whole of the property, and to have the rents of the whole interest accounted for.

We do not understand that the bill, in any sense, seeks to have W. K. Parmer's agreement to convey specifically performed. Its sole purpose, so far as that agreement is concerned, is to have it considered, with the deed of Mrs. Allen, as giving to that instrument the defeasible character which shows it to have been a mortgage, and not, as it would appear if considered alone, an absolute conveyance. We have no difficulty in concurring with the chancellor that the allegations of the bill clearly invest the conveyance with that character, and that the defendant's rights and duties are those simply of a mortgagee in possession before foreclosure. A bill to redeem, under this state of things, may be filed at any time before the statutory bar of 10 years gives repose to the title of mortgagee. *Byrd v. McDaniel*, 33 Ala. 18; *Coyle v. Wilkins*, 57 Ala. 108; *Mewburn's Heirs v. Bass*, 82 Ala. 622, 2 South. Rep. 520. The present case is distinguishable from the cases of *Moseley v. Moseley*, 86 Ala. 289, 5 South. Rep. 732, and *Micou v. Ashurst*, 55 Ala. 607, where the transactions were held to be conditional sales, on two grounds: *First*, that the complainant here had a perfect equity, having fully paid the purchase money, whereas, in each of those cases, the party who claimed as mortgagor, and was held to be a vendor on condition, had not paid for that land, and hence did not have an equitable title; and, *second*, in those cases there was no independent debt between the original vendee and the person to whom the original vendor conveyed the premises with a defeasance in favor of the vendee, when in this case there was an independent debt, which was not paid, but continued to be a subsisting liability, with the conveyance as a mere security for its payment. This last fact is usually one of the decisive tests by which the question whether the relation of mortgagor and mortgagee exists between the parties is determined. *Vincent v. Walker*, 86 Ala. 333, 5 South. Rep. 465.

The relation of mortgagor and mortgagee, existing on this state of facts between H. A. and W. K. Parmer, do extend to Susan Parmer, the wife of the former. Her undivided half interest in the land did not pass under the mortgage for the two reasons—either one of which is sufficient—that she was not a party to the arrangement under which Mrs. Allen executed the conveyance, and that the mortgage, being to secure the debt of her husband, would have been void as to her interest, under the statute then in force. Had she formally executed it; the land, presumably, being a part of her separate estate. *Steed v. Knowles*, 446. The mortgage, therefore, embraced only the complainant's undivided half interest; and his prayer to redeem the property—if, indeed, it is at least more than a prayer to be let in to redeem the mortgage off the premises, in so far as it is really an incumbrance on any part thereof or interest therein, which is not decide—may be for broader relief than he is entitled to; but on the facts of the case he is clearly entitled to some part of the relief he asks, and the fact that he is entitled to all that is prayed is no ground for denying him that part. The same reservation will apply with respect to the rents and profits of the undivided half interest which belonged to his wife, even if he be conceded that these, under the particular facts of this case, did not belong to his husband, as to which is not necessary for us to express an opinion. *Moseley v. Pearce*, 70 Ala. 452. There was no error in the decree overruling the demurrers, and it is affirmed.

BOLLING *et al.* v. MCKENZIE.

(Supreme Court of Alabama. May 6, 1900.)
ACTION ON BILL OF EXCHANGE—REPLICATION—DEPARTURE.

1. Where, in a suit against an indorser of a bill of exchange, the complaint simply charges non-payment and notice, and notice was duly given, and the replication that defendant was the real debtor, "owing the debt represented by the bill," is sustained, the consideration thereof being goods and merchandise sold by plaintiffs to defendant, and a departure, and a demurrer thereto was properly sustained.

2. The replication is also insufficient because it fails to negative the legal implication that the bill was in the hands of the indorser representing him from the drawer.

3. Another count of the replication that, since the protest of the bill, "the defendant, with knowledge that the usual steps of protest, and notice were not duly taken, sustained his liability as indorser on said bill," is insufficient because the promise was not made before the bringing of the bill, and the acknowledgment of continuing liability without such allegation, and a demurrer to the count was erroneously sustained.

Appeal from circuit court, Butler county; JOHN P. HUBBARD, Judge.
E. P. Morrisett, for appellants.
Hardson & Steiner, for appellee.

STONE, C. J. The bill of exchange is the foundation of the present suit, and is described in the complaint as drawn

Southern Railway Construction & Land Company upon C. W. Scofield, president, payable to the order of B. B. McKenzie, and by him indorsed to R. E. Bolling & Son. The bill bears date, as it is averred, June 1, 1887, and it is not stated when it matured or would mature. We suppose no day was fixed for its payment. We must presume it was payable when presented. The complaint avers that "the said bill, not being paid at maturity, was duly protested, of which the defendant [McKenzie] had due notice." The legal implications of this transaction were and are that the Southern Railway Construction & Land Company had funds in the hands of Scofield subject to its draft, that it was indebted to McKenzie, and that by this bill or draft it appointed and directed the payment of its debt to McKenzie out of the funds so held by Scofield. In McKenzie's hands, the bill, *prima facie*, represented an indebtedness to him from the Construction & Land Company. When he traded and indorsed it to Bolling & Son, the *prima facie* intentment was and is that, for a valuable consideration, he appointed the payment of this indebtedness which the Construction & Land Company owed to him to be made to R. E. Bolling & Son. The bill or draft, and its subsequent indorsement, do not, on their face, purport to rest on one and the same consideration. McKenzie's obligation to pay Bolling & Son was not primary and unconditional. It was contingent. That is, it bound him to pay in the event Scofield failed to pay, and he (McKenzie) was duly notified of the failure. One reason for requiring due and prompt notice to the indorser of the principal debtor's failure to pay, is that the indorser may take prompt measures to obtain indemnity against loss. Story, Bills, § 112; Story, Prom. Notes, § 153; Jordan v. Bell, 8 Port. (Ala.) 53; Rives v. Parmley, 18 Ala. 256; Flowers v. Bitting, 45 Ala. 448; John v. Bank, 57 Ala. 96.

It is not pretended that notice of non-payment by Scofield, or by the Southern Construction & Land Company, was given to McKenzie until a month or more after the bill was dishonored. In fact, it is not shown it ever was presented to Scofield, or that McKenzie was notified that he would be looked to for payment, until a month or more after he indorsed the bill to Bolling & Son. The defense on which this case went off was raised by pleas of defendant, denying that the bill had been presented for payment, either to the Railway Construction & Land Company, or to Scofield, and denying that notice of non-payment had been given to McKenzie. To these pleas plaintiff interposed two replications. We will consider them in their inverse order. The second of the replications avers "that the said defendant is the real debtor, owing the debt represented by said bill of exchange, the consideration thereof being goods and merchandise sold by plaintiffs to defendant." A demurrer was interposed to this replication, which the court sustained. The complaint contains a single special count on the indorsement of a bill of exchange. The replication, if otherwise sufficient, counts

on the consideration of the indorsement, and in the absence of a count, general or special, claiming for goods sold and delivered, it is a departure from the cause of action set forth in the complaint. But it is insufficient for another reason; it does not negative the fact that the bill in the hands of McKenzie, before it was traded to Bolling & Son, represented a debt due from the Railway Construction & Land Company to him. This, as we have shown, in the absence of a negative averment, is the legal implication arising out of the giving of the bill; and, even if the complaint had contained a count for goods sold, the replication would have been insufficient, if it had not either negatived indebtedness from the Railway Construction & Land Company to McKenzie, or denied that the bill was given in payment or part payment of such indebtedness. In other words, to make the offered replication sufficient, it must have been shown that the bill, until it was traded to Bolling & Son, was mere accommodation paper on the part of the Railway Construction & Land Company, given to enable McKenzie to raise money, or money's worth.

The other replication to defendant's pleas set up "that, since the maturity and protest of the bill of exchange sued on, the defendant, with knowledge that the usual steps of demand, protest, and notice were not duly taken, acknowledged his liability as indorser on said bill, and promised plaintiff to pay the same." To this there was a demurrer, because it did not aver that the acknowledgment and promise were made before the suit was brought. This demurrer was sustained by the court. This ruling was incorrect as to the acknowledgment averred to have been made. It was clearly right as to the alleged promise. The replication was amended, and issue taken upon it. If the drawer or indorser of a bill, with knowledge that the usual steps of demand, protest, and notice have not been duly taken, promises to pay, or acknowledges continued liability and obligation to pay, this, without more, fixes his liability, to the same extent as if there had been no laches on the part of the holder. 2 Daniel, Neg. Inst. § 1147; Thornton v. Wynn, 12 Wheat. 183; Sigerson v. Mathews, 20 How. 496; Pugh v. McCormick, 14 Wall. 861. Mr. Daniel adds (section 1148) that "it makes no difference at what particular time the promise is made. It may be after suit brought, and even while a motion for a new trial is pending." In support of this last principle, he cites Louisiana decisions.

We concede the correctness of the text, so far as it refers to acknowledgments of continued indebtedness. Such acknowledgment is but another mode of expressing the defendant's admission that he still owes the debt represented by the bill of exchange. This does not create the liability, but tends only to show that the holder's laches have not absolved the defendant from the liability he had incurred by drawing or indorsing the bill. It is an admission that he still owes the debt, the debt itself antedating the suit. The legality of such admission as evidence is not

dependent on the inquiry whether it was made before or after suit brought. This is a self-proving proposition.

When, however, the plaintiff's right of recovery is rested on an alleged subsequent promise to pay, the rule and the reason on which it rests are different, for reasons which will suggest themselves. A promise to pay, made after suit brought, will not maintain the action, unless there is something included in the promise which is equivalent to an admission that the liability incurred by the bill is still subsisting. The replication to which the court sustained the demurrer we are considering, averred both an acknowledgment of continuing indebtedness and a promise to pay. As to the former it was sufficient, whether the acknowledgment was before or after suit brought. The replication setting up two answers to the plea, one of which was sufficiently averred, even if the other ground is insufficient of itself, or is insufficiently averred, this is not a defect which can be reached by demurrer. A motion to strike out the imperfect part, or a special explanatory charge, is the proper recourse in such a case,—most generally the latter. And the fact that the replication is double is not an available defect, under our system of pleading. The circuit court erred in sustaining the demurrer to plaintiff's first replication.

It is contended for appellee that, if the circuit court erred in the ruling noted above, it was error without injury; for under their replication, as amended, the plaintiffs got in all the testimony alike of alleged admissions and promises. We cannot know this. Under the court's ruling on the demurrer, it would have been improper, if not disrespectful, in plaintiffs to offer testimony of acknowledgments of liability made by defendant after suit brought. It is not affirmatively shown they had no such testimony. When error is shown, injury is presumed, unless the contrary is affirmatively and clearly proved. 1 Brick. Dig. p. 780, § 100; 3 Brick. Dig. p. 406, §§ 25, 26.

But there is another reason why the doctrine of error without injury should not be applied in this case. The record before us shows that there was a conflict in the testimony whether or not a certain conversation which one of the plaintiffs had with the defendant, relating to the subject of this suit, took place before or after the suit was brought. It follows that the court's ruling on the demurrer laid down a rule which may have materially affected the finding of the jury on that disputed question of fact. It denied to them all right to consider any evidence of defendant's alleged acknowledgment, if they failed to find that the conversation in which the acknowledgment is alleged to have been made occurred before the suit was brought.

The executions in favor of other plaintiffs against the Railway Construction & Land Company, and the returns on them, were improperly admitted, even for the limited purpose to which they were restricted. They were *prima facie* irrelevant, and there is nothing shown in the record to overcome that *prima facie* in-

tendment. It is not perceived that could shed any light on the inquiry whether the alleged conversation took place before or after the present suit brought.

Reversed and remanded.

AMERICAN UNION TEL. CO. v. DAUGHTRY.
(Supreme Court of Alabama. April 15, 1881.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGES—PLEADING.

1. In an action against a telegraph company for failure to deliver a message, where it is shown that the message was signed and delivered to the defendant by plaintiff's brokers, so that the liability to the contract closed by such message, it is proper to allow an amendment to the complaint making it the suit of such brokers for the use of plaintiff.

2. When an amendment to a complaint is made to the commencement of the action, and a new matter or claim is introduced thereby, the statute of limitations ceases to run at the filing of the original complaint.

3. The testimony of the operator in charge of the defendant's office, from which a telegram was sent, that he sent away all the papers found shortly after the telegram was sent, and that he has been informed that they were destroyed, is competent to show the destruction of the telegram for the purpose of admitting parol evidence of its contents.

4. Proof of the testimony of a witness that the jurisdiction of the court, in answer to interrogatories, is not admissible where it is not shown that his deposition was used on a former trial, or that defendant had notice of the filing of the interrogatories, or was called on to cross-examine the witness.

5. A stipulation that the telegraph company shall not be liable for failure to deliver a message in a greater sum than that paid for the service, void, as the company cannot contract to limit its liability for its own negligence.

6. The telegraph company is liable for damages directly arising from its failure to deliver a message directing plaintiff's brokers to deliver a quantity of cotton on his account for delivery at specified times, though the message was in fact delivered, and the company was not informed of the contents, nor of the fact of plaintiff's prior purchase of the same quantity of cotton to be delivered at the same time. *SOMERVILLE, J.*, dissenting.

7. As affecting the telegraph company's liability, it is immaterial whether or not a contractual relations existed between plaintiff and persons to whom the directions contained in the telegram were addressed.

Appeal from circuit court, Lee county, Ala. J. M. CARMICHAEL, Judge.

This action was brought by H. L. DAUGHTRY against the appellant corporate defendant to recover damages for its failure to forward a telegram within a reasonable time. The suit was commenced on February 4, 1881. A message was sent from Opelika, Alabama, on January 6, 1881, addressed to Lehman Brothers, New York, and in these words: "Send Daughtry, to cover, bottomed, incense, bouncer, incarnate." This message was explained to mean, "Sell on account of Daughtry, to cover, 100 June, 2000, and was an instruction to them (Lehman Bros.) to sell 300 bales of cotton on their account. The message was sent for plaintiff by Renfro Bros., but in their name; and during the trial, as the exceptions shows, on this fact appealed to the court allowed the plaintiffs to amend the summons and complaint by a

the names of the surviving partners of that firm, suing for his use. The defendant objected, and excepted to the allowance of the amendment, and pleaded the statute of limitations of six years to the complaint as amended, to which plea a demurrer was sustained. The complaint contained seven counts, to which a demurrer was interposed, assigning nine grounds or causes of demurrer, which were, in substance, (1) that no contract between plaintiff and defendant was shown; (2) that the message was in cipher, and unintelligible, and its meaning was not explained to the receiving operator; (3) that the message was part of a gambling contract, which was illegal and void, no actual sale of cotton being contemplated or intended, but only the payment of the difference in price. The court overruled the demurrer, and the defendant then pleaded (1) the general issue, on which issue was joined; (2) "that the contract made by the defendant with Renfro Bros. was that defendant was not to be liable for damages from any failure to transmit or deliver, or from any error in the transmission or delivery, of an unrepeatable message, but, to guard against errors, the company will repeat back any telegram for an extra payment, or one-half of the regular rate, and in that case it is not to be liable for damages beyond fifty times the amount paid for sending and repeating the telegram, and defendant avers that in this case there was not any amount paid for repeating said telegram, and the same was not offered to be sent as a repeated telegram." To this plea the court sustained a demurrer. The defendant also pleaded (3) that the message was in cipher, was not intelligible, and was not explained to the operator; and to this plea, also, the court sustained a demurrer.

The telegram was not produced on the trial, but proof of its loss was made as follows: J. H. Purnell, the manager in charge of the Western Union Telegraph Company at Opelika, testified that his company succeeded to the business of the American Union Telegraph Company, in October, 1881, and he had been in charge of the office at Opelika ever since; that all the papers on file when he took charge of the office were sent by him to Mobile, whence, as he afterwards learned, they were shipped to New York, and there sold to a paper-mill, and ground into pulp; that he had never seen said telegram, and did not know that it was among the papers so sent off and destroyed. To the admission of each part of this evidence the defendant objected and excepted. John M. Chilton, plaintiff's attorney, testified, as a witness in plaintiff's behalf, that he did not personally know who was the defendant's operator at Opelika in January, 1881, and he was then asked: "Was the testimony of said operator ever taken by interrogatories in this case?" The defendant objected to this question as calling for illegal and irrelevant testimony, and excepted to the overruling of its objection by the court. The witness then stated "that said testimony was taken by interrogatories; that the operator at that time, Elmore Culp,

according to his best recollection, resided at that time in West Point, Ga., and affidavit was made to that effect at the time of filing the interrogatories to him; that he filed the interrogatories to said Culp, and attached to them a copy of the telegram as set out in the complaint; and that said interrogatories, and the testimony of said Culp thereon, had been lost, and could not be found after diligent search." The witness further stated that he "remembered the testimony of said Culp, substantially," and that it was to this effect: "That he was the defendant's operator at Opelika on the 6th January, 1881, and received the original telegram, of which the copy attached to the interrogatories was correct, and forwarded the same by way of Montgomery; that he received from the operator at Montgomery an acknowledgment of the receipt thereof, indicated by the letters 'O K'; that he afterwards tried to trace said telegram, but could not trace it beyond Montgomery." The defendant moved to exclude each and every portion of this testimony from the jury, but the court overruled its motion, refused to exclude the same, and the defendant thereupon duly excepted.

Among the numerous charges requested by the defendant, in writing, were the following: "(1) If the jury believe the evidence, they must find for the defendant. (2) If the jury believe the evidence, they cannot find for the plaintiff for more than the price paid for sending the telegram. (3) Under the evidence in this case, Renfro Bros. were not the agents of the plaintiff, but were brokers through whom he made his contracts, to whom he was liable for any loss he sustained, and from whom he was to receive any profits arising from the transactions in cotton with them. (4) Under the evidence in this case, there were no contractual relations between plaintiff and Lehman Bros. They were not his agents or brokers, and owed him no duty to act on his telegram. (5) Under the evidence in this case the right to recover special damages arising from a failure to cover any contracts which plaintiff had on hand on the 6th January, 1881, is barred by the statute of limitations of six years. (6) Under the evidence in this case the plaintiff is not entitled to recover anything except the price of the telegram, and such damages as would naturally result from a breach of the contract whereby it agreed to deliver said telegram to Lehman Bros. in New York." The court refused to give each of these charges as asked, and the defendant reserved an exception to each refusal.

There were 44 assignments of error, and they embraced all the adverse rulings of the court on the pleadings and evidence, charges given, and the refusal of charges asked to be given.

Jones & Falkner, A. & R. B. Barnes, and Gaylord B. Clark, for appellant. *J. M. Chilton*, for appellee.

CLOPTON, J. It having appeared during the course of the trial that the legal title to the contract was in Renfro Bros., the brokers of H. L. Daughtry, by reason of

having signed in their own names, and delivered to defendant for transmission, the telegram set forth in the complaint, an amendment making it the suit of the surviving partners of Renfro Bros. for the use of Daughtry, in whose name it was originally commenced, was proper. *Harris v. Plant*, 31 Ala. 639. The amendment, when allowed, related to the commencement of the suit; and, no new matter or claim being introduced, the statute of limitations ran only to the filing of the original complaint. *Evans v. Richardson*, 76 Ala. 329.

As in cases of other writings, proof of the loss of a telegram is a prerequisite to the admission of secondary evidence of its contents. *Whilden v. Bank*, 64 Ala. 1. Ordinarily the declarations of the person who last had possession of a writing are not receivable as evidence of its loss if he be alive, and in the jurisdiction of the court. There are cases in which the declarations of a person to whom it was last traced, to the effect that he did not have the instrument, or to whom he had delivered it, have been received for the purpose of showing that the party had prosecuted a diligent search. *Reg. v. Kenilworth*, 53 E. C. L. 642. Though, as the sufficiency of the preliminary proofs for the court, it may not be necessary to preserve the strict rule between direct and hearsay evidence, it is not so far relaxed as to admit hearsay evidence to show the fact of search, or the destruction of the writing by the declarant. 1 *Whart. Ev.* § 150. It was not competent to allow the witness Purnell to testify, from information received from others, that the papers of defendant had been sent from Mobile to New York, and sold to a paper-mill. In 1 *Greenl. Ev.* § 163, the rule as to proof of the testimony of a witness given on a former trial is stated as follows: "Where the testimony was given under oath in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted after the decease of the witness in any subsequent suit between the same parties. It is also received if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane or sick, and unable to testify, or has been summoned but appears to have been kept away by the adverse party." That the witness was examined under oath in a judicial proceeding, and that the opposite party had an opportunity, and was legally called upon, to cross-examine, are essential requisites to admissibility. It sufficiently appears that the witness Culp was beyond the jurisdiction of the court, that interrogatories were filed, and an affidavit of his non-residence made, and that his answers to the interrogatories were taken; but it is not shown that his deposition was used in evidence on the former trial, or that defendant had notice of the filing of the interrogatories, or was called upon to cross-examine.

The second plea of defendant sets up that by the contract for the transmission of the message, defendant was not to be

liable for damages from any failure to transmit or deliver, or from any error in the transmission or delivery, of any repeated message, and to guard against errors would repeat any telegram for payment, or one-half the regular rate in such case not to be liable for damages beyond 50 times the amount received for sending and repeating the telegram that the telegram in question was repeated. In *Telegraph Co. v. Way*, 542, 4 South. Rep. 844, we held that a telegraph company contract to be solved from due care and diligence in the transmission and delivery of telegrams at a point of destination on its own behalf, for exemption from liability for the negligence of its own agents, and that the conditions similar to those set forth in the plea are limited to cases where the negligence of the company is not the cause of delay or non-delivery. The plea is defective in failing to aver facts which make the case within the scope of exemption.

On the former appeal in this case several grounds of demurrer to the complaint now presented for consideration except two interposed after the case was remanded, were fully considered, and not to be well taken. The question relating to the liability of the telegraph company for failure to transmit and deliver a message in cipher, which was not explained to the operator, though presented by demurrer alone, is now presented by both demurrer and charges. The court held when the case was formerly before it, that, though the message was in cipher and its contents or importance were not communicated to the operator, if the company received and agreed to transmit and deliver it, and failed to do so in consequence of the fault or neglect of its agents, it is liable for the damages naturally and proximately resulting therefrom, but not for damages arising from special circumstances not communicated to the company in reference to which the parties are presumed to have contracted. *Daughtry v. Telegraph Co.*, 75 Ala. 168. This question was subsequently reconsidered in *Telegraph Co. v. Way*, supra, and the court declared in the former case reaffirmed. We see no reason for departure from this ruling. But it is insisted that defendant's prior purchase of 300 bales of cotton to be delivered in May and 100 in June, 1881, are special circumstances not communicated. The telegram, as transmitted, is: "Sell on account of Daughtry's cover, 100 June, 200 May." This was a reaction to cover the previous contract for purchase of cotton to be delivered the same months, and was equivalent to a reaction to sell the cotton previously purchased. It was so construed on the former appeal, and ruled that the natural proximate damages were the depreciation in the market price of cotton between the times of the direction to sell and the actual sale, a few days thereafter. The rulings of the court with respect to the measure of damages are in accordance with these principles, except the refusal to allow the charge requested by the defendant, the effect that plaintiff is not entitled to recover any amount except the price

telegram, and such damages as naturally arose from a breach of the contract. The refusal to give this charge can be justified only on the ground that the case warranted the jury in allowing exemplary damages. There is no evidence of wanton or willful negligence, or negligence so gross as to evince an entire want of care. Not being a case for the allowance of exemplary damages, plaintiff is entitled to recover only the actual damages sustained. It is shown that Renfro Bros. were the brokers of Daughtry, and that Lehman Bros., to whom the telegram was addressed, were their correspondents, and members of the Cotton Exchange in New York. Whether Lehman Bros. were the brokers of Daughtry, or whether there were any contractual relations between them, is immaterial. The liability of the defendant is not affected by the character of their relations, or by the want of contractual relations. The several charges in reference to this question were abstract and properly refused.

The other assignments of error have not been pressed in argument, and it is unnecessary to consider them.

Reversed and remanded.

SOMERVILLE, J. I dissent from so much of the opinion of a majority of the court in this case as relates to the damages recoverable for the failure to transmit and deliver cipher telegrams. I think the sound rule is to limit the measure of damages in these cases to such as are nominal, for, at most, the price paid for sending the message. The reason and authorities in support of this conclusion are fully discussed in my dissenting opinion in *Telegraph Co. v. Way*, 83 Ala. 562-565, 4 South. Rep. 844.

OHMER et al. v. BOYER.

(Supreme Court of Alabama. April 28, 1890.)

DEED OF TRUST—PAROL EVIDENCE OF CONSIDERATION—SUBROGATION.

1. A husband, by deed of trust, gave a life-estate in lands to his wife, with full right to the rents and profits, and provided that at her death, if he were then dead, one-half of the lands "shall inure to and belong to my devisees, and, in default of devisees, to the heirs at law" of his wife, "and the remaining half shall inure and belong to the devisees, and, in default of devisees, to the heirs at law" of the grantor. The grantor died intestate, and afterwards his wife died, having willed all her property equally to the three defendants. Held, that plaintiff, the niece and heir at law of the husband, and defendants were tenants in common, the former owning a one-half interest, and the latter a one-sixth interest each.

2. Where a deed of trust of lands from a husband to his wife is recited to be for a valuable consideration, parol evidence is inadmissible, in a contest between the heirs of the former and the devisees of the latter, to show that no such consideration was actually paid.

3. The wife having paid a balance due on a mortgage of the whole tract executed by the husband and wife for his debt, her devisees are entitled, as against his heir, to be subrogated to the right of the mortgagee to the extent of the amount so paid.

Appeal from city court of Montgomery; F. M. ARRINGTON, Judge.

Moore & Findley, for appellants. John Gindrat Winter, for appellee.

SOMERVILLE, J. The bill was filed by the appellee, claiming an undivided half interest in the lands in controversy, as a tenant in common with the defendants, who are alleged to own the other undivided half interest, in three shares of one-sixth each. The complainant claims title as the niece and sole heir of Joseph Bihler, deceased, the original owner, who died in February, 1876. The defendants claim title through Theresa Bihler, the wife of Joseph Bihler, and as devisees under her last will, they being her brother and two sisters. The title of Mrs. Bihler was derived from her husband, under a deed of trust executed by him to one Scheusler, and bearing date March 10, 1870. This instrument conveyed to the wife a life-estate in the lands, (then subject to a recorded mortgage to which the deed made no allusion,) with full right to the rents, income, and profits thereof for her support and maintenance during her natural life, and thereupon as follows: That "said property shall, upon the death of said Theresa Bihler, should I then be living, inure to my own use and benefit; and, should I then be dead, then the same shall be divided, and one-half of the same shall inure to and belong to my devisees, and, in default of devisees, to the heirs at law of the said Theresa Bihler, and the remaining half shall inure and belong to the devisees, and, in default of devisees, to the heirs at law of me, the said Joseph Bihler." Inasmuch as the grantor in this deed died prior to his wife, Theresa, and she made a will leaving all her property, real and personal, to the defendants as her devisees, thus exercising the power of appointment conferred on her by her husband, no reasonable doubt can exist as to the proper construction of the deed, or the consequent status of the title. The defendants acquired, as tenants in common, an undivided half interest in the property, subject to the existing mortgage incumbrance, holding as devisees of Mrs. Bihler. The complainant took the other undivided half interest, as sole heir of Joseph Bihler, he having made no will, subject only to the mortgage then existing on it. Code 1886, § 1829; *Gosson v. Ladd*, 77 Ala. 223. The mortgage of the lands, above alluded to, was executed to the Montgomery Mutual Building Association by Joseph Bihler and Mrs. Theresa Bihler, on April 30, 1869, to secure a debt due by Joseph Bihler to the mortgagee, for \$4,000. This incumbrance, it is important to emphasize, was prior to the deed of trust under which Mrs. Bihler and her devisees claim, and, of course, superior to any claim on the part of the grantor's heirs, including the title of the complainant.

The main point of contention in this case arises from the payment of this incumbrance by Mrs. Bihler during her life-time, and the attempt of the defendants, by cross-bill in this suit, to set up the right of subrogation under it by claiming the benefit of its equitable assignment. The bill itself prays for the sale of the land on the ground that it cannot be equitably divided among the joint owners without such sale, which is now made the basis of chancery jurisdiction by statute. Code

1836, § 3262. It also prays for the removal of the administration of Mrs. Bihler's estate from the probate to the chancery court for settlement. The chancellor adjudged the complainant to be entitled to the relief prayed, but disallowed the defendant's claim of subrogation under the mortgage. There is no controversy about the fact that the mortgage debt, to the extent of a remaining balance of something over \$1,700, was paid by Mrs. Bihler, prior to and in November, 1883. The mode of its payment was by surrendering possession of the premises to the agent of the mortgagee, who collected the rents accruing, and applied them to the satisfaction of the mortgage debt. This was done under the compulsion of a foreclosure suit in which a decree had been rendered by the chancery court in favor of the mortgagee.

It is insisted that there can be no just claim to subrogation, or, what is the same thing, to the benefit of the mortgage, by way of equitable assignment, because the deed of trust conveying the life-estate to Mrs. Bihler was not based on a valuable consideration, but was a mere deed of gift, without covenants of warranty. We think there can be no doubt of the fact that the only valuable consideration recited in the deed, additional to that of the good consideration of love and affection, is merely nominal, as compared with the real value of the property. The recital of a valuable consideration in a deed, although nominal, estops the grantor, and those holding under him, from alleging that it was executed without any consideration. Parol evidence is not admissible to qualify the extent of the title conferred, or to otherwise vary the legal effect of a deed, by attacking the consideration, even though nominal. In other words, the operation of the instrument as to the interest or estate purporting to be conveyed cannot be affected by oral evidence of another or a different consideration. *Railroad Co. v. Wilkinson*, 72 Ala. 286; 3 Brick. Dig. p. 299, § 41; *Draper v. Shoot*, 69 Amer. Dec. 462. The recital of a nominal consideration has been held sufficient, as between the parties, to prevent a resulting trust, and to confirm the title in the fee. *Jackson v. Cleveland*, 90 Amer. Dec. 266, 270, note; *Sand. Uses & Trusts*, 334, 335. As forcibly observed by CABELL, J., in *Harvey v. Alexander*, 1 Rand. (Va.) 219, "this is not the case of a deed purporting to be for good consideration only. It is in express terms for valuable as well as for good consideration. It is true that the valuable consideration expressed is only one dollar. But one dollar, viewed as a consideration, is [between the parties] as much a valuable consideration as a million of dollars." And we accordingly hold that parol evidence is inadmissible, in the absence of fraud or mistake, to show in this case the falsity of the recital. 2 Pom. Eq. Jur. § 1035, note 1; *Squire v. Harder*, 1 Paige, 494. The evidence offered for this purpose should have been excluded. It was competent to show that a less sum than that recited was in fact paid, but not that nothing was paid, or that there was no consideration whatever for the deed, which was an executed not an exec-

utory contract, in any manner requiring the aid of a court of chancery to perfect the grantee's rights under it. A different rule would of course prevail if the deed was assailed for fraud by a creditor of the grantor. *Myers v. Peek*, 2 Ala. 648.

The rights of the parties to this suit must be governed by the rights of the respective parties under whom they claim; for an equity of this kind once attaching will follow the property in its various devolutions of title in the hands of heirs, devisees, or even purchasers for value with notice. 3 Pom. Eq. Jur. § 1225. This being so, the only inquiry is whether Mrs. Bihler could have claimed the benefit of the mortgage, as equitable assignee, against her husband's interest in the property, had she paid it during his lifetime. She was a tenant for life in the mortgagor's equity of redemption, her husband, as owner, having conveyed to her such estate subsequent to the execution of the mortgage, with remainder of an undivided half interest to her heirs or devisees, with a reversion of the other half reserved to himself, and a contingent remainder to his own heirs or devisees, in the event of his death before the termination of the life-estate. It seems to us that Mrs. Bihler had an undoubted right to redeem the property from the mortgagee, she being the assignee of the equity of redemption. Any person having a partial interest in the premises, and whose rights would be prejudiced by a foreclosure of a mortgage, has a right to redeem the mortgaged premises by paying the entire debt. This principle has been held to include persons having an estate in land as tenants for life, as doweress, heirs, devisees, grantees, and tenants in common. It without doubt embraces a tenant for life whose estate is derived immediately from the mortgagor, as in this case. *Id.* § 1220, and note; *Butts v. Broughton*, 72 Ala. 294; *Har. Subr.* §§ 692-697. Having the right to redeem, did she become the equitable assignee of the mortgage, on the principle of subrogation, a doctrine which is not dependent on contract, but is the creature of equity designed for the promotion of justice? "The rule," says Mr. Pomeroy, (2 Eq. Jur. § 799) "is well settled that when a life tenant, or any other person having a partial interest only in the inheritance or in the land, pays off a charge, mortgage, or incumbrance on the entire premises, he is presumed to do so for his own benefit. The lien is not discharged, unless he intentionally release it. He can always keep the incumbrance alive for his own protection and reimbursement. His intention to do so will be presumed, even though he has taken no assignment. In fact his payment constitutes him an equitable assignee." And again: "In general," he observes, "when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own

benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection." 3 Pom. Eq. Jur. § 1212, and note 2, and section 1221; 2 Pom. Eq. Jur. § 795; *Everson v. McMullen*, 118 N. Y. 298, 21 N. E. Rep. 52; *Sandford v. McLean*, 23 Amer. Dec. 773; *Averill v. Taylor*, 8 N. Y. 44.

There is no pretense that Mrs. Bihler became in any manner liable personally for this mortgage debt by reason of being the transferee of the equity of redemption. It was her husband's debt, and not hers, so that she was under no legal liability to pay it, primarily or otherwise. *Lovelace v. Webb*, 62 Ala. 271; 3 Pom. Eq. Jur. § 1225. Nor is any question raised as to the rights of subsequent incumbrancers, as in *Bolles v. Wade*, 4 N. J. Eq. 454, and *Denton v. Cole*, 30 N. J. Eq. 244, where the payment of a mortgage by the tenant of the equity of redemption was held to inure to the benefit of subsequent mortgagees. So in *Cowley v. Shelby*, 71 Ala. 122. We cannot see that the equities of the parties are at all changed by the fact that the deed to Mrs. Bihler, conferring her life-estate, was based on a nominal consideration. Even a mere donee of the equity of redemption, conferred in consideration of love and affection, has an undoubted right to redeem by paying the mortgage debt, and the right of equitable assignment, which is another name for subrogation, is an incident of the right of redemption. *Cole v. Malcolm*, 66 N. Y. 368; *Har. Subr.* § 718. *A fortiori* is this true where the grantee of the mortgagor's interest is a purchaser, even though for a nominal consideration. By conveying to his wife the equity of redemption for life, Joseph Bihler armed her, as a necessary means of redemption, with the authority to pay the mortgage debt, which, we repeat, was his debt, not hers. A conveyance by a deed from a mortgagor with covenants of warranty, based on an adequate consideration, is not required, in order to confer the right on a grantee, to redeem from a prior mortgagee. The effect of a warranty deed would even extend further, and extinguish the mortgage debt and lien, even though it had been paid by the mortgagor with his own funds and for his own benefit. *Mickler v. Townsend*, 18 N. Y. 575. Nor is it material that the mortgage debt was paid with the rents of the mortgaged property. As between Mrs. Bihler and her husband, the grantor-mortgagor, the rents were hers, and not his; and while it is true that they were subject to the lien of the mortgage, they were not more so than the land itself. In fact the rents belonged to the life-tenant until they were intercepted in some lawful mode by the mortgagee. *Johnston v. Riddle*, 70 Ala. 219; *Tied. Real Prop.* § 324. They belonged to her absolutely as against the mortgagor, for the land was hers as against all the world, except the mortgagee, and the rents were a mere incident to the freehold. A payment of the mortgage debt with the rents, therefore, would confer the same right of

subrogation to its benefit, as if it had been paid with her money derived from any other source. The fact of the ownership of the money, and not the source or mode of its acquirement, is the controlling factor in the transaction. It follows from these principles that the chancellor erred in not granting the relief prayed by the defendants' cross-bill, so far as to subrogate them to the rights of Mrs. Bihler as the equitable assignee of the mortgage, to the extent of the balance paid by her during her life-time. In other respects, the decree seems to be free from error.

It will become necessary to remand the cause for the taking of an account by the register, in connection with the settlement of the administration of Mrs. Bihler's estate. The inquiry will be as to what ratio of the mortgage debt shall be apportioned among the different parties to the suit, as their several ratable shares. The rule in such cases is to compel the life-tenant to pay the annual interest on the mortgage debt during his or her life-time. Being under obligation to keep down the interest, the life-tenant is not entitled to any contribution from the remainder-men or reversioners for payments made as interest. 3 Pom. Eq. Jur. § 1223; *Tied. Real Prop.* § 66. For so much of the payment made by Mrs. Bihler as covered accumulated interest, if any, no credit can be allowed to the defendants. Nor should any interest be allowed on the principal up to the time of Mrs. Bihler's death, which occurred December 29, 1886. From that day, however, the interest commenced to run, and is allowable as the legitimate fruit of the principal. The amount thus accruing must be charged against the reversioners or remainder-men in the ratio of their shares owned in the common property. This would operate to apportion one-half of this sum to the complainant, and the other half equally against the several defendants,—or one-sixth part to each. It is manifest that the statute of limitations is no bar to the defendants' claim of subrogation under this mortgage. This claim, as we have said, is based on the sole fact that the defendants, who stand in the shoes of their testatrix, have become the equitable assignees of the mortgage security. Against the enforcement of a mortgage no period of time will avail as a bar less than 20 years, in the absence of an actual possession by the mortgagor, or those claiming under him, adverse to the mortgagee, and brought home to his knowledge. 3 Brick. Dig. p. 622, § 303; and an equitable assignee has the same period of time in which to assert his claim in a court of equity as his assignor had, unless some special circumstances of the case call his diligence into extraordinary activity, so as to charge him with laches.

The decree of the chancellor will be reversed, and the cause will be remanded, that a decree may be rendered in accordance with the foregoing opinion, and the requisite orders made for the settlement of the administration of Mrs. Bihler's estate.

ELYTON LAND CO. v. MINGEA.

(Supreme Court of Alabama. April 9, 1890.)

IMPUTED NEGLIGENCE—PLEADING—AMENDMENT—EVIDENCE.

1. In a suit by a city fireman against a railway company for personal injuries received in consequence of the overturning of a hose-cart on which he was riding, alleged to have been caused by coming in contact with an improperly placed rail, the negligence of the driver of the hose-cart could not be imputed as contributory negligence to plaintiff, when it appeared that he had no authority or control over the driver.

2. The fact that plaintiff and the driver were both in the employ of the city, and engaged in a common enterprise, did not render them mutually responsible for each other's acts.

3. Under the circumstances, the fact that plaintiff knew the street to be dangerous was not proof of contributory negligence, and that question was properly left to the jury.

4. The contract between the defendant and the city was properly admitted in evidence to show that the former was licensed by the city to construct the track.

5. The plaintiff, having originally declared under a count for defendant's negligence generally, in failing to keep its track in proper condition, and a count for such negligence as being a violation of its contract with the city, the subsequent addition of a third count, alleging such negligence as a violation of a city ordinance, was not the introduction of a new cause of action.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Action by Samuel Mingea, a fireman of the city of Birmingham, against the defendant, for damages for personal injuries incurred by the overturning of the hose-cart upon which he was riding. The original complaint contained two counts, the first being based upon the alleged negligence of the defendant in not keeping its railway at the place of the accident, properly ballasted, surfaced, and filled in. The second was founded upon the same acts of negligence, which were alleged to be in violation of a contract between the defendant company and the city of Birmingham, whereby defendant was obliged to keep its track properly ballasted, surfaced, and in good repair. The complaint was amended by adding a third count, upon the same acts of negligence, committed in violation of a city ordinance. The defendant demurred to the amendment on the ground that it introduced a new cause of action, and the overruling of the demurrer is assigned as error. The complaint was also amended, against the exception of defendant, by alleging more specifically the defendant's negligence in "failing to keep its said railway track and road-bed in a reasonably safe condition at the point where said hose-carriage was overturned. The verdict and judgment were for the plaintiff, from which defendant appeals.

Alex. T. London and W. C. Ward, for appellant. Taliaferro & Smithson, for appellee.

SOMERVILLE, J. The plaintiff, as an employe of the fire department of Birmingham, while riding on a hose-cart or reel, in the regular pursuit of his duties as a fireman, was injured badly by the capsizing of the vehicle, as it turned suddenly from Twenty-Second street into Avenue A, which intersected the street at right angles. The

horses of the cart were driven by one line, also a fireman, and were under exclusive control. The alleged cause of the accident was the impinging or collision of the cart wheels on the iron rail of the defendant's dummy line railway projected above the surface of the street. The evidence tended to show that the condition of the dummy or street railway track was bad, and had become dangerous for the passage of vehicles, by reason of being defectively ballasted and surfaced, and that the duty of keeping the track in good condition devolved on the defendant as owner of the line, and by contract with the city. The accident was alleged to have been caused by the negligence of the defendant in failing to keep it in proper repair.

1. The court charged the jury that the negligence of Mullins, the driver of the hose-carriage, could not be imputed to plaintiff, and would be no bar to his recovery in the present action, provided plaintiff himself was guilty of no negligence. And many charges, requesting the defendant, were refused which sought to impute the alleged negligence of the driver to the plaintiff, although the defendant had no control over the management of the hose-carriage, or the control of the horses attached to it. The question presented by these rulings is the old one first decided in the familiar and much criticized case of *Thorogood v. Bryan*, 8 C. (1849), and followed afterwards in *Strong v. Railway Co.*, L. R. 10 Ex. (1875.) The action in that case was founded on Lord Campbell's act, in 1846, the deceased, a passenger in an omnibus as he was alighting, was knocked down and killed by collision with another omnibus belonging to the defendant. The defense interposed was the contributory negligence of the driver of the vehicle in which the plaintiff was riding. The question was whether a passenger in an omnibus is considered so far identified with the driver that negligence on the part of the driver or his servants is imputable to the passenger himself. It is difficult to perceive any sound principle upon which the decision in *Thorogood v. Bryan* can be maintained, and it is admitted on all sides, by the courts and daily increasing weight of authority, that the decision rests on indefensible ground.

In this state I find two cases opposed to it in principle, and none in support of it. In *Otis v. Thorn*, 23 Ala. 463, (1853,) the plaintiff was injured in a collision with a stage-coach in a ferry-boat was a negligent collision with a steam-horse, an action was brought against the defendant by the owner of the coach, it was decided that the contributory negligence of the driver of the ferry-boat was a fact entirely irrelevant to the issue of the defendant's liability. In the recent case of *Railway Co. v. Hackett*, 87 Ala. 610, 6 South. Rep. 413, an action for personal injuries sustained by the plaintiff through the negligent collision of two road trains at a crossing, it was held that the contributory negligence of the plaintiff's carrier was no bar to plaintiff's recovery, not being imputable to him. See *Otis v. Hackett*, 116 U. S. 366, (1885,) Ct. Rep. 391, the decision of *Thorogood*

Bryan was fully discussed and utterly repudiated, not only as indefensible in principle, but as opposed to the weight of American authority, as to which latter point there seems now to be no question. Mr. Justice FIELD uses this language: "The identification of the passenger with the negligent driver or owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." It is needless to review the cases on this subject. This view is concurred in by a strong current of American authority, the doctrine of *Thorogood v. Bryan* being now disapproved by the highest courts of Alabama, New York, New Jersey, Maine, New Hampshire, Maryland, Ohio, Illinois, Indiana, Kentucky, Minnesota, Michigan, California, and other states. In a few states it has been adopted in a modified form, some of the courts repudiating the reason on which the doctrine was founded by the English courts. *Railway Co. v. Hughes*, 87 Ala. 610, 6 South. Rep. 413; *Robinson v. Railroad Co.*, 68 N. Y. 11, 23 Amer. Rep. 1, and note, 4; *Railroad Co. v. Steimbrenner*, 47 N. J. Law 161; *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. Rep. 690; 10 Amer. St. Rep. 410, note, 419; *Borough of Carlisle v. Brisbane*, 113 Pa. St. 544, 6 Atl. Rep. 372; 57 Amer. Rep. 483, and note, 488-511, and cases cited; *Nesbit v. Town of Garner*, 75 Iowa, 314, 39 N. W. Rep. 516, 9 Amer. St. Rep. 486, note, 491; *Railway Co. v. Shacklet*, 105 Ill. 364; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. Rep. 32; *Brown v. Railroad Co.*, 88 Amer. Dec. note, 359; 1 Shear. & R. Neg. (4th Ed.) § 66; *Beach, Contrib. Neg.* 111-114; *Campb. Neg.* (2d Ed.) 185; 1 *Smith Lead. Cas.* (4th Ed.) 220, note a. Added to this vast array of authorities is the crowning fact that the case of *Thorogood v. Bryan* has recently been expressly overruled by the English court of appeals, after having been weakened by constant criticism from the English bench and bar for more than 30 years. In the case of *The Bernina*, 12 Prob. Div. 58, decided as late as 1887, in an able and elaborate review of the authorities, both English and American, Lord ESHER, the master of rolls, observes that the court "cannot see any principle on which it can be supported," and that "the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion," he concludes, "that the proposition maintained in it [meaning the case of *Thorogood v. Bryan*, supra] is essentially unjust, and inconsistent with other recognized propositions of law." *Lindley and Lopes* (L. J.) concur in opinions fully discussing the subject, the former observing: "The doctrine of identification laid down in *Thorogood v. Bryan* is to me quite unintelligible. It is, in truth, a fictitious extension of the principles of agency; but to say that the driver

of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable, e. g., to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd, but which, of course, the court never meant." The doctrine of *Thorogood v. Bryan*, 8 C. B. 115, may now be considered as effectually exploded on both sides of the Atlantic. And the rule must be regarded as now fully settled, both in England and America, and certainly in this state, that the negligence of the driver of a vehicle cannot be imputed to a passenger therein when the passenger is free from personal negligence, and has no control over the driver, and has not been guilty of any want of care in his selection. The circuit court did not err in charging this to be the law, and in refusing to give the numerous charges asserting a contrary doctrine.

2. It is insisted, however, that the above rule has no application to this case. The reason for this contention is said to be that the plaintiff, Mingea, and the driver of the horse-cart, Mullins, were in the common employment of the city of Birmingham, as firemen, and were, at the time of the injury, engaged in a joint enterprise, and for this reason the contributory negligence of the one should be imputed to the other. There is a class of cases where such a principle is recognized, but we discover no evidence in the record which would justify the inference that this case falls within that class. Where several persons are engaged in a joint enterprise, so that each is mutually responsible for the acts of the other, and no one has any exclusive control of the vehicle or vessel in which all are traveling, the one in management may be regarded as the agent of the others; and in such cases the rule we have first above announced would have no application, that rule being based on the fact that there is no relation of principal and agent between the driver of a vehicle and one who rides with him without authority to control him in its management. *Beck v. Ferry Co.*, 6 Rob. (N. Y.) 82; *Robinson v. Railroad Co.*, 23 Amer. Rep. 1, 3; *Nisbet v. Town of Garner*, 39 N. W. Rep. 516. The charges based on this contention were abstract, not being supported by the evidence, and there was no error in refusing them.

3. It is not negligence *per se* for one who knows the dangerous condition of a highway to persist in traveling over it. He may lawfully proceed to do so, if the act, under the circumstances of the particular case, does not evince a want of ordinary care on his part. *City Council of Montgomery v. Wright*, 72 Ala. 411; *Turnpike Co. v. Jackson*, 44 Amer. Rep. 274, note, 276; *Town of Albion v. Hetrick*, 46 Amer. Rep. 230; *Thomp. Neg.* 1203. *A fortiori*, does this principle apply to one who rides with another, and has no authority to control the team or to dictate the route the vehicle should go. Whether the plaintiff, therefore, was negligent in not warning the driver as to the rate of speed he was going, or in not calling his attention to

the defect in the highway, if in fact he so failed to do, was a question of fact for the determination of the jury, and not a question of law to be decided by the court. It was properly submitted to the jury, and there was no error in refusing such of the defendant's charges as sought to take away from them its decision by devolving this inquiry on the court.

4. There is no evidence tending to show that the driver was not generally careful and competent for the discharge of his duties, or that the plaintiff had reason to believe him imprudent, and all charges based on this idea of any contributory negligence on the plaintiff's part were properly refused. In the absence of such evidence arising from the case made by the plaintiff, the *onus* was on the defendant to prove such contributory negligence.

5, 6. The contract between the city of Birmingham and the defendant, dated April 24, 1885, was admissible in evidence to show a license conferred by the city authorizing the construction of the dummy line, if not to show the understanding of the parties as to what was a proper state of repair in which the track had to be kept. The rule is that, when a railroad company lays its track along a public street, it impliedly assumes the duty of keeping the part of the street so occupied in a reasonable state of repair for the safe passage of travelers over it. This implies the duty of keeping the track properly surfaced and ballasted, free from dangerous defects, and conformed to the grade of the street. And for a violation of these duties the defendant would be liable to travelers for injuries sustained in consequence. 2. Shear. & R. Neg. § 357. This is not a liability on the contract made with the city, but a liability for a tort, committed under the license of the contract, which has resulted in injury to another.

7. The action of the court was obviously unobjectionable in permitting the complaint to be amended so as to more fully describe the nature of the negligence imputed to the defendant, as a failure to keep the road-bed of the railway in a reasonably safe condition at the point of the accident.

8. The third count also added no new or independent cause of action. The introduction of the city ordinance in this count was only the statement of a new logical premise from which the conclusion of negligence would follow, in failing to keep the track in a proper condition of repair for the free passage of vehicles. The failure to comply with a regulation imposed by a city ordinance on a railroad, and not shown to be unreasonable, is generally held to be *per se* culpable negligence. *Railroad Co. v. Donovan*, 84 Ala. 141, 4 South. Rep. 142. The third count, in other words, only stated a new reason for the fact of negligence previously alleged in the other counts. We have particularly noticed as many of the assignments of error as seem to us to be plausible. The others have been examined with proper care, and are deemed not to be well founded. We discover no error in the rulings of the court, either on the evidence or the law, and the judgment must be affirmed.

STATE V. BERTIN.

(*Supreme Court of Louisiana.* May 19, 1890.
42 La. Ann.)

CRIMINAL LAW—APPEAL—RECORD.

When the record contains no bill of exception, motion in arrest of judgment, or assignment of error, and there is no error on the face of the record, the verdict and judgment will not be disturbed.

(*Syllabus by the Court.*)

Appeal from criminal district court, parish of Orleans; BAKER, Judge.

John G. McMahon, for appellant. The Attorney General, for the State.

MCENERY, J. The accused was convicted of entering a store in the night-time, without breaking, and of grand larceny, and sentence to 12 years' imprisonment in the penitentiary. He has appealed from the verdict and sentence. There is no bill of exception, motion in arrest of judgment, or an assignment of errors in the record. There are no errors to be found on the face of the record, after an inspection of the same, that would entitle the accused to relief. The motion for a new trial is not sworn to, and there is no question of law brought up in a bill of exceptions which we can consider in connection therewith. The judgment appealed from in such a case will not be disturbed. *State v. Sweeney*, 37 La. Ann. 1; *State v. Deas*, 38 La. Ann. 581; *State v. Davis*, 41 La. Ann. 328, 6 South. Rep. 546; *State v. Trancho*, 41 La. Ann. 619, 6 South. Rep. 328.

Judgment affirmed.

STATE V. MASON.

(*Supreme Court of Louisiana.* May 19, 1890.
42 La. Ann.)

CRIMINAL LAW—VERDICT—WOUNDING LESS THAN MAYHEM.

1. A verdict, "guilty of wounding less than mayhem," is responsive to an indictment charging that the accused has "willfully, maliciously, and feloniously inflicted, with a dangerous weapon, on C., a wound less than mayhem," and is good.

2. The ruling in *State v. Watson*, 41 La. Ann. 599, ante, 125, has no bearing. It was made in a case in which the charge was that the accused had feloniously, etc.; the words "willfully and maliciously," found in the statute, having been omitted, and replaced by the previous one.

3. Where an indictment contains two counts, and the verdict is guilty of the lesser offense, it will be sustained.

(*Syllabus by the Court.*)

Appeal from district court, parish of Jefferson; ROSE, Judge.

Alfred E. Billings, for appellant. The Attorney General, for the State.

BERMUDEZ, C. J. The accused was prosecuted for an assault with an intent to murder, and, in another count, for willfully, maliciously, and feloniously, with a dangerous weapon, inflicting on one Henry Curtis a wound less than mayhem. He was found "guilty of wounding less than mayhem." He moved in arrest on the ground that the verdict is not responsive to the indictment. The motion was overruled. He was sentenced, and has appealed.

He has filed in this court an assignment of error to show that the motion in arrest ought to have been sustained. His only reliance is on the recent ruling of this court in *State v. Watson*, 41 La. Ann. 599, ante, 125, by which he claims that it has been held that the plea of "guilty of wounding less than mayhem" was a plea of "guilty of no crime known to the law." By reference to the opinion, it will be perceived that the ruling was made in a case in which the indictment merely charged that the accused had feloniously inflicted, etc.; the words "willfully and maliciously," found in the statute, having been omitted, and the previous word, not in the statute, "feloniously," substituted therefor. The court held that the offense charged is statutory; that the word used was meaningless and surplusage; that the offense should have been charged in the words of the statute, or in words conveying the clear meaning of the language used in the statute. It is well settled that, when an indictment charges no offense known to the law, and the accused pleads guilty to the charge, none is confessed. In the present instance the indictment charges the offense to have been committed willfully, maliciously, and feloniously. The verdict returned was "guilty of wounding less than mayhem," is responsive to the second count, and therefore good. *State v. Green*, 37 La. Ann. 382, and cases cited. Judgment affirmed.

STATE v. BUTLER.

(*Supreme Court of Louisiana*. May 19, 1890.
42 La. Ann.)

CONTINUANCE—ABSENCE OF WITNESS—AFFIDAVIT.

When an affidavit for continuance sets forth all the essential requisites as to the names and residence of the witnesses, the character and materiality of their testimony, the exercise of proper diligence, and the ability to procure attendance of the witnesses if the trial be deferred, the refusal by the judge, who signs the bill of exceptions without qualification and without reasons, is error.

(*Syllabus by the Court*.)

H. N. Gautier, for appellant. *The Attorney General*, for the State.

FENNER, J. Appeal from the district court for the parish of Jefferson. The defendant was indicted for murder, and appeals from a verdict and sentence for manslaughter. The error assigned is the refusal of a continuance. The continuance was applied for upon an affidavit setting forth the absence of three witnesses, averring the materiality of their testimony; setting forth the relevant material facts he expected to prove by them, and that said facts could be proved by no other witnesses; that he had given their names to the clerk and sheriff in ample time to have them summoned; that they resided in the immediate vicinity of the court-house, but were temporarily absent in the neighboring parish of St. James, which absence was not known to him until he came to summon them; that, nevertheless, he had caused summons to issue to the parish of St. James, upon which no return had been made; that their attendance can be as-

cured if a continuance is granted; and that the motion is not made for delay. An additional ground for continuance was assigned in the affidavit of his counsel that he had been employed, only the instant before, by friends of the accused, and had had no time to prepare the defense; and that he believed, if proper time were allowed, a sufficient defense could be made. The judge refused a continuance, and signed the bill of exceptions without contradicting any statement above recited, or assigning any reasons for his action. This was patent error. The bill of exceptions, thus signed, without qualification, authorizes us to take as true the facts stated in the affidavits, and those facts undoubtedly sustain the application for continuance. A motion was subsequently made for a new trial on the ground of error in refusing the continuance. In his reasons for refusing a new trial, the judge says: "The court, considering that the accused was arraigned at the beginning of the term, and asked for witnesses residing 50 miles from the court-house four days before the trial, and considering, further, that the witnesses who testified in the case for the accused gave him an opportunity to make a full defense, and that this motion is made for delay, orders that the motion for a new trial be refused." It is questionable whether we should import these reasons into the bill taken to the refusal of the continuance, but, even if we should do so, they are manifestly insufficient. The case is fully covered by our decision in *State v. Egan*, 37 La. Ann. 368. It is therefore adjudged and decreed that the verdict and sentence be annulled and reversed, and the case be remanded for further proceedings according to law.

STATE v. CHANTLAIN.

(*Supreme Court of Louisiana*. May 5, 1890.
42 La. Ann.)

JUDGES—PLEAS OF RECUSATION—HEARING.

Articles 338, 340, Code Prac., define and limit the causes for which judges may be recused or may recuse themselves. While it is the duty of the judge to refer pleas assigning any of such grounds of recusation to a judge *ad hoc* for trial, irrespective of the merits, this duty does not apply to pleas which set forth no legal cause of recusation, and which, if admitted to be true, would furnish no ground therefor. Such pleas the judge may treat as frivolous, and made for delay, and may set them aside without reference.

(*Syllabus by the Court*.)

Appeal from district court, parish of Acadia; *Lewis*, Judge.

Charles W. Dukoy, for appellant. *The Attorney General*, for the State.

FENNER, J. Appeal from the district court for the parish of Acadia. The sole ground of error assigned arises on a bill of exceptions to the ruling of the judge overruling a motion to recuse him, and refusing to refer it for trial to a judge *ad hoc*. If the motion had assigned any legal ground for recusation, it would have been the plain duty of the judge to refer it for decision to a judge *ad hoc*, under our repeated decisions. *State v. Judge of Fil-*

teenth Dist., 33 La. Ann. 1293; State v. Judge of Twenty-First Jud. Dist., 37 La. Ann. 253; State v. Judge of Third Jud. Dist., 38 La. Ann. 247; State v. Judge of Twenty-Second Jud. Dist., 39 La. Ann. 995, 3 South. Rep. 91. But these decisions do not refer to motions which upon their face, and admitting all their allegations to be true, afford no legal ground for recusal. The Code of Practice (article 338) is very explicit in defining and limiting the causes for which a judge may be recused. He cannot be recused, nor, under article 340, can he recuse himself, for any other causes than those so specifically mentioned. The motion made by defendant sets forth no one of these causes. It was frivolous on its face, made only on the eve of trial, and could have no purpose or effect but to create delay. When we said, in the opinions above referred to, that the judge's duty to refer was irrespective of the merits of the plea, of course we meant only the issues of fact involved under a plea valid if sustained by proof. We did not mean to compel judges to go through the idle ceremony of referring pleas which, if admitted to be true, would furnish no ground for recusal. This would be to issue a patent for a brand new device to obtain delays in criminal causes which the clumsiest hand could operate successfully. Judgment affirmed.

STATE v. FERGUSON *et al.*

(*Supreme Court of Louisiana. May 19, 1890.*
42 La. Ann.)

CRIMINAL LAW—APPEAL—RECORD—DISMISSAL.

Where a *certiorari* has issued to complete a record, and a reasonable time for the service of the writ and the return of the record has elapsed, and the appellants have neglected to take out and serve the writ, the appeal will be dismissed.

(*Syllabus by the Court.*)

Appeal from first recorder's court; W. B. MURPHY, Recorder.

John G. McMohan, for appellants. T. McC. Hyman, for the State.

MCENERY, J. The defendants are appellants from a sentence of the recorder's court of the city of New Orleans condemning them to pay a fine for a violation of a city ordinance. A motion to dismiss the appeal has been filed by the city of New Orleans.

The transcript was filed 23d September, 1889. The case was fixed for hearing 5th December following. On that day appellants, alleging a defective record, moved for a *certiorari* in order to complete the record. The case was again fixed for trial on the 24th day of April, 1890. No time was asked for in defendants' motion, and no day fixed for the return of the writ in the order of court, but more than reasonable time has elapsed since the order was granted. The appellants have neglected to take out and serve the writ in order to complete the record. The fault is imputable to them.

It is therefore ordered that the appeal be dismissed.

STATE v. JOHNSON *et al.*

(*Supreme Court of Louisiana. May, 1889.*
41 La. Ann.)

WITNESS—ATTACHMENT—IMPEACHMENT—MURDER—CONDUCT OF TRIAL.

1. An attachment cannot be required against an absent witness when it appears that he is not in the state, and was not served, and there is no showing that the accused did not know of his absence, that his testimony is material, and that his attendance can be secured for an early trial.

2. A previous statement made at the calling of the case, on inquiry by the court, that only one attachment would be desired against an absent witness, not the one out of the state, is a waiver of all attachments against all other witnesses.

3. No question, the object of which is to impeach the testimony of a witness, can be put unless a foundation for it has been previously laid, and the witness put on his guard.

4. Arraigning a witness who refuses to testify in a case in which he is a co-defendant with one on trial, and who has severed in his defense, is no irregularity which vitiates the proceedings as to the accused at the time on trial by the jury.

5. A statement by the trial judge that evidently an effort is made to intimidate the witness on the stand is not a comment on the facts.

6. A question to ascertain the general reputation of the witness for truth and veracity must seek to elicit the information for such in the neighborhood in which he lives.

7. A statement of what another said touching the condition of a particular spot at a specified time may be admitted to establish one of the mediums by which a successful search was made for the weapon used in the commission of the offense charged.

8. The reception of such statement cannot be complained of in the absence of a showing that it unduly influenced the jury, or injuriously affected the accused.

9. Jurors, without any charge from the court, know that testimony of that character can at best be only circumstantial, particularly in criminal cases, in which substantial and convincing proof is required for conviction.

10. The fact that the trial judge admitted two of the co-defendants to trial cannot be established to conduce to the innocence of the other accused.

11. Such action, if allowed to be proved, might be considered as a comment on the facts by the judge, who would not have allowed the privilege of bail, where the proof is evident or the presumption great.

12. Compulsory process against witnesses will not be granted where the testimony would be cumulative only of that heard on the trial, and due diligence was not used to secure the attendance of the witnesses for the trial.

13. Testimony to show the spot at which was found the weapon with which the crime was committed is admissible.

14. A question put a witness on his *voir dire* to affect his credibility, and not allowed to be answered, cannot serve as a matter of complaint where the witness was not heard otherwise in the case.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; LEWIS, Judge.

Jules Gil, H. L. Garland, Jr., Kenneth Ballho, E. P. Veazie, and W. S. Frazee, for appellant. Walter H. Rogers, Atty. Gen., for the State.

BERMUDEZ, C. J. Joe Johnson, John Hardy, and two others were prosecuted for murder. The former were found guilty without capital punishment, and sentenced to hard labor for life. The latter were acquitted. Johnson had severed in his defense. Hardy alone appeals from

the verdict and sentence. The transcript contains 11 bills of exceptions, and a motion for a new trial. In their brief, counsel for appellant allude to many of them, saying merely that they are all well founded, and calling the attention of the court to the remaining ones, taken to the refusal of the trial judge to allow them to cross-examine Joe Johnson, a co-defendant, to grant a continuance, a new trial, and to issue compulsory process against certain witnesses. The bills will nevertheless be considered *seriatim*.

1. The first bill relates to the refusal of the trial judge to issue an attachment for Hudson, an absent witness. It appears that this witness had not been served, because not found, as he was then in Arkansas, and was not served. The accused made no showing to establish that he did not know of the absence of the witness, that his testimony was material, or that his attendance could be secured for an early trial. It also appears that on the day previous, when the case was called and taken up, counsel for the accused, after ascertaining that this witness could not be found, stated, in answer to inquiries from the court, that another witness, Emily Williams, was the only one for whom an attachment was desired. This was a waiver of attachments against all other witnesses. The motion presented no merit, and, apparently made for delay, was properly declined.

2. The second refers to the refusal of the judge to compel Johnson, while a witness on the stand, to answer questions touching certain statements said to have been made by him. The object in view appears to have been, in putting the questions, to impeach his veracity as a witness. As no foundation had been previously laid to put this witness on his guard, and such was essential, the court was bound to protect him, and ruled correctly.

3. The third bill relates to the refusal of the court to allow a continuance owing to the absence of the witness Hudson. What has already been said to justify the court in refusing an attachment against this witness is a ready answer to the complaint of the refusal to continue the case owing to his absence.

4. The fourth bill refers to the arraignment of the co-defendant Johnson in presence of the jury before which Hardy was being tried. As already stated, Johnson had severed in his defense. Put on the stand by the state, he refused to testify, on warning by the court that his testimony might be used against him on his trial for the same offense. On his refusal to testify, he was arraigned. It appears that the court allowed the arraignment to give the state time to serve copy of the *venire* and indictment on Johnson, to expedite his trial at that term of the court. The state had a right thus to arraign the accused, as it had to arraign any other accused, and the jury had no right to consider the arraignment as having any connection with Hardy's case before them. It is not perceived, nor has it been shown, how this arraignment could have illegally and injuriously influenced the jury on the occasion. The judge did not err.

5. The fifth bill relates to a remark made by the judge while Johnson was on the stand, which was, that it was perfectly evident that an effort was being made by defendants' counsel to bulldoze him. The objection that this remark amounts to pronouncing on the facts, which are within the province of the jury alone, is too trivial to receive an extended notice. The judge, however, has given satisfactory reasons to show how this remark was induced and justified.

6. The sixth bill refers to the refusal of the judge, on objection, to allow the following question to be put to a witness on the stand: "Do you know the general reputation of Johnson for truth and veracity?" The court ruled that the question was not in proper form, as it did not call for the general reputation of the witness in the neighborhood in which he lived. The question ought to have embraced at least that material element, and was properly excluded.

7. The seventh bill relates to the admission of the statement of a witness that another had told him "that the pond was dry." The admission was opposed because hearsay, and the declaration was made out of the presence of the accused. The judge says that the question was designed to establish one of the mediums of information by which the sheriff was enabled to make a successful search for the knife alleged to have been used by one of the accused. No showing is made to justify the slightest suspicion or inference that the statement could have or had any influence on the jury, or that the accused would be or was injuriously affected by it. Jurors know, without any charge from the court, that such evidence must be barren of effect, particularly in criminal cases, in which substantial and convincing proof is required for conviction.

8. The eighth bill refers to the refusal of the judge to allow the defendant to introduce evidence to show that he had allowed two co-defendants the privilege of bail. Had the judge admitted the proof, he might have been amenable to the charge of indirectly commenting on the facts, as he would not have permitted release on bail had the proof been evident, or the presumption great.

9. The ninth bill relates to the refusal of the judge to grant compulsory process against witnesses to substantiate the grounds upon which the motion for a new trial was founded, and to grant the new trial. It appears that the facts intended to be proved had been established at the trial, and that the testimony would have been cumulative only, and that the defendant had not used due diligence, as he could and should have done, to secure the other witness to testify before the jury. The reasons given by the judge amply support his ruling.

10. The tenth bill refers to the admission of the statement of the sheriff, as a witness, that the knife with which the throat of the deceased had been cut had been thrown in the pond. The court received the statement as corroborative of a kindred matter testified to by another, and as designed to establish a fact which in-

duced the sheriff to take action, which he detailed to the jury. The court properly received the testimony.

11. The eleventh and last bill relates to the refusal of the judge to allow a question to be put to Johnson recalled after he had been examined on his *voir dire*, and declared competent. The question was put during a second examination on his *voir dire*, but was not allowed to be answered, as it did not affect his credibility; and he was not heard otherwise in the case, because he would not testify.

12. It is needless to consider the motion for a new trial and the affidavit in support, as its merits have already been tested, and received attention, in passing upon the ninth bill of exceptions. Judgment affirmed.

STATE *et al.* v. MILLER.

(Supreme Court of Louisiana. Jan., 1899. 41 La. Ann.)

CRIMINAL LAW—APPEAL—DISMISSAL.

An appeal taken from a judgment rendered in a proceeding, apparently criminal, will not be dismissed for want of a citation to the plaintiff, who cannot be permitted to change the character of the proceeding, and claim that it is civil in its nature, to oust the defendant from an appeal taken by him, as though the proceeding was a criminal prosecution, in which no citation is required.

(Syllabus by the Court.)

For former opinion, see 5 South. Rep. 258.

L. De Porter and Howe & Prentiss, for appellant. H. N. Gautier and Gervais Leche, for appellees.

FENNER, J. Defendant appeals from a judgment imposing upon him a fine of \$20, and, in default of payment, imprisonment for 16 days, as a penalty for the violation of an ordinance of the police jury of the parish of Jefferson, passed in the following terms: "No railroad train shall be allowed to pass through the limits of the villages of this parish at a greater rate of speed than six miles an hour, and any conductor or engineer so offending shall, on conviction before a proper court, be fined for such offense the sum of twenty (\$20) dollars, or be imprisoned in the jail for a period not less than ten, nor more than thirty, days." The suggestion that we have no jurisdiction in such a case is without merit. It is undoubtedly a case "wherein the constitutionality or legality of fine or penalty imposed by a municipal corporation is in contestation," and of all such cases, without limitation, article 81 of the constitution invests this court with jurisdiction. Various defenses are urged, one of which, however, is so radical that, being well founded, it dispenses us from the necessity of considering any others. This is the lack of authority in the police jury to pass such an ordinance. Police juries can only exercise such powers as have been granted to them in express terms, or such as are necessarily implied from, or incidental to, powers so expressly granted. 1 Dill. Mun. Corp. § 353. The power exercised by this ordinance to regulate the speed of railroad trains is certainly one not usually granted to, or claimed by,

municipal bodies having such broad territorial jurisdiction as police juries. Such power is, indeed, frequently granted to incorporated towns and cities, and, in cases where such bodies are vested with general grant of police powers, perhaps the power to make such regulations would be considered as embraced therein. But the legislature of this state has not seen fit to invest the police juries of the parishes with any general grant of police powers. An examination of the provisions of the Revised Statutes, under the title of "Police Jury," shows that the legislature has very carefully limited and defined the powers granted to these bodies, and nowhere therein can be found any grant embracing, either expressly or by implication, or as a necessary incident, the power asserted by the police jury in this ordinance. Even had there been a general grant of police powers, we do not think it could, under any reasonable construction, have embraced the power here asserted, because it would have been a power entirely outside of the usual function of police juries hostile to public policy, and trenching upon the proper legislative domain. As every railroad train necessarily runs through a succession of parishes, if each may require a rate of speed not exceeding six miles, all may do so, and the practical result might be that no railroad train could run at a greater speed anywhere in this state. It is true the ordinance only refers to the passage of the train through "the village of the parish," but if it may exercise the power there, why not elsewhere? Besides, what are the "villages of the parish?" We are not aware of any law recognizing such municipal organizations. Any settlement may claim to be a "village" as well as another. Every plantation "quarters" might set up its claim, and the result would be that the unhappy conductor or engineer might hardly know when he was in or out of the limits of a "village." Satisfied, as we are, that the police jury, in passing the ordinance, exceeded its powers, the penalty for its violation cannot be enforced. It is therefore ordered that the judgment appealed from be avoided and reversed, and that the defendant is discharged.

STARNES *et al.* v. HADNOT *et al.*

(Supreme Court of Louisiana. March 3, 1899. 42 La. Ann.)

JUDGMENT—COLLATERAL ATTACK—ESTABLISHMENT OF DESTROYED RECORDS.

1. Under Act No. 102 of 1863, providing for the establishment of destroyed records in the courthouse at Alexandria, in Rapides parish, the record and judgment in the suit has the force and effect of the original record destroyed, and is the best evidence of its contents.

2. A judgment rendered by a court of competent jurisdiction, when the proper parties have been cited, must have full force and effect until set aside by a direct action. It cannot be attacked collaterally.

(Syllabus by the Court.)

Appeal from district court, parish of Grant.

R. J. Bowman, for appellants. White & Thornton, for appellees.

McENERY, J. This is a suit to partition the community alleged to have existed between Martha E. Lewis and her husband, C. Lewis. They had been previously married, and Mrs. Lewis had children by her former marriage. Both had property when married. The plaintiffs are the children of the first marriage. The defendants are the children of Mr. and Mrs. A. C. Lewis.

The defendants excepted to the demand of plaintiff upon the ground that there was a marriage contract entered into before marriage between Lewis and Mrs. Starnes, which provided that there could be no community of acquiescence and gains, and for the additional reason that Mrs. Lewis had before her death partitioned all her property among her children by both marriages. The exception was refused to the merits to stand on an answer. By agreement the issue is confined to the question of the right of plaintiff to a partition, which involves the fact whether or not there was a marriage contract which stipulated there could be no community between the spouses. There was judgment in favor of the defendants, from which plaintiff appealed. To prove the marriage contract, the defendants offered in evidence the record and judgment in suit No. 1,428 of the district court of the parish of Rapides, entitled *Martha E. Starnes v. Alfred C. Lewis*, her husband, reviving the marriage contract between her and her husband. The marriage contract had been passed before Lewis, a notary public for the parish of Rapides, and had been by him deposited and recorded in the recorder's office of that parish. The original was so deposited and recorded. The suit of Mrs. Starnes against her husband, Lewis, was brought in pursuance of Act No. 102 of 1868, providing for the revival of destroyed records by the burning of the court-house in Rapides parish in May, 1864, by the federal troops, when they set fire to and destroyed the town of Alexandria. Section 3 of said act is as follows: "That hereafter any person desiring to establish any deed, bond, mortgage, judgment, or any writing whatsoever, which was of record or deposited in any office in said parish, and destroyed by the burning of the court-house in May, 1864, may have the same established by applying to the judge of the district, by petition setting forth the contents and description of the deed, bond, mortgage, judgment, or any writing whatever which he, she, or they, may wish to establish, with as much specific certainty as possible, which petition must be signed by the maker or other party, or parties in interest of the said maker or other party or parties in interest, residing in the parish of Rapides." The act (section 3) requires the judge to render judgment establishing or not such deed, etc., as the evidence proves it to have existed. The recorder's office was in the court-house, and the records of the office were destroyed. The plaintiff objected to the introduction of this record and judgment on the ground that it is not the best evidence, and no basis had been established for its offer." The record is the best evidence of its contents. The act referred to

authorized the suit to establish the existence of a lost or destroyed record, and the judgment reversing and establishing the same has the same effect as the original writing which was destroyed.

The plaintiffs object, also, to the suit, because Lewis, the defendant, acknowledged service, and confessed the fact. He had, under the act, no other alternative. In proceeding to establish the destroyed record, the defendant is required to admit the facts, or to deny them under oath.

This judgment is not impeached for any reason that would render it an absolute nullity. It must have full force and effect until set aside in a direct action. The judgment was rendered by a court of competent jurisdiction, and the proper parties were duly cited. It cannot be attacked collaterally. *Succession of Quin*, 30 La. Ann. 947.

There is a large amount of testimony introduced and objected to, by both parties, to establish or deny the existence of the marriage contract. But we deem it unnecessary to review it, and go beyond the record in the suit of *Starnes against Lewis*, her husband. The judgment in the case establishes the existence of the marriage contract, and the stipulation therein that there should not be community between the spouses.

The judgment appealed from is therefore affirmed.

SUCCESSION OF GIRARDEY.

(*Supreme Court of Louisiana*. April 7, 1890.
42 La. Ann.)

JUDICIAL SALES—DISCHARGE OF LIENS.

1. Liens, privileges, and mortgages for taxes are excepted from the general rule that judicial sales have effect to cancel mortgages and privileges, and to refer them for satisfaction to the proceeds of sale.

2. Such privileges and mortgages are governed by special legislation in reference thereto, under which they adhere to the property until paid or extinguished in some other legal mode, notwithstanding any sale.

(*Syllabus by the Court*.)

B. R. Forman, for appellant. *Wynne Ragus* and *W. B. Somerville*, for appellee.

FENNER, J. Appeal from the civil district court for the parish of Orleans. The property of this succession having been duly sold at probate sale to pay debts, a certificate of mortgages was obtained which exhibited sundry conventional, legal, and judicial mortgages standing against the property, besides numerous tax-liens and privileges in favor of the state and city. Thereupon the administratrix took a rule against two of the private mortgage creditors, the city of New Orleans, the city comptroller, and the state tax collectors for the several districts of the city, requiring them to show cause why all the inscriptions reported in said certificate of the recorder of mortgages should not be erased and canceled, and why the said tax collectors and city comptroller should not erase and cancel from their respective books all claims for state and city taxes as claiming to bear upon the property described, and their respective claims be re-

ferred to the proceeds, and said officers be ordered to give their certificates to be annexed to the acts of sale, showing that said claims have been canceled and erased. Under this prayer we consider nothing at issue in the proceeding, as between the succession and the state and city, except the legal question whether or not a probate sale of property to pay debts has effect to transfer tax-liens and privileges from the property to the proceeds of sale. Counsel for plaintiff in rule, in his brief, states that the relief sought was "to show cause why all the inscriptions should not be erased and canceled, and their respective claims be referred to the proceeds." We shall therefore decline to consider the questions suggested in other parts of the rule and of the briefs, attacking the validity of the tax inscriptions as affected by prescription and other defenses. The question here is not whether the claims are valid, but whether they are to be removed from the property, and referred to the proceeds. The judge *a quo* evidently took this view of the rule, because he discharged it absolutely, although sundry of the tax inscriptions are admitted by all parties to be prescribed, and although it is elementary, and not disputed by any one, that the sale had effect, when duly executed by payment of the price, to transfer the private mortgages and privileges to the proceeds for satisfaction. We shall therefore confine our discussion to the question above indicated, viz., whether or not the judicial sale of property has effect to discharge it from tax-liens and privileges, to refer them to the proceeds of sale, and to pass the title to the purchaser disincumbered of such liens. Whatever may be said of the wisdom and policy of such legislation, the revenue statutes of the state leave no room for doubt that property subject to tax-liens and privileges cannot be disincumbered thereof otherwise than by payment of the taxes, or by their extinguishment in some other legal mode, and that no sale can have effect to relieve the property sold therefrom, and to refer them for satisfaction to the proceeds. Section 2519 of the Revised Statutes, reiterated expressly in the general revenue laws subsequently passed, provides: "Hereafter neither recorders, sheriffs, notaries throughout the state, nor other persons authorized to convey real estate by public act, shall pass or execute any act for the sale, transfer, or exchange of any real estate, unless the state, parish, or municipal taxes due on the same be first paid, to be shown by the tax collector's receipt or certificate to that purpose." Such provisions are obviously inconsistent with the claim advanced by the plaintiff in rule. So far from transferring the tax-liens from the property to the proceeds of sale, the law holds the title of the property *in statu quo*, and prohibits its passing to the purchaser at any sale, public or private, until the taxes due thereon are first paid. We need not discuss the validity or effect of Act No. 88 of 1888, amending section 2519, Rev. St., because it perpetuates the same principle in a modified form. Several cases are quoted in which the right of the state and city, consenting thereto, to look

to the proceeds of sale for satisfaction of their taxes, has been recognized. *Sion of Zacharie*, 30 La. Ann. 1260; *Sion of Dupuy*, 33 La. Ann. 260. But cases obviously rest on the consent of the taxing authorities, and the absence of test. When the question was so presented, in absence of such consent, very recently held that the tax-lien privileges adhered to the property withstanding the judicial sale, and not transferred to the proceeds. *v. Lalaurie*, 39 La. Ann. 47, 1 South. 659. Plaintiff's right to test the validity and existence of the taxes, and inscriptions thereof, in a proper proceeding is reserved, and, with this reservation, judgment affirmed.

STATE *ex rel.* BRAZEALE *v.* FRANKLIN
(Supreme Court of Louisiana. March 43 La. Ann.)

TAXATION—APPEAL—JURISDICTIONAL ACT

1. The supreme court, when the amount involved is less than \$2,000, has jurisdiction of tax-suits when the constitutionality or legality of the tax is involved.

2. In the absence in the pleadings of objection as to the legality or constitutional character of the tax, the appeal will be dismissed.

Appeal from district court, parish of Natchitoches; PIERSON, Judge.
Jack & Dismukes, for appellants.
Brazeale, for appellee.

MCENERY, J. This is a suit to compel the payment of licenses alleged to be due by defendants for carrying on the business of traveling show, dentistry, mail-order business, merchant, and hawker, aggregated for both state and parish licenses to the sum of \$281.75. Defendants answered that they constitute a firm, and carry on business as a hawker, in the capacity of which they are liable to the license of hawker, and that capacity for which they have paid, and they owe no other. There is no issue suggested by the pleading in and out of the legality or constitutionality of the tax. There is only a question of fact at issue,—whether or not the defendants carry on the business for which a license is demanded. It is not plain that the license as hawker covers the occupation, and authorizes the defendants to pursue them. The amount involved is less than \$2,000, and this court is therefore without jurisdiction. Article 81 of the constitution, as amended. We will, therefore, *ex proprio motu*, dismiss the writ. *Police Jury v. Wise*, 33 La. Ann. 704, 1 South. 804, 6 South. Rep. 804, (not decided.) It is therefore ordered that the appeal be dismissed.

STATE *ex rel.* BOARD OF DIRECTORS OF PUBLIC SCHOOLS *v.* CITY OF NEW ORLEANS
(Supreme Court of Louisiana. Feb. 1900.)
CONSTITUTIONAL LAW—TAXATION—SCHOOLS—MUNICIPAL CORPORATIONS.

1. A municipal corporation, sued under a writ of mandamus, deemed by it to be unconstitutional, the object of which is to compel it to increase its appropriation from its alimony, has the right

the unconstitutionality of the act, and to have the contention determined by the court.

2. It cannot be called on to show cause why a relief sought against it should not be granted, and, when it appears, in response, be met with the objection that it has no standing in court, and cannot be heard.

3. In such cases, the court will not refuse to listen to the defense, but will inquire and pass upon its merits.

4. The supremacy of a legislature over a city is not so absolute that it cannot be restrained by the organic law. Limitation imposed by the constitution upon its power cannot be overleaped.

5. The system of free public schools in Louisiana is a state institution, for the establishment, maintenance, and support of which the state is required to provide by taxation or otherwise.

6. As a rule, the taxing powers may be exercised by the general assembly for state purposes only, and by parishes and municipal corporations, under authority granted them by the legislature, for parish and municipal purposes alone; but, under express sanction of the constitution, the general assembly may authorize parishes to levy a tax for the public schools therein, not exceeding the state tax, and, with other parish taxes, not exceeding the limits of parish taxation fixed by the constitution.

7. The legislature cannot force a parish to levy a tax for school purposes. It may authorize it to do so, and when it has done so, and the parish undertakes to raise it, the constitutional limit must be observed.

8. To be valid, the levy of such a tax must find authority in the organic law.

9. It has therefore no authority to compel the city of New Orleans, which is the parish of Orleans, to make an appropriation to stand in place of the amount which a school-tax, if specially levied, would have realized.

10. The legislature cannot transgress its powers, nor invade those which are secured by the constitution to the city of New Orleans.

11. It cannot do indirectly that which it is incompetent to do directly.

12. Although the first part of section 71 of Act 81 of 1888 may be constitutional, the provisions which follow it, and which require the city of New Orleans to appropriate not less than \$250,000 for school purposes, are unconstitutional. They are therefore deemed unwritten, and not binding on the city.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

Walter H. Rogers, A. H. Wilson, E. B. Kruttschnitt, Chas. F. Buck, and Frank N. Butler, for appellant. Samuel L. Gilmore and Francis B. Lee, for appellee.

BERMUDEZ, C. J. This is a *mandamus* proceeding, the object of which is to compel the city of New Orleans to place the relator board on its budget of expenditures for 1889, for the sum of \$250,000, which it has failed to do, except to the extent of \$180,000. The petition is based on section 71 of Act 81 of 1888, relative to public schools. That section provides, substantially, that the council of New Orleans, in making their annual budget of expenditures, shall include therein the amount deemed necessary to meet the expenses of the schools, and keep in good repair school-houses and grounds, as may seem just and reasonable; provided it shall not exceed the statement of the school board to be previously made, and shall not be less than \$250,000, whereof \$75,000 is to be paid out of the reserve fund of 20 per cent. constituted by section 66 of Act 20 of 1882 and Act 109 of 1886, from

which certain claims against the board shall be paid gradually, so as to be extinguished in 1895. The section authorizes the board, if necessary, to enforce its provisions by *mandamus*. There is a charge of failure, and a prayer for relief. The defenses of the city are a general denial, and the unconstitutionality of the act on various grounds. A number of persons, claiming an interest, intervened, joining the board, and were met by exceptions and answers by the city. From a judgment dismissing the proceedings and the intervention, the relator and the intervenors have appealed.

The opposition of the city to the constitutionality of the act may be summarized as follows: (1) It embraces two objects; (2) it attempts to amend the city charter in a prohibited manner; (3) it is a local or special enactment, which was adopted without previous publication of intention, etc.; (4) it requires the city to pay, through the board of directors, a debt which it does not owe; (5) it requires the city to make an appropriation, for school purposes, which the city cannot be compelled to raise by a school tax. Counter, the board and the intervenors retort that the city of New Orleans has no legal standing to charge the unconstitutionality of any law affecting her.

Touching this peremptory objection to the right of the city to stand in judgment, which must be determined at the threshold, it might suffice to say that, however absolute and broad the powers of the general assembly may be in the city of New Orleans, their supremacy must be confined within certain boundaries by the state organic law, which cannot be overleaped; and that, when an attempt is made to transgress them, the city has an undoubted right to interpose impediments, and to be heard; but it is better that the matter receive attention.

The principle is well recognized that "where a demand is asserted against a municipality, though of a nature that the legislature would have a right to require it to incur and discharge, yet, if its legal and equitable obligation is disputed, the corporation has the right to have the dispute settled by the courts, and cannot be bound by a legislative allowance of the claim." Cooley, Const. Lim. 232, 233. Indeed, were it not so, the mouth of political organizations representing the corporations would remain absolutely muzzled. The corporations would have, not only tamely to submit to and passively to allow unconstitutional legislation to be executed, but could be constrained to carry it out themselves. The books are full of cases in which political corporations have been recognized the privilege of setting up the unconstitutionality of law, under which some unwarrantable right against their revenue and property was sought to be enforced, and in which the legality of such defenses has been sanctioned. When, therefore, the courts have said, in cases of that category, that such corporations cannot resist legislation affecting them, they would mean, and meant only, constitutional, and in no way unconstitutional, legislation, for the glaring reason that to

have meant and said the reverse would have been to have held that municipal corporations must, in all contingencies, accept and further unconstitutional legislation, which would be a monstrous proposition. The ruling of this court in the recent case of *State v. Shakespeare*, 41 La. Ann. 156, 6 South. Rep. 592, is no authority to prevent the city of New Orleans from being heard in the instant controversy. It was a suit in which the governor, intrusted with the execution of the law, claimed that, under the provisions of Act No. 63 of 1888, entitled "An act creating police board for the city of New Orleans, and defining its powers," it was made the ministerial duty of the mayor and councilmen of New Orleans to proceed to the election of six commissioners, who were, with the mayor, to constitute the police board; that they had declined to perform that duty; and that they should be compelled to do so. The return of the defendants was a charge of the unconstitutionality of the act sought to be enforced. The issue was whether the defendants, the representatives of the corporation as its council, could resist the execution of the law on that plea. It did not involve the question whether the defendant had any legal standing to plead the unconstitutionality of the law, or whether the city revenues should or should not be appropriated for the purposes of the police department. The act contemplated a reorganization of the police force, by withdrawing from the mayor and council the appointing power, and vesting it in a board created by the statute; and it prescribed, as a preliminary matter, that an election should be made by the council of the commissioners, who, with the mayor, were to constitute that board. Although the court catechised the defendants by informing them that it was improper for them lightly to question the validity of the act, which was *prima facie* constitutional; that it was better that they withhold their resistance until after it has been judicially declared unconstitutional; and that, by executing it, their responsibility was sheltered,—it did not hold that they did not possess the right of pleading its unconstitutionality, and that they would not be heard. Far from refusing to consider that defense, the court inquired into it, and sustained the constitutionality of the act, ordering the defendants to proceed with the election.

Here the controverted question involves the right of the legislature to dispose without warrant, and in spite of constitutional inhibition, of a large portion of the city's revenue for a specific purpose, injuriously. It is claimed, to other superior purposes; in other words, the power of that body to divert a part of the alimony of the city for an object for which it could not be forced to provide, which is not one of her essential wants and necessities, and which in amount is larger than that which the city can consecrate to that end. In support of her resistance, the city invokes the organic law, which prevents the legislature from enacting, and which has vested it with a discretion which cannot be coerced, and which she has reasonably exer-

cised. It would be strange, indeed, if, after the defendants have been commanded to show cause why the relief sought against them should not be granted, they could be met, when they appear in response, with the objection that they have no standing in judgment. *Grieff v. Kirk*, 17 La. Ann. 26; *Pasteur v. Lewis*, 39 La. Ann. 11, 1 South. Rep. 307; *McVeigh v. U. S.*, 11 Wall. 267.

Pretermittting an examination of the constitutional objections affecting the form of the act, primarily raised and before mentioned, we will now proceed to inquire and determine the last one which assails the substance of the act, as it may be valid in form, and yet invalid intrinsically. It is elementary that a state, in the absence of constitutional prohibition, may delegate part of her political and administrative powers to municipal corporations within her border, which then become state functionaries, and that, whenever such delegation may take place, the state can confer on them certain rights, which she may subsequently extend, abridge, or withdraw, as may seem just and advisable. This principle of delegation is essential in the very nature of things, as otherwise the local administration necessary for public good would be an impossibility, in consequence of the practical inability of the state general government to well provide, by itself, for the regulation of administrative matters in numerous important details, in the different parts of the state. The organic law may, however, check the incidental right of the legislature, so that, when constitutional restrictions have been enforced, the limitation is paramount, and the legislature is impotent. Indeed, it is a question settled beyond the possibility of reasonable doubt, and which needs no reference to authorities to be verified, that the supremacy of the legislature over a municipal corporation, in many respects, is restrainable by qualifications placed by the constitution, in terms or by fair implication. It is clear that the legislature can no more transgress a state constitution than a convention can violate the federal constitution, or than a municipal corporation can override its charter, valid laws affecting it, and the federal or state constitution. It therefore follows that, when restrictions have been placed by the higher law on the powers of the legislature, or when the authority with which it is specially vested is limited, the legislature has no right to compel municipal corporations to do that which the constitution says the legislature may authorize them to do; and, if the legislature undertakes to go beyond its power of authorization, its action is nugatory.

The fundamental questions upon which this controversy turns are: (1) Whether the legislature has stripped the city council from discretion in the matter of school appropriation; and, if it has done so, (2) whether it has or not transgressed the constitution in requiring an outlay which it could not command.

1. It is apparent that the legislature has in unmistakable language industriously at first expressed its will that the city council of New Orleans shall have a discre-

tion in such matters; but it is evident that it subsequently circumscribed the exercise of that discretion, when it provided that the total shall not exceed the amount set forth in the estimate of the board of directors to be submitted before the annual budget of expenditure is prepared, and shall not be less than \$250,000. It is therefore clear that the legislature intended that the city authorities should not have a discretion to appropriate more than one sum, and less than another, and that a breach of duty could be summarily provided against.

2. Such being the case, the momentous question arises,—whether the legislature had authority to prescribe and command as it did, in this case, requiring an appropriation. The city of New Orleans is a political organization, recognized and protected by the constitution and by legislation, under its provisions. It enjoys the privileges of a municipal corporation; possesses all the inherent powers necessary for its existence and maintenance, for the accomplishment of the purpose for which it was created. It is a being which cannot be blotted out of life. Its citizens have rights which cannot be divested. Although, under an express constitutional provision, the legislature has authority to cancel its charter, remit its inhabitants to another form of government, (article 254,) that body has no right to compel its representatives, by whatever name, under its actual or under an eventual power of government, to do that which parochial or municipal organizations cannot be forced to do. So that, if by the terms of the constitution, or by fair implication from them, it appears that the legislature cannot compel the city to make any appropriation for school purposes, it irresistibly follows that the legislature is not permitted to do so, either by special or general legislation, or by an amendment of the charter. The system of public education in Louisiana now is a state institution, and as such is placed under the control and protection of the state by the very terms of the constitution. Article 224 provides: "There shall be free public schools established by the general assembly, throughout the state, for the education of all the children of the state between the ages of six and eighteen years, and the general assembly shall provide for their establishment, maintenance, and support by taxation or otherwise; and all money so raised, except the poll-tax, shall be distributed to each parish, in proportion to the number of children between the ages of six and eighteen years." Inasmuch, however, as the revenues or resources of the state, owing mostly to the restriction imposed upon her taxing powers, may be inadequate to accomplish those purposes, the constitution (article 229, last sentence) has required the legislature to provide for the levy of school tax. The article (229) reads: "The legislature * * * shall provide that every parish may levy a tax for the public schools therein, which shall not exceed the state tax: provided, that, with such tax, the whole amount of parish taxes shall not exceed the limits of parish taxation fixed by this constitution."

In furtherance of that provision, the legislature has adopted Act 81 of 1888 by which parochial authorities have been empowered, in their discretion, to raise such tax. It is a remarkable circumstance that, had the constitution not thus expressly provided, the legislature could not have empowered parishes to assist the state in the establishment, maintenance, and support of the public schools, which are a state institution; for article 202 of the constitution says: "The taxing power may be exercised by the general assembly for state purposes, and by parishes and municipal corporations under authority granted to them by the general assembly, for parish and municipal purposes." In the case of *State v. Police Jury*, 40 La. Ann. 756, 5 South. Rep. 23, identical in principle with the instant one, it was claimed, under section 54 of that act, that the police jury of a parish was bound to levy such tax; but the court found and held that the word "may," used in the text, did not mean "shall," and that, traced through the last sentence of the article (229) to Act No. 23 of 1877, § 28, it simply meant "are authorized," determining, therefore, that the language is directory, and not mandatory. In that case it was said that a legislation touching public education, in order to be valid, must find its authority in the organic law itself, because public education is a state institution, to be fostered by the state. The court consequently held that legislation such as that before it could not be and was not peremptory, as otherwise it would transgress the legislative powers, and thus be unconstitutional; concluding that police juries are clothed, both by the constitution and the same act, with the discretionary or optional power of levying a public-school tax or not, as they might deem proper. Indeed, were a police jury to exercise its discretion and to levy a tax, this mere fact would not of itself make the tax legal and obligatory; for, under the very precautionary terms of the constitution, it would be valid only when with the whole amount of parish taxes, it would not exceed the limits of parish taxes fixed by the constitution, and, had the parish taxation already reached such limits, no such new tax could be at all levied. It appears by reference to section 54, invoked in the case just mentioned, that the city of New Orleans was industriously excluded, no doubt because there was to be further on, in section 71, some special legislation relative to it, and which is that relied on in this controversy.

The city of New Orleans represents the parish of Orleans, which has a nominal existence only. The territory over which the charter of the city extends is that of the parish of Orleans. The parish of Orleans, independent of the city of New Orleans, has no practical or legal existence. It is not governed by a police jury, and is not represented by any parish officer. The parish is the city, and the city is the parish. In the second paragraph of article 225 of the constitution, under the head of "Public Education," the city of New Orleans is treated of and dealt with as if it was the parish of Orleans, and, in section 54 of the act under consideration, provision is

made that towns, not exempted under their charter from the payment of parish taxes, and subjected to the burden of taxation, as the parishes are, shall not pay the tax mentioned in the section; for the same is included in the taxes imposed by the parish in which the town is situated. Now, if the legislature has no right to require a parish to levy a tax for school purposes, and if the city of New Orleans is the parish of Orleans, or the parish of Orleans is the city of New Orleans, where is its authority to demand, in place of such tax, that the sum of at least \$250,000, or any sum, be appropriated to school purposes. Even if the city was not the parish, where would be the authority of the legislature to divert from the alimony of the city, for school purposes, any sum, when, under section 54, the city would be formally exempt from any contribution in the cause of education? The city, however, was vested with authority to appropriate a sufficient amount out of her revenue for school purposes, by the first portion of section 71 of Act 81 of 1888, which left it a discretion in the matter, and which, exclusive of the provisos which follow, is constitutional; and the city did so, taking care that the amount appropriated, added to other sums appropriated for indisputable wants and necessities, should not aggregate more than the amount which the 10 mills tax imposed by her would realize. The city could not have imposed a special school tax, which, added to the city taxes, would have exceeded the 10 mills which, under article 209 of the constitution, it was authorized to levy, and the proceeds of which were to stand "for all purposes whatsoever." It appears from the record that the city council, in the exercise of the discretion with which it is vested by section 64 of the charter of 1880, in the apportionment of the alimony of the city, has prepared and adopted a budget of the expenditures of the city for 1889, in which provision has been made for all the essential wants, and for public schools, placing these in it for \$155,000, to be paid out of the general revenue, and \$25,000 for repairs of school-houses, etc., to be taken from the 20 per cent. reserve fund mentioned in section 71, relied on by the relator, for raising a total of \$180,000, about one-eighth of the gross amount of expenditures figured up therein, as being \$1,415,053. Considering, therefore, that the provisos of section 71 of Act 81 of 1888 are unconstitutional, and not binding on the city, it is ordered that the judgment appealed from be affirmed, with costs.

STATE *ex rel.* VOORHIES *et al.* v. EDWARDS,
Judge.

(Supreme Court of Louisiana. April 7, 1890.
42 La. Ann.)

CRIMINAL LAW—PLEAS—AUTREFOIS ACQUIT.

1. Where several pleas are tendered at the same time to an indictment, and they involve separate and distinct issues, they must be tried separately.

2. The plea of *autrefois acquit* is a plea in bar, and the defendant may show by matter outside of the record that the indictment is not maintainable.

3. The plea is of a mixed nature, embracing both law and fact, and ordinarily, therefore, requiring a jury, and must be disposed of by a plea of not guilty.

(Syllabus by the Court.)

Application for *mandamus*, *prohibere*, and *certiorari*.

W. & M. Voorhies, for relators.

MCENERY, J. The relators complain of the rulings of the respondent judge in the trial of an offense charged against them by information, for threats, violence, and intimidation at the municipal election of the town of Lafayette on May 1, 1889. There are several alleged irregularities in the rulings of the respondent judge, which we deem it necessary to notice only in the refusal of the judge to hear the *autrefois acquit* at the proper stage of proceedings.

There were three indictments preferred against the accused by the grand jury of the October term, 1889, of the district court for Lafayette parish. At the term of court the district attorney filed an information charging one of the relators with having made an assault with a dangerous weapon on one Mouton, which grows out of the same transaction as the alleged intimidation, threats, and violence of said municipal election. The indictments—*State v. Olivier*—intimidation, threats, and violence, were tried, and the defendant acquitted. One of the relators. The two other indictments were quashed, on demurrer, on the ground that there was no law making the acts alleged in the indictment an offense against the state. After the judgment in these cases the district attorney, at the last day of the term, filed two informations against the relators, charging them with the same offense which had been preferred in the quashed indictments. Relators filed in the three pending informations motion to quash the same on general grounds; among others, that the accused had already been put in jeopardy for the same offense charged in the informations, and that they had been finally discharged upon demurrer. On the next day, after these indictments were filed, the district attorney filed a fourth information against relators in the matter of *State v. C. H. Voorhise et al.* On the next day, relators filed a motion to quash the information, embodying the same grounds as in the other motions. Disregarding the motions of the relators, the court filed its judgment on Thursday of the same week. The court refused to hear evidence on the motion, in which was contained among other matters, the plea of *autrefois acquit*. The motion contained pleas, and, although tendered to motions involving separate and distinct issues.

In his opinion for overruling the motions the district judge says: "While defendants were not allowed to offer evidence in support of their motion, yet, conceding all the facts to be admitted, does it come within the grounds for quashing? As former judgments do not put defendants in jeopardy on the principle of once in jeopardy, double jeopardy does not apply; and, on general principles, it is concluded that such former indictment, and

quashing thereof, does not constitute a bar to the prosecution." This was gratuitous and irrelevant. The plea of *autrefois acquit* is a plea in bar, and the defendant may show by matter extrinsic of the record that the indictment is not maintainable. 1 Bish. Crim. Proc. § 742. The plea is of a mixed nature, embracing both law and fact, and ordinarily, therefore, requiring a trial by jury. Id. § 816. The evidence to sustain it is the record, and it is conclusive of what it recites. The identity of the parties and the offense is established by parol testimony. Id. § 816.

The judgment of the court on overruling the motion is as follows: "The motion to quash is for the above reasons overruled, reserving to defendants the right to try the special plea of *autrefois acquit* and the matter in abatement under the second ground." The minutes of the court show, however, that no opportunity was afforded relators to try this plea at the proper stage of the proceedings. At the very moment the order in this case was served on the respondent judge, the trial was progressing on the plea of not guilty. The relators, after the filing of the special plea, were arraigned, and pleaded not guilty. In his work on Criminal Procedure, Mr. Bishop says: "Where the special plea and not guilty are pleaded together, the better practice is not to try them together, but to submit the former to the jury first. Still, some American courts appear to allow it, when accompanied by the instruction to the jury to pass on the former first, and disregard the latter if they find on the former for the defendant. But even then a verdict of guilty, with no response to the special plea, will be erroneous." Section 812. The plea ought to have been submitted to the jury before the plea of not guilty was tried. Whart. Crim. Law, § 568. Although the plea was tendered with other pleas, it involved a distinct issue, and should have been tried separately. 1 Bish. Crim. Proc. § 752.

It is therefore ordered and decreed that the ruling of the district judge wherein he declined to allow the relators to adduce evidence in support of their motion to quash, in so far as it sets up the plea of *autrefois acquit*, and the subsequent rulings in said case, be annulled; and it is now ordered that he be directed to hear said motion anew, and to try said plea and admit said evidence, and further to proceed therein according to law, and that the restraining order herein be made peremptory until he shall have retried and determined said motion to quash.

NEW ENGLAND & MUT. LIFE INS. CO.
v. RANDALL et al.

(Supreme Court of Louisiana. Jan. 6, 1890.)

PRINCIPAL AND SURETY—RIGHTS OF SURETY
—RELEASE.

1. When a creditor receives property from a debtor for the payment of a debt for which security has been given, it is the duty of the creditor to hold the same for the joint benefit of himself and surety. He has no right to dispose of it or appropriate it without the surety's consent.

2. When the creditor intends to look to the surety for payment, he is compelled to preserve unimpaired all his rights against the debtor.

3. If the creditor, therefore, does any act without the surety's consent, which impairs his rights of subrogation, or the means of enforcing his claim against the principal in case he should pay the debt, the surety will be discharged.

4. The right of subrogation to the rights of the creditor is an essential part of the contract of suretyship.

ON REMARRING.

1. If the creditor has any security from his debtor, and he parts with it, without communication with his surety, that will operate, to the value of the security, to the surety's discharge.

2. If the creditor does any act, without the surety's consent, which impairs or reduces the means of enforcing his claim against the principal, in case he should be called upon to pay the debt the surety is discharged.

3. It is of the essence of the contract of suretyship that the surety who pays has a right to demand of the creditor subrogation to his rights, securities, mortgages, and privileges; and this right of subrogation is part of the consideration of his contract of suretyship.

4. There is a privity of contract between the surety and creditor which compels the latter to preserve his rights for the former. No one can become surety against the creditor's will, though he may against that of the debtor.

5. The creditor has an undoubted right to receive additional securities, but not the right to appropriate them without the surety's consent. If he does, the surety is discharged.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

Bayne, Denegre & Bayne, for appellant.
Merrick, Foster & Merrick, J. McConnel, Blanc & Butler, and W. S. Benedict, for appellees.

MCENERY, J. The plaintiff sued M. C. Randall, its agent in the city of New Orleans, and Henry Ginder, E. C. Palmer, P. H. Werlein Mehele, the sureties on his bond, for the sum of \$33,233.93, the amount of the defalcation of the agent, Randall, to said company. There was judgment against Randall on his written confession, which was made final, and the sureties were released, from which judgment the plaintiff has appealed.

The answer of the sureties is substantially as follows: They plead the prescription of one, two, three, five, and ten years. They allege that there is no sum of money due said company by Randall; that if any sum is due to the company by him it arose through the negligence of the company in failing to compel him to make prompt returns of collections; that, if the plaintiff is entitled to a judgment against defendants, they are entitled to receive from plaintiff the sum of money received from the assets turned over to plaintiff by Randall, and that they are entitled to a judgment in reconvention of said amount; that, if any liability existed on the part of the sureties, they have been discharged by plaintiff's own acts and doings, made without the knowledge or consent of the defendants, in regard to the property and assets turned over and assigned to plaintiff by Randall, and converted to its own use and benefit by said insurance company.

The evidence establishes the liability of the defendant Randall in the amount of which judgment was rendered against him. There is no evidence that the company was guilty of any negligence that contributed

to Randall's defalcation. A demand was made upon the sureties, and suit commenced, before prescription had been acquired.

The only serious defense is that the sureties are discharged by the company's acts in receiving property from Randall on account of his defalcation, administering it and converting the same to its own use and benefit, without the knowledge or consent of the sureties. Before and after the institution of this suit the company received from Randall a number of insurance policies upon which it placed its own valuation; a fee due Randall in the insolvency of Carriere & Co., which it collected; a claim against Joseph Satini for \$6,315.38, which it compromised, as the evidence shows, at considerable less than its value; and immovable property in Virginia, which the company in part disposed of, and retained an interest, which it has valued in the remainder, and a cash payment from Randall of \$740.11, and a transfer from Randall for commission for policies received, amounting, it is alleged, to some \$9,000. The full value of these assets was more than sufficient to extinguish Randall's liability. The company admits it realized only \$12,098.12 on these assets. The company received from Randall all the property he possessed, and administered it as receiver, disposing of it, and converting it without the knowledge or consent of the sureties.

It matters not whether the company received the full value of the assets turned over to them by Randall. The question is whether the company has changed the obligation of the surety, and impaired any of the rights of the surety against the principal. "The surety is discharged when, by the act of the creditor, the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety." Rev. Civil Code, art. 3061.

The company received voluntarily from the agent, Randall, all of his property. It was appropriated by values placed upon it by the company, and by Randall, and it disposed of all of it, either to the company or to others. The duty of the company was not to appropriate or dispose of the property, whether received before or after the sureties' liability had accrued by the defalcation of Randall, without the knowledge and consent of the sureties, but to hold it responsible for its care and the sureties' benefit. *Springer v. Toothaker*, 43 Me. 381; *Baker v. Briggs*, 8 Pick. 122; *Hayes v. Ward*, 4 Johns. Ch. 129; *Low v. Smart*, 5 N. H. 353. This the company has not done. The plaintiff has placed the property beyond the reach of the sureties. They cannot demand subrogation to the creditor's rights against the principal, to which they are entitled under their contract of suretyship. When the creditor intends to look to the surety for payment he is compelled to preserve unimpaired all his rights against the debtor. If the creditor, therefore, does any act, without the surety's consent, which impairs his rights of subrogation or the means of conferring his claim against the principal in case he should be called upon to pay the debt, the surety will be discharged. The sureties in

this case may have desired to pay their obligation, which was for \$2,500 each, and take the assets of their principal, to the extent and amount of securing them against loss, and administer them for their just benefit. The evidence in the record leaves little doubt but that they could have realized more from the assets of Randall had they received and properly administered them, or had they been consulted about this disposition.

In the petition of plaintiff no mention is made of the transfer of the assets of Randall to the company, nor is there any credit given to the defendants for the sum realized on them. The plaintiff contends that the acts of the company in taking the property of Randall operated an advantage to the sureties, and therefore they have no cause to complain. Admitting this to be so, the sureties stand on the strict terms of the contract, and even should the act be beneficial to them, if it in any way changes the contract of suretyship, the sureties will be discharged. The creditor has the right to make any change in the obligation. *McGuire v. Wooldridge*, 6 Rob. (La.) 50. The right of subrogation to the rights of the creditor is a part of the obligation, and an essential one, when the contract of suretyship is entered into. It exists whether the surety pays voluntarily or compulsively. *Offutt v. Hendsley*, 9 La. 12. In this case it is clear that the creditor, by his own act, has changed the contract of the surety, and has placed it beyond the power of the company to subrogate the sureties to its rights against the property of Randall.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

WATKINS, J. We have considered appellant's application for an oral argument on this motion, but deem it unnecessary to depart from the rules of court, as the question on which it rests is one of law, and the mover's brief is elaborate, and fully presents the authorities relied upon as supporting its theory. That theory is that, having a final and unqualified judgment against the defendant for \$33,000, as their agent, the plaintiff had the right to receive payment, or securities from him, for the deficiency, which was not affected by the obligations of the sureties. For instance, plaintiff's judgment being for \$33,000, and the several obligations of the sureties aggregating only \$10,000, Randall was at liberty to make a payment to the plaintiff in money, or to furnish the securities to the extent of the difference of \$23,000, and the plaintiff had the right to appropriate the same to the satisfaction of that difference, it not being covered by the sureties' obligations; and only when this deficiency had been first provided for could the sureties complain of any after-application of rights and securities of the debtor, and then to the extent only of the injury suffered by the sureties.

As supporting this proposition, counsel cite a number of authorities. The general effect of those decisions is that a partial release of any of the mortgages or privileges of the creditor releases the surety only *pro tanto*; or, in other words, the

discharge of the surety only takes place to the extent to which the acts of the creditor have prejudiced the recourse of the surety for reimbursement of what he may be obliged to pay under the contract of suretyship; or, as the cases put by Judge Story: "On the other hand, if the creditor has any security from the debtor, and he parts with it without communication with the surety, * * * that will operate, at least, to the value of the security, to discharge the surety." 1 Story, Eq. Jur. § 326. A careful study of the question has satisfied us that the contention of the plaintiff's counsel cannot prevail, though the principles of law that are announced in the various authorities cited are well recognized by us. We hold, simply, that the insurance company received from Randall, the defendant, all the values he possessed, and converted them to its own use, without the consent of the sureties, and in so doing placed same beyond their reach, and deprived them of their right of subrogation to the rights of the company against their principal, on the theory that, when a creditor intends to look to the surety for payment, he is bound to preserve unimpaired all of his rights against the debtor. On this hypothesis, our opinion proceeds and declares: "If the creditor, therefore, does any act, without the surety's consent, which impairs his rights of subrogation, or the means of enforcing his claim against the principal, in case he should be called upon to pay the debt, the surety will be discharged."

Our opinion rests upon an article of the Code, and *McGuire v. Wooldridge*, 6 Rob. (La.) 47, and *Offutt v. Hendsley*, 9 La. 12; but many other cases of like kind, import, and force can be cited. To point the argument in favor of its correctness, we make the following quotation from the latter: "It being of the nature of the contract of suretyship, that the surety who pays, whether willingly or compulsively, has a right to demand the subrogation of all the creditor's rights on his debtor, his property and his sureties, this right of subrogation is the consideration (or a part of it) of the obligation which the surety contracts. There is a privity of contract between the surety and creditor, which compels the latter to preserve his rights for the former. If the preservation of these rights be not burdensome to the creditor, they put an end to all trouble when the day of payment arrives, by insisting on payment from the surety. No one can become surety against the creditor's will, though he may against that of the debtor. The assent of the creditor is of the essence of suretyship; and no one can complain of the natural consequences of any contract into which he may enter." To this effect are many authorities: *Millaudon v. Arnoux*, 3 Mart. (N. S.) 598; *Abat v. Holmes*, 3 La. 352; *Mayor v. Blache*, 6 La. 514; *Hereford v. Chase*, 1 Rob. (La.) 212; *Commissioners v. Cordevielle*, 4 Rob. (La.) 506; *Van Wart v. Hopkins*, 5 La. Ann. 268.

It follows that the surety has a right to stand upon the very terms of his contract, and the creditor has no right to make any alteration in it. These principles are founded on provisions of the Code. Sure-

tyship is an accessory promise made to the creditor. Rev. Civil Code, arts. 3035, 3045. "The surety is discharged when, by the act of the creditor, the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety." Id. art. 3061. His discharge proceeds upon the theory that the act of the creditor which deprives the surety of the right of subrogation to the former's securities violates their privity of contract, and prevents the latter taking them to himself on paying the debt of the principal, to the extent of his contract of suretyship. Undoubtedly, the creditor has a right to receive securities from the debtor, but he has not the right to appropriate them, and thus deprive the surety of the right to subrogation, in case of making payment. The creditor's first and highest duty is to the surety; and he has no right to first exhaust the debtor's resources, and reduce him to a state of bankruptcy, and then call upon the surety to pay the balance that remains due.

We are thoroughly satisfied that our opinion is well grounded in law. Rehearing refused.

FENNER, J. I have given very close attention to the able brief for rehearing, and to the authorities in support thereof. These authorities certainly place a judicial construction on article 3061, Rev. Civil Code, to the effect that the partial release of any of the securities of the principal held by the creditor only releases the debtor *pro tanto*. *Barrow v. Shields*, 13 La. Ann. 63; *Provan v. Percy*, 11 La. Ann. 179; *Bourcier*, 29 La. Ann. 844; *Stewart v. Lacoume*, 30 La. Ann. 159. They rest on the principle that the creditor has the right to take payment from the debtor without discharging the surety from liability for any balance that may remain due; and so, if he has released, or has applied to his debt, securities of fixed or certain value, at that value, the sureties cannot, on that account, claim discharge from liability for the amount remaining due after crediting the debt for such values.

But I cannot convince myself that the principle or the authorities cover such a case as the one before us, on which the creditor, after the defalcation of its employe, takes from him all the assets of every kind which he possesses, consisting of a mass of securities of contingent value, such as policies of life insurance on the lives of the debtor and of third persons, undivided interests in real estate, litigated claims against debtors, unliquidated demands of various kinds, and, without notice to the sureties, proceeds, at its leisure, to reduce them all to cash by settlements, compromises, and otherwise, and after crediting such cash on the excess of their claim above the amount of the sureties' obligation, proceeds against the sureties for the balance. These securities transferred had an apparent or potential value exceeding the total amount of the debtor's liability. The policies of life insurance alone approximated in amount the total liability. Had Randall died the day after the transfer, the policies on his life alone, with the amounts actually collected from

other sources, would have wiped out the whole debt. What right had the creditor, without notice to the sureties, to surrender these policies to the insurance companies at a trifling cash valuation? *Non constat* that the sureties might not have preferred themselves to take these policies at the cash valuation, to keep them alive, and thus secure themselves against eventual loss. Might not the sureties have preferred to buy in the real estate which was sold in partition, which sale may have been at a sacrifice, or which they might have desired to hold for a rise in value? Might they not have chosen to resist the compromises and settlements of the litigated and unliquidated claims, which the creditor chose to make, or to have paid him the amounts which he was willing to take for them, and to prosecute the suits? These rights certainly belong to the sureties under article 8061 of the Code, and the creditor had no right to deprive the surety of them. They had the right and the interest to see that the assets surrendered by their principal were so administered as to realize the utmost possible value to be appropriated in reducing the debt for which they were responsible, and to have a voice in such administration. The creditor had no right to so make compromises, and settlements and surrenders, according to his own whim, without consulting the sureties, and without giving them even a chance of taking to themselves the benefit of such settlements, and, after denuding the principal of everything he has in the world, to turn his sureties over to a barren recourse against him. Such unauthorized dealings with the securities turned over by the debtor are inconsistent with the intention or with the right to pursue the sureties. He has deprived the latter of valuable rights of subrogation which inhered in their contract, and the penalty is the loss of his right to proceed against them. It is said, however, that, in this case, the denial by the sureties of their liability on this bond, in any event, deprives them of the right to complain of want thereof. They never made such denial until their answer in this suit, which was not filed until after all the dealings above complained of had been completed. They were left in ignorance of any claim against them until after their principal had been shorn of every vestige of property to which they might have looked for protection under the unauthorized dealings of the creditor, and I think they were justified in setting up every possible defense to such a suit. I therefore concur in the refusal of the rehearing.

POCHÉ, J., concurs in this opinion.

BROWN *et al.* v. TEXAS & P. RY. CO.
(Supreme Court of Louisiana. April 7, 1890.
42 La. Ann.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

1. If a railroad crosses a common road on the same level, the traveler on the latter, and the railroad company, are under the common obligation to do all in their power to prevent a collision.

2. From the character and momentum of a railroad train, and the requirements of public travel

by means thereof, it cannot be expected that it shall stop and give way to an approaching wagon. The train has the preference and right of way, but it is bound to give due warning of its approach.

3. Hence it is negligence on the part of the engineer running the train to omit to give such warning by sounding the whistle the distance required by the rules of the company.

4. But, on the other hand, those who travel on a common road, and are approaching a railroad track, are bound to exercise due care and ordinary diligence to ascertain if a train is approaching, even if, to their knowledge of the road's schedule, no train is due at that particular time. Before attempting to cross the railroad track, they are bound to use their senses to listen, and to look, in order to avoid any possible accident from an approaching train.

5. Hence it is negligence on the part of such a person to attempt to cross a railroad track which is several feet above the level of surrounding fields, on which there are no obstructions to view or to sound, in broad day-light, and to fail to look either way on the track, or to listen to the noise made by an approaching train running at great speed. In such a case, as his negligence has contributed to the accident, he cannot recover damages against the railroad company.

(Syllabus by the Court.)

Appeal from district court, parish of Iberville.

Howe & Prentiss, for appellant. E. B. Talbot, Sims & Gaudin, and J. A. Talbot, for appellees.

POCHÉ, J. This is an action in damages, by the father and the mother of one Elize Brown, for the death of the latter, which resulted from a collision between a passenger train of the defendant company and a plantation cart driven by the deceased. The defense is a general denial, and the plea of contributory negligence. The railroad company appeals from a judgment of \$10,000 based on the verdict of a jury.

The accident occurred on the 6th of March, 1889, at about 2 o'clock P. M., on a large sugar plantation, situated on the Mississippi river, extending to the rear between lateral lines, and which is crossed from one of said lines to the other by the road-bed. There are on the plantation several roads, extending from the front to the rear thereof, which cross the railroad, and which are elevated at each intersection to a height sufficient to reach the level of the road-bed, so as to facilitate the passage over the same. On that day the deceased, Elize Brown, who was a laborer on that plantation, was engaged in hauling seed cane from the front to the rear of the field, and in that work he had to use one of the roads which intersected the track as hereinabove stated. The cart which he drove was hitched to four mules,—two leading together, and two together as wheel mules; one of the latter being ridden by the driver. As a special passenger train, running from New Orleans west at the rate of 30 miles an hour, approached that plantation, Brown, the deceased, was driving his empty cart from the rear or swamp side of the railroad to the front or river side of the plantation; and, as his team was in the act of crossing the track, the collision occurred, by which three of the mules were killed outright, and by which he received the injuries which caused his death some 50 hours later.

Plaintiff's theory of the case is that the

accident is attributable exclusively to the fault of the company and of its employes, and that the deceased is entirely free of any charge of negligence, or want of proper care, in the premises. Their contention is that it was gross negligence on the part of the engineer to have failed to blow his whistle at one-quarter of a mile before reaching the crossing, as he was required by the rules of the company, and for failing to give any other warning of the approach of his train, which was an extra train running and passing that point at an unusual hour, at which time no train of any description, or in any direction, was due, according to schedule. They further contend that for these same reasons the deceased, whose work necessitated his frequent crossing of the railroad track, and who knew that no train was to be expected from New Orleans before late evening, and that the first train due on that day was to come from an opposite direction on its way to New Orleans, and would be due only at half past 8 in the evening, was not held to a greater degree of care and caution than that which he had exercised on the occasion.

On many of the questions of fact involved in that contention the evidence is very conflicting, but the preponderance of the testimony in the record is to the effect that, as Brown approached the railroad track, he was driving his team at a slow trot, but, as he began to ascend the elevation leading to the crossing, his mules moved at a walk, which was their gait when struck by the engine. He was looking straight ahead, and he did not see the train, or hear its noise. When he was at a short distance from the track, he was seen by the fireman, who had just then taken his seat on the same side of the engine as that on which the team was moving, having a moment before been engaged in putting coal in the furnace. As soon as he saw Brown, he began to ring his bell, and, observing that the latter was still approaching the track, he sang out to the engineer that a team was approaching; but Brown was then only about 10 feet from the track. The engineer, who sat on the opposite side of the engine,—the regular place of that employe,—did not, and says that he could not, see Brown, on account of the intervening boilers; and he saw only the two lead mules, and that only at the moment of the collision. On the warning of the fireman the engineer at once sounded his whistle, applied the air-brakes, and reversed his engine; but it was too late, and the collision occurred.

It is admitted by the engineer in his testimony that he did not sound his whistle one-quarter of a mile before reaching the crossing at which Brown was struck, and that his only alarm whistle was sounded at about half a mile distant from that point, and that it was really the whistle for a platform on the adjoining plantation. That testimony, therefore, goes a great way to fasten proof of negligence on the engineer, who is thus shown to have neglected or failed to comply with the rule of the company itself, by which he was required to have sounded his whistle at a

quarter of a mile before reaching the crossing at which the accident occurred.

But the question is yet open as to the contributory negligence charged to the deceased. It is in proof that the road-bed was elevated about four feet above the level of the surrounding fields; that, at that season of the year, there were no plants growing or grown, no weeds or undergrowth of any kind, or other obstacle to obstruct the view of the road, which lay high and clear, open to uninterrupted view, for at least half a mile either way from the crossing. The whole scene was in a large open field in full cultivation, without the slightest obstacle to noise or sound; and it was on a clear day, with sunshine, at about 2 o'clock P. M., that the accident occurred. It is therefore clear and unquestionable that the deceased was in no way deprived of every facility to see the approaching train, or to hear the loud noise made by it in its rapid motion, at the rate of 30 miles per hour. But it is in proof, and it is not denied by plaintiff, that as he approached the road, and before attempting to cross it, Brown looked right straight ahead, without turning his eyes either way, although his mules slackened their gait as soon as they reached the elevation hereinabove described, which was at least a reminder of the proximate crossing. It is no answer to this suggestion to say that the train was a special train, running at an unusual and an unexpected hour. It is in proof that special or extra trains were not of unfrequent occurrence on that road; and common prudence would dictate to any ordinary man that a train might be expected at any time on a railroad of vast extent, in full and active operation, especially at its busy season, as was the case here.

The relative duties of persons in charge of trains on railroads, and of travelers who have occasion to cross such railroads, are well defined in jurisprudence, and are thoroughly understood in all American courts; and we commend our learned brother of the district court for having adopted, and embodied in his charge to the jury, the following simple and clear exposition of those rights and duties made by the supreme court of the United States in the case of *Improvement Co. v. Stead*, 95 U. S. 161: "If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to any approaching wagon to make the crossing first. It is the duty of the wagon to wait for the train. The train has the preference and right of way; but it is bound to give due warning of its approach, so that the wagon may stop, and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. * * * On the other hand,

those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But, notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them,—such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their own misfortune."

In another case the same exalted tribunal announced practically the same principle in the following language, as condensed in the syllabus of the case of *Railroad Co. v. Houston*, Id. 697: "The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveler on the street from the necessity of taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses, to listen and to look, in order to avoid any possible accident from an approaching train."

In his work on *Contributory Negligence*, Beach, culling the same rule from "a multitude of decisions," formulates the doctrine thus: "When one approaches a point upon the highway where a railway track is crossed upon the same level, it is his plain duty to proceed with caution; and, if he attempts to cross the track, either on foot, or in a vehicle of any description, he must exercise, in so doing, what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption. * * * In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track." Section 63, pp. 191, 192. "Statutes and municipal ordinances in every jurisdiction prescribe specifically the duty of railway corporations in respect to railway crossings; but no failure on the part of the railroad company to do its duty will excuse any one from using the senses of sight and hearing upon approaching a railway crossing, and, whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of negligence, without any reference to the railroad's failure to perform its duty." Section 64, p. 195. See, also, 2 Wood, Ry. Law, 1312; *Salter v. Railroad Co.*, 75 N. Y. 281; *Murray v. Railway Co.*, 31 La. Ann. 492; *Childs v. Railroad Co.*, 33 La. Ann. 154; *Houston v. Railroad Co.*, 39 La. Ann. 796, 2 South. Rep. 562; *Weeks v. Railroad Co.*, 40 La. Ann. 800, 5 South. Rep. 72.

As applied to the case in hand, this rea-

sonable rule required that Brown, in attempting to cross the railroad track, should have looked up and down the track. By so doing, he would inevitably have seen the train, which was in full view for nearly a mile without the slightest obstruction. And that obligation is not affected by the fact that the train was a special or extra train. That circumstance may have mitigated the degree of his negligence, but it could not screen his conduct from the imputation of some negligence. Had he listened as he approached the crossing, he would certainly have heard the train as it thundered along in the open field, at the rate of 30 miles an hour, with no obstruction to sound, and making a noise which one of the witnesses compares to that made by "a drove of cattle going across a bridge." It is in proof that one of plaintiffs' witnesses, who was half a mile off, another, who was at a distance of 100 yards, a third, who was 800 yards off, and a fourth, who was at a distance of several hundred yards, and who was walking towards Brown on the same road, and on the opposite side of the track, all saw and heard the train before the accident, and that the attention of one of them was attracted to the train by the noise which it made. There is no pretense that Brown was defective in hearing, or near-sighted, and it is passing strange that he should have neither seen nor heard the approaching train. Plaintiffs' counsel suggest that his mind was absorbed in thoughts about his work. This is very probably the case; and it turns out to have been his misfortune, and the loss of his parents, but is legal negligence which clearly contributed to the deplorable accident which cost him his life, and which is a bar to plaintiffs' right of recovery in this case.

It was negligence on the part of the engineer to have omitted to sound the whistle at a quarter of a mile before that crossing; but that omission did not render the accident inevitable if, on the other hand, Brown had been sufficiently prudent and careful when he approached the crossing. It is in proof that his mules came from a slow trot to a walk at about 20 feet from the track. Had he seen or heard the train, it was yet time, and it would have been easy for him, to have stopped his team, and thus have avoided the accident. When the train hands first saw him, they used every means in their power to avert the collision; but it was no easy matter to stop a train moving at the rate of 30 miles an hour, and there was no obligation on the part of the company to slacken the speed of its trains at the numerous plantation cross-roads intersected by its track. When the fireman first saw Brown, he rang the bell, and he naturally supposed that the team would be stopped before reaching the crossing. But, as the team kept on approaching, the engineer who could not see Brown from his place, was thus warned; and he applied the brakes, and reversed his engine, but he was too late. At that point, nothing more could have been required of them.

We therefore conclude that Brown's

negligence or want of care contributed to the accident, and that, therefore, his parents cannot recover in the present action.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the verdict of the jury be set aside; and that plaintiffs' demand be rejected, and their action dismissed, at their costs in both courts.

Rehearing refused.

STATE v. CLEMENT.

(*Supreme Court of Louisiana.* May 5, 1890.
42 La. Ann.)

FORGERY—INDICTMENT—EVIDENCE.

1. Forgery can be proven, although the instrument forged is not minutely described, provided it be described by any name by which it is usually designated.

2. An allegation of the value of the forged instrument is not essential in the indictment or information.

3. The offense may be charged in different ways in several counts.

4. When counts for felonies are joined in a way to prejudice the defendant, the remedy is by motion to elect or motion to quash, but after verdict it is too late.

(*Syllabus by the Court.*)

K. A. Cross, for appellant. *The Attorney General*, for the State.

BREAUX, J. Appeal from the seventeenth judicial district court, parish of East Baton Rouge. The accused is charged with having committed forgery. From the sentence to hard labor, he appeals.

During the trial, he objected to the admissibility of evidence, and assigned as error that the bill of information was too vague and indefinite to authorize the admissibility of the proof offered; that the check alleged to have been forged was not described, nor the name forged alleged. The objection was overruled, and a bill of exceptions was reserved to the court's ruling. By way of motion in arrest of judgment, the grounds overruled and reserved in this bill are alleged, and with particularity it is set forth that the first count of the bill of information is insufficient and illegal; that it is not alleged in what the forgery consisted, nor whose name was forged on the order. A bill of exceptions was taken to the court's refusal to permit its minutes to be amended by substituting the words "guilty on both accounts" to the words "guilty on both counts." Lastly, it is assigned as error that the accused was not present when the motion for a new trial and the motion in arrest of judgment were argued and overruled, and when the verdict was returned into court.

1. In support of his proposition—the first presented—with reference to vagueness, and the absence of material allegations, counsel for the defendant cites as authority the case of *State v. Sheldon*, 8 Rob. (La.) 540. Since the date of that decision the statutes denouncing forgery have been amended and remodeled, and criminal pleadings, in so far as relates to forgery, have been liberalized, without curtailing the protection of the innocent accused of crime. *State v. Maas*, 87 La. Ann. 293;

State v. Wingard, 40 La. Ann. 735, 5 South. Rep. 54; Rev. St. § 1049. It is sufficient to describe the instrument forged by any name by which it is usually designated. It is not essential to state the value of the forged instrument in the indictment or bill of information. It is alleged that the accused forged the indorsement. This denounces the felony, and sufficiently notifies the defendant of the name he is accused of having forged. It was proper to admit the evidence.

2. In support of defendant's motion in arrest of judgment, it is urged by counsel that the first count does not charge in what the alleged forgery consisted, or the amount of the order, or whose name was forged; that the second count does not charge whose name was forged as indorser, and does not describe the order. We have already discussed some of these grounds, and have expressed our conclusion. The defendant is charged in two counts: In the first, with having falsely made, forged, counterfeited, and altered as true a false order for the payment of money, knowing the same to be false, forged, and counterfeited, with intent to injure and defraud the First National Bank of Baton Rouge. In the second he is charged with having falsely made, forged, and counterfeited, and altered as true, an indorsement of a bill of exchange for the payment of money, knowing the same to be false, forged, and counterfeited, with intent to injure and defraud the First National Bank of Baton Rouge, and A. Martinez. In each count he is charged with forgery, and with altering and publishing a forged instrument. In the last he is especially accused of having forged the indorsement on this forged instrument. The defendant chose to plead to the information without presenting the plea of duplicity, without calling on the prosecutor to elect, and without motion to quash. In permitting different counts, the object is to permit the charge to be brought so as to prevent an acquittal by reason of insufficient allegations. Bish. Crim. Proc. 422, sets down certain rules on the subject, and concludes that, "where counts for felonies are joined contrary to these rules, or in any way to prejudice the defendant, the remedy is by motion to compel the prosecutor to elect on which count he will proceed, or by motion to quash, but after the verdict it is too late." *State v. Depass*, 31 La. Ann. 488. The offense may be charged in different ways in several counts. *Nelson v. People*, 5 Parker, Crim. R. 39; *Lanergan v. People*, 6 Parker, Crim. R. 209.

3. It is also contended that the defendant was not present when the motion for a new trial and the motion in arrest of judgment were heard and overruled, also when the verdict was returned into court. There was no necessity of his presence when the motions for a new trial and in arrest of judgment were argued and denied. He was present when the verdict was returned into court. *State v. White*, 37 La. Ann. 178. He was present when the jury was impaneled. The case was tried in a day. There was not any adjournment during the trial. Unless the absence

is shown, the defendant must be considered present when the verdict was returned into court. *State v. Price*, Id. 215.

4. The last ground is directed against the form of the verdict. The defendant represents that he is aggrieved in that the verdict read "guilty as charged on both accounts," and that an incorrect entry was made in the minutes of "guilty as charged on both counts." This does not vitiate the verdict. It is a clerical error. It escaped attention at the time. Some time after the entry had been made in the minutes, after sentence, and after the judgment had been signed, a motion was made to correct the minutes, and refused. The verdict might have been delivered orally. The clerical error cannot defeat the evident finding of the jury. *State v. Florez*, 5 La. Ann. 429; *State v. Ross*, 32 La. Ann. 854; *State v. Smith*, 33 La. Ann. 1414.

Judgment affirmed.

STATE V. PALFREY *et al.*

(*Supreme Court of Louisiana*. May 5, 1890.
42 La. Ann.)

CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS.

In case a trial judge shall state, in a bill of exceptions reserved by counsel for an accused person, that he has substantially given to the jury certain requested special charges, and the proof adduced on a motion for a new trial discloses that, in point of fact, the judge has accidentally failed to thus charge the jury, either in terms or substance, justice requires that a new trial should be ordered.

(*Syllabus by the Court.*)

J. Foster, J. A. Breaux, and Foster & Brauvall, for appellants. *The Attorney General*, for the State.

WATKINS, J. Appeal from the twenty-first judicial district, parish of Iberia. The several defendants were jointly indicted for murder, convicted of manslaughter, and from judgment and sentence thereunder have appealed.

1. During the progress of the trial defendants' counsel insisted (1) that the state must prove the existence of a conspiracy before she can introduce in evidence the declarations of one of the alleged co-conspirators as against others; (2) that a proper foundation must first be laid. The ruling of the judge was made the subject of a bill of exceptions, and defendants' counsel contend that, while admitting the force of the rule, the judge reversed it, and permitted in evidence the declarations of some of the parties as against others, to prove a conspiracy. But this is refuted by the judge, who states in the bill that "the evidence was offered by the state to show conspiracy, and in order to lay the proper basis for the introduction of evidence of the subsequent declarations made by the parties accused."

2. Counsel further objected and excepted (1) that the declarations or admissions of one person are not admissible in evidence against another person, who is jointly indicted, unless the indictment charges a conspiracy; (2) that the declarations or confession of an alleged co-conspirator, made after the accomplishment or abandonment of the common enterprise, could not be received in evidence as against others. The

court overruled the objections to the testimony on the grounds "that the declarations sought to be proven are the statements of each individual accused as to himself; that the evidence is not received of the declaration of one, to have effect against the others, but are received against each, in so far as it may affect him, and not the others." Of this ruling we can perceive no well-grounded complaint.

3. On the trial the defendants' counsel requested the court to charge the jury (1) that the declarations of one of the alleged co-conspirators, made after the homicide, are not admissible in evidence against others jointly indicted, if the indictment does not charge conspiracy; (2) that the declarations of one conspirator, made after the purpose of the conspiracy had been accomplished, are not admissible against the others jointly indicted. The court refused to so charge the jury, on the grounds following, viz.: "After a full and exhaustive charge on all the laws connected with, and applicable to, the case, or any of the facts of the case, the defendants' counsel requested the aforesaid special charges; and I carefully read both the written requests, and proceeded to give to the jury instructions on the point as a whole. After completing the charge, the jury was ordered and taken to their room for deliberation, counsel not insisting on anything more than what I have stated, suggesting nothing more, and in no way complaining to me. After the jury had retired, counsel then arose, and said: 'We reserve a bill to the court's refusal to charge as above.' The court then proceeds to state that, in point of fact, it 'never did refuse to charge on the points stated, and it felt satisfied that, in the charge given to the jury, ample and sufficient instructions had been given on all laws relating to the cause on trial.' The court had specially charged the jury in relation to declarations and confessions of parties jointly accused, and (under the facts of the case) had, in so many words, instructed them that the declaration of each or either, as to the commission and perpetration of the crime charged, was evidence against the party who made the declaration or confession alone, etc. The judge thus substantially answered the objections urged by counsel. It has been held that 'when a judge has already charged the jury on a given matter, and the prisoner among his requests of charges made thereafter includes the matter already charged, the judge may well refuse to repeat it.' *State v. Boasso*, 38 La. Ann. 202. But it is the contention of counsel that the judge was in error in stating that he had, in substance, given to the jury the charge requested. But, on the face of the bill of exceptions, there is nothing to show whether the judge or counsel is correct. Counsel of defendants freely admit the force of the rule, by us repeatedly announced, that, 'in considering bills of exception which contain conflicting recitals by counsel, and by the trial judge, [we] will be guided by the statements of the judge.' *State v. Waggoner*, 39 La. Ann. 920, 3 South. Rep. 119; *State v. Young*, 40 La. Ann. 483, 4 South. Rep. 481.

4. The defendants' counsel filed an extended motion for a new trial, the point of which is that the judge never directed the jury, and failed to give them proper instructions, as matter of fact, in reference to the testimony adduced, and particularly with reference to such part of the evidence as is covered by the bills of exceptions above enumerated, and whereby the jury may have been unduly influenced against them. Among other things the following are specified, viz.: (1) That the jury were not warned to disregard the alleged declarations and confessions of some of the accused parties, made after the homicide had been committed, and the judge did not, in the presence and hearing of the jury, limit and restrict the effect of the evidence, as he assigned in the bills of exception; (2) that, in point of fact, the judge did not instruct the jury as requested by them, and as set out in their bill of exceptions which is discussed in paragraph 3, and they gave weight to, and consideration of, illegal evidence, which influenced their verdict. The motion covers the point raised in the third bill of exceptions, and raises the question of fact whether the judge in reality gave the requested special charges. On the trial thereof testimony was introduced, and *inter alios* a sworn copy of the stenographic report made of the charge actually given to the jury, and which was made at the request of defendants' counsel at the time. An attentive perusal of it discloses the fact that the judge failed, in words or in substance, to charge the jury as requested. As a witness, the judge says: "I do not now remember whether or not, when the exceptions marked '2' and '3' were signed, the jury were still in their room. Since having examined the notes which I had taken in the case while it was being tried, I find that the special charges alluded to by counsel in bill No. 4 were not given, because, in the rulings made at the time in bills 2 and 3, my notes indicated that these reasons had already been stated." From a copy of the stenographic report of the charge, and the judge's admission as a witness, he made the statement quoted from bill of exceptions, under a misapprehension of fact arising from his accidental omission to follow his notes, in giving an oral charge to the jury, and one of great length. We think the jury may have been prejudiced thereby, and that a new trial should have been allowed the accused. It is therefore ordered and decreed that the verdict and judgment appealed from be set aside, and the cause be remanded to the lower court, to be therein proceeded with according to law and the views herein expressed.

BREAUX, J., having been of counsel, recuses himself.

STATE v. ANDERSON *et al.*

(*Supreme Court of Louisiana.* May 5, 1890.
42 La. Ann.)

CRIMINAL LAW—APPEAL—REVIEW—EVIDENCE— BILL OF EXCEPTIONS.

1. An accused has a right to have testimony reduced to writing, in exceptional cases, to es-

tablish material facts, touching which there exists a difference of opinion between the judge and himself, which would have disclosed a condition of things favorable to the accused, and assisted him in his efforts for an acquittal.

2. A bill of exceptions taken to the refusal of the trial judge to cause such writing to be taken down cannot be sustained where it does not show the nature and substance of the testimony; that there existed a difference between the accused and the judge; that the testimony was illegally admitted, and was insufficient to serve as a foundation for the introduction of proof of voluntary declarations; and that, had the testimony been written down, it would have shown that the declarations ought not to have been received, and that by its not being thus taken the accused has sustained real injury.

3. A motion in arrest, based on the insufficiency of the description of part of the goods alleged to have been stolen, in an information for larceny, comes too late after trial and conviction. Even if the description was defective, it would be no reason to quash the entire information where it contains another good count, descriptive of other objects said to have been stolen.

4. A bill of exceptions to the overruling of a motion in arrest is a superfluity.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; LEWIS, Judge.

E. P. Veazie and *Chas. W. Du Roy*, for appellant. *The Attorney General*, for the State.

BERMUDEZ, C. J. Anderson appeals from a judgment sentencing him to hard labor for 18 months on a conviction for larceny. The record contains a bill of exception to the refusal of the trial judge to have certain testimony reduced to writing, a motion in arrest, and another bill to the overruling of such motion.

1. The first bill recites "that, on the trial of this prosecution on its merits, the state was proceeding to offer evidence to lay the basis for the introduction in evidence of voluntary declarations of the accused, when the accused asked the court to reduce the said evidence to lay a basis to writing, inasmuch as this was a question of blended law and facts reviewable by the supreme court, and inasmuch as the accused wished to have the question reviewed by the supreme court, which could only be done by writing down said evidence to lay a basis for the introduction of voluntary declarations; but the court refused to reduce the same to writing, and proceeded and admitted the said declarations of accused. To which ruling," etc. In support of this position the decision in *State v. Selley*, 41 La. Ann. 143, 6 South. Rep. 571, is invoked. The right of the accused to have testimony reduced to writing in exceptional cases was there, it is true, recognized, but for the sole purpose of establishing material facts in cases in which a difference of opinion as to such facts exist between judge and accused, and in which, had the testimony been thus reduced, it would have disclosed a state of facts favorable to the accused, and assisted him in his efforts for an acquittal. In the present instance the bill does not show, as it ought, the nature and substance of the testimony, whether there existed any difference between judge and accused or counsel; that it was illegally received, and was insufficient to serve as a foundation;

and that, had the testimony been thus taken down, it would have shown that the voluntary declarations should not have been received, and that, by its not being so reduced to writing, accused has sustained great and irreparable injury. The bill cannot, therefore, be considered well founded.

2. The motion in arrest of judgment charges "that the indictment against him [accused] is insufficient, defective, and null, in this: that it does not describe all the goods alleged to have been stolen with legal certainty; that part of the count charging the stealing "other things of the goods and chattels of Joseph Landry," being a component part of the charge, is too vague and indefinite, and does not enable "the defendant, in case of acquittal or conviction, to plead the same to a subsequent indictment relating to the same property." If the information was defective in not specially describing the "other things," the accused should have demanded before trial a bill of particulars, or objected to the admission of proof when offered, during trial, to show what those "other things" consisted in. After taking the chances of a trial without any complaint on that score, his attack comes too late. Even if he were in time, it is more than questionable whether the objection could prevail against an information which contains a sufficient description of other goods and effects alleged to have been stolen. *State v. Laqué*, 37 La. Ann. 886.

3. The bill of exception taken to the overruling of the motion in arrest is a redundancy. The decree denying the motion is of record. Bills of exceptions are designed to put of record matters which without them would not appear. Considering that the motion in arrest was properly set aside, it is unnecessary to notice this bill further.

Judgment affirmed.

PEETZ v. ST. CHARLES ST. R. Co.

(*Supreme Court of Louisiana*. May 5, 1890.
43 La. Ann.)

STREET RAILWAYS—PERSONAL INJURIES—NEG- LIGENCE—EVIDENCE.

1. The failure to examine witnesses who are employees will not justify the application of the presumption of negligence, unless, as in the case of *Day v. Railroad Co.*, 35 La. Ann. 694, they were present, or it be made evident that they had knowledge which the employer desired to conceal.

2. The duty of municipal corporations is only to see that its sidewalks are safe for persons exercising ordinary care and prudence.

(*Syllabus by the Court*.)

Harry H. Hall, for appellant. B. K. Miller and James Timony, for appellee.

BREAUX, J. Appeal from the civil district court, parish of Orleans. Plaintiff alleges that she was injured on the night of the 26th of November last, between the hours of 8 and 9 o'clock, by a fall occasioned by a plank nailed on a bridge at the intersection of Baronne street by Euterpe street; that in the fall she broke her left arm between the elbow and the wrist, and that she was bruised on her side and hips; that

she suffered pains, mental and physical, and was confined to her house about one month, under medical treatment. She claims damages in the sum of \$10,000. The answer is a general denial. The case was tried by a jury, and a verdict was rendered in favor of the plaintiff for the sum of \$750. From the judgment the defendant appeals. The facts are that plaintiff, who is about 45 years of age, and who was at the time in the enjoyment of good health, received injury in a fall caused by stumbling against a plank nailed on a bridge, which the defendant company obligated itself to keep in good repair in a contract dated the 11th day of April, 1881. On the 12th day of December last she notified the company of the accident, and of the amount she claims. There are two parallel bridges over the gutters crossing Baronne street from the sidewalks to the railroad bed. The gutters covered by these bridges are the continuation on Baronne street, of the gutters on each side of Euterpe street. The plaintiff nearly always passes on the lower side of Euterpe street. On the night of the 26th of November last she passed on the upper side, and was crossing the upper bridge on Baronne street, when she stumbled and fell. The plank against which she stumbled and fell was about three feet and a half in length, ten inches wide, and about two inches in thickness. The plaintiff, as a witness, was questioned with reference to the accident. She was alone at the time. She stated that she fell on her arm. After the fall she rose hastily, and went on to where she intended to go. At the time she did not know that her arm was broken. The witness also testifies that there was an electric light burning brightly at the corner of the street near which she fell. She further testifies that she had seen planks nailed on other bridges, as this was; that if she looked she could have seen the plank; and adds: "I wouldn't have stumbled against it; I didn't want to fall." Two days after the accident, she called in a physician, and was informed by him that her arm was fractured. It is not proven by whom the plank had been nailed to the bridge. It was put there to cover a crack on this bridge. Most of it had been worn down by the wheels of passing carts and carriages, to nearly the level of the bridge; that part on which plaintiff stumbled was two inches and one-sixteenth above its level.

Counsel for plaintiff requested the court to charge that the failure of the defendant to call in their employees (to whom were personally intrusted the repairs of the bridge) as witnesses was evidence of the act of negligence charged against the defendant. This charge was asked on the authority of *Day v. Railroad Co.*, 35 La. Ann. 694. The president of the company, who is also the superintendent, testified that he made efforts to ascertain who had nailed that plank, and could not find out who had put it there. We will first pass upon the refusal to charge as requested. In the case cited as authority it is said by the court that the conclusion was fortified by the failure of the defendant to introduce the testimony of any of the em-

ployes on the train when the accident happened. In support of this proposition, the following from Thompson on Negligence (volume 1, p. 514) is referred to and accepted as an approved authority by the court in that case: "An absence, from the trial, of the employes of defendant who were on the cars and present at the time of the accident, and were witnesses of the injury, raises a strong presumption of negligence against the company." The case at bar is not similar. It is not shown that the employes knew who nailed this plank; that they had anything to do with it. Inquiry was made by the principal officer of the company with reference to the plank. He did not ascertain, he testifies, that the employes knew anything about it. While municipal corporations, and all those entrusted with the keeping of bridges in good repair, should be active and exceptionally careful in the performance of that work, on the other hand, those who cross these bridges are not entirely relieved from the necessity of exercising some little care and of giving some attention to their steps. Damages cannot be recovered for all injuries received. If, in the haste of the moment, or while the attention is entirely absorbed in thought, to an unfortunate pedestrian the fall is not always exclusively due to the uneven surface. Most of us are prone to forget that sidewalks and bridges are not always level, and have sometimes suffered severely on account of inattention or forgetfulness, without the possibility of recovering damages. Plaintiff was not ordinarily careful in crossing this bridge. There was a bright light near. She admits that she had seen planks before on other bridges nailed as this was; that if she had looked she could have seen it. The plank was not of extraordinary thickness, and was securely nailed on the bridge. It is not shown by whom it was put on, or that the defendant company had notice of the condition of this bridge, or that any complaint was made prior to the accident, or that the crossing was at all hazardous. When the plaintiff, recalling doubtless the pain she endured, sadly says, "I wouldn't have stumbled against it; I didn't want to fall,"—there is great sincerity in her words, and they naturally awaken a sentiment of kindness and sympathy, but they cannot serve to maintain precedents. It is not possible justly to charge to the defendant that to which plaintiff's own sad fate contributed, at least in part. To hold for plaintiff would be, in effect, to decide that whenever an accident occurs on uneven sidewalks, or in crossing bridges not level, without regard to the lack of care, damages can be recovered. It would be to decree, in effect at least, that all bridges and sidewalks should be level, and that nothing about them should be in the least rugged or uneven. However desirable it may be that all the streets be level, it is not a possibility. The regrettable accident is not one for which the defendant can be held in damages. The duty of municipal corporations is only to see that its sidewalks are safe for persons exercising ordinary care and prudence. 2 Dill. Mun. Corp. § 1019. It is therefore ordered, adjudged, and decreed

that the verdict be set aside, and that the judgment appealed from be annulled and reversed, and that there be judgment rejecting plaintiff's demand, with costs in both courts.

THEOBALDS, Tax Collector, v. CONNER.

(*Supreme Court of Louisiana.* June 13, 1890.
42 La. Ann.)

CONSTITUTIONAL LAW—TAXATION—LICENSES— MASTER BUILDERS.

1. Section 12 of Act 101 of 1886, the license law of that year, which provides an annual license for every individual carrying on the business or profession of master builder, or mechanic who employs assistance, does not contravene the provisions of article 206 of the constitution, which exempts from the payment of a license tax those who are employed in mechanical pursuits.

2. The law imposes a license on those persons who carry on any of the businesses, callings, or professions therein enumerated, such as contractors, master builders, and the like, and the constitution exempts those persons who are engaged in mechanical or manual labor.

(*Syllabus by the Court.*)

Appeal from magistrate's court, parish of Ouachita.

Boatner & Lamkin, for appellant. *Thomas O. Benton*, for appellee.

WATKINS, J. The tax collector proceeded by rule on the defendant to compel him to show cause why he should not pay license for pursuing "the business of contractor, or mechanic employing assistance." For answer to the rule, defendant denies owing the license demanded, and avers that so much of section 12 of Act 101 of 1886 as authorizes the collection of annual licenses of \$25 from every individual carrying on the business of master builder, or "mechanic who employs assistance," is null and void because it is in contravention of the 206th article of the constitution, which exempts persons engaged "in mechanical pursuits" from payment of such license. The magistrate made the rule absolute, and condemned the defendant to pay the license demanded, and he has appealed.

The defendant's counsel cite and rely upon our decision in *City of New Orleans v. Bayley*, 35 La. Ann. 545, as being conclusive of the question in his favor. In that case we had under consideration and construed the provisions of section 12 of Act 119 of 1880, it being the license law of that year enacted in pursuance of articles 206 and 207 of the constitution, and also a city ordinance providing a similar license for the municipality. In the course of that opinion we said: "The defendant is a plasterer, works at his trade with his own hands, and, when executing a larger contract than he can conveniently do himself, employs other plasterers to assist him. Manifestly he is engaged in a mechanical pursuit. The employment of assistance in his occupation does not alter the nature of his occupation. The constitution exempted those engaged in mechanical pursuits from the payment of license upon their trades." It then held that the license law of the state, and the license ordinance of the city enacted in pursuance thereof, were both illegal, saying: "The

superior law had already prohibited that kind of business from being taxed, and therefore the legislature was without authority to impose a tax upon it. Much more was the city without authority."

Undoubtedly that opinion is correct, for Bayley was a plasterer, and worked at his trade with his own hands. When he had a larger contract than he could conveniently perform himself, he employed other plasterers to assist him. Manifestly he was engaged in a mechanical pursuit, such as is contemplated in the constitutional exemption. But we feel quite sure that it was not the intention of the framers of the constitutional article to exempt persons carrying on the business in which the defendant is engaged, and we are equally certain that the legislature did not so construe its provisions; for, notwithstanding the interpretation placed by this court upon the provisions of the license act of 1880, the identical provisions thereof are found incorporated in the license law under consideration. The act declares "that the annual license * * * for every individual, or company *carrying on the profession or business of* * * * agency for steam-boats, * * * draying, trucking, keeping cabs or carriages, horses for hire, owners or lessees of toll-bridges and ferries, and *master builder, stavedore, and mechanic who employs assistance,* * * * shall be," etc. (*Italics ours.*)

The statute places each and every one of these avocations or employments in the category of "business or profession." Article 206 of the constitution declares that "all persons, associations of persons, and corporations pursuing any trade, *profession, business, or calling,* may be rendered liable to such [license,] tax, except clerks, laborers, clergymen, school-teachers, *those engaged in mechanical, agricultural, horticultural, and mining pursuits,*" etc. (*Italics ours.*)

This language justifies the distinction which the statute has made. It justifies a license tax being imposed on such persons as pursue any of the professions, businesses, or callings which are enumerated therein, and the exemption from such tax of those who are engaged as clerks or laborers, and those engaged in mechanical pursuits, etc. So it may be that a master builder or contractor, who employs workmen or assistants, is liable to this license tax; and at the same, a clerk, laborer, or one engaged in a mechanical or agricultural pursuit, who employs other laborers or mechanics to assist him, is exempt therefrom. The question turns upon the character of the avocation or employment, and not upon the fact of assistance being employed. A "mechanic," according to Worcester, is one employed in mechanical or manual labor; and "mechanical" is defined to be "employment in manual labor." Taking the phrase "engaged in mechanical pursuits" according to these definitions, and it is clear that the framers of the constitutional article intended to relieve from license those persons who are engaged, from day to day, in the performance of manual labor in mechanical or agricultural pursuits; and that the master builders and contractors, who employ oth-

ers to do the work which they merely superintend, should, like other professional men, pay the license tax. It appears from the evidence in this case that the defendant is a brick mason, but has not followed the manual duties of that occupation for many years; that he makes contracts for the erection and construction of brick edifices, the building of which he supervises, while the mechanical labor of laying the bricks is performed by employees of his own, or those of the person for whom the contract is taken. The defendant is also a manufacturer of brick, and he makes contracts to place them in the walls of buildings, at a fixed price per thousand. In such case, he employs brick-layers to do the mechanical part of the work, and he superintends the construction of the building. Two of the witnesses state that the "defendant has been a contractor for the brick-work of many buildings constructed in the city of Monroe during the past fifteen years;" and he "has not performed any regular manual labor, in laying bricks, in the erection of these buildings. He has contracted for the brick-work, or supervised or superintended it, in all the cases referred to." It is shown that defendant has, within the past 15 years, occasionally laid bricks in order to exhibit his own skill, or to direct others.

The defendant is a contractor, or master mechanic, or builder, who employs other persons to do the work which he superintends. Unlike Bayley, he does not "work at his trade with his own hands," nor does he engage others to assist him. Those whom he employs perform the work with their hands, and he superintends them merely. The statute which subjects persons pursuing such avocation as defendants to a license tax is not unconstitutional, and he is liable for its payment.

Judgment affirmed.

STATE V. GUILLORY.

(*Supreme Court of Louisiana. May 19, 1890.*
42 La. Ann.)

MURDER—VERDICT—ASSAULT WITH INTENT TO KILL—APPEAL.

1. The charge in an indictment, and not the verdict of the jury or judgment of the court, determines the right of appeal.

2. Under an indictment for murder, a verdict of "guilty of an assault with the intent to kill" is not responsive to the charge in the indictment, and the variance is fatal.

3. The two offenses are separate and distinct crimes, which could not be joined in the same count in the indictment.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Landry; LEWIS, Judge.

The Attorney General, for the State. E. P. Veazie and Chas. N. Dukoy, for appellant.

McENERY, J. The defendant was indicted for murder, and convicted of an assault with intent to kill, and sentenced to pay a fine of \$100, and to be imprisoned in the parish jail for six months. From this judgment, he has appealed.

MOTION TO DISMISS.

The motion to dismiss the appeal is based on the fact that the fine imposed does not

exceed \$300. The offense charged in the indictment is punishable with death or hard labor. This question of jurisdiction under article 81 of the constitution of 1879 was elaborately reviewed in the case of *State v. Judge*, 33 La. Ann. 1227. The interpretation of the article was that "under the present constitution the accused, in criminal cases in which the punishment of death or imprisonment at hard labor may be inflicted, is entitled to an appeal to this court whether the verdict of the jury, or judgment of the lower court, is or not for a lesser punishment." This has been affirmed in several cases. *State v. Williams*, 37 La. Ann. 200; *State v. Taylor*, 34 La. Ann. 978. The motion to dismiss is therefore denied.

There are several defenses urged. It will be necessary to notice only the exception to the judge's charge to the jury, and the motion in arrest of judgment. They will be considered together, as the verdict was in accordance with that portion of the charge excepted to. The indictment charged murder. The verdict was, guilty of an assault with intent to kill. The motion in arrest of judgment is that no such verdict could be returned on the indictment. It must prevail. The two offenses are separate and distinct, and could not be included in the same count in an indictment. They are not of the same generic class, and the lesser is not included in the greater. The verdict was not responsive to the indictment. *State v. Pratt*, 10 La. Ann. 191; *State v. Murdoch*, 35 La. Ann. 729; *State v. Day*, 37 La. Ann. 785; *State v. Oliver*, 38 La. Ann. 632. Under our jurisprudence, on an indictment for murder a verdict for only one crime (manslaughter) of a less grade is permitted. Rev. St. § 785.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and amended; and it is now ordered that the case be remanded to be proceeded with according to law.

STATE ex rel. JOHNSON v. CITY OF NEW ORLEANS et al.

(Supreme Court of Louisiana. Jan., 1889. 41 La. Ann.)

CITY COUNCIL—ALLOWANCE OF DEMANDS—REVIEW—INJUNCTION.

1. The city council of New Orleans has the right, and it is its duty, to refuse to pass an ordinance to pay claims of doubtful validity. Its decision, however, is not final. The creditor has the right to apply to the courts to have his claim judicially determined, and its payment enforced, if correct and valid.

2. An injunction cannot issue when there is no primary demand in aid of which this secondary remedy is invoked.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

Carleton Hunt, City Atty., for appellant. *Braughn*, *Buck*, *Dinkelspiel & Hart*, for appellee.

MCENERY, J. The relator alleges he is the holder and owner of certificates for work and labor done in the police and improvement departments of the city of New Orleans for over \$2,000; that the amounts

due him are for services rendered in said departments during the months of March and April, 1888, as shown by the rolls of said months for said departments; that he is the transferee of the claims from the beneficiaries; and that he acquired the same in due course of business, and in a manner which has long been practiced with the approval of said city. The transfers have been registered, as required, in the office of the comptroller. The city refuses to pass the required ordinance for the payment of these claims, and alleges that they are not due, and are in dispute. Payments by the city of the pay-rolls in these departments have been made of subsequent months, and what is known as the "one-twelfth rule" has been violated. For these reasons relator and plaintiff fears that the fund out of which his claims are to be paid will be destroyed, and he will suffer an irreparable injury, as his only mode of payment is by an ordinance of the city council directing the payment of his claims out of the budget appropriation for said months of March and April. He prays for a writ of injunction, as follows: "That a writ of injunction issue, enjoining, directing, and prohibiting the said city of New Orleans, through the mayor and council aforesaid, from passing any ordinance directing the payment and appropriation of the funds in the department of public works and the department of police, for the year 1888, for any months subsequent to that of April and March aforesaid, until said months of April and March have been paid, or an ordinance directing a payment in due course passed; and, further, that an injunction issue prohibiting and restraining the comptroller of said city, Otto Thomas, and the city treasurer, J. N. Hardy, from auditing, warranting, or paying any ordinance passed to pay appropriations in the departments of public works or police, for any time or month subsequent to said months of March and April, until said months of March and April of 1888 are fully paid and satisfied; and petitioner prays that said city of New Orleans, its mayor, members of the council, said comptroller, Otto Thomas, and said treasurer, J. N. Hardy, be cited to appear and answer this petition, and, after due proceedings, that said writ of *mandamus* be made peremptory, and the injunction perpetuated."

The *mandamus* proceeding has been abandoned. The judge *a quo* refused the prayer for an injunction, and from this order plaintiff in injunction appealed. The evidence taken and introduced on the application for the *mandamus* is offered to support the plaintiff's petition for an injunction. Section 64 of the city charter provides that the estimate for the city expenses, known as the "Budget," "shall be considered as the appropriation of the amount therein stated, for the purposes therein stated; and the comptroller shall not audit, nor shall the treasurer draw or sign, any checks upon the fiscal agent therefor of any claims, unless an appropriation therefor has been duly made in accordance with this act." Acts 1882, p. 35. The amounts set apart in the budget for any specific purpose are to remain dedi-

cated to said purpose, and a penalty is provided for a violation of this law. When debts have been contracted by the city, by its direction and under its authority, for the purposes for which said appropriation in the budget is made, the fund so set apart remains dedicated to that purpose, and the creditors have a right to be paid out of that fund. This is undeniable. It is the duty of the council, when debts have been thus legally contracted, to pass the required ordinance for their payment out of the fund set aside for this purpose. In this respect, the council's duty is ministerial, and not legislative. But this duty does not compel the council to pay claims against which there is a valid objection. It has the right, and it is its duty to exercise this right, in the interest of and for the protection of the public, to refuse to pay doubtful claims. Its decision, however, is not final. The party aggrieved has the right to have his claim judicially determined, and its payment enforced, if correct, by appropriate remedy. No unconditional judgment could be rendered against the city on the claims in this case, but, on a proper presentation of them, there can be a judicial determination as to the city's liability, and, if adversely to the city, it can be enforced. The petition for the injunction, however, does not disclose any primary demand in aid of which the secondary remedy by injunction is invoked. The city is not cited to answer any demand for the recognition of plaintiff's claims, but, assuming that the claims are valid and existing obligations against the city, he asks for an injunction to restrain the city indefinitely from doing and performing necessary acts of administration until his claims are paid. He does not ask that the city shall perform any act in aid of his rights. This important primary demand is abandoned, and the injunction must fail, as there is no demand made upon the city to perform any act in aid of which the injunction issued. The judgment appealed from is affirmed, with costs.

SANDERS v. LEVI.

(Supreme Court of Louisiana. May 19, 1890.
42 La. Ann.)

ROAD TAXES—INCORPORATION OF DISTRICT—EXEMPTIONS.

1. The legislature of the state invests the police juries of parishes with plenary jurisdiction over public roads, and expressly authorizes them to exact road duty from "all male" inhabitants not expressly exempted.

2. The incorporation into a town of a certain district of the parish under the general town incorporation law does not exempt the inhabitants of such town from road duty, in absence of any law granting such exemption.

(Syllabus by the Court.)

Cunningham & Tucker, for appellant.
D. C. Scarborough, for appellee.

FENNER, J. Appeal from the district court for the parish of Natchitoches. The only question involved in this case is whether the inhabitants of an incorporated town are liable to public road duty under ordinances of the police jury of the

parish in which the town is situated. We have held that, under the legislation of the state, "police juries are clothed with plenary and exclusive power to regulate by ordinances the manner of making and repairing public roads in their respective parishes." *Barrow v. Hepler*, 34 La. Ann. 362; *St. Landry v. Stout*, 32 La. Ann. 1278. Act 112 of 1880, authorizes police juries to "appoint overseers of highways or roads, who are to summon all male persons from the age of 15 to 50, (except ministers of the gospel and such other persons as are or shall be exempt,) * * * to work on the public roads," and authorizes infliction of penalties for failure or refusal to work. Defendant does not deny that he was liable to said duty up to the year 1888, when, under the general town incorporation act No. 49 of 1882, the inhabitants of a certain portion of the parish organized themselves into a incorporated town called "Provencal." He claims that this fact operates an exemption of himself and his fellow townsmen from road duty. Why? Nothing in the act authorizing the organization of town expresses, or even hints at, such an exemption. No one will dispute that the granting or refusing of such exemption was clearly within the legislative power, and a matter of legislative option. The act 112 of 1880 expressed the legislative will authorizing the police jury to require such service from "all male" inhabitants of the parish, and defendant is such an inhabitant. This act has never been repealed, and the town incorporation act contains nothing inconsistent with it. It is well settled that the property and inhabitants of an incorporated town remain subject to property and license taxation by the police jury of the parish, unless specially exempted by the legislature. *Iberia v. Chapiella*, 30 La. Ann. 1143. The same principle must apply to road duty, which, though not a tax, is a forced contribution subject to legislative delegation. The public roads of a parish are matters of concern to all the inhabitants of a parish, wherever they reside. Whatever may be said of the policy or justice of such exactions from inhabitants of incorporated towns, we can look only to the law of the case. We have carefully examined the various authorities cited by counsel for defendant, but do not find them applicable to this case. The right here recognized conflicts in no manner with the town's exclusive control of its own streets and highways, nor with any other of its proper municipal privileges. Judgment affirmed.

Succession of ROGERS.

(Supreme Court of Louisiana. April, 1889.
41 La. Ann.)

SUCCESSORS—SETTLEMENT—PAYMENT OF DEMANDS.

1. A 12-months bond, which operates as a vendor's privilege, must, in the settlement of a succession, be paid by preference and priority over all other privileges except the expenses for the sale of the property, affixing seals, and other expenses necessary to the sale of the property.

2. A privilege for supplies can only be enforced on the crop for which they were furnished.

3. An administrator who sues the succession for a debt due to himself, and cites himself as ad-

ministrator, cannot, by such a proceeding, conclude the creditors of the succession by the judgment rendered in the case. The creditors, by opposition to his account, can inquire into his claim as though no judgment had been rendered.

4. An administrator who claims a privilege on personal property of the succession, and sells the real estate and personal property in bulk, without separate appraisement, loses his privilege.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Mary; WINCHESTER, Judge *ad hoc*.

D. Caffery, for appellant. *Foster Bros.*, for appellee.

MCENERY, J. W. P. Kemper, the administrator of the succession of Francis H. Rogers, filed his tableau of classification and distribution of the funds of said succession. The assets of the succession are the proceeds of the sale of the immovable property, the Pleasant Side plantation, live-stock, and agricultural implements, sold in bulk, amounting to \$7,600, and the proceeds of the sale of sugar and molasses, amounting to \$2,628.75. The opponent, the owner and holder of a 12-months bond, which operates as a vendor's privilege, claims that his 12-months bond should be first paid out of the fund realized from the sale of the real estate, and also opposes the claim of Foster Bros. for attorney fees, for attending to litigation in the United States court, as the services rendered do not belong to that class of law charges to which a privilege is attached, and to the claim of the administrator for a privilege for \$1,481.10, and interest. There are other items opposed in the account, but they seem to be abandoned by the opponent, as in the brief it is asked that "the tableau of classification should be so amended as to place the opponent's bond as the first privilege after the law charges, and by striking therefrom the privilege of W. B. Kemper for \$1,481.10, and the fee of \$400 allowed Foster Bros. for appearing before the United States court," and as thus amended the judgment of homologation be affirmed.

The 12-months bond and interest owned by opponent amounted to \$6,181.32 at the date of filing the account. It is secured by the vendor's privilege on the immovable property, and therefore he has preference and priority on the proceeds of the sale of the property over all other privileges, except the expenses for the selling of the property, affixing seals, costs of inventory, etc. Succession of Forstall, 89 La. Ann. 1052, 3 South. Rep. 277. The claim of Foster Bros. for service in the United States court was incident to and necessary for the protection of the succession property, and is therefore to the amount allowed a valid and privileged claim against the succession. But we are inclined to the opinion that, considering the amount of the succession, and the character of the litigation accompanying its administration, the fee of \$700 allowed by the administrator is sufficient to cover all services rendered, including attention to the rules in the United States court. The amount of \$1,481.10, with interest, claimed as a privileged debt by the administrator, should not be allowed as such. The claim is based upon

a note given by the deceased to Kemper, the administrator, in 1875, for seed cane, mules, and agricultural implements sold to him. It was recorded March 8, 1875. Rogers died in 1879, and in 1881 Kemper brought suit against himself, as administrator, and obtained a judgment recognizing his privilege. No one opposed the suit. There is no argument needed to show that such a judgment is not binding on the creditors. He sold seed cane in 1875 and in 1881. When he asserted his privilege many crops had been made, and as many times the seed cane had reproduced itself. His privilege for this item could only have been enforced against the crop upon which he had made advances. The mules and agricultural implements, if they had not diminished in numbers, must have deteriorated in value. They were sold by the administrator with the plantation, and were confusedly sold with other things without separate appraisement and identification. He has therefore lost his privilege. *Lambert v. Saloy*, 87 La. Ann. 3; *Bank v. Maureau*, Id. 857. It is therefore ordered, adjudged, and decreed that the claim of the administrator for \$1,481.10, with 8 per cent. interest from February 5, 1876, be rejected as a privileged debt, and that the claim of Foster Bros. be reduced to \$700, and as such it be recognized as a privileged debt, and that the opponent's 12-months' bond be placed on the tableau of classification as a first privilege after the payment of the law charges, and as thus amended the judgment homologating the account be affirmed.

SHREVEPORT & A. RY. CO. v. HOLLINGSWORTH *et al.*

(*Supreme Court of Louisiana. May 26, 1890.*
43 La. Ann.)

EMINENT DOMAIN—COMPENSATION—INTEREST.

1. The constitution authorizes the expropriation of lands for railroad necessities, on previous payment of the value thereof and of damages, when any have been sustained.

2. Interest is allowable on the amount allowed as the value, from judicial demand, when the company has taken possession, and has not paid prior thereto, but on the damages only from judicial liquidation.

(*Syllabus by the Court.*)

Appeal from district court, parish of Bossier; DREW, Judge.

Young & Thatcher and *Alexander & Blanchard*, for appellants. *T. C. Barrett*, for appellee.

BERMUDEZ, C. J. The object of this suit is the expropriation of certain land of the defendants for the roadway of the company. The defense is a denial of the right of expropriation of the ownership, and the admission of such right to the extent of a servitude only. By reconventional demand, the defendants claim the value of the land, some special damages, and general, actual, and prospective damages. The controversy was developed, argued, and submitted to two juries, who failed to agree. In order to end it, the parties consented to have it determined by the court. The district judge allowed to the

owners of the Hollingsworth place \$1,000, as the value of the land, some 10 acres, \$375 for a lost crop and the removal of a fence, and \$3,750 general damages, and to the owners of the Williams place \$500 for the value of the land, some five acres, and \$1,000 general damages, with interest on all amounts allowed to the defendants from the filing of their answer, considered as the date of the judicial demand. The plaintiffs appeal, contending that all the amounts should be reduced by 50 per cent. The defendants, on the other hand, while contending that the same ought to have been much larger, enter an appearance of resignation, should the judgment be affirmed. Some 20 witnesses, in chief and in rebuttal, have been heard, and documentary evidence has been adduced. The lands are at a short distance from the city of Shreveport, prospering and to prosper. They front on the Red river, draining from it to the rear. They are sandy, high, and dry. The center, or about, is the portion judiciously selected for the building of the road. The principal improvements have been put up on the transition soil. The road apparently divides the lands into halves.

1. The right of the company to expropriate is recognized by law and jurisprudence, and cannot form the subject of serious contention. From the days of Rome, when land-owners could prevent the construction of aqueducts to supply the city with water, and otherwise resist the divestiture of their property, to our times, the right of power and expropriation has undergone such radical changes, required by public exigencies, for the greater good of the people, that the owner may be dispossessed of the ownership; but with the condition of equitable indemnity previously made, not only for the value of the property, but also, when the contingency arises, for the damage which may consequently be sustained by him. Const. art. 156; Railroad Co. v. Avart, 11 La. 190; Mayor, etc., v. Delachaise, 22 La. Ann. 26; Bourdier v. Railroad Co., 35 La. Ann. 947; Railroad Co. v. Dillard, Id. 1045; Payne v. Steamship Co., 38 La. Ann. 164; Rev. Civil Code, art. 497; Cooley, Const. Lim. 670 et seq.; Id. *537 et seq. In such cases the owner is assimilated to a debtor to society, in certain emergencies, as in ordinary matters a debtor is to his creditor; the use of his property, in the one case, for public utility, being subjected in satisfaction of it, as in the other it is made liable to the payment of an individual claim by the arm of the law.

2. The value of the land is established by a number of intelligent, disinterested, experienced, unbiased, and reliable witnesses, whose testimony is not counterbalanced. It is fixed by them at \$100 per acre. The 10 acres from the Hollingsworth place are shown to yield an annual rental of \$100 at least, which, however, reduced by the payment of taxes and repairs, could not be realized by usual interest on the allowed amount, were it loaned out. Much is said, to like effect, of the 5 acres from the Williams place to show its value; both lying in the proximity of a rapidly flourishing city.

3. The proof in the record touching the quantum of damages sustained is contradictory, and, as usual, unsatisfactory. Some witnesses say that the lands will in no way be damaged, while others are positive that the injury extends to \$10,000 as to the Hollingsworth place, and that it is quite considerable as to the Williams place. The two plantations are represented as planned, disposed, and drained symmetrically, so as to promote profitable management, and as being in a high state of improvement and cultivation. The great damages complained of are that they are cut into two parts, and that communication from the one to the other by laborers, vehicles, etc., is obstructed; that the owners are deprived of the free use and enjoyment of their property, and also of the increase of value of the same, owing to its vicinity to a prosperous city. The district judge has valued the damages to the Hollingsworth place at \$3,750, and those to the Williams place at \$1,000, without, however, undertaking to claim for such adjustment absolute accuracy. When the testimony of credible witnesses is considered, coupled with the claim of the plaintiffs for a reduction of all allowances to half the satisfaction of the defendants, who ask no increase, we incline to the belief that, while the valuation put to the expropriated land and the special damages may remain untouched, the adjustment of the general damages may be justly interfered with by reducing them, so as to give \$2,800 to the Hollingsworth place, and \$750 to the Williams place. It is difficult to conceive how, notwithstanding the speculative testimony adduced, more damage can be sustained by the divested owners.

4. Considering the fact that the company had taken previous possession without anterior indemnity, we think that interest is allowable on the value of the lands from judicial demand, which is the date of the claim in re-convention, namely, the 11th July, 1888; but we do not consider that interest should run on the amount of damages, unless from the date of the final liquidation thereof by the judgment of this court, which is the only time when the plaintiffs know the precise extent of their liability for the same, after which they can be delinquent. It is therefore ordered and decreed that the judgment appealed from be amended so as to allow to the owners of the Hollingsworth place \$2,800, and to the owners of the Williams place \$750, to be divided according to their respective rights, with interest on the value of the lands from July 11, 1888, and on the general damages from the finality of the present judgment; appellees to pay costs of appeal, and appellants those of the lower court.

STATE V. DENT *et al.*

(Supreme Court of Louisiana. Nov. 18, 1889.
41 La. Ann.)

CRIMINAL LAW—VENUE—COMPETENCY OF JURORS.

1. The allowance of a change of venue is largely within the sound legal discretion of the trial judge, and his ruling will not be disturbed

unless it is manifest that his discretion has been abused.

2. An objection to the want of competency of a juror based on the ground that he was not sufficiently acquainted with the English language, and did not understand such terms as "bias," "prejudice," and "verdict," must be received and construed reasonably. The law does not require a juror to be a scholar, or that he should have an education. It only requires that he should comprehend ordinary discourse in the English language.

3. The expression of an opinion which disqualifies a juror is a fixed, deliberate, and determined one, which does not yield to evidence.

(*Syllabus by the Court.*)

Appeal from district court, parish of East Feliciana; F. D. BRAME, Judge.

Merrick & Merrick and J. G. Kilburne, for appellants. The Attorney General and Joe Stone, for the State.

WATKINS, J. Isalah Dent and Charles Dent appeal from an unqualified conviction of murder, and sentence of death; and Frank Cooper appeals from a qualified verdict, and a sentence to life imprisonment. During the progress of the trial, quite a number of bills of exception were taken by the defendants' counsel to the refusal of the trial judge to grant them a change of venue, and his refusal to sustain various challenges for cause, which were tendered by them, to different persons who were called either as regular jurors or as talesmen. We will discuss only those bills which are argued in counsel's brief.

1. The application for a change of venue on the part of defendants rests upon their averment "that, by reason of prejudice in the public mind engendered by newspaper reports and articles, and other causes, they cannot obtain a fair and impartial trial in the parish where the charge against them is now pending, and that said prejudice exists in all the parishes of the adjoining judicial districts." This application is sworn to by the defendants Charles and Isalah Dent only. The defendants' bill of exceptions No. 1, and the certificate of the judge appended thereto, contain all the evidence appertaining to the existence of "prejudice in the public mind" against the accused. The bill states "that at the time they were captured, and brought back to the town of Clinton, a body of some forty or more men appeared at the jail, and demanded the prisoners for the purpose of lynching them; that it was only by the nerve and quickness of a few leading citizens that the accused were passed out of jail, and surreptitiously conveyed to New Orleans; that the train on which the prisoners were carried to New Orleans was boarded by a body of men who threatened to lynch the prisoners, but who were unable to find them, as they were in the baggage-car; that there was much excitement at the time, and ill feeling against the prisoners." On this score the trial judge states that "after hearing six witnesses on the part of the defendants, and fifteen on the part of the state, some of whom were residents of each and every ward and neighborhood of this parish, and the most of whom were from the best and most influential citizens of the parish, and each and every witness having sworn positively that there was no such state of prejudice

or ill feeling in the parish against defendants as would prevent them from having a fair and impartial trial," he overruled the motion. Under the circumstances we are of opinion that the judge's ruling was correct. The motion for change of venue is largely within the sound legal discretion of the trial judge. *State v. Gonsoulin*, 38 La. Ann. 460; *State v. White*, 30 La. Ann. 365; *State v. Bunger*, 11 La. Ann. 607; *State v. Daniel*, 31 La. Ann. 92; *State v. Ford*, 37 La. Ann. 443. We are satisfied that the judge's discretion was not erroneously exercised.

2. Defendants' sixth bill was reserved to the judge's refusal to sustain a challenge for cause which they tendered to the juror E. A. White. This bill was imperfectly transcribed into the transcript, and does not cover the ground taken in counsel's brief altogether, but enough appears to fully justify the judge's ruling. It states that "the court was of opinion that said juror was competent because, in answer to questions by the court, he stated that his opinion was formed from rumor, and not from conversations with any of the witnesses, that he had no bias or prejudice against the parties accused, and that he would be governed entirely by the evidence on the trial in making up his verdict." We think the juror was competent.

3. The seventh bill was retained to the judge's refusal to sustain defendants' peremptory challenge of the tales juror Carl Hogle on the ground that he confessed on his *voir dire* that he did not understand the words "bias," "prejudice," and "verdict," and was therefore incompetent to sit as a juror. The court held that he was competent and qualified, for the reason "that the juror, a young German, was naturally bright and intelligent, and, while he talks English brokenly, is about as intelligent, and understands the English language about as well, as the average American citizen, and said he could understand what the lawyers and witnesses said in court." What was said on the subject by our predecessors in *State v. Tazwell*, 30 La. Ann. 884, is quite appropriate to this case: "The law certainly does not require that jurors must be scholars, or even that they have any education, but it does require that they comprehend ordinary discourse in the English language, and wisely gives the judge power to determine this important fact; and we have no authority to review his decision thereon. * * * The judge had the jurors before him, and had better opportunity of knowing this matter than we have; and, even if we had the power to review, we have no reason to believe that he abused the discretion the law vested in him." In that case the cause assigned was that the juror confessed in his *voir dire* that he did not know what a "verdict" meant. The cause assigned by the defendants is not good, for a like reason.

4. The eight, ninth, and tenth bills were severally taken to the judge's refusal to entertain defendant's challenges of Brash-ear, Bruton, and Irwin for causes assigned, same being that the jurors had previously formed, and expressed fixed and deliberate opinions relative to the guilt or innocence

of accused. The reason assigned by the judge for refusing same being quite similar, they may be considered together. With regard to the first, he said: "This juror said he had a fixed opinion, and, when, asked by the counsel for defendants what he meant by a fixed opinion, said that he meant that his mind was satisfied one way, but that his opinion could be changed by evidence; that the opinion he had formed was entirely from rumor; that he had no bias or prejudice against the accused, and that, if taken on the jury, he would be governed entirely by the evidence adduced on the trial in making up his verdict; and that he was able to render a fair and impartial verdict according to the law and the evidence, without being influenced in any way by what he had heard." With regard to the second, he said: "This juror said that he had no bias or prejudice for or against the accused; that he had a fixed opinion,—pretty well fixed,—but that it was entirely from rumor and newspaper reports, but that it could be changed by evidence—by strong evidence—either positive or circumstantial, but, if circumstantial, it must be properly connected; that he would be governed entirely by the evidence in making up his verdict; and that he was able to render a fair and impartial verdict according to the law and the evidence adduced on the trial, without being influenced in any way by what he had heard, or the opinion he had formed." With regard to the third, he said: "This juror said that he had formed, from rumor and newspaper reports, somewhat of an opinion, and that it would require evidence to remove that opinion; that it might be changed by circumstantial evidence,—that is, it would require pretty strong circumstantial evidence to change it; that it was not a fixed opinion; that he had no bias or prejudice against the accused; and that he would be governed entirely by the evidence in making up his verdict, without being in any way influenced by his opinion, and what he had heard." When taken altogether, there is no substantial variation between the counsel's statement and that of the judge, with regard to the purport of the three jurors' evidence on their *voir dire*.

In *State v. Farrer*, 35 La. Ann. 315, we had occasion to say that the "expression of an opinion which disqualified a juror is a fixed, deliberate, and determined one, which cannot be changed;" and in *State v. Dorsey*, 40 La. Ann. 740, 5 South. Rep. 28, that precept was repeated, and we further observed that "the opinion of the juror in question may be said to have been a fixed or decided opinion, but not an unyielding and determined one." In the former case, we also said that "the record does not show that the prisoner had exhausted his peremptory challenges before the jury was fully made up, and that he did not obtain an entire panel of his own choice." The great object of the constitution and the law is that an impartial jury may be obtained in every case. The rejection of the juror had no tendency to prevent the attainment of that end, for the prisoner had

not exhausted his challenges before the jury was fully made up, and consequently he had obtained an entire panel of his own choice. Those opinions are in perfect accord with prior and subsequent authority on the subject, and must control our decision in this case; nor do we understand the opinion in *State v. Ricks*, 32 La. Ann. 1101, as expressing a contrary view. They are in perfect accord with the majority opinion of the court in *State v. Bunker*, *vide* page 461, 14 La. Ann.

Judgment affirmed.

Rehearing refused.

STATE V. FORD.

(Supreme Court of Louisiana. March 3, 1890.
43 La. Ann.)

CRIMINAL LAW—CONDUCT OF TRIAL—COMPETENCY OF JURORS.

1. Where there is a difference in statement of facts between counsel and the trial judge, the latter will be accepted.

2. It is not necessary to the competency of a juror that he should be a scholar, and understand the definition of every word used in the course of a trial by witnesses, counsel, and the court. It is sufficient if he is conversant with the English language so as to understand in substance the argument of counsel, and the testimony of witnesses.

3. When erroneous statements are made by counsel which are instantly corrected by the judge, and the jury cautioned against them, the verdict of the jury will not be set aside.

4. The supreme court will not interfere with the discretion of district judges in the enforcement of rules of decorum in their courts. *State v. Duck*, 35 La. Ann. 764.

5. When a juror in his *voir dire* states that what he had heard about the case has made some impression upon his mind, but that he could go into the jury-box free from bias or prejudice, and try the case fairly and impartially according to the evidence, and the instructions of the court as to the law applicable to the case, he is a competent juror.

6. Because the names of witnesses appear on the back of the indictment imposes no duty on the prosecuting attorney to swear them as witnesses. The accused has no right to require the prosecution to call and swear them, so that he can cross-examine them.

7. There is no law in this state requiring that the accused shall be tried by jurors selected from his own race.

8. When it appears by the record that a juror has been peremptorily challenged by the accused, and did not serve on the jury, the error in the ruling of the district judge declaring his competency will not invalidate the trial, as the accused was not prejudiced thereby.

(Syllabus by the Court.)

Appeal from district court, parish of Avoyelles; Coco, Judge.

E. J. Jaffin and John C. Wickliffe, for appellant. Walter H. Rogers, for the State.

McENERY, J. The defendant was convicted of murder, and appealed. There are in the record numerous bills of exception to the rulings of the trial judge, a motion for a new trial, and a motion in arrest of judgment.

Bills 1, 3, 4, 5, and 6 may be considered together. In these bills there is a wide difference in the statement of facts presented by the counsel for the accused, and the trial judge. It has been repeatedly held that, where there is a difference in statement of facts between counsel and judge, the latter's statement will be accepted.

The first bill is to the effect that the juror to whom objection was made was not familiar with the English language. The juror's answer to interrogatories was that he understood the English language sufficiently well to comprehend the testimony of witnesses, and the arguments of counsel. The trial judge says that, after a thorough examination of the juror, he was satisfied that he was sufficiently conversant with the English language to make a competent juror. It is not essential to the competency of a juror that he shall be so educated as to understand the meaning of all words in the English language. From the juror's answer, and the result of the trial judge's examination of the juror, it is evident that he was a competent juror. *State v. Williams*, 34 La. Ann. 959; *State v. Offutt*, 38 La. Ann. 364; *State v. Dent*, 41 La. Ann. —, ante, 694.

No. 3. This bill was reserved to the ruling of the trial judge as to the competency of the juror Brice. The juror answered on his *voir dire* that what he had heard about the case had made some impression upon his mind, and that he would to some extent be influenced by this; that he had no prejudice for or against the accused; that what he had heard of the case did not purport to be the facts; that the person he heard talk about the case did not pretend to detail the facts; that what he had heard had not created a firm or fixed opinion upon his mind, and the impression created by what he had heard would readily yield to the evidence; and that he would try the case fairly and impartially according to the evidence adduced, and the law as given by the court. The juror had no fixed opinion. The impression that had been made upon his mind was from facts stated to him by persons who did not pretend to give the facts of the case. This impression would readily yield to the evidence. He was, therefore, a competent juror. *State v. Dugay*, 35 La. Ann. 327; *State v. George*, 37 La. Ann. 786; *State v. Ford*, Id. 443; *State v. De Rance*, 34 La. Ann. 186; *State v. Dent*, 41 La. Ann. —, ante, 694.

No. 4. The juror Harvey was asked if he would judge of the innocence or guilt of the accused by the preponderance of evidence, or whether he would give the accused the benefit of a reasonable doubt. He answered that, if there was a preponderance of evidence in favor of the state, he would give the state the benefit of this, and convict. He also stated that he would not give the accused the benefit of a reasonable doubt. In answer to questions by the court, the juror stated that he would follow the instructions of the court upon questions of law, and that if the judge, in his charge, instructed him that the accused should be given the benefit of a reasonable doubt, he would do so;

that he would apply the law as given by the court, and would try the accused accordingly. The definition of a "reasonable doubt" is one of law, and is embodied in the charge of the judge to the jury. The juror answered he would apply the law as given by the court. There are definitions of terms of purely legal significance which it is not expected that the mass of the people will understand. It is therefore necessary for the trial judge to instruct the jury in relation to their meaning and employment.

No. 5. J. E. Seguin, on his *voir dire*, answered that he thought a man should be sent to the penitentiary for killing another in self-defense. The trial judge says: "It being evident that the juror did not fully understand the question of counsel, the court proceeded to examine the juror. Under the examination by the court the juror stated that if the court instructed him that, under the law, if the party doing the killing acted in self-defense, he should be acquitted, he would respect the law, and act according to the instructions of the judge. The juror also stated that he had not fully understood the question of defendant's counsel when he answered that a person killing another in self-defense should be sent to the penitentiary." The statement of the trial judge, and the answers of the juror when he fully understood the questions, dispose of the defendant's objection.

No. 6. In answer to a question of defendant's counsel, the juror Bordelon stated that he had conscientious scruples to the infliction of capital punishment. The state was satisfied with the juror, and made no objection to his competency. It is difficult to assign a reason for the defendant's objection to the juror, as the conscientious scruples of the juror, if they existed, were favorable to him. As the district attorney made no objection to the juror, it is to be presumed that he was impressed, as was the trial judge, with the fact that the juror was confused, and did not understand the question addressed to him. When understanding the question, and in reply to interrogatories propounded by the judge, he stated: "A verdict which would inflict the death penalty should depend upon what the party had done. If the party accused had done enough to deserve death, he would agree to a verdict that would hang." This juror's answer also disposes of defendant's objection to his competency. These jurors were peremptorily challenged by the accused, and did not serve on the jury. If there had been error in the ruling of the trial judge as to their competency and qualification, it would not be sufficient to invalidate the trial, as it appears from the record that the jurors were peremptorily challenged by the accused. *State v. Ford*, 37 La. Ann. 443; *State v. Simmons*, 38 La. Ann. 41; *State v. Farrer*, 35 La. Ann. 315; *State v. Redmond*, 37 La. Ann. 774.

Nos. 2 and 8. These were reserved to the course of examination pursued by the district attorney in the examination of a juror, and to the argument of the attorney, assisting the district attorney, to the

jury. In both instances, an objection being made by counsel for accused, the court interfered, and sustained the counsel for the accused, and stopped the course of examination of the juror by the district attorney, and the argument by the assistant attorney. In the latter case the jury was instructed by the judge to disregard it, and to be guided only by "proof" in the case. The accused obtained all he asked for. It was the only relief the court could afford him. There is no force in the objections, as this court will not interfere with district judges in the manner in which they enforce discipline and decorum. *State v. Duck*, 35 La. Ann. 764.

No. 7. The counsel for defendant made a motion that the court direct the district attorney "to call, swear, and put upon the stand" certain witnesses whose names appeared upon the back of the indictment. These witnesses were not called and sworn in behalf of the prosecution, and the defendant's reason for the motion is that he was entitled to cross-examine said witnesses. There is no law authorizing the accused to direct and control the prosecution against him. He has no right to direct in what manner the district attorney shall conduct the case against him, and control in the selection of his witnesses, and the introduction of the evidence of the prosecution. Nor has he the right to impose his defense upon the district attorney. If the witnesses were material and important, and knew facts which would aid and assist in the defense, it was the duty of the attorney of the accused to summon and examine them in his behalf.

No. 9. Motion for a new trial. The motion only alleges facts set forth in the several bills of exceptions, and was therefore properly overruled.

No. 10. Motion in arrest of judgment. The motion alleges that the accused is a negro, and that the jury was composed entirely of white men. The record does not show that any juror was excluded from the jury on account of his race or color. There is therefore no error on the face of the record upon which to base a motion in arrest of judgment. There is no law in this state requiring that the accused shall be tried by jurors selected from his own race. In civil matters, all distinctions on account of race, color, or previous condition of servitude have been abolished. Judgment affirmed.

STATE V. CORNIG.

(*Supreme Court of Louisiana*. March 17, 1890.
42 La. Ann.)

BAIL-BOND—FORFEITURE—SETTING ASIDE.

1. When the forfeiture of an appearance bond has been set aside, the accused stands before the court as though no such proceeding had taken place; and it was his duty, in complying with the conditions of the bond, to appear from day to day until the charge against him was legally disposed of.

2. The court had the undoubted right to fix a day for the trial, and in default of the appearance of the accused to enter a judgment forfeiting the bond.

3. When the surety on the bond moved to set aside a forfeiture of the bond, and the district attorney afterwards files a like motion, and the judg-

ment of forfeiture is set aside, the surety has no cause to complain, as all that he asked was granted by the order setting aside the forfeiture.

4. The recorders of the city of New Orleans are fully authorized, as committing magistrates, to take and acknowledge bonds where the punishment is hard labor.

5. The forfeiture of a bond in a criminal case, for the appearance of the accused, is a criminal proceeding, and is to be tested alone, on a question of jurisdiction, by the character of the crime charged against the accused.

(*Syllabus by the Court.*)

Appeal from criminal district court, parish of Orleans; *BAKER*, Judge.

Walter H. Rogers, Atty. Gen., for the State. *Harry L. Edwards*, for defendant.

MCENERY, J. The defendant was accused of the crime of embezzlement, and gave bond, with one Nicholas Arthur as surety, to appear before the criminal district court of the parish of Orleans to answer said charge. The bond is in the usual form, and was properly taken and acknowledged before the judge of the first recorder's court for the city of New Orleans. In the criminal district court an information was filed against the defendant for said charge. He appeared, and pleaded not guilty. He failed to appear for trial, and a judgment was rendered against him and his surety, forfeiting the bond. The surety filed a motion to set aside the judgment of forfeiture on several grounds. The district attorney, after the filing of the defendant's motion, also asked that the judgment of forfeiture be set aside. On this motion the judge set aside the judgment of forfeiture. The case was then fixed for trial; and, the defendant failing to appear, a second judgment of forfeiture was rendered. In this latter proceeding the district attorney offered and filed in evidence the bond, which he had neglected to do in the former forfeiture. This is an appeal from this second judgment forfeiting the bond. The defense is (1) that there could be no second forfeiture of the bond; (2) that the defendant surety had filed a motion to set aside the forfeiture, which was by the judge taken under advisement, and undisposed of, when the second judgment of forfeiture was rendered, and therefore no proceeding could be had in the case until that was disposed of; (3) that the recorders of the city of New Orleans are without authority to take bonds in cases in which the penalty is death or hard labor; (4) that the bond was not authentic, and proof was required of its execution; (5) that the criminal district court of the parish of Orleans has no civil jurisdiction, and can render no moneyed judgment.

1. The judgment setting aside the first forfeiture placed matters in the same condition in which they were before the judgment had been rendered, and the accused was before the court with the crime charged against him, to which he was bound to answer in person from day to day until disposed of, according to the conditions of his appearance bond. It was competent for the court to render any order in the case, and to fix the same for trial. The fact, therefore, of the bond once having been forfeited is no objection, after it has been set aside, for another

judgment of like character to be entered in the case.

2. The judge, in setting aside the judgment of forfeiture first entered, granted all that the surety asked and prayed for in his motion, and he therefore has no reason to complain. *State v. Ford*, ante, 698, (not yet officially reported.) After the order setting aside the forfeiture had been rendered, there was no motion to this effect pending in the case. It had been disposed of by the judgment. The reasons alleged in his motion by the defendant surety were all to the same effect and purpose,—that the judgment of forfeiture should be avoided. The granting the same relief sought by the surety, on the motion of the district attorney, because the judge adopted some of the grounds and omitted others as his reason for setting aside the judgment, does not leave the omitted reasons of the defendant's counsel as a standing undecided motion.

3. The recorder was fully authorized to take and acknowledge the bond. Act No. 269 of 1859, approved March 17, 1859; article 136, Sess. of 1879.

4. The bond was in proper form, and duly authenticated by the recorder, before whom it was taken. It made full proof of itself. *State v. Lewis*, 7 La. Ann. 541.

5. Article 130 of the constitution of 1879, in defining the jurisdiction of the criminal district court for the parish of Orleans, says that it shall have general criminal jurisdiction only. There is no limitation as to its criminal jurisdiction. The forfeiture of the appearance bond, and the judgment and execution thereon, were proceedings springing directly from a criminal prosecution, and were necessarily of the character of criminal jurisdiction. The forfeiture of a bond in a criminal case for the appearance of the accused is not a civil but a criminal procedure, to be tested alone, on a question of jurisdiction, by the character of the crime charged against the accused. *State v. Cassidy*, 7 La. Ann. 276; *State v. Williams*, 37 La. Ann. 200; *State v. Burns*, 88 La. Ann. 363.

Judgment affirmed.

Rehearing refused.

STATE v. DOYLE.

(*Supreme Court of Louisiana.* May 5, 1890.
42 La. Ann.)

CRIMINAL LAW—APPEAL—APPEARANCE BOND— FORFEITURE—JUDGMENT.

1. Where the object of a proceeding is to have execution issue on a judgment of forfeiture of a bond in a criminal case, it is a criminal, and not a civil, proceeding; and the jurisdiction of the supreme court is to be tested by the character of the crime charged in the indictment.

2. Where the minutes of the court contain no record of the forfeiture of an appearance bond in a criminal case, the record cannot be supplied by parol testimony. To amend the record, long after it has been made up, by parol testimony, particularly when the amendment is for the purpose of establishing a judgment, would be a dangerous proceeding.

3. In a suit, in the nature of a *scire facias*, to revive a judgment of the forfeiture of an appearance, and to cause execution to issue thereon, it is not necessary to advertise the loss of the bond before giving evidence of its description, as the suit

is not founded on the bond, but the judgment of forfeiture.

(Syllabus by the Court.)

Appeal from district court, parish of Webster; DREW, Judge.

The Attorney General, for the State.
Watkins & Watkins, for appellee.

McENERY, J. Two indictments for larceny were presented against one John Richardson. The court granted an order fixing the amount of the bond in each case at \$250. Richardson being unable to give this bond, on motion in open court, which does not appear upon the minutes, the bonds were reduced to \$150 each, which Richardson, who was in custody, furnished, with Doyle as his surety. The bonds were lost or stolen from the clerk's office. On the theory that the recognition of the accused had been forfeited in pursuance of section 1032, Rev. St., the district attorney, in the nature of a *scire facias*, proceeded against the surety on the bonds. There was a judgment of nonsuit against the state, from which this appeal is taken. A motion is made to dismiss the appeal on the ground that the forfeiture of an appearance bond is a criminal procedure only when proceedings are conducted under section 1032, Id.

The object and purpose of the proceedings is to have an execution issued on a judgment of forfeiture. At most the proceeding is only in the nature of an original action. It springs directly from a criminal proceeding, and is not to be tested by the rules applicable to civil actions. *State v. Williams*, 37 La. Ann. 200; *State v. Burns*, 88 La. Ann. 363; *State v. Balize*, Id. 542; *State v. Cornig*, ante, 698, (not yet officially reported.) The motion to dismiss the appeal is denied.

ON THE MERITS.

The order authorizing the sheriff to take bond was in writing. Being unable to furnish the bond in the amount as originally fixed in the written order, it was reduced in each case to \$150 on motion in open court. No record was made of this motion, and the order granted thereon at the request of, and for the benefit of, the accused. The signature to the bond is not denied, and it is not urged that the amount of the bond is not correct. The accused was in custody, and the bond effected his release. As the bond does not exceed the amount authorized in the written order authorizing it, it is difficult to perceive the force of the objection of the surety. He cannot question the regularity of the proceedings which procured the release of the accused when in custody. The irregularity complained of was the reduction of the bond, at the instance and in the interest of the accused, on a verbal order of the judge. It is no defense to the breach of the condition of the bonds. *State v. Snow*, 23 La. Ann. 596; *State v. Loeb*, 21 La. Ann. 599; *State v. Nicol*, 30 La. Ann. 628; *State v. Canady*, 16 La. Ann. 141; *State v. Hendricks*, 40 La. Ann. 719, 5 South. Rep. 24. The district attorney offered in evidence the order of court authorizing the taking of the bonds for the amount of \$250, cash. He then offered to

prove a description of the bonds actually taken for \$150. To this the counsel for the accused objected, on the ground that the loss of the bonds had not been established. The objection was properly urged. The district attorney afterwards offered to prove the loss of the bonds, and a description of the same, to which counsel for defendant urged the same objection, and the additional one that the loss of the bonds had not been advertised in accordance with article 2280, Rev. Civil Code. It was not necessary to advertise the bonds, as they were not the foundations of the suit. The suit is based upon the alleged forfeiture of the bonds, and a judgment upon the forfeiture on the non-appearance of the accused when called. On the trial, no judgment of forfeiture was offered in evidence. The state offered to amend the minutes by showing by parol testimony that the bond had been forfeited in accordance with section 1032, Rev. St. This correction was not offered at the same term of court at which the forfeiture is alleged to have occurred, but at a different term, long after the minutes of the previous term had been approved and signed. To amend the record, long after it had been made up, by parol testimony, would be a dangerous proceeding, particularly when the amendment is for the purpose of establishing the existence of a judgment. The minutes of the court are authentic. The forfeiture of the bond in a criminal prosecution is a judicial act, and must appear of record, and cannot be supplied by parol testimony. Judgment affirmed.

CITIZENS' BANK V. HYAMS *et al.*

(*Supreme Court of Louisiana.* April 21, 1890.
42 La. Ann.)

CONFISCATION—RIGHTS OF MORTGAGEE—STOCK SUBSCRIPTIONS.

1. Proceedings under the act of congress of July 17, 1862, to condemn and confiscate property, when consummated did not divest the fee or naked ownership which continued to dwell in the confiscatee. Nothing beyond the life-estate or usufruct passed to the adjudicatee.

2. The claim of a mortgage creditor of the confiscatee, who becomes the adjudicatee, and pays the price, is not thereby extinguished by confusion.

3. A sale of that which was thus acquired by such creditor does not transfer the fee or naked ownership, but only the life-estate or usufruct, which determines at the death of the confiscatee, when the fee passes to the heirs.

4. The intervention of the confiscatee in an act purporting to dispose of the fee and life-estate, and his ratification thereof, produces no legal effect.

5. That which the confiscatee could not do directly, he could not accomplish indirectly.

6. The fee or naked ownership continued in him, notwithstanding condemnation and adjudication, without any power on his part to control or dispose of the same in any manner, or to any extent whatever.

7. Stock contributions are prescribed by 10 years.

8. Prescription does not run against a debt secured by a pledge, as long as the creditor has possession of the pledge. Detention of it is a constant recognition of the debt and renunciation of prescription, which prevents prescription from beginning to run.

9. Under its charter, the Citizens' Bank is entitled to proceed against the heirs of a stockholder

for the satisfaction of its claims, secured by mortgage and pledge, and enforcement of the same by seizure and sale of the property, without recovery to the hypothecary action. It cannot, however, recover a personal judgment where they have accepted, under benefit of inventory, the succession of their author.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

H. C. Miller, for plaintiff and appellant.
W. S. Benedict, *Charles Carroll*, and *E. H. Farrar*, for defendant and appellee.

BERMUDEZ, C. J. This is an action to recover certain calls or contributions due on stock and the balance of a loan; the former secured by mortgage, the latter, by a pledge of the shares. It is brought against the heirs of Henry M. Hyams, who are in possession. Their defense is that the claim is extinguished by confusion and prescription, and that no personal judgment can be rendered against them, as they are beneficiary heirs only. The district court consulted the plaintiff, with a reserve of right to proceed in a different form. From the judgment thus rendered the bank appeals.

The record shows that in 1860 Henry M. Hyams became a stockholder of 292 original, or 272 reduced, shares of \$100 each of the Citizens' Bank, representing nominally \$27,200, to be paid for as provided for by the charter; and that he obtained from the bank, in the place of his vendor, a loan of \$7,884, for which he issued his note, payable according to the provisions of the charter, securing it by a pledge of his shares, the payment of which had been guaranteed by a special mortgage, with stringent clauses, on certain real estate. In 1865, under the act of congress of July 17, 1862, proceedings were instituted against Hyams for the confiscation of the property. The bank intervened, asserted its claims, and a judgment of condemnation only being rendered, all the rights, title, and interest which Hyams had in and to the property that could be seized, sold, and divested under the act were offered at public auction by the marshal and adjudicated to the bank, which, after paying the charges, applied the residue to its claim. Subsequently, in 1866, under the impression that it had acquired the absolute ownership,—the fee and the right of enjoyment,—the bank executed an act of sale of the same to Isaac S. Hyams, on certain terms, Henry M. Hyams intervening and ratifying what was thus sought to be done. Later, in 1876, the vendee failing to respond to his engagements under this act, the bank brought suit against him, had the property and the shares seized and advertised for sale, and became the adjudicatee. Further on, Henry M. Hyams having departed this life, his heirs brought suit, in 1886, before the United States circuit court, to be declared the owners of the property and shares, and judgment was rendered, thus recognizing them, with a reserve of the rights of the bank, however. Finally, contributions having been called by the bank on the shares, and payment having been demanded of the amount due on the loan, and no judgment

being made, the bank brought, in 1886, the present suit to enforce her rights.

The defenses set up by the heirs are not well founded. The claims of the bank are extinguished neither by confusion nor prescription unless partially. The ownership of the property and stock never was acquired by the bank. The fee never was divested from the confiscatee. It continued to reside in him without any right of control, notwithstanding the condemnation and adjudication, until his death, when it passed to his heirs. *Lange's Case*, 18 Wall. 177; *Marquard's Case*, 20 Wall. 114; *Bosworth's Case*, 133 U. S. 92, 10 Sup. Ct. Rep. 231. What was condemned and passed to the bank was the life-estate of the confiscatee. The sale of the property and stock by the bank to Hyams, Jr., was an empty and idle ceremony. As the bank had no title to the naked ownership, the sale was that of another's property, and so a nullity. Rev. Civil Code, art. 2542. What the bank conveyed was the life-estate which it had acquired, nothing more. The intervention of H. M. Hyams in the act, and his ratification of what was thereby proposed to be done, had no legal meaning or effect. Although it be true that the fee was not divested from H. M. Hyams by the confiscation, it is no less so that he had no right whatever to control it, or dispose of the same in any manner, directly or indirectly; so that what he then did, or whether he did nothing, amounted to the same. The fee continued to dwell in him until he died. *Railroad Co. v. Bosworth*, 133 U. S. 92, 10 Sup. Ct. Rep. 231; *Avegno v. Schmidt*, 113 U. S. 293, 300, 5 Sup. Ct. Rep. 487; *Shields v. Shiff*, 124 U. S. 352, 8 Sup. Ct. Rep. 510. When the bank sued Hyams, Jr., and became the adjudicatee at the sale, what passed to it was that which it had previously conveyed to him, and which it had acquired at the condemnation sale,—the life-estate or naked ownership. Finally, at the death of Henry M. Hyams, the life-estate having determined, and the fee which was in him having passed from him to his heirs, these became the owners of the property and shares, such as it stood, but *cum onere*. So that it is apparent that the bank never having united the qualities of creditor and debtor, its claims were not extinguished by confusion. Rev. Civil Code, art. 2217.

2. The defense of prescription cannot avail in every respect. The stock contributions could not be prescribed against until the same had been called. There was one for \$584 called for in December, 1873. All the others were called for in December, 1876, and subsequently, within the 10 years preceding the institution of this suit, in July, 1886. The call for the contribution of \$584 was barred by the prescription of 10 years at the bringing of the action, and this reduces the amount claimed to \$2,588. Id. art. 3544. The possession of the pledge was a constant recognition of the debt, which prevented prescription from ever beginning to run. It is not the contract or act of pledge that interrupts prescription, but it is the detention of the things pledged. Such possession is a constant renunciation of prescription every instant that it begins to run. Mar-

cade, 7, 205; *Troplong*, Presce. 65, 75, 254, 534, 618, 628; *Bank v. Johnson*, 21 La. Ann. 128; *Police Jury v. Duralde*, 22 La. Ann. 107; *Bank v. Knapp*, Id. 117; *Bank v. St. Amans*, 23 La. Ann. 293; *Case v. Bank*, 100 U. S. 450; *Conger v. New Orleans*, 32 La. Ann. 1253.

Under the terms of section 24 of the charter of the bank, and even under the general law, the bank had a right to press and enforce the claims herein set up against the heirs *via ordinaria*, even if they were third persons. The charter formed part of the contract, as though it had been incorporated into it. Under its provisions, the bank could pursue any property, regardless of any alienation, in the hands of any possessor holding by any title, just as it could have done had it proceeded against the original mortgagor and debtor. *A fortiori*, had it such right, when the property was in the hands of the heirs of such debtor, without being subjected to pursue the form and delays of the hypothecary action, to which it was relegated by the court below. The bank, however, cannot hold the defendants liable or conditional, but as beneficiary heirs only. As such they are not responsible beyond the assets of their author. Code Prac. art. 734; Rev. Civil Code, art. 1058; *Bank v. Buisson*, 7 Rob. (La.) 506; *Association v. Claiborne*, 7 La. Ann. 319; *Bank v. Deynoodt*, 25 La. Ann. 628; *Latiolais v. Bank*, 33 La. Ann. 1444; *Mitchell v. Logan*, 34 La. Ann. 998; Hen. Dig. 1469. The child is prohibited from taking the father's property unless he pays the father's debts. *Dupre v. Soye*, 31 La. Ann. 450; *Lesseps v. Lopene*, 34 La. Ann. 117. The amount of contributions due is \$2,588, with interest, and the stock not reduced by credits is \$5,600, with interest. The stock is secured by mortgage on the property described in the petition, and the stock note is secured by the pledge of the stock and the mortgage guarantying the shares.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that there now be judgment in favor of plaintiff, the Citizens' Bank, and against the defendants, as beneficiary heirs of Henry M. Hyams, and without liability beyond the assets of this succession, to-wit: Clarence D. Sprigg, Mrs. Bettie M. Hyams, wife of Andrew H. Butler, Josiah Chambers, tutor of Daisy Hyams, Emma Hyams, Lelia A. Hyams, represented herein by her tutor and *curator ad hoc*, W. R. Rutland, executor of Henry M. Hyams, Jr., and tutor of his minor children, Laura R., Judith L. Rutland, Nellie C., Augusta M., and Edith C. Hyams; and it is ordered and decreed that the Citizens' Bank is entitled to seize and sell the property described in its petition and in the act of mortgage of Henry M. Hyams to the Citizens' Bank, of date 23d of October, 1860, passed before Felix Grima, and to seize and sell also the 277 shares of the capital stock of said bank owned by said Henry M. Hyams, to pay and satisfy the loan debt contracted by the late Henry M. Hyams, Sr., to-wit, \$5,600, with 10 per cent. interest from July 1, 1886, and to pay and satisfy, also, the stock debt due to the bank of \$2,588, with 8 per cent. interest

upon \$156 thereof from the 1st of December, 1876, and on \$156 thereof from the 1st of December, 1877, and on \$580 thereof from the 1st of December, 1881, and on \$584 thereof from the 1st of December, 1882, and on \$584 thereof from the 1st of December, 1883, and on \$544 thereof from the 1st of December, 1884, and on \$584 thereof from the 1st of December, 1885, and costs; and the said mortgage in favor of the bank, to secure the payment of said debts, is hereby recognized and decreed to exist upon the aforesaid mortgaged property described in the petition and in the act of mortgage aforesaid, and the privilege upon said shares of stock to secure payment of said debt is also recognized and decreed to exist upon said stock, and the mortgage accorded by the act to secure the stock debt of the bank of \$26,028, not due, but liable to be called for under the charter of the bank, and the laws relative thereto, is hereby recognized and decreed to exist upon the aforesaid property, is to be assumed by the purchaser of the property, and to subsist thereon until final payment.

It is further ordered that the plaintiff and appellant recover costs in both courts.

WELLER v. VAN HOVEN.

(Supreme Court of Louisiana. May 19, 1890.
42 La. Ann.)

HUSBAND AND WIFE—SEPARATION—COMMUNITY PROPERTY.

1. Under article 2420, Rev. Civil Code, the failure of the wife, separated from bed and board, to accept the community, either expressly or tacitly, within the delays therein prescribed, operates a conclusive and irrevocable renunciation thereof, which bars any subsequent assertion of the community rights.

2. Article 2420 remains in force, and was not repealed by Act No. 4 of 1882.

3. Failure of wife to repay to the community sums which had been advanced by it during its existence for the benefit of her separate estate does not amount to taking possession of community property, operating a tacit acceptance.

4. Peremptory exceptions founded on law may be filed at any stage of the trial before judgment.

(Syllabus by the Court.)

Chas. Osterberger and Gus A. Breaux, for appellant. B. R. Forman, for appellee.

FENNER, J. Appeal from the civil district court for the parish of Orleans. Plaintiff and defendant were married in 1868. In 1884 the husband sued the wife for a separation from bed and board, and obtained judgment, which became final on December 17, 1884, and from which no appeal was taken. Subsequently he obtained a final divorce. On June 9, 1886, plaintiff filed this suit, in which she claims a settlement of the community of acquets and gains which subsisted during the marriage, and was terminated by the judgment of separation from bed and board rendered in 1884. Rev. Civil Code, art. 155. The defendant joined issue on the merits, and the trial of the case had made some progress when he filed a peremptory exception, founded on law, to the effect that, by reason of plaintiff's failure to accept the community within the delays allowed by law, she had tacitly and irrevocably renounced the same, and her right of action

here asserted was thereby barred, and destroyed. From a judgment maintaining this exception the present appeal is taken.

The exception is founded on article 2420, Id.: "The wife, separated from bed and board, who has not, within the delays above fixed, to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same, unless, being still within the term, she has obtained a prolongation from the judge after the husband was heard, or after he was duly summoned." It is shown, and is undisputed, that plaintiff did not accept within the term prescribed, and obtained no prolongation thereof from the judge. The above article is taken from article 1463 of the French Code, and its meaning and effect are conclusively settled by both our own and the French jurisprudence. It is universally held to mean that the failure of the wife separated from bed and board to accept the community, either expressly or tacitly, within the prescribed delay, operates a conclusive renunciation thereof, which is irrevocable, and which bars any subsequent acceptance or assertion of community rights. 5 *Marcade*, 605; 3 *Baudry, Lacantinère*, 130; 22 *Laurent*, 425, 431; *Herman v. Theurer*, 11 *La. Ann.* 70; *Audrich v. Lamothé*, 12 *La. Ann.* 76; *Ewing v. Altmeyer*, 15 *La. Ann.* 416; *Decuir v. Lejeune*, Id. 569; *Snoddy v. Brasher*, 13 *La. Ann.* 469. We do not understand the learned counsel of plaintiff to dispute the perfect validity of the exception if article 2420 remains in force, but they claim that this article has been repealed by the statute No. 4 of 1882, which is in the following words: "At the dissolution, for any cause, of the marriage community, it shall be lawful for the wife to accept the community of acquets and gains under the benefit of inventory in the same manner, and with the same benefits and advantages, as heirs are allowed by existing laws to accept a succession under the benefit of inventory." The statute contains no repealing clause, and it cannot be held to repeal article 2420 by implication unless its provisions are "contrary to, or irreconcilable with, those of the former law." Rev. Civil Code, art. 23. Repeals by implication are universally disavowed. The principle formulated by Mr. Sedgwick, and approved by this tribunal, as well as by courts generally, that "laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject; and it is, therefore, but reasonable to conclude that the legislature, in passing a statute, did not intend to abrogate any prior law relating to the same subject-matter unless the repugnancy between the two is irreconcilable." *Sedg. St. & Const. Law*, 106, 98; *Railroad Co. v. City*, 34 *La. Ann.* 441, and authorities there cited. There is no such repugnancy between the article 2420 and the subsequent statute. On the contrary, they may well stand together, and might be incorporated in a single consistent statute which would provide (1) the delays within which the wife separated from bed and board should be bound to signify her acceptance; (2) that said acceptance, however, might be made under the benefit of

inventory, in the same manner, and with the same benefits and advantages, as the law provides in the case of beneficiary heirs. Where is the inconsistency? The article and the statute in fact treat of different matters. The article treats of the time within which the wife must signify her acceptance. The statute treats of the manner in which she may accept. The evil intended to be remedied by the statute was very clear. Under the prior law the wife, in all cases, was bound to accept or renounce the community unconditionally, taking upon herself the risk of its solvency. The object of the statute was simply to change this, and to authorize the wife to accept, under benefit of inventory, whereby she incurred no liabilities beyond the value of the community.

We have been unable to appreciate the force of the argument of counsel that the act of 1882 destroys the reason and motive on which article 2420 rests, and that *ratione cessante, cessat etiam lex*. His suggestion of the reason underlying the article, as being intended only as a protection to the wife, is quite contrary to the view expressed by the court and the French commentators. "The reason of the rule," said this court, "is doubtless this: The husband is the head and master of the community, and at once responsible for its debts; and, being seised of it, he ought not to be compelled to demand a partition of the wife of the effects in his hands, and thus lessen his means to meet the debts, particularly as he is responsible for the whole, whilst his wife, by acceptance, would only be responsible for one-half of the same. The interest of the creditors and of the public requires that the delay allowed the divorced wife to accept should be as provided by the Civil Code." *Herman v. Theurer*, 11 La. Ann. 70.

Other reasons are given by the French commentators, but all are entirely contrary to the one suggested by counsel. 3 Baudy, Lacantinière, 130; 22 Laurent, 425.

Authorizing the wife to accept with benefit of inventory detracts in no manner from the reason and policy of the law which requires her to exercise the right within a brief delay under penalty of forfeiture.

The objection to the timeliness of pleading the exception is unfounded. It is clearly a peremptory exception, as defined by article 345, Code Prac., "which, without going into the merits of the cause, shows that the plaintiff cannot maintain his action either because it is prescribed, or because the cause of action has been destroyed or extinguished." Such exceptions, under the express terms of the following article, (346,) "may be pleaded in every stage of the action previous to the definitive judgment."

The contention that plaintiff tacitly accepted the community within the terms prescribed finds no support in the record. Surely the suggestion is hardly serious that, because the wife is indebted to the community for sums advanced during its existence for her separate estate, her failure to pay such debts is to be treated as a conversion of community property operating as an acceptance.

The earnest and very able argument of counsel for plaintiff has commanded our attentive consideration, but we can discover no ground for reversing the judgment of our learned brother of the district court.

Judgment affirmed.

STATE v. DESCHAMPS.

(Supreme Court of Louisiana. May 21, 1890.
42 La. Ann.)

MURDER—MALICE—EVIDENCE—RES GESTÆ.

1. Ordinarily, when the act is deliberately committed with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed. But, as a general rule, it has been held that the presumption which arises from a killing, unconnected with such circumstances of violence, is that of murder in the second degree only.

2. Since malice cannot usually be directly proved, and the evidence of it, therefore, being circumstantial, any facts which go to afford an inference of its existence are admissible.

3. Where the *scienter* or *quo animo* forms an essential or indispensable part of the inquiry, testimony may be offered of such acts, conduct, or declarations of the accused, as tend to establish such knowledge or intent, notwithstanding they may, in law, constitute a distinct offense.

4. Though generally objectionable, proof of a different crime from the one charged is admissible, when both offenses are closely linked, and constitute parts of the *res gestæ*; and when it is pertinent and necessary to show intent.

5. As it is permissible, on a trial for murder, to show guilty knowledge, or criminal intent, by making proof of the commission of another crime, either perpetrated or attempted, and which constitutes a part of the *res gestæ*, and for the purpose of showing intent, further proof of premeditation is unnecessary.

6. It has often been held by us, that, as this court has appellate jurisdiction on questions of law alone, it will not revise the refusal of the lower court to grant a motion for a new trial, based solely on an alleged deficiency of evidence to make out a case.

(Syllabus by the Court.)

Alfred Roman, for appellant. *The Attorney General* and *Lionel Adams*, for the State.

WATKINS, J. Appeal from the criminal district court, parish of Orleans. This is the defendant's second appeal from a verdict and judgment subjecting him to the extreme penalty of the law for the commission of the crime of murder. 41 La. Ann. —, ante, 133. The grounds on which the reversal of the judgment is demanded are: (1) That certain testimony was improperly admitted; (2) that the court below improperly declined to give certain requested special charges to the jury; and (3) that his application for a new trial was illegally refused.

1. The first bill of exceptions to which our attention is attracted is that in reference to the testimony of the coroner, who was called, and interrogated as a witness, on the part of the state. The objections to the coroner's statement as a witness are: (1) That it is irrelevant to the issue; (2) "that its tendency was to prejudice the accused before the jury;" and (3) that it tended to establish the perpetration of another and different crime than the one charged against the accused, and which

was not necessarily included therein. To these objections, the trial judge replied that, "in all cases of homicide, even when it is not absolutely necessary to prove the condition of the body of the deceased, in order to ascertain and determine the cause of the death, and the instrumentality, means, and agencies by which the death was accomplished, such testimony is admissible to show whether or not the killing was by the use of means and agencies prepared in advance, and dangerous to human life. Such testimony is, also, admissible to show motive, and whether the killing, intentional or unintentional, was done while the accused was engaged in doing some other unlawful or felonious act." He therefore considered the testimony competent, and admitted it over defendant's objection and exception.

In thus ruling we think the judge's decision was undoubtedly correct. The simple proof of a homicide is insufficient to establish the crime of murder. Some proof must be first affirmatively made, on the part of the state, of the existence of malice in the heart of the perpetrator of the act, in order to put the accused upon his defense. Ordinarily, where the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed. But, as a general rule, it has been held in different states that the presumption which arises from a killing, unattended with such circumstances of violence, is that of murder in the second degree. And as, under our law, there are no grades, or degrees, in the crime of murder, the simple proof of a killing by the accused, unattended by any circumstances of malice, could raise no stronger presumption against him than that of manslaughter. 2 Whart. Crim. Law, § 752.

But there are many circumstances from which malice may be inferred, other than the use of a deadly weapon; and Mr. Wharton instances "prior attempts to injure, though in other ways." Id. § 954. The same author says: "Since malice cannot usually be directly proved, and the evidence of it, therefore, being circumstantial, any facts which go to afford an inference of its existence are admissible." Id. § 956. The same author announces the rule to be that, where the *scienter* or *quo animo* forms an essential or indispensable part of an inquiry, testimony may be offered of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent; notwithstanding they may, in law, constitute a distinct crime. Whart. Hom. §§ 701, 702. Bishop puts the principle thus tersely: "The proof of criminal intent and of guilty knowledge not generally admitting of other than circumstantial evidence, may often be aided by showing another crime, attempted or perpetrated; and, when it can be, it is permissible." 1 Bish. Crim. Proc. § 1126. In treating of what is admissible in proof of *res gestæ* the same author says: "Therefore, if two or more offenses are committed in one transaction, all the transaction—that is, all the offenses—may be given in evidence on the trial for one.

And all the *res gestæ* may be shown, though the transaction is a continuing one, or done in parts on different days." Id. § 1125. Our predecessors recognized and enforced this precept of criminal law in *State v. Patza*, 3 La. Ann. 512; the rule being stated thus: "The general rule is, as stated by the counsel for the accused, that no evidence can be given of other felonies committed by the prisoner than that charged in the indictment. To this rule, however, there are exceptions, one of which is when it becomes material to show the intent with which the act charged was done. Evidence may then be given of a distinct offense, not laid in the indictment." See, also, *State v. Thomas*, 30 La. Ann. 600. We have maintained the right of the state to offer such evidence as is here objected to, in a recent and conspicuous case, (*State v. Vines*, 34 La. Ann. 1081,) in which we said: "Proof of a different crime from the one charged, though generally objectionable, is admissible when both offenses are closely linked or connected, especially in the *res gestæ*, and also when such proof is pertinent, and necessary to show intent." *State v. Mulholland*, 16 La. Ann. 377; *State v. Rohfrisch*, 12 La. Ann. 882. On this summary of authority we can safely rest our conclusion as to the correctness of the ruling complained of by the accused.

2. The defendant's counsel requested several special charges, which were refused by the trial judge, which we will consider separately.

(a) That no evidence tending to establish the commission of other offenses, not connected with the charge of murder, and not growing out of such charge, should be considered by the jury in forming their verdict in this case. To this request the judge responds that it proceeds upon the hypothesis that there was evidence before the jury tending to establish the commission of other offenses, not connected with the charge of murder; but he says: "There was no evidence before the jury respecting the commission of any offense by the accused which was not connected with the charge of murder, and which did not tend to show that the killing was done while the accused was engaged in the commission of an offense which was a felony." On this statement of fact, the requested charge would have been misleading and superfluous, if made, and the judge properly refused to give it to the jury.

(b) That should the jury believe, from the law and the evidence, that the accused, being of sound mind, caused the death of the deceased in an unlawful manner, though not against the will of the latter, and should the jury also believe that the result of the defendant's act showed negligence or gross imprudence, but no premeditation,—no preconceived design to kill,—and, therefore, no malice on his part, it would be the duty of the jury to find for manslaughter, but not for murder. The judge declined to give this special charge, on the ground that it was not a correct exposition of the law; insisting, on the contrary, that if the killing was shown to have been done while the accused was engaged in doing an act which was itself a

felony, the absence of proof of premeditation or preconceived design to kill the deceased is insufficient to reduce the crime to manslaughter. He supports that view by reference to his written charge, in which similar grounds are taken, viz.: "If the jury believe from the evidence, and are satisfied, that the deceased came to her death from any drug, or potion, or intoxicant furnished by the accused for the purpose of depriving her of consciousness or volition, to enable him thereby to have either sexual or unnatural intercourse, and not for the purpose of causing death, yet if, in the perpetration of such unlawful design, death ensue, such act is murder." This requested charge is but a supplement to the objection urged to the admissibility of evidence discussed in paragraph 1; for if it be permissible, on a trial for murder, to show the guilty knowledge and criminal intent, by making proof of the commission of another crime, attempted or perpetrated; if more than one offense may be proved to have been committed by the accused, when the two transactions constitute parts of the *res gestæ*; if it be an exception to the general rule that, where it becomes material to show the intent with which the act charged was done, evidence may be given of a distinct offense, not laid in the indictment,—what becomes of the proposition that other proof of premeditation should be administered in order to make out a case of murder? As we understand the proposition argued and determined, it is that such proof is admissible for the purpose of showing premeditation and malicious intent; or that, if offered and received, the proof of the commission of such contemporaneous crime, forming, as it does, a part of the *res gestæ*, would be accepted as sufficient proof of malice. Certainly no argument can be required in support of the proposition that the homicide committed by an accused, while he is actually engaged in the perpetration of a known felony, such as rape, is murder.

(c) That if the jury should believe, from the law and the evidence, that the accused is guilty of felonious homicide, but that, at the time of the commission of the offense, he was suffering from such mental disease, or such delusion, that it overpowered his will, and rendered him unable to distinguish between right and wrong as to the act actually committed, or made it impossible for him to elect between right and wrong; and that no reason, or rational cause or motive, for the perpetration of the deed is shown to have existed; and that, furthermore, the evidence adduced on the trial shows no ill will, or malice, or evil intent on the part of the accused, as against the deceased,—the prisoner cannot be found guilty of murder. The judge assigns, as reason for refusing to so charge the jury, that there was no proof offered with respect to the mental condition of the accused at the time of, or previously to the perpetration of, the crime charged. No evidence to that effect is found incorporated in the transcript. None is adverted to in the defendant's bill of exceptions. How, then, was it possible for the jury to have believed "from the evidence" that the accused was

suffering from mental disease or delusion sufficient to have overpowered his will and rendered him unable to distinguish between right and wrong at the time he did the fatal act? Of course they could not as there was no such evidence adduced.

As the assumed insanity of the accused is the *gravamen* of the charge requested, and there was no such proof adduced, we need not prosecute this inquiry further; for it is an elementary precept of our criminal jurisprudence that a court cannot be required to charge the jury in matters of law upon a point which does not arise in the case, and which is not applicable to the facts in evidence. *State v. Moultrie*, 34 La. Ann. 489; *State v. Thomas*, Id. 1084; *State v. Riculd*, 35 La. Ann. 770; *State v. Garic*, Id. 970; *State v. Hamilton*, Id. 1043; *State v. Melton*, 37 La. Ann. 77; *State v. Ford*, Id. 443; *State v. Labuzan*, Id. 489; *State v. Simmons*, 38 La. Ann. 41; *State v. Primeaux*, 39 La. Ann. 673, 2 South. Rep. 423.

(d) That, in circumstantial evidence, every necessary link in the testimony, and every material and necessary fact, upon which the conviction depends, must be proven beyond a reasonable doubt, and that, if any of the facts or circumstances established be inconsistent with the hypothesis of guilt, that hypothesis cannot be true. For his refusal of this request the judge inadvertently assigned no reason; but as counsel, in his brief, has made no mention of it, we will pass it by without discussion. We referred to it merely for the purpose of exhausting the grounds assigned in defendant's bill of exceptions.

3. The grounds of the application for a new trial are: (1) That the verdict of the jury is contrary to law and evidence; (2) that the jury disregarded the evidence submitted to them, and rested their verdict, apparently, on the evidence given on a former trial; (3) that the jury was swayed by the specious theories of the coroner, who was, against defendant's protest, allowed to testify upon matters extraneous to and not connected with the charge in the indictment. It is against elementary principles, and in the face of a special statute, to claim that we can consider, for the purpose of the allowance *vel non* of a new trial, the evidence adduced before the jury on the issue of guilt or innocence of the accused. That question has passed beyond the domain of discussion in this court. *State v. Selley*, 41 La. Ann. 143, 6 South. Rep. 571, and cases cited therein. It has often been held by us that, as this court has appellate jurisdiction on questions of law alone, it will not revise the refusal of the lower court to grant a motion for a new trial based solely on an alleged deficiency of evidence to make out the case. *State v. Hopkins*, 33 La. Ann. 34; *State v. Crowley*, Id. 782; *State v. Young*, 34 La. Ann. 346; *State v. Diskin*, 35 La. Ann. 46; *State v. Reilly*, 37 La. Ann. 5; *State v. Taylor*, Id. 40; *State v. Hahn*, 38 La. Ann. 169; *State v. Smith*, Id. 301; *State v. Backarrow*, Id. 316; *State v. Bates*, Id. 491; *State v. Bird*, Id. 498; *State v. Broussard*, 39 La. Ann. 671, 2

South. Rep. 422. The discretion of the district judge cannot be disturbed on the showing made.

This completes the review of the numerous points made in this case; and our conclusion is that the trial was regular in every particular, and no error is apparent from an inspection of the record. The counsel who was also appointed to represent defendant has represented him with signal ability, and we are very much indebted to him for his exceptionally able and exhaustive brief. But on the record, as presented to us, there is nothing which entitles the accused to relief at our hands.

Judgment affirmed.

STATE *ex rel.* HOPE *et al.* v. BOARD OF LIQUIDATION.

(*Supreme Court of Louisiana.* May 22, 1890.
42 La. Ann.)

MANDAMUS—To EXECUTIVE OFFICERS—BOARD OF LIQUIDATION.

1. When official acts to be performed by the executive branch of the state government are divided into ministerial and political, and courts assume the right to enforce the performance of the former, it opens a wide margin for the exercise of judicial power. The judge may say what acts are ministerial, and what are political. Circumstances may arise, and conditions may exist, which would require the governor, in the proper exercise of his duty, and with due regard to the interests of the state, not to perform a plain ministerial act. Is the judge to arbitrarily determine his duty in such a case, and by *mandamus* seek to coerce its performance?

2. Whenever, by the constitution and laws of a state, officers of the executive branch of the government are vested with discretionary powers and functions in the performance of civil duties, or when political powers and responsibilities are devolved upon them, they are not amenable to judicial process. In such case, their acts are only politically examinable.

3. When such duties and powers devolve upon the executive department of the state government as a whole, the members of such a board, collectively, are likewise exempt from judicial control, notwithstanding individual members may be compelled by *mandamus* to perform "their ordinary official duties."

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

H. Denis and Farrar, Jonas & Kruttschnitt, for appellant. *Walter H. Rogers*, for appellee.

WATKINS, J. This suit is a supplement to that of same title decided recently, and adversely to the relators. 41 La. Ann. 535, 6 South. Rep. 819. The relators seek by *mandamus* to compel the various respondents, as the members of the board of liquidation, to assemble, take action on their bonds, and decide whether or not they are fundable in consolidated bonds of the state. The respondents return (1) that relators' petition states no cause of action; (2) that the judicial department of the state government has no power to control their official action; (3) that they are members of the executive department of the state, and as such designated as members of said board of liquidation of the state debt, and that they are not responsible to the judicial department of the state government as to the time when, or the manner in which, they shall per-

form their duties; (4) that the courts are without jurisdiction to compel them to meet, or to fix a time for their meeting, as the authority to convene the board is executive; (5) that in their opinion the present time is inopportune for a meeting of the board. The judge below made the *mandamus* peremptory, and in his decree fixed and designated a time within which the respondent should convene, and decide whether or not relators' bonds are fundable. From that judgment the respondents have appealed. The question is, therefore, whether the courts have jurisdiction and authority over the respondents, as members of the board of liquidation, to compel them to meet, and take action on the bonds of relators.

The respondent board was created under and by virtue of Act 3 of 1874, which was a legislative enactment making provision for an examination into and funding of the valid part of the public debt in consolidated bonds of the state. Section 1 of that act provides "that, for the purpose of consolidating and reducing the floating and bonded debt of the state, the governor, lieutenant governor, auditor, treasurer, secretary of state, and speaker of the house of representatives are hereby authorized to cause to be prepared and to issue bonds, to be known as 'consolidated bonds of the state of Louisiana,' * * * to the amount of \$15,000,000, or so much thereof as may be necessary," etc. Section 2 provides "that the parties designated in the foregoing section shall constitute a board of liquidation, and a majority of said board shall elect a fiscal agent for the state, who shall be a member of said board." Section 3 provides "that the bonds authorized by section one shall be signed by the governor, auditor, and secretary of state; * * * and, when so prepared, said bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the state, and all valid warrants drawn previous to the passage of this act, * * * at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants: provided, that the holder of any bond or valid warrant rejected by a majority of said board may apply by petition to the proper court for relief; and, if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided by this act," etc.

That this was intended as a scheme for the ascertainment and reduction of the public debt within a prescribed compass will appear by reference to the provisions of section 13 of the act, which are as follows, viz.: "That the entire state debt prior to the year of our Lord 1914 shall never be increased, directly or indirectly, beyond the sum of \$15,000,000, hereby authorized; it being the intent and object of this act, and of the exchanges to be effected thereunder, to reduce and restrict the whole indebtedness of the state to a sum not exceeding \$15,000,000, and to agree with the holders of the consolidated bonds to be issued hereunder that said indebtedness shall not be increased beyond said

sum during said period." This act was approved on the 24th of January, 1874; and at the same time a constitutional amendment was proposed confirmatory of the scheme, and which declares that the consolidated bonds to be issued under and in pursuance of that act shall be valid and binding contracts of the state in favor of the holders thereof.

Under the constitution of the state in force at the time, as well as under the one now in force, the executive department of the state government was composed exclusively of the officers enumerated in the funding law as composing the board of liquidation, with the exception of the speaker of the house of representatives, who is an officer of the political department of the state. When we take into consideration that the object in view was to liquidate the public debt, which consisted at the time of many millions of dollars in excess of the proposed limitation, evidenced by bonds and warrants of various series, and in exchange for which consolidated bonds were to be given, it is manifest that a political question of serious importance was presented for the consideration of the general assembly, and that they wisely conceived the idea, and devised the funding scheme, and gave it in charge of the executive department of the state government, with the solitary superaddition of the speaker of the house of representatives, as the most suitable exponent of the political power of the state. Or, in other words, a case is presented where the political department of the state has delegated to the executive department thereof the authority to examine into, and place a limitation upon, the state debt, by funding miscellaneous evidences of debt into consolidated bonds of the state. At most, the funding law merely extends a grace to the public creditors of the state, of which they have the option to avail themselves under the exceptional circumstances stated. In case creditors elect to do so, and any one of their claims should be disputed and disallowed by the respondent, such creditor has the right to have its legality tested in the mode pointed out in section 3 of the act. That is the particular manner and event in which the state has consented to submit herself to the jurisdiction of the courts in the premises; and the statute points out the formula or ceremonial of the judicial procedure, and expressly limits action in the premises. *Cecil v. Board*, 30 La. Ann. 35; *State v. Jumel*, 38 La. Ann. 337; *State v. Board*, 39 La. Ann. 395, 1 South. Rep. 910.

Act 11 of 1875 supplemented only the authority conferred by the statute of 1874 in the following particulars: (1) By authorizing any tax-payer to institute suit in his own name, or to intervene in any pending suit, for the purpose of testing the legality or validity of any issue of bonds or warrants, and to inquire into the consideration for which same issued; (2) to restrain the board from funding such bonds or warrants until their validity shall have been finally determined by this court; (3) by making an enumeration of the various issues of bonds and war-

rants which were deemed of doubtful validity; (4) by declaring that the presidents of the Cotton Exchange and of the Board of Trade shall be members of this board, with the proviso "that any delay, refusal, or inability of either or both of said last-named persons to qualify as members of said board, or of the non-existence of either, shall not affect the validity of the said board and its acts, and a majority of said board shall be required in order to perform any official act." Acts 1875, p. 110 et seq. It is apparent that this statute did not change the autonomy of the board as originally organized. On the contrary, it expressly provides that the addition of the presidents of two New Orleans exchanges shall not alter the status of the board; that a failure or refusal of either to act shall not affect the validity of the board, or its acts; and that a majority of said board shall be required in order to perform any official act. Evidently the presidents of the exchanges were intended to be advisory members only, and their addition did not in any way affect the character of the organization as an executive body charged with the performance of political functions. Indeed, Act 58 of 1877, amendatory of section 2 of Act 3 of 1874, omits the presidents of the exchanges entirely, while it reiterates all others. As drawing very clearly a line of distinction between the political powers which the board was to perform, and the judicial power the courts were authorized to exercise, we refer to what was well said in this case when it was last before us,—this, to-wit: "The state has given permission for a certain class of obligations to be presented by the holders of them to Louisiana courts for determination as to their validity; and thus, in authorizing suit against herself, she has pointed out the channel through which it must reach the courts, and it must be followed." 41 La. Ann. 535, 6 South. Rep. 819. But we are requested to go much further now, and coerce the action of the board, not in reference to the recognition *vel non* of the claims of creditors, but in reference to the propriety of its meeting at all, and the designation of time when and the place where it shall meet, and the purpose for which the meeting is to be held.

When we reflect upon the object to be attained by the funding scheme, and that the total debt was to be thereby reduced to \$15,000,000, and then consider that the holdings of the relators amount to more than \$4,000,000 of capital alone, it may be a question of serious consideration with the respondents when they should take action in the premises. It may well be that the precipitation of an issue of such great moment as that of the allowance *vel non* of the claim equal in amount to one-fourth of the public debt at an inopportune moment might prove embarrassing to the state, and seriously affect her credit at the time of greatest need.

It was made a question before our immediate predecessors whether a loan proposed to be made by the legislature to the New Orleans Pacific Railway Company in 1878 was not unconstitutional because the \$15,000,000 limit to the state debt con-

templated and provided in the funding laws and the constitutional amendment of 1874 had theretofore been reached. On that question, they said: "This legislation—the funding bill, and the act proposing the constitutional amendment—followed immediately upon the submission to the general assembly of the auditor's report dated January 1, 1874, wherein is this statement and information." Then follows a quotation from the auditor's report, giving in detail the amounts of warrants and bonds representing "the actual debt of the state" which he esteemed fundable, and the aggregate of which was \$24,356,338.72. The opinion then proceeds: "In a tabulated statement appended to the report, and forming one of the exhibits, the 'total amount of the bonded debt of the state for which the state is actually liable' is fixed at the figures above set forth; and there are then itemized other bonds, for which the state is contingently liable, amounting to \$4,803,683.33, which, with a sum stated as the 'miscellaneous debts' of the state, make up a sum total of \$30,000,000. In exact figures, it is that sum less \$8,217.17. The funding of that sum at the rate suggested by the auditor, and adopted by the legislature, will create a consolidated debt of \$18,000,000. The funding of the sum stated by the auditor as the actual debt of the state will create a consolidated debt of a little less than \$15,000,000. It is obvious that the 'plan,' both of the auditor and of the legislature, embraced only the latter sum, or, in other words, that it excluded the bonds loaned to the Citizens' Bank and the Consolidated Planters' Association, which amounted, in round numbers to the sum above stated, as a debt for which the state was only contingently liable." In the concluding part of the opinion the court says: "It is impossible that the contingent liability of the state upon the bonds loaned to the citizens in consolidated banks should have entered into the 'plan,' because funding them with the other liabilities will produce a sum total greatly exceeding that fixed by the act and the amendment." State v. Nicholls, 30 La. Ann. 980. When we reflect upon the fact that the relators' bonds are the bonds there under consideration, the difficulty of the situation is increased; and the urgency of relegating the whole matter to the discretion of the board of liquidation, and ultimately to the legislature, is increased. It is quite true that this might be an argument against the fundability of the bonds when put upon their merits before the board for allowance, but it also affects the question now before us, as to whether it was contemplated that the judiciary should take action in the premises. We think it is clear that we should not; and, as our duty to grant the ordinary relief afforded by *mandamus* has not been made plain and unmistakable, we ought to refuse it, and shift the burden on the shoulders of the legislature, who are better capacitated to deal with the question than the judiciary are. This question is now presented and contested for the first time; and no case cited, and none that we have been able to find, is at variance with the view we have expressed. We have examined the following

cases, viz.: State v. Board, 31 La. Ann. 273; State v. Board, 30 La. Ann. 816; Louisiana Nat. Bank v. Board, Id. 1356; State v. Board, 33 La. Ann. 124; State v. Board, 29 La. Ann. 264; State v. Board, Id. 690; Manning v. Board, 39 La. Ann. 327, 1 South. Rep. 654; Jarret v. Board, 40 La. Ann. 379, 3 South. Rep. 893; State v. Board, 39 La. Ann. 395, 1 South. Rep. 910; Oliver v. Board, 40 La. Ann. 321, 4 South. Rep. 166; Sage v. Board, 37 La. Ann. 413; Adams v. Board, 39 La. Ann. 689, 2 South. Rep. 508,—and find no contrary principle announced therein; and we apprehend none can be found in opposition to it. That *mandamus* will go to state officers for the performance of purely ministerial functions has been decided in many cases, among which the following may be cited: State v. Clinton, 27 La. Ann. 429, 28 La. Ann. 47; State v. Johnson, Id. 932; State v. Dubuclet, 26 La. Ann. 133; State v. Jumel, 30 La. Ann. 861, 31 La. Ann. 142; State v. Burke, 33 La. Ann. 969; State v. Steele, 37 La. Ann. 355.

But it has long been a question of delicacy and great difficulty for the courts of this country, state and federal, of last resort, to determine where the exact line of demarkation is to be drawn between political and executive duties, for the performance of which *mandamus* will not go to a governor of a state, and purely ministerial duties, for the performance of which the writ will lie. As applicable to the question in hand, we may well cite State v. Warmoth, 22 La. Ann. 1, in which our predecessors expressed themselves as follows, viz.: "When the official acts to be performed by the executive branch of the government are divided into ministerial and political, and courts assume the right to enforce the performance of the former, it opens a wide margin for the exercise of judicial power. The judge may say what acts are ministerial, and what political. Circumstances may arise, and conditions may exist, which would require the governor of a state, in the proper exercise of his duty, and with regard to the interests of the state, not to perform a ministerial act. Is the judge to determine his duty in such a case, and compel him to perform it? The reasons of the executive for the non-performance of an act the judge may never know, or, if brought to his knowledge, he may review and overrule them, and in so doing assume political functions. He would determine in such a case the policy of doing the act. The [legislature which] prescribed the act might hold the executive harmless, while the judge condemned him." (Italics in quotation are ours.) In our opinion, the very difficulty suggested by the court in that opinion has arisen, and is confronting us here,—the rightfulness of the exercise of judicial power for the purpose of coercing "the executive branch of the government" in the performance of duties which it, in the proper exercise of its discretion, and with due regard for the interests of the state, declines to perform. If it be even conceded that it is questionable whether the duties assigned to the funding board are purely ministerial, this court would "open a wide margin for the exercise of judicial power" in assuming that they are, and making the *mandamus*

peremptory. The question of greatest importance, and that which is uppermost in the executive mind, is, what, under the circumstances, is the proper exercise of executive duty in the premises, with due regard to the welfare of the state? Can the judiciary, with due regard to the funding scheme, decide the question thus arbitrarily, and by *mandamus* compel the respondents to act?

Another decision of our predecessors, construing a similar funding statute, has peculiar significance in respect to the one under consideration, wherein a judgment refusing a peremptory *mandamus* against a board of liquidation was affirmed. The court invited special attention to the fact that the words used are "authorized and empowered," as exercising a controlling influence over the performance of duty by the board of liquidation. *State v. War-moth*, 23 La. Ann. 76.

In this connection, it is a noteworthy fact, and should be taken into consideration, that the only words employed in the funding laws of 1874 and 1875 with regard to the powers or the organization of the board are "that the parties designated in the foregoing section shall constitute a board of liquidation." In the case last referred to, the court said of the statute considered that the act which the members of the board were required to do was not ministerial, and from its very nature involved a discretion in them in regard to the manner of doing it. *State v. Board*, Id. 388. The same rule of interpretation is applicable to the respondent board under the law of 1874. This seemed to be the view entertained of it by our immediate predecessors, who, in considering an application for *mandamus* to the respondent board, said: "The writ is never granted in doubtful cases." To warrant the relief, the relator must have a clear and legal right to the performance of a particular act, or the fulfillment of a particular duty, at the hands of the respondent; and this right must be a complete, and not merely an inchoate, right. High, Ext. Rem. § 7 et seq. "To justify the issuance of the writ in this case, the relator must have a present and perfect right to have the bonds presented by him funded; and it must be the respondent's duty to fund them,—a duty, the performance of which is not discretionary on the one hand, a right which is not inchoate and imperfect on the other." *State v. Board*, 29 La. Ann. 264.

Counsel for relators cite with reliance an opinion of the Indiana supreme court which says: "But the question whether a mandate will lie against the governor to enforce the performance of an executive duty does not arise in this case. The duty of the governor, in connection with the other officers named in the act, is not executive. The executive power of the state is vested solely in the governor. Const. art. 5, § 1. Any power or authority vested by legislation in the governor together with other officers or persons, in which they are to have an equal voice with him, cannot be executive, as he alone is vested with the executive power of the state. Any duty which he is by law required to perform in connection with others, in which they have

an equal voice with him, can in no sense be said to be an executive duty. The governor and the other officers named in the act may well be regarded as constituting a board organized by the legislature for the performance of certain duties, and a mandate will lie against them to enforce the performance of the duties prescribed." *Gray v. State*, 72 Ind. 578. But that opinion is not applicable here, for two reasons: (1) Because "the executive power of the state" of Louisiana is not exclusively vested in the governor,—only "the supreme executive power;" (2) because "the other officers named" in the funding statutes of 1874 are themselves members of the executive department of the state government. Hence this is not a case where the governor is merely designated as *ex virtute officii*, a member of the board, in connection with certain other persons, which is charged with the performance of certain designated ministerial duties. On the contrary the law declares that "the governor, lieutenant governor, auditor, treasurer, secretary of state, and speaker of the house of representatives shall constitute a board of liquidation." Such officers have acted; and when their terms of office have, from time to time, expired, their successors in office have taken their places in the board of liquidation without any formal reappointment or investiture with any *insignia* of office as such. The board is a continuing one, only subject to legislative recall.

There are many cases in which the courts of different states have held that *mandamus* will go to the chief executive office of the state but for the performance only of specific ministerial duties. Of that class we cite the following, viz.: *Bonner v. State*, 7 Ga. 481; *State v. Chase*, 5 Ohio St. 528, 7 Ohio St. 372; *Attorney General v. Barstow*, 4 Wis. 567; *Cotten v. Ellis*, 7 Jones, (N. C.) 545; *State v. Blasdel*, 4 Nev. 241; *State v. Kirkwood*, 14 Iowa, 162; *Harpending v. Haight*, 39 Cal. 189; *McCanley v. Brooks*, 16 Cal. 11; *Middleton v. Low*, 30 Cal. 596; *Stuart v. Haight*, 39 Cal. 87; *Chamberlain v. Sibley*, 4 Minn. 312, (Gil. 228;); *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; *Railroad v. Moore*, 36 Ala. 382; *Governor v. Nelson*, 6 Ind. 496; *Baker v. Kirk*, 33 Ind. 517; *Chumasero v. Potts*, 2 Mont. 242. We cite these merely for the purpose of showing that in a variety of cases, and in different courts of the country, *mandamus* has gone to the chief executive officer only when the law had imposed on him, either alone or in connection with other persons, the performance of specific ministerial functions, superadded to those devolving upon him under the constitution and general laws of the state. But even on this question there are quite as many, and quite as respectable, authorities which express a contrary view; and in the following cases it has been held in no case will the writ of *mandamus* lie to the chief executive of the state: *People v. Hatch*, 33 Ill. 9; *State v. Deslonde*, 27 La. Ann. 71; *State v. Dike*, 20 Minn. 363, (Gil. 314;); *Railroad Co. v. Randolph*, 24 Tex. 337; *Bledsoe v. Railroad Co.*, 40 Tex. 537; *Railroad Co. v. Gross*, 47 Tex. 428; *Chalk v. Darden*, Id. 438. In the fol-

lowing cases, doubt is expressed as to the allowance of the writ, and limiting its employment to extreme cases: *Hawkins v. Governor*, 1 Ark. 570; *State v. Drew*, 17 Fla. 67; *Low v. Towns*, 8 Ga. 380; *People v. Bissell*, 19 Ill. 229; *People v. Yates*, 40 Ill. 126; *In re Dennett*, 32 Me. 508; *People v. Governor*, 29 Mich. 320; *Rice v. Austin*, 19 Minn. 103, (Gil. 74); *Railroad Co. v. De Graft*, 27 Minn. 1, 6 N. W. Rep. 341; *Railroad Co. v. Lowry*, 61 Miss. 102; *State v. Governor*, 39 Mo. 389; *State v. Governor*, 25 N. J. Law, 331; *Hartranft's Appeal*, 85 Pa. St. 433; *Mauran v. Smith*, 8 R. I. 195; *Turnpike Co. v. Brown*, 8 Baxt. 490.

This extensive examination of, and research into, adjudicated cases, has satisfied us of the correctness of the general proposition that whenever, by the constitution and laws of a state, officers of the executive branch of the government are vested with discretionary functions in the performance of civil duties, or political powers and responsibilities are devolved upon them, they are not amenable to judicial process, but that their acts are only examinable politically. From this proposition the supplemental one may be deduced that when such duties and powers devolve upon the executive branch or department of the state government as a whole, as in this case, the members of the board thus constituted are likewise exempt from judicial control; and notwithstanding that some of the officers, respectively, are subject to judicial control, and can be coerced by *mandamus* to act, and to perform "their ordinary official duties." Such is the purport of *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. Rep. 12; *Kendall v. U. S.*, 12 Pet. 524; *U. S. v. Schurz*, 102 U. S. 378; *Decatur v. Paulding*, 14 Pet. 497.

On reason and authority, we think the judgment should be reversed. It is therefore ordered and decreed that the judgment appealed from be reversed; and it is further ordered that a peremptory *mandamus* be refused, at relators' cost in both courts.

Mr. Justice BREAUX, not being a member of the court when this case was argued and submitted, takes no part.

WILSON SEWING-MACHINE CO. v. SOUTHERN EXP. CO.

(*Supreme Court of Louisiana.* May 5, 1890.
42 La. Ann.)

ESTOPPEL IN PAIS.

An equitable estoppel arises when one party to an action has, by his faulty and negligent conduct, induced his adversary, from whom he claims a loss, to omit some act which, but for said fault and negligence, he would have done, and which, if done, might have prevented the loss.

(*Syllabus by the Court.*)

Rice & Armstrong, for appellant. *Long & Blair*, for appellee.

FENNER, J. Appeal from the civil district court for the parish of Orleans. The statement of the case made by the district judge in his reasons for judgment is so full, and so perfectly correct, that we adopt it.

"Plaintiff sues the defendant for dam-

ages suffered by the non-delivery of three packages containing promissory notes valued at \$3,164.80 to the consignee, S. B. Kirby & Co., Little Rock, Ark. The evidence proves the following substantial facts: On October 1, 1883, the plaintiff delivered to Adams Express Company at Chicago a package of promissory notes of the face value of \$2,348.58, addressed, and to be delivered, to S. B. Kirby & Co., at Little Rock, Ark. Around the package, and inclosed in a sealed envelope delivered to the express company, was a list of the notes, and a receipt to be signed by the consignee. Accompanying the package was also a letter of instructions addressed to the express company at Little Rock, Ark. It instructed the company, upon receipt of the package, to deliver to S. B. Kirby & Co., when they had compared the notes with the list in the receipt, and signed the receipt. It also instructed the express company to return the receipt given by Kirby & Co. to plaintiffs. The express company received the package, agreed to deliver the same for a charge of fifty cents, signed the usual receipt, which contained, in printed letters, a special contract limiting their liability for loss or damage unless claim therefor be made within thirty days after date of shipment, and to the extent only of fifty dollars, unless a greater valuation should be given by the shipper at the time of shipment. This contract inured to the benefit of the connecting carrier. The defendant, the Southern Express Company, received this package from the Adams Express Company at St. Louis, and carried to its destination,—Little Rock, Ark. It was received by the express agent at Little Rock, George T. McFadden, on October 3, 1883. The firm of S. B. Kirby & Co. was composed of Samuel B. Kirby and Logan H. Roots. Kirby was the managing member of the firm. The agent sent the package to the firm, and Kirby stated that the Wilson Sewing-Machine Company had made a mistake in sending the package to S. B. Kirby & Co., and that it should have been sent to him individually. The agent answered that the package was sent to S. B. Kirby & Co., that they were the proper parties to deliver it to, and that his receipt was good. Thereupon Kirby opened the package, took out the notes and list, compared the same, and then signed the receipt, 'S. B. KIRBY.' The agent then placed the receipt and the original letter of instructions in a sealed envelope, marked, 'Receipt of S. B. Kirby & Co.,' and addressed to the Wilson Sewing-Machine Company, Chicago, and forwarded the same on October 4, 1883. It was received by plaintiff about October 6, 1883. On October 19, 1883, plaintiff delivered another package of notes, face value \$2,360.44, addressed to S. B. Kirby & Co., with a like list, receipt, and letter of instructions. The express company entered into a like contract, with the exception of limiting its liability to the sum of fifty dollars. This package was received by the agent of the Southern Express Company, at Little Rock, and delivered by him on October 24, 1883, to S. B. Kirby. Kirby and the agent made, in substance, the same state-

ments. Kirby signed the receipt, 'S. B. KIRBY,' and the receipt, list, and letter of instructions were in like manner sent to the plaintiffs at Chicago. They were received by plaintiffs about October 26, 1883. On December 10, 1883, plaintiffs delivered to the Adams Express Company another package of notes, addressed 'S. B. Kirby & Co.,' face value \$88.45; and they were delivered, received, and receipt signed and returned, in like manner. The last receipt was returned December 13, and received by plaintiffs about December 20, 1883. These notes were secured by pledge on sewing-machines sold to the signers thereof. They were held by plaintiffs as collaterals to secure an indebtedness due them. They were sent to S. B. Kirby & Co. for collection. Plaintiff demanded of S. B. Kirby & Co. the return of the notes. On January 15, 1884, S. B. Kirby & Co., in answer to the demand, denied that they had ever received the notes, and refused to return them. On the 17th day of October, 1884, plaintiffs obtained judgment in the United States circuit court at Little Rock, Ark., for \$3,164.80, against S. B. Kirby, on the debt due, for which the notes herein mentioned were given as collateral. The judgment was not realized, as Kirby was then insolvent. On the 9th of July, 1885, plaintiffs sued the Adams Express Company for \$10,000 damages sustained by the loss of the said three packages of notes. They also sued S. B. Kirby & Co. in Chicago. In both suits, judgment was rendered in favor of defendants. On the 15th day of June, 1885, eighteen months after the delivery of the notes, a demand for their return, or value thereof, was made upon the defendant, the Southern Express Company. On April 23, 1888, this suit was filed. S. B. Kirby is not insolvent; and the notes, under the laws of the state of Arkansas, were prescribed when this suit was filed."

Defendant sets out several defenses arising out of the conditions expressed in its contract, and also pleads estoppel. The estoppel, which was sustained by the judge *a quo*, appears to us to be so clearly well founded that we find it unnecessary to consider any other defenses. We are dealing with no gross misconduct on the part of defendant. The main function of the express company is to make safe carriage of things intrusted to it to their destination, and there to make delivery to one authorized to receive it. Here the express company's agent delivered the thing at the proper place, and into the hands of the proper person, viz., at the office of S. B. Kirby & Co., into the hands of the managing partner of the firm, S. B. Kirby. The only error committed was in accepting a receipt signed by S. B. Kirby instead of S. B. Kirby & Co. The agent evidently thought that the duty of the express company was fully discharged by such proper delivery; and, if the receipt taken proved the fact of delivery, it mattered not whether S. B. Kirby, who was authorized to receive it, signed the receipt in his own or in the firm's name. However this may be, he immediately complied with the direction contained in plaintiff's letter of instructions by returning to plaintiff

the receipt taken. The express company thus informed the plaintiff exactly what had been done. If the plaintiff was dissatisfied with the manner in which its trust had been executed, its duty was plain immediately to disaffirm it, and to notify defendant. No such disaffirmance was made. On the contrary, plaintiff shipped a second package, with similar instructions, which were executed by taking and returning a similar receipt; and this was followed by a third consignment executed in the same way. These several transactions took place in October and December, 1883. It is admitted that the receipts returned were all promptly received by plaintiff. No notice of disavowal was given to defendant until June, 1885. Defendant had a right, conclusively, to presume that its action, thus fully communicated to its principal, was ratified by the latter. The only excuse of plaintiff is the pretense that it never looked at the receipts. If so, this was gross fault and negligence on its part. It was more than doubtful, in point of law, whether it can be heard to set up such fault as a ground of excusing its gross dereliction of duty to defendant. *Bank v. Morgan*, 117 U.S. 108, 6 Sup. Ct. Rep. 657, and numerous authorities therecited. But it is very clear that it had full knowledge of the receipts at least one year before it ever made any complaint to the express company. Instead of disaffirming these, it seems to have adopted them, and actually brought suit and recovered judgment against S. B. Kirby in October, 1884; and yet no notice of any claim against defendant was given until eight months more had elapsed. If plaintiff had promptly notified the express company of its repudiation of the latter's conduct when the receipts were returned, there is little doubt that the defendant could have protected itself against loss by proper proceedings against Kirby. Even if the notice had been given in January, 1884, when the letter of Roots, the other member of S. B. Kirby & Co., distinctly informed plaintiff that the receipts had been signed by S. B. Kirby individually, defendant might still have found means of protection. It was a condition precedent to any claim against defendant that plaintiff should have given such notice, and secured to defendant the opportunity of recourse against Kirby. As was said by the supreme court of the United States in an analogous case: "If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. * * * As the right to seek and compel restoration * * * from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and it may be effectually, exer-

cising it." *Bank v. Morgan*, 117 U. S. 108, 6 Sup. Ct. Rep. 657. The foregoing doctrine is fully applicable here, and sanctions the formulation of the doctrine of estoppel, sustained by universal jurisprudence, to the effect that an equitable estoppel arises when a party to an action has by his faulty and negligent conduct induced his adversary either to do or to omit some act or acts, by means of which the loss which is claimed against him might have been averted. 6 *Walt, Act. & Def.* 681, 683, 685, and authorities there cited.

The authorities relied on by plaintiff to the effect that there is no estoppel when the party pleading it knew, or ought to have known, the facts on which the estoppel is founded, are sound, but totally inapplicable. The vital fact upon which this estoppel is founded, and which the defendant did not know, is the fact that plaintiff disaffirmed, and claimed to hold defendant responsible therefor. Plaintiff's conduct and silence authorized defendant to assume that its action was approved, and induced it to omit taking those steps to avoid the loss which it would have taken but for plaintiff's culpable fault and negligence in failing to give any notice of its complaint. Judgment affirmed.

WARE V. MORRIS.

(*Supreme Court of Louisiana*. June 11, 1890.
43 La. Ann.)

APPEAL—ABANDONMENT—JUDGMENT—EXECUTION.

The defendant having authorized his attorney to abandon the appeal if he thought that the judgment would be affirmed; the attorney having informed him that in his judgment such would be the result; and having abandoned the appeal, not having executed a bond or taken up the case on appeal; the counsel representing the plaintiff having been informed by the counsel representing the defendant, at the time, that the appeal had been abandoned, and the judgment acquiesced in; the property to recover which a petitory action had been brought having been delivered to plaintiff by defendant's counsel, and the defendant never having objected to the change of possession; rents due on the places at the time judgment was obtained having been paid to plaintiff by defendant's lessee, in accordance with the direction of defendant's agent; held, that there was acquiescence, and that the judgment has been executed, and the right of appeal is lost.

(*Syllabus by the Court.*)

Appeal from district court, parish of Morehouse.

Boatner & Boatner, for appellant. *Bussey & Naff*, for appellee.

BREAUX, J. On motion to dismiss the appeal on the ground of acquiescence. On the 19th day of May, 1887, defendant's counsel applied for an order of devolutive appeal, which was granted, returnable to this court on the first Monday in June, 1887. The appeal was not completed. In May, 1888, the first counsel employed in the case being no longer employed, other counsel presented a petition of appeal from the judgment, in which it was alleged that the first appeal had not been perfected by giving bond and filing the transcript. This appeal was made returnable to this court on the first Monday of June, 1887. A motion to dismiss was filed, on the ground

that the defendant (appellant) has acquiesced in the judgment. In support of this motion, a letter of the defendant to his attorney, dated the 30th May, 1887, was filed; also the affidavit of the attorney who represented the defendant in 1887. There was also filed an affidavit of defendant's agent. This evidence received the attention of this court at the time the case was submitted, in June last. With reference to the acquiescence and voluntary execution of the judgment alleged, it was held that, unless the affidavits were rebutted or conclusively explained, "it seemed clear that appellant had lost his right of appeal." The case was remanded to the lower court, with instructions to the judge to hear evidence on the questions of abandonment and acquiescence *vel non*. The court's decree having been complied with, the questions are before us for our decision. In 1887 there were two suits pending before the court *a qua*,—the first entitled *H. Ware & Son v. N. S. Greenwood*, instituted to reinstate a lost deed; the other, entitled *H. Ware v. A. M. Morris*, was a petitory action. In the former case the plea of *res adjudicata* had been filed. It was overruled on the 18th May, 1887. The day after, judgment on the merits was rendered in favor of the plaintiff. In the other case, that of *Ware v. A. M. Morris*,—part of the same litigation,—judgment was rendered in favor of the plaintiff on the 23d day of May, 1889. The counsel who represented the defendant at the time wrote to him about these suits, (in both he represented him.) The former is ancillary to the latter. There can be no question that the letter written by the counsel was dated the 24th day of May, 1887, the day after the judgment had been rendered.

The defendant testifies that he was advised that the plea of *res adjudicata* had been overruled, but that he did not receive any notice, or the least information, after the judgment on the merits had become final. The testimony of the attorney who at the time represented the defendant in these cases is different. He states: "I wrote N. S. Greenwood, about the date of the judgment, one or more letters, stating the status of the case." "My letter to Greenwood was written after final judgment." To the best of his recollection, he wrote full particulars, he says. In his answer to the letter of May 24th the defendant expresses disappointment at the result of his suit, and leaves it to his attorney to appeal or not. The attorney testifies that he had informed the defendant of the hopelessness of his case on appeal. He had received the information, for he writes in this letter that "it seems that you have no hope that the judgment can be reversed." Thus informed, he nevertheless wrote to him, and requested him not to appeal, "if you think there is no chance to reverse."

It is contended that the letter from the attorney was written immediately after the plea of *res adjudicata* had been overruled, and not after judgment on the merits; that in consequence he could not be held to have acquiesced in a judgment respecting which he had not been informed. The facts disclosed in the note of evidence

preclude us from reaching the conclusion that the directions given and the statements made were not preceded by the least knowledge on the part of the defendant that a judgment against him had been rendered. The attorney at the time employed declares: "I had no hope of gaining the case on appeal, and it is my recollection that, upon the receipt of the letter leaving the matter to my judgment, I acted as I thought to the best interest of my client, and did not carry the appeal up."

The agent of the defendant, after having consulted this attorney, directed the lessee of the defendant to pay the rental to plaintiff's counsel. In accordance with this direction, the rental of the place, for 1887, 1888, and 1889, were paid to him. The then attorney and the agent of the defendant, together, delivered the property to plaintiff's counsel. Not the least objection was made. The property was sold. The sale was made after the counsel for the defendant had abandoned the appeal, and had informed the plaintiff that he did not intend to appeal. The defendant authorized the abandonment of an appeal. Those authorized have acted upon this authorization. The rights resulting are *faits accomplis*,—a condition which commenced under defendant's direction, and has become binding and irrevocable by his acquiescence. The attorney has acted within the scope of his letter. His acts have not been repudiated, and therefore bind the principal. The taxes assessed in 1887 were not paid by the defendant. The property has been assessed in the name of those to whom plaintiff sold. The defendant has not given himself the least concern about the assessment or the taxes.

The special agent testifies that he was agent of the defendant for the years 1885, 1886, and 1887, and in that capacity leased the property involved in this litigation, and remitted the rents to him for all these years except the year 1887. The principal never called on him for the rental of this year nor of subsequent years. He surely knew that this rent had been collected and the disposition made of the amount. The agent testified that he wrote to him on the subject, and it is not made evident that the information has not been received. There is acquiescence; the judgment has been executed, and the right of appeal is lost. The motion is granted, and the appeal is dismissed.

Judgment affirmed.

STATE v. ST. CLAIR *et al.*

(*Supreme Court of Louisiana. June 11, 1890.*
43 La. Ann.)

CRIMINAL LAW—FORMER JEOPARDY—BURGLARY—LARCENY—VERDICT.

The defendants were jointly indicted for burglary and larceny, in a single count. The case went to a jury, who returned a verdict finding them guilty of larceny. The judge directed the clerk not to file the verdict, and requested the jury to return, and consider the case again, and find a verdict according to the instructions given them; at the same time reminding them that the court had not submitted to them, for their finding, whether the defendants were guilty of larceny or not, as an independent offense, and that their finding was not responsive. Thereupon, the jury fail-

ing to agree upon a verdict, they were discharged, and a new jury were impaneled, by whom a verdict of guilty of burglary and larceny was rendered. *Held*, that the verdict of the jury first rendered was legal and valid, and the defendants could not be again put in jeopardy by a new trial under the same indictment. Under this state of facts, defendants' pleas of *autrefois convict* of larceny, and *autrefois acquit* of burglary, should have been sustained.

(*Syllabus by the Court.*)

Appeal from district court, parish of Caddo.

Rob. J. Looney, for appellants. *J. Henry Shepherd*, for the State.

WATKINS, J. The indictment is for burglary and larceny, in a single count. The case went to a jury, who returned a verdict finding the defendants guilty of larceny, which was read by the clerk, who was immediately instructed by the court not to record the same as a verdict, and the jury were directed to retire, and "find a verdict according to the instructions given to them;" the court at the same time reminding them that it "had not submitted to them for their finding whether the defendants were guilty of larceny or not as an independent offense, and their finding was not responsive." The jury retired, and again considered the case, without arriving at any conclusion, and on the following day the judge discharged them *ex proprio motu*. Three days later the cause was reassigned for trial, but, before the jury were impaneled, counsel for the accused filed several pleas in bar to a further prosecution under the indictment, viz.: (1) Once in jeopardy by the trial just adverted to; (2) *autrefois convict* of the crime of petit larceny; (3) *autrefois acquit* of the crime of burglary. To these pleas the district attorney filed a demurrer, to the effect that the matters were insufficient in law to bar a further prosecution. This demurrer was sustained by the trial judge, the pleas in bar were overruled by him, and the accused were tried and found guilty of burglary and larceny. Counsel retained a bill of exceptions to the judge's ruling, and after the trial filed a motion in arrest of judgment, substantially on the same grounds as those stated in the pleas in bar, and it was also overruled.

On this state of the record, the question for decision is whether the finding of the first jury was or not a valid verdict,—such a one as the court was bound to accept at their hands; or had the judge the right to instruct the clerk not to record the one tendered as a verdict, and direct the jury to retire and consider the case again, and find such a verdict as would conform to the instructions given in his charge?

The reasons assigned by the judge below are set out at length in his written opinion, and they may be summarized as follows, viz.: (1) That counsel for the accused was present and heard the charge that was given to the jury, and made no objection to it, nor did he request any special instructions to the jury. (2) That if the verdict of the jury is not in keeping with the instructions of the court, and does not find the facts charged by the judge to be material to a conviction, but re-

turns the accused guilty of a crime not included in or covered by his instructions to them, he has the legal right to instruct the clerk not to record such verdict and to decline to receive it at their hands, and to recommit them, with instructions. (3) That the requirement of the judge to give the jury a knowledge of the law applicable to the case, and to avoid the statement of abstract principles impertinent to the facts proven in the case, imposes on him the duty of determining what legal principles are at issue under the pleadings. Hence if there is, in his opinion, no evidence whatever to support any given charge, the judge has authority to prevent such charge going to the jury; or in other words, if the finding is not responsive to his charge, or be rendered through mistake, the judge should not receive the verdict, but should send the jury back with explanations. (4) He assigns as his reason in this case, for his refusal to accept the verdict rendered by the first jury, that the crime of larceny as an independent offense was not submitted for the consideration of the jury, because there was an entire failure of evidence tending to prove the charge of larceny. (5) That in such an indictment the crime of larceny is not necessarily connected with burglary, and that a verdict which is silent as to the crime of burglary, and only finds the accused guilty of larceny, is responsive to only a part of the charge, and therefore the court ought not to receive it.

After careful consideration of the written opinion of the district judge, we deem it our duty to say, with due respect to his learning and judicial ability, that, if his theory be correct, the verdict of the jury, in any given case, would be completely under his control, in spite of the law which declares that the jury shall be the sole and exclusive judges of the facts. For what becomes of the power of a jury to judge of the facts, if the judge has the authority to decline to receive a verdict because in his opinion it is not in keeping with his charge, and does not find the facts charged by him to be material to a conviction, but returns the accused guilty of a crime not included in or covered by his charge? or if he has the right to decline to receive a verdict because, in his opinion, there had been an insufficient amount of evidence introduced to establish a given charge in an indictment, and which he had declined to submit for the consideration of the jury? If the trial judge possessed such power,—right of supervision,—his judgment would dominate that of the jury over the facts of a case completely. Surely, this cannot be the law in this state. When a trial has been had upon a valid indictment, and to which no objection has been urged, and after hearing the evidence, and the charge of the judge, the jury return a verdict, the accused is entitled, as a matter of right, to have it recorded, and the judge is without authority to set same aside *ex proprio motu*, because he is of opinion that the evidence justified a different one, and was not sufficient to justify the one which was returned. The only way in which such a verdict can be brought before him for review is by a motion for a new trial or one in arrest of judgment. We are at a loss to

perceive what the judge's charge has to do with the verdict, so long as neither the state nor the accused have made any complaint about it. The judge has no control over the submission of the case. His direction of the trial ceases with the rendition of his charge to the jury. The defendants' plea in bar should have been sustained, and all further proceedings discontinued, after the first verdict was brought into court.

The constitution declares that "no person shall be * * * twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained." Const. art. 5. The defendants made no complaint of the first verdict; they certainly made no motion for a new trial. There was no mistrial, because there was an unanimous verdict. They filed no motion in arrest of judgment. On the plainest principles of construction, the second trial of the accused, on the same indictment, did put the liberty of the accused in jeopardy the second time, in direct violation of the bill of rights. They were legally convicted of larceny, and their pleas of *autrefois convict* of larceny, and *autrefois acquit* of burglary, should have been sustained, and the motion to arrest the judgment of the court under the second verdict should have prevailed. It is therefore ordered and decreed that the judgment and decree appealed from be annulled,—set aside; that the former verdict finding the defendants guilty of larceny be reinstated; and that the cause be remanded for further proceedings according to law.

STATE V. COSGROVE.

(Supreme Court of Louisiana. June 11, 1890.
48 La. Ann.)

MURDER—SELF-DEFENSE—EVIDENCE—THREATS.

Evidence of prior threats is not admissible in support of a plea of self-defense in homicide, unless they have been followed by an overt act or hostile demonstration, at the time of killing, of such a character as to indicate that the deceased was then and there about to execute said threats, and to justify defendant in believing that his life was in such apparently imminent danger as to authorize him to take his adversary's.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans.

J. Q. Flynn, for appellant. C. H. Lusenburg, Dist. Atty., for the State.

FENNER, J. Defendant was indicted for murder, and convicted of manslaughter. In absence of any appearance by counsel on his behalf, we have given careful consideration to the bills of exception found in the record. Two of these bills are taken to the exclusion by the judge of evidence offered to prove prior threats and assaults by deceased against the defendant. The judge's ruling is sustained by his statement: (1) That the threats and assaults referred to occurred several months before the killing; (2) that they were not followed by any such hostile, overt act, at the time of the killing, as would lay the foundation for their admission.

The judge states that the only overt act proved against deceased, at or about the time of the killing, consisted in his having shaken his finger in the face of accused, adding: "This was not repelled by blows, or assault by Cosgrove, and was not followed up by blows or assault by Fitzgerald. Fitzgerald resumed his seat on the bench where he had been previously sitting, and Cosgrove sat on the steps where he had been sitting, facing the bench. After an interval of from three to five minutes, according to some of the witnesses, Cosgrove fired successively three shots," etc.

This statement does not disclose any such overt act on the part of deceased as, taken in connection with the prior threats, justified the defendant in believing that deceased was then and there about to carry the threats into execution, and that his life was in such apparently imminent danger as to justify him in taking his adversary's. These are, under our jurisprudence, the necessary characteristics of the overt act or hostile demonstration which may serve as the basis for the introduction of evidence of prior threats, of the dangerous character of the deceased, and the like. *State v. Birdwell* 36 La. Ann. 859; *State v. Jackson*, 33 La. Ann. 1088; *State v. Labuzan*, 37 La. Ann. 489.

The third bill to the refusal of the judge to give certain special charges is so conclusively disposed of by the reasons of the judge, and by the statement of the charge actually given, that it needs no comment. The only serious ground of the motion for new trial was the alleged error in excluding the testimony embraced in the bills above referred to, and our disposition of them applies to this motion. Judgment affirmed.

SAUNDERS v. MANGUM *et al.*

(*Supreme Court of Louisiana.* June 11, 1890.
42 La. Ann.)

PRACTICE IN CIVIL CASES—NONSUIT.

In the absence of a reconventional demand, when the plaintiff fails to appear and prosecute his suit either in person or by attorney, a judgment of nonsuit only can be rendered against him.

(*Syllabus by the Court.*)

Appeal from district court, parish of Ouachita.

E. T. Lamkin, for appellant. *Potts & Hudson and Newton & Cason*, for appellees.

McENERY, J. Mrs. A. L. Saunders instituted suit against the defendants to rescind an act of compromise. She, in aid of her suit, prayed for and obtained an injunction against defendants prohibiting and restraining them from selling or disposing of certain shares of stock in a corporation. Defendants filed a motion to dissolve the injunction. The case was set for trial, and, the counsel for plaintiff being absent, a motion for a continuance was made. It was denied, and the case refixed for trial. On this day another motion was made for a continuance on account of the absence of the senior counsel at Washington on official business connected with his duties as representative in congress, and the junior counsel being a member of the state legislature, which

would be in session in a couple of days. The application for a continuance was overruled, and the trial of the case ordered to be proceeded with. Whereupon a written withdrawal was filed by plaintiff's counsel. The court then had the plaintiff called by the sheriff, from the court-house door, and, upon her failure to respond, the pleadings were read, and a final judgment rendered against her, as follows: "By reason of the law and the evidence in this case being in favor of defendants and against plaintiff, and by further reason of this case having been regularly set for trial, taken up and tried on the day fixed therefor, plaintiff's attorneys, Messrs. C. J. & J. S. Boatner, having withdrawn from the case, and the plaintiff having been three times called at the court-house door to prosecute her suit, and having failed to appear, and upon trial the law and the evidence being in favor of defendants, it is therefore ordered, adjudged, and decreed that there be judgment in favor of the defendants, and against plaintiff, rejecting her demand, and dissolving her injunction, at plaintiff's costs."

The plaintiff has appealed. She urges that the pleadings did not authorize the judgment, as there was no reconventional demand, or claim for interest, or any claim for damages, set up by the defendants, and therefore a judgment of nonsuit only could have been rendered against her. The defendants admit this position of the plaintiff, and suggest that this court render such a judgment as should have been rendered by the court *a quo*. Article 536, Code Prac., provides: "If, after the cause has been set down on the docket for trial, the plaintiff does not appear, either in person or by attorney, to plead his cause, on the day fixed for trial, the defendant may require that judgment of nonsuit be rendered against such plaintiff, with costs. But such judgment cannot be pleaded as *res judicata*, or in bar of another suit for the same cause of action, provided the plaintiff show that he has paid the costs of the first suit."

Under the pleadings, the defendants were entitled only to a judgment of nonsuit. The only fact with which the court had to deal was the non-appearance of the plaintiff, either in person or by counsel, to prosecute her suit. There were no issues raised by the defendants in the way of any reconventional demand, and there was no basis upon which to render a final judgment against the defendants. *McDonogh v. Dutillet*, 3 La. Ann. 660; *Dunbar v. Mansker*, 4 La. Ann. 176. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the demand of plaintiff be dismissed as in case of nonsuit.

STATE v. TURLEY.

(*Supreme Court of Louisiana.* June 11, 1890.
42 La. Ann.)

CRIMINAL LAW—APPEAL—RECORD.

Where the record in a criminal case presents neither bill of exception, motion to quash or in arrest, or assignment of errors, and there is

no error patent on the face of the record, the judgment appealed from will be affirmed.

(*Syllabus by the Court.*)

Appeal from district court, parish of St. Charles.

H. Kirmer and C. A. Bagule, for appellant.
Gervais Leche, Dist. Atty., for the State.

MENERY, J. The defendant was indicted for horse-stealing, tried, convicted, and sentenced to one year's imprisonment at hard labor, from which he appealed.

There is in the record no bill of exceptions, assignment of errors, motion in arrest of judgment, or motion to quash. On examining the record we find no error on the trial. Where the record in a criminal case presents neither bill of exception, motion to quash, or in arrest, or an assignment of errors, and there is no error patent on the face of the record, the judgment will be affirmed.

Judgment affirmed.

POLICE JURY OF LINCOLN PARISH v. HARPER.

(*Supreme Court of Louisiana. June 12, 1890.*
42 La. Ann.)

INTOXICATING LIQUORS—ILLEGAL SALES—PENALTIES—POLICE JURIES.

The case of *State v. Harper*, ante, 446, (recently decided,) governs this case.

(*Syllabus by the Court.*)

Appeal from district court, parish of Lincoln.

E. H. McClendon, Dist. Atty., for appellant. *F. W. Price and Potts & Hudson*, for appellee.

FENNER, J. This suit arises under the same ordinance of the police jury of Lincoln parish, which was recently considered by us in the case of *State v. Harper*, 42 La. Ann. —, ante, 446. In our decision of that case, we stated the substance of the ordinance, which need not be now repeated. That case involved a criminal prosecution for violation of the ordinance, while this is a suit for the recovery of a fine or penalty for a like violation. We held that the ordinance transcended the power delegated by the legislature to the police jury, and was, therefore, illegal. All the reasons assigned for quashing the criminal prosecution apply with equal force to fines and penalties imposed by the ordinance involved in this suit. The police jury had no more power to impose fines for violation of an illegal ordinance than to inflict criminal penalties for a like violation. The judge *a quo* rightly construed our opinion as declaring the ordinance to be *ultra vires*, and illegal.

Judgment affirmed.

SCOTT et al. v. SCOTT et al.

(*Supreme Court of Louisiana. June 12, 1890.*
42 La. Ann.)

SUCCESSIONS—SALE OF LAND—CONSIDERATION.

When an adjudicatee of property at succession sale makes use of a 12-months bond, on which the deceased is security, in paying the price of adjudication, and, pursuant to an agreement with the holder of said bond, conveys a part of the property purchased to her as a consideration there-

of, and thus secures the remainder of the property without consideration, *held*, that the adjudicatee acquires no title, and the heirs of the deceased inherit the property.

(*Syllabus by the Court.*)

Appeal from district court, parish of Richland.

Wells & Rymes, for appellants. *J. W. Willis and T. O. Benton*, for appellees.

WATKINS, J. Petitioners, as widow and heirs of William M. Scott, deceased, son of Susan A. Scott, also deceased, claim, as heirs of their said grandmother, to be the joint owners, by inheritance, of an undivided one-half interest in the plantation in Richland parish known as the "Home Place," which contains 291 acres of valuable land, well improved, and in a high state of cultivation, and the rental value of which is stated to be \$500 per annum. They demand rents for several years, and to be placed in possession of the property. The averments of their petition are that during the life-time of their father and grandmother the latter consented to a mortgage on another plantation of hers, known as the "Creek Place," which contained 760 acres, as security for a debt of the former to H. F. Given & Co. of \$5,000; that Miss Mary F. Kincaid, of the state of Mississippi, having acquired an interest in said note and mortgage, she brought suit against their father on the note, and obtained personal judgment thereon, and, as against their grandmother, she obtained the recognition of, and right to enforce, her mortgage on the Turkey Creek plantation. Under this judgment, this plantation was seized and offered for sale, and, failing to bring two-thirds of its appraisement at the cash offering, it was readvertised for sale for whatever it would bring on 12 months' credit. At the second offering the property was adjudicated to William M. Scott at the price of \$1,100, for which amount he executed a 12-months bond. At its maturity he made default, and same property was again seized under execution on the bond, and Miss Kincaid became the adjudicatee at the stated price of \$300, which sum, less cost, was credited on the writ and 12-months bond. Soon after these occurrences, Mrs. Susan A. Scott died, and the defendant William H. Scott was appointed administrator of her succession, and obtained an order of court to sell all the property thereof for the purpose of paying its debts. At the sale, which took place on the 23d of March, 1884, Walter M. Scott, a brother of the administrator, became the adjudicatee of the home plantation. The further averment is made that their grandmother owed no debts at the time of her death, and there was no necessity of an administration on her succession; that the adjudication to Walter M. Scott was a fraudulent simulation, he having paid no price therefor, and his brother, the administrator, having and retaining the actual physical possession of the property at the time, and subsequently; that Miss Kincaid made a simulated and fictitious transfer to Walter M. Scott of the balance which appeared to be due her on the 12-months bond, and he assumed to

receipt and surrender same to the administrator in satisfaction of his bid, except for a small amount, which he did not pay; that in point of fact said 12-months bond had not been transferred to Walter M. Scott, but had been forgiven and released by Miss Kincaid in consideration of her purchase of the Turkey Creek plantation for the small sum of \$300, as stated.

There seems to be no serious controversy about the correctness of plaintiffs' statement of their case, except with regard to the reality and *bona fides* of the administrator's adjudication of the home place to Walter M. Scott, the reality and validity of which the defendants affirm. But a casual inspection of the record of the suit and judgment of Mary Kincaid against Mrs. Susan A. Scott et al. discloses that a personal judgment was rendered therein against the administrator of Walter M. Scott alone, and that judgment was rendered against Mrs. Susan A. Scott only to the extent of recognizing and enforcing the mortgage she executed on the Turkey Creek plantation as security for her son's debt, and no personal judgment was rendered against her for the debt. She subsequently became the security of W. W. Scott on the 12-months bond for \$1,100. This was only a contract of suretyship, which represented a contingent liability on the part of Mrs. Susan A. Scott, and entitled her to a previous discussion of the property of her principal on the bond. But it was treated by the administrator, and all parties concerned, as an unconditional obligation of hers, and made the ground on which her succession was administered, and the basis of the order of sale of the property of her estate. The administrator's *procès-verbal* of sale to Walter M. Scott shows that he paid the amount of his bid by crediting the 12-months bond, but the proof shows that the bond had been transferred to him by Miss Kincaid three days before the sale was made to him, and that the consideration of the transfer was a conveyance to Miss Kincaid of a small tract of 40 acres of land which formed a part of the Turkey Creek place, and which had been accidentally omitted from the *procès-verbal* of adjudication to her when she purchased same. But Walter M. Scott only acquired this 40 acres when the adjudication at succession sale was made to him. Thus we find that the matter stands this way: Miss Kincaid failed to get title to the whole of the Turkey Creek place by 40 acres. Hence the succession sale was made of it and the home place to Walter M. Scott. He made use of the 12-months bond of Miss Kincaid in making the acquisition; and, when the property was adjudicated to him, he conveyed the 40 acres to her, and retained the home place. By this means, Miss Kincaid perfected and completed her title to the Turkey Creek place, and W. M. Scott expected to obtain title to the home place for nothing. We are of opinion that the plaintiffs have made out their case, and that the judgment in their favor for one undivided half interest in the property should be affirmed.

The plaintiffs, however, ask an amendment of the judgment in respect to rents

of 1883, 1884, 1885, and 1886, insisting that the proof is just as clear in reference to the defendant's occupancy of the property during those years as it is in regard to the subsequent years for which allowance was made. As we have already found that William H. Scott was the acting and duly-qualified administrator of Mrs. Susan A. Scott, and has been recognized as such by this court, and that he had an apparent right to sell the property under an order of court, we are of opinion that plaintiffs are entitled to recover rent from the 1st of March, 1884, (date of order of sale,) at the rate of one-half of \$500 per annum, until the date of the delivery of possession.

Plaintiffs complain of the reservation in the judgment appealed from allowing the defendants to institute suit for improvements erected on the property during their occupancy of it, because they were possessors in bad faith. In *Heirs of Wood v. Nichols*, 33 La. Ann. 744, a somewhat similar case, we held the defendant to have been possessor in bad faith, and liable for rents, but we said: "Defendant is undoubtedly entitled to necessary expenses for the preservation of the property under article 2314, Rev. Civil Code, and to a proper adjustment of his claims for constructions and improvements under article 508, Id. We find not even plausibility in the contention that this article does not refer to possessors in bad faith." Page 751. We think that opinion furnishes a correct exposition of the rights of possessors in bad faith, and that the judge *à quo* was correct in making the reserve he did. The judgment should be amended so as to award plaintiffs rent from the 1st of March, 1884.

It is therefore ordered and decreed that the judgment appealed from be so amended as to allow plaintiffs rent at the rate of one-half the amount of \$500 per annum from the 1st of March, 1884, until the date of defendants' delivery of possession, and that as thus amended the same be affirmed, and that all costs be taxed against the defendants and appellants.

PARISH OF OUACHITA v. CITY OF MONROE.
(*Supreme Court of Louisiana.* June 12, 1890.
42 La. Ann.)

CITIES — PAYMENT OF PARISH EXPENSES — CONSTRUCTION OF ACT.

1. Act No. 57 of 1876, which authorized the city of Monroe to pay one-fourth the expenses, for certain purposes, of the parish of Ouachita, cannot be extended to any item of expense not contained in said act.

2. The authorization of the city to pay one-fourth for repairs to public buildings cannot be extended to cover the expense of the erection of new buildings.

(*Syllabus by the Court.*)

Appeal from district court, parish of Ouachita.

W. N. Potts, for appellant. F. G. Hudson, for appellee.

MCENERY, J. The legislature, by Act No. 81 of 1873, exempted from all taxes and licenses levied by the parish of Ouachita, from and after January 1, 1873, all real and personal property within the corporation of the city of Monroe, and all persons, firms, and corporations within said

city limits. By Act No. 57, approved March 21, 1876, the city of Monroe was required to pay one-fourth of all the expenses incurred and liquidated by the parish of Ouachita for drawing and summoning jurors, their mileage and *per diem*, the summoning witnesses before grand juries, for the attendance of the sheriff on the several courts, for repairs on the public buildings owned by the parish and situated within the corporate limits of the city of Monroe, for books for parish officers, for registration and election, and for the salary of the district attorney *pro tem*. The act provided for the manner in which the account for expenses should be made out and presented to the city of Monroe, and the manner of the payment by said city. In pursuance of this act the parish of Ouachita presented an account for expenses to the city of Monroe, for the sum of \$2,715.47. The account was approved, except the items for ice and coal for jail and court-house, and the item for the cost of erecting and building a new jail for the parish, which was ordered by the police jury of the parish. The parish of Ouachita brought this suit to recover the one-fourth of the account from the city of Monroe.

The facts, as admitted, are that the jail was built in 1888, by Pauly & Co., under a contract with the police jury of Ouachita parish. Its cost was \$9,466.80, one-fourth of which is claimed from the city of Monroe. Neither the mayor nor city council of Monroe was consulted about said contract, and never consented to the same. The lot upon which the old jail stood was sold by the parish for \$1,000, and the materials of the old building were sold for \$50, and the proceeds of both sales placed in the parish treasury, no part of which was credited to the city of Monroe. No part of the materials of the old jail were used in the new one, which was erected on a lot on a different square from the one on which the old jail was located. There was an imperative necessity for the construction of a new jail. Municipal corporations can exercise only such powers as are delegated to them by the legislature in express terms, or those which are necessarily implied from the powers so expressly granted, and those which are essential and indispensable to the declared objects and purposes of the corporation.

The Act No. 57 of 1876 authorized the city of Monroe to pay one-fourth of the expenses of the parish of Ouachita, only for the following purposes: Drawing and summoning jurors, *per diem* and mileage of jurors, summoning witnesses before the grand jury, for the attendance of the sheriff on the court, for repairs to parish public buildings in the city limits, for books for parish officers, for registration and election, and for salary of the district attorney *pro tem*. In this enumeration of the expenses to be borne by the city of Monroe, there is not included directly or by implication the liability of the city of Monroe for the items of coal and ice, nor is there included the authority for the city of Monroe to pay one-fourth the expenses of erecting public buildings. The authorization of the city by said act to pay one-fourth expenses for repairs cannot be ex-

tended so as to make the city liable for one-fourth part of the cost of erecting the jail. It was a new building, on a distant lot from the one on which the old jail stood, not a part even of the materials of the old jail was employed in its construction, and it would be a perversion of the meaning of the word "repairs," to so construe it that by implication or necessary inference it could be made to cover the erection of a new building, at a different locality, on an entirely different plan, and of different materials. 1 Dill. Mun. Corp. § 140.

There was no express authority granted by the legislature to the city of Monroe to pay one-fourth the expense for the erection of a jail in the city of Monroe by the parish of Ouachita, and the authority to incur this expense cannot be inferred from any grant of power to the city in its charter, or in Act 57 of 1876; and the expense was not essential and indispensable to the declared objects and purposes of the municipality, as the city of Monroe, as stated in the admissions, had provided herself with all necessary police buildings, including a police station and prison.

Judgment affirmed.

STEIN V. BRUNNER.

(Supreme Court of Louisiana. June 12, 1890.
42 La. Ann.)

NOTES — CONFESSION OF JUDGMENT — WAIVER OF CITATION.

1. Where a note provides that the debtor waives citation, and confesses judgment for the amount it represents, it can be collected in the manner consented to by the debtor.

2. Courts have the power to carry out the agreement of the parties.

3. Citation and notice are personal rights the debtor can waive.

4. Having the right, he cannot be restricted in its exercise to the time suit is instituted, or a petition is presented to the defendant or his attorney.

5. If it exists at the time, it exists prior. If there exists evil which should be remedied similar to that which prevailed prior to the act, adopted in 1861, preventing debtors from electing domiciles to be sued, it is within legislative, and not judicial, authority to remedy.

(Syllabus by the Court.)

Appeal from district court, parish of Union.

Dorkin & Dorkin, for appellant. *Everett & Thomas*, for appellee.

BREAUX, J. The defendant made a note, payable one day after date, to plaintiff or bearer, for the sum of \$2,100.47. He at the same time waived citation and the legal delays, confessed judgment in favor of the legal holder for the amount and interest, and for 10 per cent. in addition for attorney's fees, in case of suit to recover payment. He also gave his written consent at the time to the proving of this confession before any court of competent jurisdiction. Nearly five years after maturity, plaintiff presented his petition to the court of defendant's residence, and prayed for the enforcement of this waiver, and for judgment without citation. A judgment of nonsuit was rendered, from which plaintiff appeals.

In argument, counsel representing the

plaintiff contends that citation can be waived at the time and in the manner it was waived by the drawer of the note. On the part of the defense, counsel for the defendant argues that a defendant cannot waive service of petition and citation in any other manner than that provided by article 177 of the Code of Practice. Further, that the waiver of citation, and confession of judgment on the note sued on, is not such waiver as is contemplated by law.

If the question presented is not exclusively personal, but one the community is interested in enforcing as a rule of right affecting the general interest,—if it be one appertaining to a public cause,—it cannot be waived. The interest of the community is an expression of general import. The community is a fictitious body composed of individual persons. The sum of the interest of its members constitutes the community. If the renunciation of laws is made in derogation of this common interest,—this sum of the interest,—it is a wrong which should not receive judicial sanction. If the individual member of the community chooses to renounce a personal right of property affecting no interest except his own, and not in violation of a law made, prohibitory in its character, in the interest of the body politic, or in the maintenance of public order or good morals, he alone is concerned. We quote from Judge Cooley, in his treatise on Constitutional Limitations, page 216: "Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will." The statute must be read with an implied proviso that the party to be affected shall assent thereto. A party may consent to waive rights of property. The waiver in the instant case relates to rights appertaining to property.

Having laid down these propositions, it becomes necessary to determine whether the waiver of a citation, and the confession of judgment as made, are illegal and null. We think not. In abruptly reaching this conclusion, we are not unmindful of the hardships that may be imposed on the confiding and too willing debtor, and we have felt impressed by the possibilities of imposition ably presented by defendant's counsel. But these individual considerations should not be of any avail in determining a question general in its character, and in regard to which legislative authority is silent. Article 178, Code Prac., if mandatory as contended, is mandatory only in so far as the clerk is concerned. The defendant can waive its provisions in so far as relates to his personal rights. If article 177, Id., is mandatory to that officer, it is not as to a defendant who can waive the right secured in his interest. They provide one of the forms whereby service may be waived. It is not sacramental or exclusive. These articles are directory. In forced sales, it is provided that appraisers shall be appointed. The debtor, when his rights alone are affected, can waive their appointment. The right to waive is the rule, and

is denied only in compliance with some provision of law. "In all cases in which it is not expressly or impliedly prohibited, parties can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good," the welfare of the whole body politic. Article 11, Civil Code. "In all covenants, every one may renounce his own rights, and that which is for his advantage, provided that what he does is not contrary to equity, law, and good manners, nor to the interest of third persons." 1 Dom. Civil Law, 128. An individual is always at liberty to waive the benefit of laws made for his advantage. There are exceptions, classed as follows by Toullier: "(1) Where the law itself has prohibited any deviation from its dispositions; (2) where it may be inferred from the dispositions or the motives of the law that it is absolutely prohibitory; and, (3) where the law has for its foundation some public or political cause, or the interest of a third person." The case at bar does not come within these exceptions. The stipulation or pact *de non alienando* is but waiver of citation or notice. It has become a part of our system of laws without special enactment. It has received the sanction of our jurisprudence. The third possessor can be divested of his ownership or possession without citation or notice.

The question presented is not *res nova*. If it were, it may be that our conclusions would be different. In the case of *Tolodano v. Relf*, 7 La. Ann. 61, "the sale was by authentic act, which, among other things, provided that the act should import confession of judgment, and that the vendor should have the right immediately, and before the delivery of the goods, to have judgment entered therein for the amount of the notes, with interest, without any previous citation or notice; that no appeal should be taken from said judgment, or any notice thereof to the defendants be required. On a petition filed on the same day, judgment was rendered. The act on which judgment was rendered contained a power to the creditor to enter up personally a judgment in a court having jurisdiction,—an authority, the court held in that case, which can be legally given to a plaintiff. On the exhibition of an act of the kind, we think courts have the power to carry into effect the agreements of parties."

During many years, agreements were made electing domicile for the purpose of being sued. This election was a personal right, and could be waived. In 1861 an act was adopted to invalidate such agreements, and a general rule was laid down that a party must be sued at his domicile, and the fruitful cause of discussion and contention was brought to an end. Courts have not the authority to remedy the practice complained of. The question is one of legislative policy, and must be left to that authority to remedy.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be, and it is hereby, annulled, avoided, and reversed.

By reason of the confession of judgment, and the law and the evidence being in favor of plaintiff, it is ordered, adjudged, and decreed that he recover of the defendant the sum of \$2,100.47, with 8 per cent. per annum interest on said sum from March 3, 1885, and for the further sum of 10 per cent. on said amount for attorney's fees, and for all costs.

STATE NAT. BANK OF NEW ORLEANS V. SCOTT.

(*Supreme Court of Louisiana.* June 13, 1890.
42 La. Ann.)

HUSBAND AND WIFE—PARTNERSHIP—AGENCY.

When, in a contract of partnership between a wife and third person, it is stipulated that the wife's husband shall represent the wife in all partnership business, and that his acts shall be binding on the firm, "the same as if he were a member of said firm," such stipulation vests him with all the powers of a partner, and his signature of the firm name to notes given in the business of the firm is as binding as if signed by a partner.

(*Syllabus by the Court.*)

Appeal from district court, parish of Franklin.

A. W. Moore, for appellant. *Gorham & Berry*, for appellee.

FENNER, J. The plaintiff bank sues as holder and owner of two promissory notes purporting to be signed by the commercial firm of Earle & Scott, and claims judgment against the defendant as a member of said firm. Scott filed answer averring that "what purports to be the signature of the firm of Earle & Scott to the notes sued on was placed there by Henry T. Earle without the knowledge or consent of said firm or of defendant herein, and, further, that said firm derived no benefit from said notes, and that said Earle was without any authority whatever to sign the firm name thereto, the same having been given by said Earle as accommodation paper." The firm of Earle & Scott was composed of Mrs. S. S. Earle and H. B. Scott, Mrs. Earle being the wife of Henry T. Earle.

The articles of partnership were in writing, and contain the following clause: "It is further agreed that H. T. Earle, husband of Sarah S. Earle, shall represent her in said partnership, and she does hereby constitute her said husband her agent to represent her in said commercial partnership; and he, the said H. T. Earle, is hereby acknowledged by said firm as such to do and perform all acts pertaining to said agency, and his act shall be recognized the same as if a member of said firm."

It seems to us that this language expressly confers upon Earle all the powers of a partner, and authorizes him to act as such, and binds the firm to recognize his acts just as if he were a member of the firm. His signature of the firm name to these notes must therefore be given the same force and effect as if he had been a member of the firm. The power of a commercial partner to bind his firm and his copartners by notes given in the name of the firm, in matters relating to the business of the firm, does not admit of ques-

tion. The party who takes such a note cannot hold the firm, if it has been given for matters not relating to the firm's business; but if the note be negotiable, and pass into the hands of *bona fide* third holders, such holders are not affected by want of authority, or by the fact that it was given in a matter not relating to the firm's business. *Walworth v. Henderson*, 9 La. Ann. 389; *Martin v. Muncy*, 40 La. Ann. 190, 6 South. Rep. 640.

Third persons are not bound by special limitations in the articles of partnership of which they have no notice. *Gruner v. Stucken*, 39 La. Ann. 1076, 3 South. Rep. 338. In this case it was not made very clearly to appear how the plaintiff acquired the notes, or whether the notes were given in matters relating to the business of the firm, or inuring to its benefit, or whether plaintiffs had notice of the limitations on the partner's authority. Indeed, the judge *a quo* restricted evidence on these points, and evidently proceeded on the assumption that the firm could, under no circumstances, be bound by the signature of H. T. Earle, considering that the articles of partnership conferred no such authority. In this we think he erred; but, considering the importance of the case, and that there may be defenses other than Earle's lack of any authority whatever, and particularly considering that the defendant has not been represented on this appeal, we deem it best simply to reverse the judgment, and remand the case. It is therefore adjudged and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the case be remanded to the lower court, to be there proceeded with according to law and the views herein expressed.

McFEE V. VICKSBURG S. & P. R. Co.

(*Supreme Court of Louisiana.* June 13, 1890.
42 La. Ann.)

MASTER AND SERVANT—INJURIES TO SERVANT—UNSAFE APPLIANCES—DAMAGES.

1. Railroad companies should provide safe road-beds. The cross-ties should be sound, and the rails strong, and securely laid.

2. An accident caused by negligence in not thus providing for the safety of their passengers and employees will subject them to damages.

3. The question of punitive or exemplary damages need not be decided, nor damages allowed, as there is not that element of malice or evil intent or oppression entering into and forming part of the act charged essential to decree such damages.

(*Syllabus by the Court.*)

Appeal from district court, parish of Onachita.

Stubbs & Russell, for appellants. *Potts & Hadson* and *Boatner & Lamkin*, for appellee.

BREAUX, J. This is a suit brought by plaintiff to recover of the defendant the sum of \$50,000 for the loss of her son, George McFee, who was killed while in the service of the defendant company as a fireman on one of its engines, on the 9th September, 1889, in a wreck of the railroad of the company. The amount is alleged as due as follows: For damages in the

physical and mental torture endured by him from the burns and wounds which caused his death, and the apprehension of certain death which awaited him, the sum of \$15,000; for damages suffered in the loss of the society and support of her son, the sum of \$15,000. And she, in addition, alleges that she has suffered exemplary damages, in the sum of \$20,000, resulting from the willful and criminal negligence of the defendant company in running its trains over an unsafe and dangerous track, the necessary repairs to which were delayed, although the dangerous condition, and consequent peril to the safety and lives of its employees and the public, were well known to the managers of the company. It is also alleged that the disaster which resulted in the death of plaintiff's only son was caused by deficient and insecure rails, and rotten cross-ties, which were totally unfit for the service required, and the uses to which they were put; that the rails were greatly worn by age and use, and of a type and material long since out of use; that the cross-ties were worthless, and unfit to bear the heavy weight of the ponderous engines and cars; that the condition of the track, rails, and ties was well known to the defendant, which is guilty of gross and criminal negligence in failing to repair and put same in safe condition for traffic and travel; that a parsimonious policy was pursued. As a result, the repair force was reduced to a number totally insufficient. The defendant company, on its part, denies any fault or negligence, alleges that the employees were competent and skilled, and were supplied with necessary material to keep the track in good order, and, if there was any defect, it was latent; that, if there was any responsibility, it rested with the co-employees of the deceased; if there was any defect, the deceased was aware of the condition of the track, having passed daily over it for months. The jury found a verdict for the plaintiff for actual damages to the amount of \$7,500, and for punitive damages in the amount of \$5,000.

The testimony is quite conflicting. There are not many undisputed facts in the case. It is not contested that the deceased was the only son of the plaintiff and that he was 22 years of age; that he had been an employee of the defendant, as a fireman, about 1 year. These are about the only facts in regard to which there is no disagreement.

A number of witnesses were examined on the part of plaintiff. Some of these witnesses were present when the accident occurred, others testify as to the condition of the road, examined at other times. Several of the witnesses testify that deceased lived six or seven hours after his injuries, conscious most of the time, and suffering excruciating pain and intense agonies. He died from the effect of the injuries received in the wreck at the time alleged. He was scalded to death. With reference to the cause of the accident, the witnesses for the plaintiff do not disagree in anything material. They testify that the ties were not sound. The iron rails were not securely fastened to the ties. There were low joints connecting rails,

high counters, and no ballast. The ties were so broken and decayed that it was possible to break them with one's hands. It is stated further that the average life of a steel rail is about 10 years, and of an oak tie, in alluvial sections of country, 4 or 5 years, on a road on which there is ordinary wear by passenger and freight trains; that the rails and ties had not been renewed for a great many years; the road was not in perfect alignment in the mile 16, in which the accident occurred; it was not safe to run a train over mile 16 at the rate of 15 miles an hour; that the old style iron rail used has been done away with long since; that the modern and safer appliances to secure the rails in position had not been procured; that the cars ran entirely out of line immediately in front and immediately in the rear of the place where the accident happened. We do not think it necessary further to summarize the testimony of plaintiff's witnesses on this line. Suffice it to say that they agree in stating that the railroad was not at all in good condition.

The witnesses for the defendant, employees of the company, do not entirely agree in their statement as to the condition of the road, and as to the immediate cause of the accident. They state that the company furnished necessary materials to repair and maintain the road; that it was generally in a fair condition, safe for all trains; that the cross-ties were not so decayed as to make travelling on the road unsafe. Some of the witnesses testify that there was a cross-tie decayed—a mere shell—at the place of the derailment. A few of the witnesses testify that none of the ties were in such condition as to make it necessary to take them out, except at the place of the wreck.

With reference to the direct or immediate cause of the accident, there does not seem to be absolute certainty, or, at any rate, agreement in statement of a sufficient number of witnesses, to make the cause evident; that is, as to whether it was owing to a defective joint fastening or cross-tie or rail. Some of plaintiff's witnesses who testify on the subject state that the derailment was caused by decayed ties giving way under the rail, throwing the engine off the track. The supervisor of the road, testifying as a witness for the defendant, states that there was a decayed tie under the joint where the rails are connected and fastened. The rail had slipped a little. The flange of the wheel mounted the end of a rail, and ran about 24 feet on its top before leaving it. He testifies further: "Question. What was the condition of the tie upon which that chair was placed? Answer. The inside of the tie was rotten. The outside appeared to be sound, but was cracked right under the rail. I kicked it off where the engine mounted. It was perfectly rotten. The shell was thin,—in some places a half inch, and in some places thicker,—and appeared to be sound. To the eye, it appeared to be sound until I kicked it off. Q. What was the cause of the bad connection there? A. It was caused by the spikes not holding. That shell was loose, and would not hold the spikes. The spikes going into the rot-

ten tie would not hold." Other witnesses have testified to the same effect. The record disclosed that the road was being repaired at the time of the accident; that the old were being replaced by new rails. The train-master testifies that during the year ending October 1, 1889, more than 1,501 trains ran over mile 16.

In answer to a motion to produce it, the defendant company brought into court the "Conductors' Accident Report." From it we extract the following:

"*Personal injury.* Name, George McFee, age, 25 years; occupation, fireman; residence, Monroe. Married or single? Ans. Single. Had he children? None. Extent of injuries? Ans. Badly scalded, causing death." 2. Was injury caused by carelessness of the individual? If so, in what respect? Ans. No. Ques. Was injury caused by carelessness of any employes of the company? Was injury caused by any defect in road-way, track, bridges, machinery, rolling stock, or equipment of any kind? If so, describe nature of said defect fully. Ans. Bad track, rotten cross-ties, and chair off rail." (A chair is the fastening on either side of each end of the rail.)

An analysis of the testimony has resulted in convincing us that the answer in the "Conductors' Accident Report" is correct. He was in a position to know. This record was made at the time. It is corroborated as to its correctness by a decided preponderance of the testimony.

It devolves on railroad companies to maintain a safer road-bed, undecayed cross-ties, and to see that the rails are properly adjusted, and in proper position.

The evidence further discloses that George McFee, the deceased, contributed something to the support of his family at different times. His mother, the plaintiff, is a widow, and has two daughters. The youngest is about 16 years of age. At times, when in Monroe, the deceased resided at his mother's home. She has property of no great value, and is in debt. She owns her dwelling-house, and collects small rents.

This case, in so far as relates to the condition of defendant's railroad, and the accident which caused the damage, is similar in many respects to the case of *Rutherford v. Railroad Co.*, 41 La. Ann. 793, 6 South. Rep. 644. In that case it was held that there was negligence on the part of the defendant company, and damages were allowed for the injuries received, the sufferings, and the loss.

The duty now devolves upon us of fixing the amount of damages. It is a responsibility we meet with concern, and not without solicitude. If we were to consider only the excruciating pain, the agony suffered from the time of the injury until the death, the mental distress of the deceased while struggling with death, the great suffering of the mother in parting from her only son, the affliction, the sad event memory unwillingly and mournfully recalls, and attribute these to willful and outrageous negligence, the amount of our decree would be for a very large amount. While there must be compensatory damages allowed, there exists a responsibility towards a defendant who, although negli-

gent, never—nor its employes—for an instant realized the possibility of an accident to one against whom they did not bear the least ill will. There was too much delay in making repairs, an excess of economy, error of judgment, but there are no acts of malicious or outrageous negligence.

From the case of *Peyton v. Railroad Co.*, 41 La. Ann. 861, 6 South. Rep. 690, we quote: "A review of our reports in similar cases points to only two occasions on which this court has allowed damages in excess of \$10,000 for personal injuries. [Among the cases we find an allowance of \$7,000, for an accident whereby the head of a large family lost his life, their only support, and the allowance of \$5,000 in another, and \$3,000 in another case.] We find that the courts of other states have allowed less." In the case of *Poirier v. Carroll*, 35 La. Ann. 708, the court held, (the verdict of the jury was for \$12,000:) "We think it is excessive, and should be reduced. The suit is not, nor could it be, brought for damages sustained in consequence of the death of Poirier, but for the suffering and pain which he endured from the time of the explosion to that of his death, a period of some eighteen hours, during part of which he was apparently insensible or unconscious. Whatever the endurance was, his widow and minors cannot secure heavier damages than he would have been entitled to demand and receive had he survived. In the Case of *Vredenburg*, in which the unfortunate victim had been sprung upon by a furious bear, which lacerated his flesh, and suffered torture ending after twenty-eight days, the jury had allowed fifteen thousand dollars, but their verdict was reduced to half, [\$7,500.] We do not think that, under the circumstances of this case, the suffering not having been longer than 24 hours, the plaintiff should recover more than \$2,500."

Having considered the jurisprudence on the subject, fixing the amount in similar cases at considerably less than we allow in our decree, and giving due weight to the verdict of the jury, to which we attach importance, although we cannot agree with its finding, we put the compensatory damages at \$6,000. The object is not benefit, but compensation. We think this amount secures justice. We will not particularize the damages, and we will not dissect the purest sentiments, and the kindest impulses, to establish how much is allowed for each separate item of suffering. The facts have been carefully examined. Our conclusions have been reached, and the amount fixed, after close study, deliberation, and consultation.

The reasoning which led to the conclusion just expressed precludes the possibility of condemning the defendant to pay exemplary damages. If such damages are allowable as such at all, under our system, they are allowable only when an element of malice or evil intent or oppression enters into, and forms part of, the act. This the line of reasoning followed by us has clearly negated.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be amended by deducting

therefrom the sum of \$5,000 allowed for punitive or exemplary damages; that the amount allowed for actual or compensatory damages be reduced from \$7,500 to \$6,000; and that as thus amended the judgment is affirmed, with interest at legal rates from judicial demands on the amount allowed. Defendant and appellant to pay the costs of the lower court, plaintiff and appellee the costs of appeal.

LEARNED v. WALTON.

(Supreme Court of Louisiana. March 3, 1890.
42 La. Ann.)

MORTGAGES — STIPULATIONS — FORECLOSURE — CLAIMS OF THIRD PERSONS.

1. In case the defendant in a pending suit raises the question of the nullity of a sale made to the plaintiff *pendente lite* by way of an answer, and reconventional demand, a previous tender is not a condition precedent thereto, particularly when the sale has been made in the foreclosure of a special mortgage, and the mortgagee becomes the purchaser, and attributes the whole of the price to the satisfaction of his mortgage claim.

2. A clause in an act of conventional mortgage stipulating a waiver of the benefit of appraisal is valid in law.

3. A sequestration of property which is immovable by destination, and forms part of realty under mortgage, but which has been removed therefrom by the mortgagor as an ancillary proceeding for the recovery and restoration thereof to the mortgaged premises for seizure and sale, is a legal and valid proceeding, and does not have the effect of changing executory proceedings into those *via ordinaria*.

4. In case some third person opposes the claim of the mortgage creditor, and sets up title in herself to the property thus sequestered, and the former retorts in an answer that the third opponent's title is simulated and fraudulent, this pleading does not have such effect.

5. When the mortgagor enjoins the sale, and the mortgagee, in his answer, prays judgment for the mortgage debt, his right thereafter to proceed under the writ of seizure and sale enjoined is abandoned and lost.

6. A creditor seizing a plantation under a writ of seizure and sale, in foreclosure of a mortgage, has a right to require the sheriff holding the property, to cultivate it while under seizure for the account of the mortgagee, upon making the necessary advances for that purpose; and he has the right to recover the amount of such advances, and the value of his services.

7. The cost of such cultivation, keeper's fees, and all other costs incurred other than such as are covered by the statutory fee-bill, must be taxed on rule as a supplement to the final judgment.

(Syllabus by the Court.)

Steele & Dagg, for appellant. Luce & Lemle, for appellee.

WATKINS, J. Appeal from the ninth judicial district, parish of Concordia. The multifarious issues raised in this case require a careful and concise statement, in chronological order, to be clearly understood.

On the 2d of January, 1889, the plaintiff, Learned, obtained an order for the seizure and sale of the defendant's (Walton's) Ashland plantation, with its improvements and appurtenances, in the foreclosure of a special mortgage of \$8,100; the act stipulating the pact *de non alienando*, and a waiver of the benefit of appraisal.

ment. On the 10th of January, prior to the issuance of the writ, the plaintiff obtained a sequestration of certain movable effects, which were immovable by destination, and formed part of the mortgaged property, though some of it had been removed therefrom. This proceeding had for object to restore and maintain intact the property which was affected by the mortgage, and was ancillary to the executory proceedings; the sequestration only being intended to aid in subjecting the movables to the writ of seizure and sale. On the 16th of January, likewise prior to the issuance of a writ of sale, Walton, the mortgagor, enjoined and prohibited the sheriff from making a seizure of the mortgaged property, on the ground that the creditor had given him an extension of time, and his action was premature. On the 23d of January, R. M. Walmsley & Co. obtained a like order of seizure and sale against the same property and appurtenances, in the foreclosure of a second mortgage of some \$4,000; and on the 29th of same month the mortgagor, Walton, enjoined on the ground that the debt had been paid. Between the time of the filing of the two injunctions, Mrs. Henrietta Rosenthal filed a third opposition proceeding, claiming the ownership of the mules, cows, calves, yearlings, hogs, wagons, farming implements, etc., by purchase of William G. Walton, the son of the defendant; and she was permitted to release same from the sequestration on furnishing a bond of \$2,200. In the meanwhile, Walton appealed from the order of seizure and sale on technical grounds, and in this court the order was maintained. 41 La. Ann. 233, 6 South. Rep. 125. On the 16th of April, 1889, the two injunctions were dissolved, no evidence having been introduced in their support, and all the property seized was advertised for sale on the 18th of May following; it being described in the advertisement as it was on the 14th of January, when the writ of seizure and sale issued. The third opponent, Mrs. Rosenthal, was again permitted to release the whole of the personal effects she claimed from seizure and sale, on furnishing a forthcoming bond for \$3,750. As the sale-day was approaching, the sheriff gave the third opponent a notification to that effect, and demanded the forthcoming of the property bonded for sale on that day. Failing to do so, she amended her third opposition, and obtained an injunction against its sale, and against Learned's enforcement of the forthcoming bond, and obtained an order for its separate appraisal and sale. In this the seizing creditor, Learned, appears to have acquiesced; and, as Walton made no further opposition, the naked plantation was sent to sale on the date specified, and the mortgagee, Learned, became the purchaser at the price of \$11,000. The sheriff's *procès-verbal* recites the order of court directing a separate appraisal of the personal property, and the postponement of the sale thereof. It also makes specific mention of the sale having been made of the crops growing on and attached to the land at the time, though nothing is stated with reference to any other appurtenances,

or immovables by destination forming a part of the property which was seized and sold. In the meanwhile Learned filed an answer to the third opposition of Rosenthal, affirming the pendency and full force of his executory proceedings, and his right to have sold, under his writ of seizure and sale, all of the immovables by destination, which are claimed by the third opponent, averring the fraud and simulation of her title to same, and that it should be annulled and set aside, and praying judgment rejecting her demand of ownership, decreeing that said property be subjected to his mortgage claim, and that it be sold to pay and satisfy same. While these proceedings were in progress, the seizing creditor induced the sheriff, as a matter of judicial administration, to undertake the pitching and planting of a crop on the plantation, though this appears to have been done under disadvantageous circumstances. Walton had stripped it of everything which in any way served for the labors of the farm, and its cultivation, immediately previous to its seizure, leaving it bare. But Learned advanced the necessary means to put farming operations in progress, and a crop was planted by the sheriff's keepers; and it was well advanced when the sale was made. In this condition affairs remained until October following the date of sale, when Walton, defendant, filed an extended answer to the third opposition of Rosenthal, and made a reconventional demand on the seizing creditor, Learned, alleging that the sale of the land was null and void for various causes. R. M. Walmsley & Co. also appeared in various capacities and pleadings; and so did other parties.

On final trial the judge *a quo* rendered judgment in these above-related proceedings as follows, viz.: (1) Sustaining plaintiff's sequestration, except as to 5 head of milch cows, 8 head of yearlings, 8 head of calves, 30 head of hogs, and 1 iron safe, as to which it was dissolved; they not being considered immovable by destination. (2) Sustaining Mrs. Rosenthal's third opposition, and recognizing her ownership of those items of property only as to which the plaintiff's sequestration was dissolved. (3) Maintaining defendant's (Walton's) reconventional demand in so far as to annul the sheriff's sale to Learned of the Ashland plantation under the writ of sale. (4) Annulling the sale of William G. Walton to Mrs. Rosenthal of all the property she claimed, except that above mentioned, and certain cotton seed, corn, and hogs, and dissolving her injunction restraining the enforcement of her forthcoming bond. From this judgment, plaintiff, Learned, and third opponent, Rosenthal, alone appeal, the practical effect of which is to eliminate all other parties, and to restrict the issues for our determination to the following, viz.: (1) The validity of the sheriff's sale to Learned; (2) that of Mrs. Rosenthal's title from William G. Walton. Counsel for the defendant, George L. Walton, answered the appeal, and prayed for an amendment of the judgment appealed from by allowing him the rent demanded, or by rejecting this de-

mand as of nonsuit. The judge *a quo* states in the judgment pronounced by him that, as no evidence was adduced to establish this claim, and counsel for defendant did not refer to it in his argument, it has not been considered; and for that reason we do not consider it to be a question for our consideration.

1. Was the sheriff's sale to Learned a valid one? The grounds assigned by Walton for its nullity are (1) that the sale was made without an appraisal having been made, and that he had not the legal right to make a waiver of the benefit of appraisal; (2) because the creditor Learned, had previous to said sale converted his proceedings *via executiva* into proceedings *via ordinaria*, whereby the seizure of the mortgaged property was released, and the sheriff left without power to proceed with the sale. The counsel of Learned strenuously insist upon the application of the rule that a previous tender of the amount of the purchase price must be made by Walton as a condition precedent to the institution of an action to annul the sale. Farquhar v. Iles, 39 La. Ann. 874, 2 South. Rep. 791. Without making any departure from that well-fixed rule, it is sufficient answer to say that this is not a suit, in the ordinary acceptance of that term, but a reconventional demand which is incorporated in an answer; as the purchaser of the property is the plaintiff in the writ under which the sale was made, and paid no part of the price in cash, as his mortgage was the senior one in rank. In addition to this, the judgment revoking the sale recognized his mortgage as still in existence, unimpaired. It has been frequently decided by this court that a clause in an act of mortgage dispensing with appraisal is valid in law. Broadwell v. Rodrigues, 13 La. Ann. 68; Insurance Co. v. Bagley, 19 La. Ann. 89; Jouet v. Mortimer, 29 La. Ann. 210. The second ground is equally untenable. In neither the petition of Learned for a sequestration, nor in his answer to the third opposition of Mrs. Rosenthal, is there any prayer for judgment *in personam* against the debtor and mortgagor, George L. Walton, on the mortgage notes. The sole object of the former was, as we said above, to recover and maintain, intact, and as a part of the mortgaged property, the immovables by destination, and in order that same might be seized and sold under the writ of seizure and sale. When Mrs. Rosenthal set up a claim of ownership to the identical property which was sequestered, it was perfectly legitimate and necessary for him to protect his right to subject this property to seizure and sale under the writ of sale by establishing the fraud or simulation of her title in aid of his previous sequestration. It was her claim of ownership that rendered this charge an essential issue. Her third opposition created the necessity for this pleading. The third opposition is an integral part of the sequestration, upon which it is ingrafted. These are ancillary to the executory proceedings of Learned, and do not in any wise impair their force or effect. On the contrary, they are in

aid of their efficacy. Such a sequestration was recognized in *Duncan v. Wise*, 39 La. Ann. 75, 6 South. Rep. 13, and *Mortgage Co. v. Ralston*, 38 La. Ann. 595, as legal and proper. It would be inconsistent to hold at the same time that such ancillary proceedings had the effect of rendering inefficacious such executory proceedings. Mrs. Rosenthal being a stranger and third person claiming ownership, and not a party to the Walton mortgage and notes, it is apparent that no personal judgment could have been asked or rendered against her; and therefore no controversy between Learned and Mrs. Rosenthal could in any way affect Learned's executory proceedings against Walton. This is evident. It is only when the creditor and defendant in an injunction suit by his debtor answers, and prays personal judgment against him, for the amount of his mortgage claim, that the proceedings *via executiva* are transformed into proceedings *via ordinaria*. Our conclusion is that this part of the judgment appealed from is erroneous, and the sheriff's sale was improperly annulled.

2. The validity of the sale of William G. Walton to Mrs. Rosenthal depends upon whether or not it is simulated and fraudulent. While it is true that all the things which the owner of a tract of land has placed upon it for its service and improvement, such as working cattle, implements of husbandry, and the like, are immovable by destination and covered by a pre-existing mortgage attaching to the realty, yet the effect of the mortgage is maintained only so long as the condition of immovable by destination continues. We held in *Well v. Lapeyre*, 38 La. Ann. 303, that "a sale in good faith by the owner, [of such immovables by destination,] followed by actual delivery to the purchaser, * * * does liberate the things thus sold from the effect of the mortgage to which they had been subjected," etc. The statement of facts on which the title of Mrs. Rosenthal depends is as follows, viz.: In December of 1887, G. L. Walton, the defendant, sold, or purported to sell, to his son, William G. Walton, the immovables by destination in satisfaction of an alleged claim of \$2,000 due him for his wages, as manager of the Ashland plantation, during previous years. For the year 1888 the father leased the plantation to his son, ostensibly for \$3,000, and the latter retained the movables on the place as they were before. In December, 1888, the son removed a part of this property across the river, into the state of Mississippi, and while there negotiations were opened with Mrs. Rosenthal, who lived on a plantation in Louisiana about six miles from Ashland, and in consummation of which, it is claimed, she became the purchaser for the stated price of \$2,600; and that part of the movables remaining on Ashland was at once removed to Union Point plantation, and the portion that was transferred to Mississippi was returned to that place, also. We have examined the evidence with care, and it has satisfied us that the whole transaction was a sheer simulation. The two important factors in riveting this

conviction in our minds are (1) that, while the third opponent claims to have derived title from William G. Walton, all the evidence, and particularly the correspondence, shows that George L. Walton, the mortgagor, conducted the negotiations from beginning to conclusion, and neither the name nor pretensions of William G. Walton are therein once adverted to; and (2) while all the correspondence points to the consideration as \$1,000 in cash, and six and eight months' notes for the balance, the parol proof shows that only one note was executed, and it found its way into a bank in Mississippi as a deposit for the account of G. L. Walton's attorneys. It thus appears that not only was G. L. Walton the party negotiating the sale, but the beneficiary of the price. The burden was on third opponent to show ownership, but her own letters go a long way to show the contrary, and other testimony puts the fraudulent simulation of her letter beyond doubt. Her demands should be rejected *in toto*, and Learned's sequestration maintained *in toto*. The title never passed to Mrs. Rosenthal.

3. Much has been said in argument and brief in regard to a large claim, of over \$6,000, which is preferred against Walton, defendant, on account of the cultivation of a crop on the mortgaged premises, prior to sale, for account of the sheriff; but there is no mention of it in the judgment appealed from, and the question of its allowance *vel non* is not properly before us now. We think there is no longer any doubt as to the authority of a sheriff, in proper cases, to plant a crop on plantations under seizure. In *Lockhart v. Morey*, 41 La. Ann. 1165, 4 South. Rep. 581, we said on this subject, in substance: "A vendor seizing the plantation securing his claim has a right to make the advances necessary for the working of the place while in the sheriff's custody, and to oversee it, with the sheriff's consent. In both cases, he is entitled to recover the amount of the advances shown to have been made, and to receive payment for his services." *Tayl. Dig.* p. 362, No. 10. To the same effect is *Lambreth v. Sheriff*, 41 La. Ann. 749, 6 South. Rep. 558. Defendant's recourse is by a proceeding contradictorily with the sheriff by rule, as outlined in the *Lambreth* Case, and in *Iron-Works Co. v. Reuss*, 40 La. Ann. 121, 3 South. Rep. 500. The proceeding would be in the nature of an interlocutory one, forming an *addendum* to the final judgment rendered in the case. See *State v. Lazarus*, 40 La. Ann. 856, 5 South. Rep. 289. The crop that was growing, and formed a part of the realty, at the date of sale, (May 18th,) necessarily passed with the land to the purchaser, Learned. The debtor, Walton, did not undertake to prevent its sale, or to require a separate appraisal and sale, so as to segregate the proceeds of one from the other, and a sale *in globo* was not objected to by him. But the movables which Learned caused to be placed on the plantation subsequent to the seizure were not expressly mentioned in either the advertisement or *procès-verbal* of sale. It is questionable whether they formed a part

of the immovables by destination, not having been so placed by the owner of the realty. We think the ends of justice would be best subserved by remitting this question, also, to the determination of the court *a quo*, in connection with the question of cost of cultivation of the plantation, and other cost.

It is ordered and decreed that the judgment appealed from be reversed, and it is now ordered and decreed that the sale of Ashland plantation to R. F. Learned be declared legal and valid, and that the sale of the plantation included that of the growing crop; that the sale from William G. Walton to Mrs. H. Rosenthal be declared a fraudulent simulation, and void, and plaintiff's sequestration thereof be reinstated, and sustained *in toto*; that third opponent's injunction restraining the plaintiff's enforcement of the forthcoming bond be dissolved; that all other questions be dismissed as of nonsuit, with the rights of all parties fully reserved.

It is finally ordered and decreed that the defendant, George L. Walton, be taxed with all the costs of the main demand, and its incidents, and the third opponent with all the costs of the third opposition, and its incidents, and that third opponent and defendant be taxed with the costs of appeal ratably and proportionately to their respective demands.

ON APPLICATION FOR REHEARING.

WATKINS, J. Several defects in our opinion are suggested, and in those particulars we are requested to amend our decree, or grant intervenor and third opponent a rehearing.

The first one is that until it is first established that the defendant, Walton, is indebted to the plaintiff, Learned, in some fixed amount, the latter has no right to contest the validity of the sale to Mrs. Rosenthal. This is true, no doubt, as a general proposition, but the principle cannot be properly invoked here. The plaintiff held a mortgage for about \$8,000 on Walton's plantation and immovables by destination, and sought to foreclose by executory proceedings. Not knowing what the land alone would sell for, he sought by sequestration to recover the immovables by destination which the defendant had removed from the mortgaged property, when he was met by Mrs. Rosenthal's third opposition, and claim of ownership thereof. During its pendency the land and growing crop were sent to sale, and realized \$11,000, bid by the plaintiff. It is the present contention of the third opponent that the proceeds of sale of the land are more than sufficient to discharge the debt, with interest, attorney's fees, and all costs, and that there will be no necessity for the sale of the immovables by destination, or the collection of the forthcoming bond, and that the question of the simulation of the sale to Mrs. Rosenthal should be deferred. This may or may not be so. It is quite impossible for us to decide that question now. A question of costs was nonsuited, and remanded for the court *a qua* to determine on

rule. When it shall have determined the question of cost, nothing will remain to be done but to cast up a settlement, and ascertain how the balance stands,—for or against the defendant. If nothing remains due, no further proceedings will be entertained looking to the enforcement of the forthcoming bond, or the sale of the immovables by destination. But we need not disturb our decree. It will suffice to preserve the *status quo* in respect to both, and direct that no further proceedings be taken until the amount of costs and charges is determined, provided the property be restored to the custody of the sheriff, or otherwise satisfactorily accounted for.

The second point is that the third opponent was not properly put in default, no order of court having been granted directing her to return the property for sale; and, if the demand made by the sheriff was sufficient, it was, under the circumstances, practically impossible for her to have returned it by the day of sale. We do not understand that a forthcoming bond operates an absolute release of property from seizure. The law merely extends to the claimant the grace of keeping the property in his custody pending an opposition resisting the seizure, merely to economize cost. The only effect of putting the claimant in default is to make the bond exigible. For this purpose a notification by the sheriff is sufficient. An order of court was unnecessary. If, for any reason, it is out of the claimant's power to return the property on the day fixed for its sale, the execution of the bond may be resorted to, and any other property of hers seized and sold; but it would be competent for her, at any time before sale of property under execution on the bond, to return the property bonded, and thus abate further proceedings. The date for the return of the property is ordinarily fixed in the bond, and must be rigorously adhered to, on the penalty of proceedings of forfeiture being commenced *instantly*, subject, as we have just stated, to the claimant's or debtor's subsequent return of the property released. The mortgage creditor was entitled to sell all of the immovables by destination under his order of seizure and sale, or under an execution on the forthcoming bond. We have recognized his right so to proceed, but have restrained all further proceedings until the amount of cost is ascertained. In the instant case the third opponent's contention is that, as the property in question was on Union Point plantation, 48 miles distant from the sheriff's office, two days' notification was insufficient, because, in the then condition of the roads, two weeks' time would have been required to effect a delivery. It must be borne in mind that third opponent's injunction only restrained the sheriff from declaring the bond forfeited. Evidently, there has already elapsed much more time than was requisite for that purpose; and our decree dissolving the injunction will operate a forfeiture by judicial decree, if the property has not been surrendered. But, if the released property is not surrendered, the creditor can proceed on the bond. One or

both must respond to the balance due the creditor after the costs have been ascertained, and the proceeds of sale of the land have been first applied to the amount of the debt, principal, interest, and cost.

The third point suggested is that, because W. G. Walton leased Ashland plantation for the year 1888 with the knowledge and full acquiescence of Learned, it necessarily follows that the products raised by him on that plantation during that year are his, and his sale thereof to Mrs. Rosenthal was valid. In this we think third opponent's counsel is correct. This lease is not attacked in these proceedings by Learned. The possession of W. G. Walton in 1888 is substantiated by proof. The products raised on the place are presumably his, and do not form part of the mortgage debtor's effects, which was placed on the mortgaged property for its service and improvement; and hence same does not constitute any part of the immovables by destination. It ought, therefore, to be declared not subject to the seizure and sale, and that plaintiff has no right of action against it. In this respect, our former decree should be amended. It was not our intention to impose on the defendant particularly, or on any other party, the duty or responsibility of obtaining a rule for the ascertainment and taxing of costs. We made merely a suggestion. We will be more specific, and embody it in a supplemental decree.

It is therefore ordered and decreed that our decree herein previously rendered be so amended as to declare that all products raised on the Ashland plantation in 1888 are not immovables by destination, not subject to plaintiff's mortgage, and that same shall be released to the third opponent.

It is further and finally ordered and decreed that the right of any and all parties is reserved to proceed by rule against proper parties to have costs, other than those fixed in the statutory fee-bill, taxed according to law, and that, during the pendency of the proceedings to tax costs, all further proceedings in the enforcement of the forthcoming bond, or on the sale of the property bonded, be stayed; that, in all other respects, our former decree remain undisturbed, and that a rehearing be refused.

STATE v. DUPRE *et al.*

(*Supreme Court of Louisiana.* April 7, 1890.
42 La. Ann.)

LICENSE TAX—EXEMPTION—NEWSPAPER PUBLISHERS.

Considering that, under the statement of facts in this case, the making of newspapers is a business, that the process of making them employs machinery and extensive manual labor, and large quantities of physical raw material, which are placed in new combinations, and that the newspaper, when made, is a new and distinct article of commerce, sold by the makers thereof directly to dealers and consumers; considering that such business falls within the reason and motive of the constitution, which was to encourage enterprises furnishing employment to home labor, in the making of things which the people use and require, and which, if not made at home, would be brought from abroad; considering that the constitution, in

article 207, uses the term "manufacturer" in a broader sense than that attached to it in common parlance, embracing under that term such business as boat-making, stationers, makers of chocolate, etc.; and considering that the legislature obviously considered this business, as well as that of book-publishers, to be exempt, by expressly enumerating among business tax "editors" and "agencies for publications," and making no mention of home publishers of either newspapers or books,—held that newspaper publishers are exempt from license taxation under article 206 of the constitution. BERMUDEZ, C. J., and POCHÉ, J., dissenting.

(*Syllabus by the Court.*)

Appeal from city court, parish of Orleans; R. H. MARR, Judge.

Spearing & Spearing, for appellants. N. E. Roberts and Chas. Carroll, for the State.

FENNER, J. The state, through her tax collector, claims a license from defendants for conducting the business of "editing, printing, publishing, and binding a newspaper called the 'Daily States.'" This business, though from its nature the most public and universally known of all, is not included in the enumeration of businesses taxed contained in the state license law. The tax collector predicates his claim exclusively upon the concluding phrase of the act, which levies a license on "all other business not herein provided for." The omission is certainly significant as indicating either that the legislature did not consider this business as taxable, or that it did not intend to tax it. We have held that the legislative power to levy license taxes under article 206 of the constitution is discretionary and not mandatory, and that the state may abstain from taxing any occupation or calling, if it so desire. *City of New Orleans v. Mülé*, 83 La. Ann. 826. The inference that, if the legislature had intended to tax this particular calling, it would have named it, particularly as it did specifically name the business of "editor," is very strong; but, as defendants have pleaded exemption under article 206 of the constitution, which exempts from license taxation "manufactures other than those of distilled, alcoholic, or malt liquors, tobacco, and cigars, and cotton-seed oil," we prefer to rest our decision on that point.

This raises the novel question whether or not a newspaper is an article of manufacture, and whether those who pursue the business of making or publishing newspapers are manufacturers, within the meaning of the constitution. The legal meaning of this term, "manufacturers," has been more than once considered by us in this same connection. In one case we said: "A manufacturer is defined to be one who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell, and stands between the original producer and the dealer or first consumers, depending for his profit on the labor which he bestows on the raw material. *City of New Orleans v.*

Le Blanc, 84 La. Ann. 597." City of New Orleans v. Ernst, 85 La. Ann. 747. Keeping this definition in view, the statement of facts embodied in this record shows that defendants use in their business valuable machinery and implements; that, in addition to the clerical and editorial departments, they employ a large number of mechanical laborers, such as type-setters, engineers, pressmen, and their assistants; that they purchase and use great quantities of raw materials, such as paper, ink, glue, etc.; that, by means of this machinery and mechanical labor, they convert this raw material into new and distinct articles, fit for use and in commercial demand, called a "newspaper," which they sell directly to dealers and consumers.

Certainly, from a mechanical point of view, this presents all the essentials of "manufacture," under every definition of the word. It also comes clearly within the reason and motive of the constitutional exemption, which was to encourage enterprises that furnished employment to home labor in the making of things which the people use and require, and which, if not made here, would be bought abroad. But because the value of the newspaper is not derived from the raw material, or from the mechanical labor expended upon it, but rather as a mere medium for conveying ideas and information impressed upon it by the purely intellectual labor of its editors, reporters, correspondents, and advertisers, the judge *quo* concluded that the newspaper is a product of mind labor, rather than of hand labor, and therefore is not an article of manufacture. The suggestion is plausible, but, we think, not sound. Such a view would deny exemption to a book publisher, or manufacturer of books; yet it seems very clear that he would be considered a manufacturer, within the intendment of the constitution; for when we turn to article 207 of the constitution, we find expressly exempted from property taxation, capital, etc., engaged in the manufacture of stationery. What is "stationery?" Worcester defines it thus: "The goods sold by a stationer, such as books, papers, pens, sealing-wax, ink, etc." He says that "stationer" originally was synonymous with "book-seller," and meant "one who kept a stall or station for selling books." But in modern use the term "stationery" probably covers only blank books, account books, etc.; yet the constitution clearly considers the makers of such books as manufacturers; and it is certainly difficult to conceive of any reason or principle that should deny the same quality to the maker of printed books. Are we to say that a maker of blank books and account books is a manufacturer, but a maker of printed books is not, although the latter employs in his operations much more elaborate machinery, and more varied and extensive labor, than the former? We think not. Then the argument stands thus: If the maker of blank books and account books is a manufacturer, under the express terms of the constitution, the maker of printed books, employing similar processes, with more machinery and labor, is also a manufacturer; and, if the publisher of books is

a manufacturer, all the reasons on which the denial of the same quality to the publisher of a newspaper rests absolutely fail. That the legislature took this view seems very clear from the fact that, while it mentions "agencies for publications" among the businesses taxed, it makes no mention of home publishers; just as it taxed editors, but does not allude to newspaper publishers. Other illustrations might be given of the fallacy of the view on which the judgment appealed from rests. Who would deny that an establishment to make, with the aid of machinery, and skilled workmen, optical instruments such as telescopes and microscopes, would be exempt as a manufacturer? Yet manifestly the value of such instruments is not derived from the brass, glass, or other component materials, nor from the mechanical labor expended thereon, but from the scientific skill and knowledge which, by the power of adaptation and arrangement, gave to them the faculty of conveying to the eye visions of remotest stars or of minutest atoms; or, to take a case more homely, and more strictly analogous, what would be said of the manufacturer of artistic wallpaper, who impresses upon raw material, prepared for the purpose, designs of grace and beauty invented and traced by his corps of skilled artists? All manufacturers combine, in greater or less degree, the products of intellectual and of mechanical labor, and in very many the intellectual element confers upon the article produced its peculiar and greatest value. Such is conspicuously the case with a newspaper; but, since the making of newspapers is a business; since the newspaper, when made, is a new and distinct article of commerce; since the process of making it requires machinery and manual labor, and physical raw material, as essential and important factors, aggregating, as this record shows, much the larger part of its cost,—we can see no sound reason why such a business does not fall within the letter and spirit of the constitutional exemption as that of a manufacturer. While we admit that newspaper publishing does not fall within the common usage of the term "manufacturer," the constitution (article 207) attaches a broader meaning to the word, by embracing within it the occupations of stationers, boat-builders, chocolate makers, etc., which are not ordinarily considered as manufacturers, any more than newspaper and book publishers. We are satisfied that the legislature took the same view of the subject, and this reinforces our own opinion.

We have nothing to say about the tax levied on the business of editor, because not here involved. This record does not advise us whether the defendants are personally editors at all, and the claim is not based on such occupation, except as an element of the general business conducted by them, which is exempt.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there be now judgment in favor of defendant rejecting the plaintiff's demand at the latter's cost in both courts.

POCHÉ, J., (*concurring*.) I cannot bring my mind to assent to the proposition that the business of printing and publishing a newspaper is a manufacture, in the sense of the constitution, or in any other sense of the word. This court has held that the business of making and selling ice-cream is not a manufacture. In that case the proof was that the defendant used in his business costly and complicated machinery, and employed numerous hands and skilled employees, and that the result was the reduction of several raw materials into a commodity fit for use; but the claim of exemption from license was declined by the court. *City of New Orleans v. Mannessier*, 82 La. Ann. 1076. The case is stronger against the newspaper business. But I find no provision in the revenue act to warrant the enforcement of a license tax against the business of printing and publishing a newspaper. I am confident that it was not within the contemplation of the framers of the constitution, and that the legislature industriously omitted to include that business in the enumeration of the large class of callings which are subjected to a license tax. For that reason, which I deem it unnecessary to elaborate, I concur in the decree rendered in this case.

BERMUDEZ, C. J., (*dissenting*.) It is elementary that exemption laws must be strictly construed, and that whoever claims an immunity under them must show himself quite clearly entitled to it. Hence it has been held that in such instances doubt is fatal. It is apparent that the case of the defendants is far from being a clear one in their favor. It is surely a doubtful one. The lower judge found that they were not entitled to the exemption claimed, and two of the justices of this court concur with him in opinion. Indeed, it is impossible to conceive how an establishment for the editing, printing, and publishing of a newspaper can be considered, under the provisions of article 206 of the constitution, a manufacturing enterprise or a mechanical pursuit. A manufactory is an establishment in which by machinery or hand work, raw materials are transformed into wares, and undergo new shapes suitable for physical use and commercial purposes. The definitions relied on to show what a manufacturer or a manufacture is are taken from *City of New Orleans v. Ernst*, 85 La. Ann. 747. They announce that the raw materials must be worked into wares suitable for use. The word used is "wares," goods, commodity, merchandise. The question arises, what are the wares suitable for use into which the defendants work the raw materials employed in their business. Those materials come to them already manufactured, ready for use. They are not afterwards worked into wares, and made to undergo any new shape. The paper remains just what it was before, unless, perhaps, in its size. The ink and mucilage applied to it by diverse processes do not alter its substance or form. The impressions made with the ink on the paper do not change the nature of the raw material, and put it into wares and shapes for physical use. After the

paper has been printed upon, it is not used as goods, commodities, merchandise, nor for physical want, necessity, or convenience. It is used exclusively as an object for an intellectual purpose. It may be that an establishment wherein wall-paper is fabricated is a manufactory, but it is because the paper is transformed into a ware, an article of commerce; is designed and used for a physical purpose, and in no way for an intellectual object.

It passes strange that since the constitution has been in force—that for more than 10 years—it never entered the mind of any owner of a newspaper establishment that he was entitled to the exemption claimed in this case. This clearly shows that it never was supposed that the article invoked could mean anything of the kind.

The other means of defense resorted to should not avail. It is clear that persons conducting the business which the defendants carry on, though not specifically designated by name in the act of 1886, No. 101, are taxable under section 12, which imposes a tax upon all business not therein provided for.

The judgment appealed from should be affirmed.

SWEENEY v. SHAKSPEARE, Mayor, et al.

(*Supreme Court of Louisiana*. April 7, 1890.
43 La. Ann.)

CITIES—BATTURE RIGHTS—RIPARIAN PROPRIETORS.

1. The city of New Orleans has the right to control, manage, and administer the use of the banks of the Mississippi river within her limits for the public convenience and utility; to establish landing places for vessels, boats, and barges; to determine what are proper and needed facilities for commerce, and on what part of the *batture* they may be established.

2. The proprietor of the soil adjacent to the river has no right to appropriate to his exclusive use the banks of a navigable water-course, because he has no property in the use thereof. It belongs to the public.

3. The owner of coal-boats and barges, moored to the river bank within the city limits, has no authority, derivable from the proprietor of riparian property, through instrumentality of a lease, to build houses in which to store apparatus and tackle and shelter his men, by resting their foundations on piles driven in *batture* outside the levees.

(*Syllabus by the Court*.)

T. M. Gill, for appellant. F. B. Lee, for appellees.

WATKINS, J. Appeal from the civil district court, parish of Orleans. As a dealer in coal, the plaintiff has constantly on hand a number of barges laden with coal, and for their safety and security he avers it to be necessary that there should be some place on the banks of the Mississippi river, and within the parish of Orleans, where same may be landed and secured, and where suitable quarters may be provided in which to store the necessary apparatus with which to protect and secure said barges and other boats, and also for the purpose of housing the men employed, and who are required to be in immediate and constant attendance. In his petition he avers that he has leased certain *batture* and riparian property, about five or six miles above Canal-Street landing, "where he

has, at large expense, sunk piles and clusters of piles, or hitching-posts, to which to fasten said barges and boats of coal, and has built two small wooden houses, at an expense of about \$500, in which to house the men, and to store the apparatus, absolutely necessary to his business," etc.; that the mayor and commissioner of public works "threaten to interfere with him in the peaceful possession and use of said house, and to remove, or cause the same to be removed, on the ground that he is a squatter, and obstructing Calhoun street." This he denies, and affirms that he is the lessee or tenant of the aforesaid *batture* and riparian rights from the Texas & Pacific Railroad Company, the owner thereof. He avers "that his said houses are not only necessary, as aforesaid, to the commerce in which he is engaged, but are neither on, nor do they obstruct, any street, and are built on the outside of the levee, upon piles driven in the *batture* aforesaid, and which *batture* is some three hundred feet in width from the levee to the water's edge." Against the threatened interference alleged plaintiff obtained an injunction in order to preserve the *status quo*. The city attorney ruled plaintiff to show cause why his injunction should not be dissolved, on the ground that his petition stated no cause of action; and, pending the trial of the rule, he specially excepted to his petition on the same ground, and prayed that the suit be dismissed. On trial the rule was made absolute, the exception sustained, and suit dismissed. From the judgment plaintiff has appealed. The city attorney's contention is that, conceding the plaintiff to be the lessee of the railroad company, and that the company was the proprietor of the soil over which the plaintiff's right of use extends, yet he discloses no legal right in himself or in his lessor to permit the construction of such houses, or other permanent structures on the *batture*, as those described in his petition. On the other hand, the plaintiff's counsel seeks to restrict the issue to the limits prescribed in his petition, *i. e.*, as to whether or not he was a squatter, and his houses an obstruction to Calhoun street.

We do not think the issues can be so restricted; for, conceding that plaintiff was not a squatter, but a lessee, and that the houses he had erected were no obstruction to Calhoun street; and yet the mayor of the city and the commissioner of public works have a perfect legal right to question his authority to build houses "outside of the levee, upon piles driven in the *batture*," as plaintiff avers he did. The district judge evidently entertained this view, and rested his decision on our opinion in *Watson v. Turnbull*, 34 La. Ann. 857, which appears to be conclusive of the whole case. In that case we said: "Within the corporate limits the city of New Orleans; under her charter and under the general law, has the right to control, manage, and administer the use of the river banks for the public convenience and utility; to establish wharves and landings; to erect works and provide facilities for the use of vessels and water craft; and to

charge just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is in the public. The discretion of the city authorities, in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a proper subject for judicial control or interference. Whatever incidental damage may result to proprietors for the exercise of these unquestionable corporate rights, it is *damnum absque injuria*." The bank of the river has been defined to be that space which the water covers when the river is highest in any season of the year. *Morgan v. Livingston*, 6 Mart. (La.) 216. The term "*batture*" is applied principally to certain portions of the bed of the Mississippi river, which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells." *Hollingsworth v. Chaffe*, 33 La. Ann. 548. It therefore follows that plaintiff's vendor, as a riparian proprietor, has no right to appropriate to its exclusive use any portion of the *batture*, and it has no right of property in the use thereof; that the city authorities are vested with a discretion in determining what are proper and needed facilities for commerce, and on what part of the *batture* they shall be established. Hence the plaintiff, as lessee, acquired under his contract no such right, and, under the law, he could not select the place at which he should establish the landing place for his coal-boats and barges. In *Pickles v. Dock Co.*, 38 La. Ann. 412, we held that the defendant had no right to locate its dock, and drive piles in the bed of the river, near the shore, although owner of the riparian property. In *Railroad Co. v. Winthrop*, 5 La. Ann. 36, it was held that a conversion of a portion of the *batture* in front of Carrollton into a wood-yard was not a public use, but a private destination of property. In *Henderson v. Mayor*, 3 La. 567, the court decided that "any works or constructions made by individuals, calculated to prevent this use entirely, or to abridge it, may fairly be considered as public nuisances and subject to be abated by the authorities of the city." In *Mayor v. Magnon*, 4 Mart. (La.) 10, the court held that "as the fisherman could not justify the inclosure of a space of ground on the bank of the river for the safety of his net when spread to be dried, nor the erection of a warehouse for the storage of his fish, the carpenter cannot justify the erection of a permanent shed or building for the safety of his tools, or the materials which he uses, nor to fence the ground for the protection of the timber which it may be his interest to accumulate." From these frequent adjudications on the subject we think it is well settled that the plaintiff was without right or authority to build houses on the *batture*, and rest their foundations upon piles driven in the ground. This was an evident appropriation to his exclusive use of the river bank, within the limits of the city, in direct violation of the right of

control and administration vested in the city. The judgment appealed from is correct, and it is therefore affirmed.

SURGET et al. v. NEWMAN.

(*Supreme Court of Louisiana.* June 18, 1890.
43 La. Ann.)

TAX-SALES—AVOIDANCE—LIMITATIONS.

In applying the prescription of Act 105 of 1874 to an action to invalidate a title to property purchased at tax-sale, it is the province of this court to see that the sale was made under and by virtue of some law of this state which authorized the sale proceedings; and, in case it appears, from a simple inspection of the title, that it was not so made, the bar of the statute will not be maintained.

(*Syllabus by the Court.*)

Appeal from district court, parish of Jackson.

F. W. Price and Boatner & Boatner, for appellants. *White & Saunders and E. E. Kedd*, for appellee.

WATKINS, J. Plaintiffs claim, in joint ownership, certain lands situated in the parish of Jackson, and to which they derived title by inheritance from their father, James Surget, who died in the state of Mississippi in 1856. They aver that they, as the sole heirs of the deceased, have been in possession of said lands ever since his death; they having unconditionally accepted his succession. They represent that the defendant claims said lands under and by virtue of a certain tax adjudication thereof to him, made and executed by the tax collector on the 24th of June, 1881, in purported satisfaction of the taxes of certain years therein indicated; that said purported conveyance to said Newman is absolutely null and void, and did not pass to him any title, because of certain alleged patent, absolute nullities, which are discoverable on a simple inspection of the act. The prayer of their petition is that the sale to the defendant be declared absolutely null, and they be recognized as owners of the property. The *procès-verbal* of the tax adjudication is annexed to and made a part of plaintiffs' petition. To this action the defendant tenders a plea of no cause of action, and pleaded the prescription of three years, under section 5 of Act 105 of 1874. On the trial this plea of prescription was sustained, and suit dismissed at plaintiffs' cost. From this judgment the plaintiffs have appealed.

From all that appears in the petition and tax-title, it is manifest that there is no merit in the exception of no cause of action, and hence our opinion must turn upon the prescription of three years. The language of the statute relied on is as follows, viz.: "Any action to invalidate the title to any property purchased at tax-sale, under or by virtue of any law of this state, shall be prescribed by a lapse of three years from the date of such sale." Evidently, then, the questions to be examined and determined under this plea are (1) whether this is an action to invalidate a title to property purchased at tax-sale; (2) was such sale made under and by virtue of any law of this state? (3) from what time is the three-years pre-

scription to be computed? The provisions of this statute have been frequently invoked as being applicable to suits seeking the revocation of tax-sales made under different laws of the state, but they have been applied in but two reported decisions of this court, and they are of recent date. In one of these (*Barrow v. Wilson*, 39 La. Ann. 410, 2 South. Rep. 809) we said: "It is a mistake to treat this statute as one intended to cure defects in tax-titles. It is a statute of prescription, barring an action regardless of the merits or demerits of either title. The statute does not concern itself with the strength of one title, or the weakness of the other." In the more recent case of *McDougall v. Monlezun*, 39 La. Ann. 1005, 3 South. Rep. 278, in which we treated of this plea of prescription, the plaintiff grounded his action in nullity on certain alleged "illegalities, irregularities, and informalities" in the assessment of the property, and in the proceedings antecedent and leading up to the tax-sale. Among them were enumerated: (1) Omission to list the property as belonging to a non-resident. (2) Omission to sell lands in 50-acre lots, as required under constitution of 1868. (3) Insufficient and defective description of property. (4) Insufficiency and irregularity of advertisement of the property for sale. But we held that, as this statute was "not intended to cure defects in tax-titles," it must be construed "and held to be an impassable barrier, which eliminates the very right of the court to investigate or consider the grounds of alleged nullity in the tax-sale."

These two opinions make it very plain that in giving effect to this prescription we are not to be limited or restricted to such tax-titles as shall contain no illegalities, irregularities, or informalities, either in the assessment or sale proceedings; for such titles are good, and do not need the help of prescription. Hence we say that this statute bars the action to annul, regardless of the merits or demerits of the title, and "eliminates the very right of the court to investigate or consider the grounds of alleged nullity," as those specified in the tax-sale attacked by McDougal in that case. But in the instant case plaintiffs' contention is that the bar of the statute does not apply, because, among other reasons, it was assigned that there was no law of the state which authorized the sale made to the defendant, and that this is a badge of absolute, incurable nullity, which is apparent from an inspection of the act, and is specially averred in their petition; or that, in the sense of the second question to be determined under this statute, in applying the bar of prescription, the sale to the defendant does not affirmatively appear by the recitals of the act, or from the face of the papers offered for our consideration on the trial of the defendant's plea that the tax-title assailed was made under and by virtue of any law of this state; and hence it is not covered by or included in the terms of the statute invoked. The averment of the petition is that the sale purports to have been made on the 21st of May, 1881, in satisfaction of the taxes assessed against the estate of

James Surget for the years 1873, 1874, 1875, 1876, 1877, 1878, and 1880, amounting, in the aggregate, to \$1,497.50; but that if said sale was attempted to be made under the provisions of Act 107 of 1880, providing for the sale of property forfeited or adjudicated to the state, it was null, because the property had neither been forfeited nor adjudicated to the state, and could not be proceeded against under the terms of the act; and, further, that said act only provides for the sale of property which had been forfeited or sold to the state for taxes due and delinquent in years antecedent to 1880, and that in this case the tax collector proceeded against the property for the collection of taxes due antecedent to 1880, and for those assessed for and due in the year 1880, confusedly, and without distinction, and therefore the sale is null.

Reference to the tax-title, which is annexed to and made a part of the petition, discloses no reference to any law under which it was made, and that fact can only be determined from other recitals thereof, and by deductions therefrom. It recites that the property was offered "for sale at public auction * * * on the 16th of April, 1881," and, there being no bid, the tax collector "then readvertised the said property, in the same manner, to be sold to the last and highest bidder * * * on Saturday May 21, 1881, for what said land would bring in cash, when, on said 21st of May, 1881," the defendant being the last and highest bidder, the same was adjudicated to him, at the cash price of \$2,155.50,—a sum exceeding by nearly \$500 the capital and interest of the taxes and the penalties due thereon. At the date of this sale, May, 1881, there were only two statutes in force under the authority of which taxes prior to 1879 and those of 1880 could have been collected, and those were Acts 107 and 77 of 1880. The latter is the general revenue law of that year, and by its terms the tax collector was restricted to making sale of "the least quantity of said specific property of any debtor, which any bidder will buy for the amount of the taxes, interest, and costs due by said debtor." It is obvious that the tax collector did not attempt to proceed under that statute. The former statute was doubtless enacted for the purpose of putting in force the provisions of article 1 of the ordinance for the relief of delinquent tax-payers; but it evidently relates only to the sale of property forfeited or sold to the state for delinquent taxes and licenses. This appears from a casual examination of the title, as well as of the body of the act, and we have frequently so construed it.

It is equally obvious that a statute which directs and requires a tax collector to sell property forfeited or sold to the state only, does not confer upon that officer power or authority to sell property of a delinquent taxpayer in satisfaction of "taxes due the state." It was this particular deficiency in the act of 1880 which necessitated the passage of Act 98 of 1882, section 1 of which required the tax collectors to advertise for sale property which had theretofore been forfeited to the state for unpaid taxes, property which had been

sold to the state, and "property upon which any taxes [were] due to the state * * * prior to January 1, 1880." Therefore, if the tax collector did proceed under that law to enforce the collection of taxes due the state prior to the 1st of January, 1880, by James Surget's estate, it cannot be said of his adjudication that it is a "title to * * * property purchased at tax-sale under and by virtue of any law of this state," in the sense of the act of 1874. It is clear to our minds that in applying the bar of that "statute to an action to invalidate the title to property purchased at tax-sale" it is our province and duty to see that the sale was made under and by virtue of some law of the state which authorized the proceedings, and our conclusion is that the title in question fails to disclose the existence of any statute authorizing such a sale, and therefore it cannot be said to be a title to property purchased at tax-sale, under and by virtue of any law of this state, and the prescription invoked and sustained by the judge *a quo* is not available to the defendant, and should have been rejected by him.

Entertaining this view, it will be necessary for us to reverse the judgment appealed from, and remand the cause to the lower court. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and that the cause be remanded to the court *a quo* for further proceedings according to law and the views herein expressed, the defendant and appellee to pay costs of appeal, and those of the lower court to await final determination of the cause therein.

HOOD v. DISTON *et al.*

(*Supreme Court of Alabama.* April 28, 1890.)

BREACH OF CONTRACT—BURDEN OF PROOF—EVIDENCE.

1. In an action for breach of a contract to "harden and temper, in a workman-like manner," certain blades, the burden is on the plaintiff to establish that the materials used in their manufacture were of such quality that the blades could by proper treatment have been efficiently tempered and hardened.

2. The business manager of defendant, called as a witness, having detailed the terms of the contract, was properly permitted to state that defendants "had performed their part of the agreement."

3. One of plaintiff's witnesses having testified that defendants unskillfully placed as many as 50 dozen blades in the furnace at a time, which was unworkman-like, it was competent for defendants to discredit such statement by proving that to have done so would have cooled the furnace, and greatly delayed the work.

Appeal from circuit court, Randolph county; JAMES R. DOWDELL, Judge.

Action by the appellant, Joseph R. Hood, against the appellees, Henry Diston & Sons, for the alleged breach of a verbal contract. The only errors complained of relate to the rulings of the court in admitting certain evidence in support of, and the giving of certain charges to the jury upon the third count of the complaint. This third count is in the following language, which sufficiently shows the ground of action: "The plaintiff claims of the defendant the further sum of three thousand

one hundred and seventy-five dollars and forty cents as damages for the breach of an agreement made by plaintiff with defendants on, to-wit, the 19th day of January, A. D., 1884, by which the defendants, for the consideration named in the agreement, viz., from twenty-five to thirty cents on hoe blades, and from fifty to sixty cents per dozen on briar scythes, promised and undertook to temper for plaintiff a large number of hoe blades, to-wit, all the hoe blades manufactured by plaintiff during the year 1884, and the defendants promised and undertook to do the same in a workman-like manner and well; but the said defendants tempered the said hoe blades defectively, and thereby broke said agreement. The said plates so tempered are too hard, and break too easily, and were and are wholly worthless; and it has cost and will cost the plaintiff three thousand one hundred and seventy-five dollars and forty cents to have new plates made and properly tempered, which amount said blades would have been worth to him had they been tempered according to contract, and, by their breach of said agreement, plaintiff has sustained damage to that amount." To this count of the complaint the defendant pleaded "(1) that the allegations in the complaint are untrue;" "(4) defendants, for answer to the third count, say the allegations contained in said count are untrue;" "(10) further answering, defendants say to all the counts, they have fully performed their undertakings with the plaintiff."

The evidence showed that under the contract the plaintiff was to furnish the hoes and blades to be hardened for him by the defendants. Thomas Disston, who was examined as a witness for the defendants, was asked in rebuttal, by the defendants' counsel, "to state whether or not the hardening and tempering of hoes would be delayed by putting fifty dozen in the furnace at one time." To this question the plaintiff objected on the grounds: "(1) Said question seeks to elicit irrelevant and immaterial evidence; (2) said question seeks to elicit evidence that is in its nature argumentative." The court overruled these objections of the plaintiff, and allowed the witness to answer "that, if fifty dozen hoes were put into the furnace at one time, the result would be that the hardening and tempering would be delayed." To this ruling by the court the plaintiff duly excepted. The witness E. B. Austin, on being examined by the defendants, testified that he was the general business manager and superintendent of all the works of the defendants, and that he made the agreement with the plaintiff for the alleged breach of which this action was brought. After having stated the terms of the agreement, the witness was then asked by defendants' counsel "to state whether or not the defendants have performed their part of the agreement." To this question the plaintiff objected on the ground "that it called for the opinion of the witness, and that it was illegal and inadmissible." The court overruled the objection, and the witness answered that the defendants "had fully performed their part of the agreement."

At the request of the defendants, in writing, the court gave the following charges: "(1) Before the jury can find a verdict for plaintiff on the contract to harden and temper goods manufactured by Joseph R. Hood, they must find from the evidence that the goods which defendants tempered and hardened for plaintiff were of such material as was suitable to be hardened and tempered, and not of a sort of material as either could not be hardened and tempered, or which would be too hard and brittle after tempering and hardening in a workman-like manner, and well. (2) If the jury believe from the evidence that, under the contract to harden and temper the hoes manufactured by Hood, the goods hardened and tempered were of a poor material, and that said goods, when hardened and tempered, were inferior or worthless because of such poor material, and not because said goods were defectively hardened and tempered, the plaintiff cannot recover on the third count of the complaint." To the giving of each of these charges the plaintiff duly reserved an exception.

Wm. H. Smith, Jr., and Kelly & Smith,
for appellant. *N. D. Denson,* for appellees.

MCCLELLAN, J. A witness for the plaintiff having testified that, in the process of hardening and tempering the hoe blades, the defendant put as many as 50 dozen of them in the furnace at one time, which was not a skillful or workman-like method of doing the work, and one of the defendants having testified without objection that that number "might be put in and heated, but it would take a much longer time, as it would cool down the furnace," we think it was competent for this last witness to further testify as an expert, which he was shown to be, that to treat that number would have delayed the work; thus showing that it was not to the interest of defendant to have done so, and affording a basis for an inference to be drawn by the jury that plaintiff's witness was mistaken in this part of his testimony.

The witness Austin having sworn that he, as general business manager of defendants, made the contract with the plaintiff, and detailed the terms of the contract by which defendants undertook to harden and temper hoes manufactured by plaintiff in a workman-like manner and well, his further statement that defendants had performed their part of the agreement was but "a short-hand" rendering of the facts involved in performance, and was properly admitted. 1 Whart. Ev. § 510; *Iron Co. v. Reed*, 84 Ala. 493, 4 South. Rep. 369; *Elliot v. Stocks*, 67 Ala. 290; *Turnley v. Hanna*, 82 Ala. 139, 2 South. Rep. 483; *Iron Co. v. Roberts*, 87 Ala. 436, 6 South. Rep. 349.

Plaintiff's testimony tended to show that the blades hardened and tempered by defendants were too brittle, and were easily broken and split. There was expert testimony on the part of the defendant that, "when steel splits, it is always due to the inferior quality of the material used, and not to the tempering." We are unable to see but that these facts tended directly to show that the material used in manufacturing the blades was of an inferior quality. By the terms of the contract

the material was supplied by the plaintiff. Whether it was of good or bad quality was a fact more within his knowledge than that of the defendants. If of inferior material in such sort as that no method of treatment by defendants, however skillful, could have resulted in a valuable product, it is impossible to conceive how any claim for damages could accrue to the plaintiff, even though the work had not been done by defendants in a workmanlike manner, and well, since, whether so done or not, the article is equally valueless. These considerations make it manifest to our minds that one essential element of plaintiff's right of recovery in the present action was that he furnished material of such quality that the blades could by proper treatment have been efficiently hardened and tempered. Until that fact appears, it is not shown that any damage was done the plaintiff by defendants' want of skill or care in tempering the metal. It follows that the burden of proving this fact was on the plaintiff. The charges given at defendants' request were in harmony with the view we have taken of the law. They were not abstract, as we have endeavored to demonstrate, and were properly given.

We discover no error in the record, and the judgment of the circuit court is affirmed.

WINTER V. BALDWIN *et al.*

(*Supreme Court of Alabama.* April 30, 1890.)

NATIONAL BANKS—STOCKHOLDERS—INSPECTION OF BOOKS.

1. Code Ala. 1886, § 1677, which provides that stockholders of all private corporations have the right to access to, and inspection and examination of, the books, records, and papers of the corporation, at all reasonable and proper times, applies to national banks located within the state; and *mandamus* will lie against the officer having custody of the books to enforce the right.

2. The rights of stockholders conferred by the above statute are not curtailed by, nor is the statute in conflict with, Rev. St. U. S. §§ 5240, 5241, which provide that national banks are subject to examination by an officer appointed by the comptroller of the treasury for that purpose, and that they shall not be subject to visitatorial powers other than those authorized by congress, or vested in the courts of justice.

CLOXTON, J., dissenting.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

The appellant in this case, Joseph S. Winter, filed his petition for *mandamus* against the First National Bank of Montgomery, and alleged that he was a stockholder in the said bank; that he had made application to A. M. Baldwin, cashier of the bank, to be allowed to inspect the books, records, and papers thereof, which was refused; and he prayed for the alternative writ of *mandamus* requiring and ordering the said First National Bank, or its agents and officers, to allow and permit him to make such examination at such times as may be reasonable and proper. The bank and its cashier each made a motion to quash the writ on the ground that no *mandamus* can issue to a bank chartered under the laws of the United States, that the state statute, under which this

petition was filed does not apply to national banks, and other grounds unnecessary to be noticed. Upon the hearing of these motions the court quashed the writ, and this ruling of the court is assigned as error.

Winter & Winter, for appellant. Tompkins & Troy, for appellees.

SOMERVILLE, J. The statute declares the law of this state to be that "the stockholders of all private corporations have the right of access to, of inspection and examination of, the books, records, and papers of the corporation, at reasonable and proper times." Code 1886, § 1677. This statute is but a slight modification of the rule of the common law, and its construction is fully discussed in the case of *Foster v. White*, 86 Ala. 467, 6 South. Rep. 88. We there held that the purpose of the statute was to secure to the stockholder of every corporation the right generally to examine the books at all reasonable and proper times, and that, upon a denial to him of the exercise of this right, he was entitled to a *mandamus* upon an averment of facts which *prima facie* bring the applicant within the terms of the statute, and showing such denial. If the inspection is sought from improper motives, or for reasons which are insufficient to justify it, this was said to be a matter of defense not necessary to be negatived by the applicant, by way of anticipation, in his pleadings.

The present application is made by a stockholder in a national bank, and the main question raised is whether these institutions are entitled to the prerogative of being exempted from the operation of the above section of the Code. The decisions are numerous which hold that the states are restrained from legislating adversely to the interests of these banks, or discriminating unfavorably against them on the ground that they are authorized, constitutional agencies of the federal government, appropriately designed to aid in the administration of the fiscal operations of the government. These decisions have reference chiefly to state laws evincing unfriendly discrimination in the exercise of the taxing power, the tendency of which was often to cripple their influence, and even destroy their very existence. *Polard v. State*, 65 Ala. 628; *People v. Weaver*, 100 U. S. 589; *Cook, Stocks*, (2d Ed.) § 571. There is nothing of a hostile or discriminating character in the operation of the statute under consideration. Its purpose is to place all stock corporations on precisely the same footing; to confer on the stockholders of each the right to know their financial condition; to ascertain whether they are being honestly and profitably conducted, or otherwise; and to keep a supervision over all the details of management which can in any way affect the value of the stock, including the good fame and financial integrity of the institution. The statute unquestionably applies to banks incorporated by the states. We see no reason why it should not also apply to national banks.

The principle is enunciated in general terms by the United States supreme court

in *Waite v. Dowley*, 94 U. S. 527, as follows: "We have more than once held in this court," says Mr. Justice MILLER, "that the national banks organized under the acts of congress are subject to state legislation, except where such legislation is in conflict with some act of congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation." It was decided in that case that a statute of the state of Vermont was valid which required the cashiers of national banks in that state to transmit to clerks of the several towns a list of the shareholders, with the number of their shares, for the purpose of taxation. The same doctrine had, in effect, been previously announced in the case of *Bank v. Com.*, 9 Wall. 353, where a statute of the state of Kentucky required "the cashier of a bank whose stock is taxed to pay into the treasury the amount of the tax due. If not, he was to be held liable for the same, with twenty per cent. upon the amount." The tax itself was authorized by the act of congress, but the state law undertook to regulate the mode of its assessment and collection, by obliging the cashier to collect the tax out of the dividends, and pay it over to the state. The objection was taken that a state could not thus interfere with national banks by interposing such a duty on their officers; but the United States supreme court held the law to be a valid exercise of state legislative power, and free from constitutional objection.

We can see nothing in the right conferred on a stockholder to inspect the books of a national bank which in any manner tends to impair or destroy the utility of such banks as fiscal agents of the federal government, or which interferes with the purposes for which they were created. Nor can we see anything in the laws of congress which, even by implication, forbids the exercise of such a right by stockholders. These laws, it is true, authorize the appointment of bank examiners by the comptroller of the currency, and provide that these institutions shall not be subject to any visitatorial powers other than those which are authorized by congress, or "vested in the courts of justice." Rev. St. U. S. §§ 5240, 5241. But these provisions were not intended, in our opinion, to curtail, or even to regulate, the rights of stockholders, or their relations towards the bank. An act of congress will not be construed to take away the jurisdiction of state courts, or to remove any favored persons or institutions from the equal operation of state laws, unless the purpose to accomplish this result is unambiguously expressed, or implied by necessary intentment. *Cooke v. Bank*, 52 N. Y. 96. It was accordingly held in *Bank v. Gunst*, 1 Abb. N. C. 292, (1876), that a national bank organized under the act of congress, which was decided to be a foreign corporation, was subject to a general statute of New York requiring foreign corporations to give security for payment of costs before instituting a suit in a state court. That decision was made by the New York superior court, but no appeal was taken from it.

See, also, 2 Morse, Banks, (3d Ed.) § 157, p. 1294; Gould & T. Notes Rev. St. U. S. 961, 962. We accordingly hold that a national bank is subject to the influence of section 1677 of the Code of Alabama equally with all other corporations.

The writ, however, must issue against the cashier of the bank, or other officer having the custody of the books; and it does not run against the corporation as such, unless to compel the discharge of some corporate duty. The bank, in its corporate capacity, was not a proper party defendant to this proceeding. *Wood*, Mand. 23, 29, 30; *Mos. Mand.* 199; *People v. Throop*, 12 Wend. 183; *People v. Mott*, 1 How. Pr. 247; *Ang. & A. Corp.* (11th Ed.) § 707.

Reversed and remanded.

CLOPTON, J., dissents, holding that section 1677 of the Code was not intended and does not apply to associations incorporated under the national bank act of congress; the relative right of the shareholders, and duties of the officers to them, not being proper subjects of state legislation.

CARTER *et al.* v. LEHMAN, DURR & CO.

(Supreme Court of Alabama. April 30, 1890.)

TROVER—PROMISSORY NOTE—INNOCENT PURCHASER.

1. An indorsee in blank of a promissory note transferred as collateral security, has title and possession sufficient to support an action of trover, of which he is not divested by returning it to the indorser for collection.

2. A note indorsed as collateral security was returned to the indorsers for collection. They had agreed with a creditor to procure and turn it over to him in payment of his demand, and informed him that it was then held as collateral security by a firm to whom they had telegraphed to send it, and with whom they had an arrangement for the return thereof, and represented that they in fact owned it. On its arrival no further questions were asked, and the note was accepted without notice that it was sent and receipted for, for collection only. Held, that the creditor was not a purchaser without notice of the rights of the indorsee so sending it.

Appeal from city court of Decatur; J. M. BUFORD, Special Judge.

Action to recover damages for the alleged unlawful conversion of a promissory note. Judgment upon agreed statement of facts, which appear in the opinion.

Wert & Speake, for appellants. *Kyle & Skeggs*, for appellees.

CLOPTON, J. The undisputed facts are: Wiggins, Vest & Co., being indebted to Lehman, Durr & Co., the plaintiffs, transferred and delivered to them several notes on various persons as collateral security for such indebtedness. Among the papers thus delivered was the note for the conversion of which this suit is brought. At the time of delivery it was indorsed in blank by Wiggins, Vest & Co., having been so indorsed by the payee to Wilhite, and by Wilhite to them. While the note was in the possession of plaintiffs, defendants called upon Wiggins, Vest & Co. for the settlement of the claim which they held against them, who proposed to turn over in settlement of the demand certain notes, the note in question being one. Not being able

to produce this note, they informed defendants, who accepted their proposition, that plaintiffs held it as collateral security; but they had telegraphed for it, and would get it the next morning. Upon defendants inquiring in what shape the note was,—whether it was plaintiffs', or did Wiggins, Vest & Co. have a right to demand it,—they were told that the latter had an arrangement with plaintiffs by which they could get it when they called for it, and that it belonged to Wiggins, Vest & Co. In response to the telegram, plaintiffs sent the note in a letter, in which was also inclosed a receipt for this and other notes held by plaintiffs as collateral security, stating they were received for collection, and that Wiggins, Vest & Co. were to remit all moneys collected, and forward all cotton or other produce received on account of the notes. The receipt was signed by Wiggins, Vest & Co., and returned to plaintiffs. Without making further inquiry, defendants received the note, indorsed to them, from Wiggins, Vest & Co., and collected the same, but without knowledge of the contents of the telegram, the letter, or the receipt. We have stated the facts thus fully, because we are required by the act creating the city court, when a case is tried without a jury, to review the conclusion and judgment on the evidence without any presumption in favor of the ruling of the court. The delivery of the note to plaintiffs, indorsed in blank by Wiggins, Vest & Co., passed the interest and property therein to them. They had title and possession sufficient to support the action of trover, of which they were not divested by sending it to the persons from whom they received it as collateral security for collection, as their agents. *Riggs v. Andrews*, 8 Ala. 628; *Blackman v. Lehman*, 68 Ala. 547. Wiggins, Vest & Co., being agents with general authority to collect the note, were not authorized to make any other disposition of it; certainly not to trade it in payment of their own debt. *Ferguson v. Morris*, 67 Ala. 389. But it may be said that, by returning the paper to Wiggins, Vest & Co. without filling up the blank indorsement in their own names, plaintiffs clothed them with apparent title and authority to dispose of the note, and, having given occasion to the commission of the wrong, must be the sufferer. Whether, if defendants had purchased under such circumstances without notice, they would have been protected against the prior title and claim of plaintiffs, it is unnecessary to decide. They had actual notice, or at least were informed of facts, which ought to have put them on inquiry, and which impute notice. They were informed by Wiggins, Vest & Co. that plaintiffs had possession of the note, and held it as collateral security. This information constituted actual notice. Having actual notice of an outstanding conflicting claim, they were not warranted in relying and acting upon Wiggins, Vest & Co.'s explanatory or contradictory statements. They were dealing with them as the owners of the note, whose interest it was to misrepresent or conceal the facts. Information that plaintiffs had the note as collateral security, coming from Wiggins, Vest & Co., who

were thus interested, was sufficient to put defendants upon inquiry as to the truth of their qualifying and contradictory statements. They should have made inquiry as to the nature and character of the arrangement between Wiggins, Vest & Co., and plaintiffs of those who were not interested in misleading them. The defendants were at fault, and must suffer the consequences. 2 Pom. Eq. Jur. § 601; *Simpson v. Hinson*, ante, 264, 88 Ala. 527. On the undisputed facts, the judgment of the court is correct. Affirmed.

KIRK et al. v. SHEETS.

(Supreme Court of Alabama. April 30, 1890.)

VENDOR'S LIEN—ASSIGNMENT—PARTIES.

1. In a suit to enforce a vendor's lien by an assignee of bonds given for the purchase money, the assignor is not a necessary party.

2. A bill in equity to enforce a vendor's lien filed by an assignee of the debt need not state when the assignment was made.

Appeal from city court of Decatur; W. H. SIMPSON, Judge.

Bill in equity to enforce a vendor's lien. It states a sale of the land to Bains, and then a sale by him to the defendants, and their giving bonds for the purchase money, —two signed by both of them, and the other by one only. The bill then alleges that the bonds are unpaid, and have been assigned to the complainants. A demurrer on the grounds that the assignor is a necessary party, that there is a misjoinder of causes, and that the bill does not state when the bonds were transferred, was overruled. This is assigned as error.

Brown & Kirk and *R. C. Hunt*, for appellants. *R. C. Brickell*, for respondent.

STONE, C. J. We find no error in this record. No relief is asked which can in any way affect Robinson, Bains, or Brown. No relief against them is asked, no title is sought to be divested out of them, and under no decree that can be rendered will they be either injured or benefited. *Batre v. Auze*, 5 Ala. 173; 1 Brick. Dig. pp. 754, 755, §§ 1714–1716, 1726; *Wilkinson v. May*, 69 Ala. 38; *McKay v. Broad*, 70 Ala. 377; *Woodall v. Kelly*, 85 Ala. 368, 5 South. Rep. 184. And it is equally a matter of indifference to the defendants at what time their bonds were transferred to Sheets. The matter of interest to them is that they should not be required to pay the purchase money of the lots to any one not authorized to receive it. When he became so authorized is a question in which they have no concern, provided his right accrued before he brought suit.

There is nothing in the other question. Affirmed.

SNODGRASS V. COULSON.

(Supreme Court of Alabama. May 2, 1890.)

MONEY HAD AND RECEIVED.

Where plaintiff and defendant enter into a contract under which defendant is to cut and saw timber on plaintiff's land, defendant to receive three-fourths of the lumber and plaintiff one-fourth, plaintiff cannot maintain *assumpsit* for money had and received on defendant's refusal to turn over plaintiff's fourth, the title to which has always remained in him, and no part of which has ever been sold.

Appeal from circuit court, Jackson county; JOHN B. TALLY, Judge.

Assumpsit by Henry H. Coulson against William E. Snodgrass. The only counts in the complaint are the common counts, and the defendant pleaded the general issue, payment, and set-off. The evidence showed that the plaintiff, who was the owner of land and the timber thereon, made a special contract with the defendant that the latter should cut and haul the timber, and have it sawed, and that the plaintiff was to get one-fourth of the lumber, the defendant retaining the three-fourths. There was a conflict in the evidence as to whether defendant was to be paid for cutting and hauling the timber. The evidence further showed that the plaintiff never sold the trees, but agreed that they might be cut and hauled and sawed, and that his property in the one-fourth of the lumber should remain in him. The evidence shows that this lumber was thus sawed and stacked up in the lumber-yard of the defendant, and there is no evidence that any part of it had ever been sold. There was also evidence that the defendant refused to let plaintiff have the lumber until he paid him for cutting and hauling the logs, though the defendant denied this. Evidence was introduced showing the amount of lumber so sawed by the defendant; and the plaintiff introduced two persons as witnesses, who testified that they measured the stumps of the trees cut by the defendant, and the length of the logs cut therefrom, and thereby made a rough estimate of the amount of the lumber cut by the defendant, at the same time putting down in a little memorandum book their figures and measurements and estimate. On motion of the plaintiff this memorandum book was introduced in evidence, against the objection and exception of the defendant. Upon the evidence as introduced, the defendant requested the court to give the following charge in writing: "If you believe the evidence, the plaintiff Coulson is not entitled to recover for the lumber in this action." The court refused to give this charge, and the defendant thereupon duly excepted. There was judgment for the plaintiff, and the defendant now appeals and assigns the rulings of the court as error.

A. C. Brickell and Hunt & Clapton, for appellant; *Speake & Coulson*, for appellee.

STONE, C. J. In *Acklen v. Hickman*, 68 Ala. 494, we laid down the rule when a memorandum, used in connection with a witness' testimony, may itself be put in evidence. The memorandum in this case was scarcely brought within the rule. Possibly, as furnishing the detailed items and numbers to which the witness had testified, it was brought within the influence of another rule.

The complaint in this case contains only common counts. The count upon which the plaintiff must have recovered is the one for money had and received. That count comes nearest to the case made by the testimony. So far as the plaintiff's claim rests on the lumber transaction there can be no recovery for money had

and received. There is no testimony that the lumber had been sold, or so converted by the defendant as that he could be made to account for the plaintiff's alleged one-fourth interest in it as for money. The lumber, even at the trial, was at the mill, undisposed of. *Snedecor v. Leachman*, 10 Ala. 330; 1 Brick. Dig. 140, 141, §§ 74, 89; 3 Brick. Dig. p. 51, § 10; *Moody v. Walker*, ante, 246. The charge asked by defendant ought to have been given. Reversed and remanded.

WADDILL v. WALTON *et al.*

(*Supreme Court of Louisiana*. June 12, 1899.
42 La. Ann.)

TAXATION—SALE FOR NON-PAYMENT—ACTION BY TAX-TITLE HOLDER.

1. Act 107 of 1880 provides exclusively "for the sale of all property forfeited or sold to the state for delinquent taxes or licenses;" and a tax-deed, made under said act, which describes the property sold as having been forfeited to the state at a particular date, and for taxes of a particular year, is null and void when it is proved that the property was never forfeited at the date, or for the taxes, stated.

2. Even if forfeiture on a different date, and for different taxes, could be proved, yet, it appearing that the price at which the property was adjudicated was less than the taxes due for which the forfeiture is claimed, this would be a cause of nullity, because violating the express prohibition contained in Act 107 of 1880.

3. Where the holder of a tax-title appears as plaintiff, in a petitory action against the former owners in possession, he is bound to establish his title, and cannot overcome objections to it on the ground of prescription.

(*Syllabus by the Court.*)

Appeal from district court, parish of Madison.

A. L. Slack, for appellant. *Stone & Murphy*, for appellees.

FENNER, J. The property in controversy belonged to Charles D. Dunlap, who died in 1855, and under his will passed to the defendants, who are his widow and daughter. It was originally a cultivated plantation; but, owing to overflows, in common with many other estates in Madison parish, its cultivation was abandoned, and it lay idle for many years. The defendants, however, occupied it, through tenants, in 1876 and 1877; and in 1887 they again put tenants upon it, who occupied it at the time when this suit was brought. There is no pretense that anybody else ever occupied the land.

In February, 1889, the plaintiff brought this petitory action against the defendants, in which he avers that he is owner of the property by virtue of a tax-title evidenced by two deeds of sale, viz.: (1) A tax collector's deed to him under a tax-sale made on May 1, 1886, for delinquent taxes due under assessments made in the name A. W. Spencer; (2) another deed, made in 1882, by which the collector sold the property to Spencer as property forfeited to the state for delinquent taxes assessed in the name of the estate of Dunlap.

Of course, the validity of plaintiff's title depends upon that of the sale to Spencer; for, if defendant's title had never been divested by a valid forfeiture to the state, and a valid sale to Spencer, assessments

in the name of Spencer could furnish no basis for a sale of defendant's property. Recurring to the deed to Spencer, we discover that it was executed under Act 107 of 1880, which provides exclusively "for the sale of all property forfeited or sold to the state for delinquent taxes or licenses." The deed describes this property as having been "assessed, listed, advertised, and forfeited in the name of estate of Charles D. Dunlap," and further, as having been "forfeited to the state of Louisiana on the 3d day of December, 1879, for the taxes due thereon for the year 1878, and not since redeemed as provided by law." Now, it is clearly proved, and indeed it is admitted, that the property was not forfeited to the state on the 3d day of December, 1879, or for the taxes of 1878; and thus, on the face of the deed, the basis on which it rests is entirely destroyed. Plaintiff seeks to escape the effect of this by proving that the property had been forfeited to the state in 1874 for the taxes of 1872. Even if this were proved, it is obvious that the state neither asserted nor conveyed any title founded on such forfeiture.

Moreover, the Act 107 of 1880, under which the sale was made, provides: "The tax collector shall not receive a bid for a less amount than the sum necessary to pay all taxes * * * that may be due," etc. Now, it appears from the very delinquent list recorded in the auditor's office, and relied on as operating a forfeiture under the sixty-eighth section of Act 42 of 1871, that the taxes of 1872, for which the forfeiture is claimed, amounted to \$137.60; and the deed to Spencer shows that the property was adjudicated to him for \$73, declared to be "one dollar more than the sum necessary to pay all taxes, etc., due." Thus, whatever forfeiture be relied on, the title fails. If the forfeiture recited in the deed be considered, the sale is null, because there was no such forfeiture. If the forfeiture claimed for the taxes of 1872 be asserted, then the sale is equally null, for violating the express prohibition of the statute, by receiving and adjudicating upon a bid less than the taxes due.

The effort of the plaintiff in a petitory action to sustain his title by a plea of prescription against any attack thereon by the defendants in possession cannot be countenanced. The plaintiff has cited no precedent for such a reversal of the ordinary principles of pleading and of prescription, and we shall not establish one. We have maintained the prescriptions of three years and of five years in favor of tax purchasers in possession as a shield against actions by former owners to invalidate such titles, and to oust them from possession. But when the holders of such titles, having never obtained possession, assume the character of petitory plaintiffs, and seek to oust the former owners, whose possession has never been divested, they must establish their title unaided by such prescriptions.

Defendants have brought no action to invalidate plaintiff's tax-title. They are simply defending their own possession and title against an attack made by him. He must submit to the burden imposed on every petitory plaintiff, of showing a title

not merely *prima facie*, but absolutely, good. Saund. Tax'n, 313. Plaintiff here has not only failed to show such title, but we think the evidence establishes that he has none. He has no equity on his side; for the uncontradicted evidence shows that he admitted that the purchase by Spencer was really made for him, and he suffered the property to go to sale for taxes which were really due by himself, and became the purchaser at that sale.

The judge *a quo* granted a judgment of nonsuit, and appellees ask that it be converted into a judgment rejecting plaintiff's demand. We think they are entitled to such amendment.

It is therefore adjudged and decreed that the judgment appealed from be so amended as to reject the demand of plaintiff absolutely, without prejudice to his right to claim reimbursement of outlays made for taxes, etc., and that as thus amended the same be now affirmed; plaintiff to pay costs in both courts.

STATE *ex rel.* McENERY v. NICHOLLS, Governor, *et al.*

(Supreme Court of Louisiana. March 3, 1890.
49 La. Ann.)

**MANDAMUS—TO REGISTER OF LAND-OFFICE—
SCHOOL LANDS.**

1. A *mandamus* proceeding against the register of the state land-office to coerce his performance of duties purely ministerial is not a suit against the state.

2. *Mandamus* will go to the auditor, treasurer, or register of the land-office of the state, in appropriate cases.

3. It is the duty of the governor, and not of the register, to sign patents for state lands. But the latter is fully authorized, under Act 23 of 1880, to furnish data, etc., prerequisite, preparatory to the issuance of patents, and it is made his specific ministerial duty to so prepare them for the governor's signature; and, upon the faith of his certificate, it is the duty of the governor to act, and sign same, when duly presented to him.

4. The state, through the register of the state land-office and the governor, was fully empowered by congress, and legislative acts in pursuance thereof, to sell school indemnity lands, convey fee-simple titles to purchasers thereof, and to dedicate the proceeds to the inhabitants of townships entitled thereto, for the benefit of public schools.

(Syllabus by the Court.)

Walter H. Roger, for appellants. John McEnery, for appellee.

WATKINS, J. Appeal from the civil district court, parish of Orleans. This is a proceeding by *mandamus* to compel the governor and the register of the state land-office to execute and deliver to the relator patents for certain lands, and to require the former to transfer and deliver to him a certain swamp-land indemnity certificate. In the court below, there was judgment making the *mandamus* peremptory as to the register, commanding him to prepare and sign patents in favor of the relator for lands recovered by him as per his contract with the state of Louisiana, which lands were divided by lot by said register on the 4th and 5th of February, 1889; but no disposition was made of the demand for a *mandamus* to the governor, aside from the general statement that the

law and evidence were in favor of the relator, "entitling him to the decree prayed for." From that decree the respondents have appealed, and in this court the relator has filed an answer praying that the judgment against the register be affirmed; but, in so far as relief by *mandamus* against the governor is concerned, the case remains *in statu quo*, and an affirmation of the judgment is all he could require.

1. The claim of the relator is that by the terms of Act 23 of 1880 the governor was authorized to employ counsel to assert the rights of the state to lands donated to the state by the federal government, or to recover the value of said lands in money or scrip, and that on the 20th of March, 1880, the governor did make and enter into a contract with him for the purposes enumerated in and contemplated by that act; that in pursuance of, and conformably to, said act and contract, he recovered for the state of Louisiana two indemnity swamp-land certificates from the general government, covering over 1,200 acres of land, and also recovered certain internal improvement and school indemnity lands which had been granted the state under various acts of congress, a schedule of which is appended to his petition; that all of said lands were by the register divided by lot into two parcels, one of which was allotted to him, and the other to the state, and of the whole he caused an act of partition, in due form, to be prepared,—the internal improvement and school indemnity lands being therein separately mentioned,—showing the quantity and description of those lands to which he was entitled, as well as those allotted to the state; that he is entitled to the share of said lands thus allotted to him on the register's *projet* of partition, and to one of the two indemnity swamp-land certificates,—they having been issued by the land-officer of the federal government in two equal portions,—the patents for the whole of said lands, and said certificates, being in the custody and control of the register of the state land-office; and, notwithstanding due demand had been made upon the governor to that effect, he has declined to sign the necessary patents, or to transfer to him either of said indemnity swamp-land certificates; and said refusal of the governor to sign and deliver said patents as evidences of title, and to transfer and deliver said certificate, and the declination and refusal on the part of the register to perform his duties in the premises, are contrary to law, and, if persisted in, will result in great loss and injury to him, and that *mandamus* affords the only remedy and relief.

The defenses assigned for the governor, who makes appearance through the attorney general, are as follows, viz.: That as chief of the executive department of the state government, he gives the court to know and be informed that he is ready and prepared to do and perform any and all duties which devolve upon him under the constitution and laws of the state, when the facts of any given case justify, but that, in respect to the matters and things set forth in the relator's petition,

no such duty devolves upon him, and he has declined and declines to act in the premises, as matters now stand; that the register questions "his right and authority to take action in the premises, and because he had also been informed that the lands mentioned were lands held in trust by the state for school purposes, and could not be diverted by the legislature or the state, directly or indirectly, to any person, and especially as was attempted to be done" in this case; that he approves of the opinion expressed by the register, and "of the final action of the register in refusing to sign said patents, and he declares that his prior action was unwarranted;" that the register had and has no legal authority or capacity, under Act 23 of 1880, to pass upon the contract entered into between his predecessor in office and the relator, and decide whether said contract be justified by said statute, or was within its terms and a legal contract, and had neither authority to examine into the services of the relator, and determine whether they were within the law and the contract, nor to approve same, and make a partition or other disposition of the lands recovered by him thereunder; that the register is utterly without "authority either to audit said matters, or to stand in judgment in respect to same;" that he (the governor) "is without any authority or capacity to audit the said claim, or to make any disposition of the scrip or land in favor of the relator or any one else, and he declines to do so, or to stand in judgment for the state, and he declines to do so; that this whole matter will require additional legislation, in that, until such additional legislation, and some remedial and enabling act [is passed,] no action whatever can be had by either the executive or judicial department," under said act and contract, "for the purpose of ascertaining and fixing the rights and obligations of the parties;" that the only authority given to the governor under Act 23 of 1880 extended to making a contract for the purposes mentioned, and not to auditing any claims or rights under it, or standing in judgment for the state under it; "that he in no way recognizes or admits that the claims and pretensions of the relator are just or well founded either in law or in fact, and he deems it his duty, as head of the executive department, to inform the court, and bring to its knowledge the matters and things herein set forth, to the end that the state suffer no injury," etc. The answer of the register is of like import, and it adopts the averments of that of the governor as his own.

This extended statement of the demands of the relator, and of the defenses of the respondents, was deemed essential to the perfect elucidation of the questions involved.

2. The substantial facts adduced on the trial are set out in certain admissions of record, and the parol testimony of the relator. They are as follows, viz.:

(1) The admissions are to the effect "that the lands described in the advertisement embrace the school indemnity and internal improvement lands recovered, and the lands allotted to the relator are correctly

described in the petition; that the swamp-land indemnity certificates described in the petition, on which the relator claims a fee under his contract, were recovered for the state in two certificates of equal amounts, and that the transfer and delivery to him in negotiable form, by the governor, of one of these certificates, will be payment for said recovery, if this action is warranted; that the said school indemnity and internal improvement lands were recovered by the relator, acting under his contract with Gov. Wiltz, that the register of the state land-office divided, and on February 4 and 5, 1889, allotted to the relator, as his fee for recovery of same, the lands so claimed and described in his petition; that frequent demands for patents for the lands, and the transfer of the scrip accruing to the relator, have been made on the governor and the register, and [such demands] have been refused."

(3) The testimony of the relator as a witness is to the effect that, by the terms of Act 85 of 1848, (Extra Session,) the state assumed control of the school lands granted to the state by certain acts of congress, by imposing upon the register of the state land-office the duty of adjusting the grant, and by authorizing him to sell school-land warrants when deficiencies were ascertained. Under the provisions of that act, and prior to 1861, about 115,000 acres of such warrants had been sold; and it was generally conceded that the state could make no further claim under the act of congress dated May 20, 1826. "Such was the supposed condition of the school grant at the date of the passage of Act 23 of 1880." "In pursuance of the contract thereunder, relator entered upon an examination of the records with a view of determining the *status* of the grant, but they were found so defective that it became necessary to form tabulated statements of all the warrants issued by the state." The records of the land-office of the United States were then examined. "In performing this work, lists were found on the files then not recorded in the state land-office, and plats were found which were not found in the surveyor general's office, and *vice versa*. It required much time and correspondence to perfect the list referred to, owing to the obstacles encountered. Application was next made to the register of the state land-office to issue warrants for deficiencies, but he refused, for the reason that he was not advised as to whether such township was entitled to indemnity." The next step taken was to ascertain where the best government lands subject to location by the state were situated, and this was done at great labor and expense to the relator; and lists were made and forwarded to the general land-office for instructions, which were after considerable delay approved, and returned to the local land-office of the United States with instructions to receive the same. "So many difficulties were encountered in the various steps of the adjustment that the relator was obliged to secure the aid of experts, both here and in Washington, at great expense."

Finally, it is stated that prior recoveries were obtained by him during the ad-

ministration of Govs. Wiltz and McEnery, and the register of the state land-office made partitions between the state and himself, just as the register proposed in this instance.

The act of the legislature under which the relator's contract was made, as well as the contract, were put in evidence. No evidence was introduced on the part of the respondent. The following is an exact copy of Act 23 of 1880, viz.: "An act authorizing the governor of the state of Louisiana to employ counsel to assert the rights of the state to lands donated to the state by the federal government, or to recover the value of said lands in money or scrip. Section 1. Be it enacted," etc., "that the governor of the state be, and he is hereby, authorized to take the necessary steps to institute proceedings, to employ counsel, and to make the necessary agreement or agreements to recover for the state the lands situated in the state of Louisiana, and donated by several acts of congress to the state for divers purposes, some of which have been illegally disposed of by the federal government, and other portions, though listed to the state, have been improperly suspended or rejected by the federal government, and the approval to the state refused, or to recover the value of said lands in money or government scrip: provided, that the state shall incur no cost or expense in the prosecution of the said claim other than an allowance to be made by the governor out of the lands, money, or scrip that may be recovered. The governor is especially authorized herein to make all agreements and contracts to carry out the purposes of this act." This act was signed and approved on the 8th of March, 1880, and duly promulgated thereafter.

On the 20th of March following, Louis A. Wiltz, the then governor of the state, entered into a written contract with the relator, in which the following, among other stipulations are found, viz.: "*First*. That the relator promises and agrees to employ his diligent and best efforts to recover for the state all lands donated to her by the general government as swamp lands, and which have been improperly suspended or rejected by the United States government, and all lands to which the state had valid claims, and which have been sold or otherwise disposed of by the United States to the prejudice of the state, or to recover the value of the lands in money or scrip, to be paid, or issued by the United States in lieu of lands sold, or otherwise disposed of by the government of the United States, to which the state had valid claims, including therein the claims of the state upon the general government for lands, or their value, for school purposes, for the amounts in money due the state by virtue of the act of congress in relation to military bounty land warrants, or their location, and also for internal improvement purposes. *Second*. The state of Louisiana, on her part, agrees to pay John McEnery fifty per centum of the lands, money, or scrip recovered, to be paid as provided in said Act 23. Where lands in kind are recovered, the compensation, as aforesaid, of the said McEnery

shall be represented in scrip or certificates to be issued by the register of the land-office of the state, and locatable upon any lands owned by the state."

It was thought to be most convenient and correct to incorporate the statute, and the contract made in pursuance of it, with the statement of facts, and deal with them as parts of the evidence, as they were introduced as such, and are the foundation of the relator's rights.

3. Inasmuch as the principal question discussed in the attorney general's brief is that the school indemnity lands, for a portion of which the relator makes claim, are not the property of the state, but only held in trust by the state for school purposes, and for that reason same cannot be transferred to him, and the legislature was without power to authorize the sale or partition of them as proposed, we will examine that proposition first, as it underlies the statute in pursuance of which relator's contract was made, and, if sustained, will invalidate much the greater part of his demands. The syllabus of his brief presents his theory in very concise form, and we quote it in full, viz.: "Act No. 23 of 1880 applies only to recovery of state lands. State lands are those in which the title of the state is absolute. Lands donated to the state for school purposes are not state lands, but lands held in trust by the state. Lands donated to townships are for the benefit of a particular township, and the legislature cannot divert them, or authorize the governor to partition them under a contract for their recovery. If such authority existed in the legislature, the costs and commission for the recovery of school lands should be equitably divided among all the townships to the extent of the benefits secured." His further contention is that the terms of the contract, in so far as they appertain to school lands, are *ultra vires*, and not covered by or contemplated in the statutes, and are therefore void. Relator's answer to this proposition is that the lands in question, a portion of which he claims, are not sixteenth sections in place, but are lands granted by the United States government to the state, as indemnity, for the benefit of the inhabitants of the townships where sixteenth sections are wanting, or deficient for any cause, and that, in recovering the said lands from the United States, his fees are charged in pursuance of the statute and his contract, upon them as a whole; that the lands recovered are not sixteenth sections, but those which have been selected and located without any reference to sixteenth sections, and which were granted in lieu of those to which certain townships were entitled under acts of congress making donations, and not secured to or received by them. The recovered lands do not belong to certain townships *eo nomine*, but to the state in trust for school purposes, if you will, and must ultimately be sold by the state, so that the proceeds thereof may be placed to the credit of the people of the respective townships entitled to participate therein. Those lands were surrendered to the state by the land department of the general government, as a matter of equity,

in order to carry out in good faith the provisions of the donation, which had not become entirely effectual, because of conflicting or prior entries of some portion of the area donated.

An examination of the register's project of partition discloses that there is not a single sixteenth section contained in it, and the testimony otherwise shows that the relator's theory is true. The lands recovered are not school lands, but, as described, indemnity lands destined to school purposes, the legal title to which is in the state, charged, however, by the terms of the contract and the statute under which they were recovered, with the compensation fixed in behalf of relator. The act of 1880 is in keeping with the general law, state and federal, on the subject. Section 2951 of the Revised Statutes declares that "the register of the state land-office is required to ascertain in what townships in this state there are no reservations of school sections, by reason of conflicting claims, or from any other cause, or where the reservation is less than contemplated by law; and in such cases it is made his duty, under the superintendence of the governor, to apply for, and as soon as possible obtain, a location of any land or part of land in lieu thereof." Section 2952 provides that "when such locations cannot be made, if deemed more advantageous to the state, the register, with the assent of the federal government, is authorized to issue scrip for such lands, which scrip shall not be sold for a less amount than one dollar and twenty-five cents per acre." These sections are in the exact language of sections 8 and 9 of Act 816 of 1855, "regulating the sale of internal improvement and school lands." From these provisions, it clearly appears that it was, at the time of the passage of that act, within the contemplation of the legislature that there were many townships wherein there were deficiencies in school reservations; and hence a special mandate was delegated to the register of the land-office, "under the superintendence of the governor," in the premises. While it is true that the act of 1880 does not in terms mention school lands or school indemnity lands, yet we are of opinion that those employed, viz., "lands situated in the state of Louisiana, and donated by several acts of congress to the state for divers purposes, some of which have been illegally disposed of by the federal government, and other portions, though listed to the state, have been improperly suspended or rejected by the federal government, and the approval to the state refused," etc., are especially distinct and efficacious when considered in the light of the antecedent statutes on the same subject. And, when taken in the light of history and the evidence in the record, the principal object in view was, evidently, the recovery of those identical lands; for it is apparent that, notwithstanding the requirements of the act of 1855, no recoveries of consequence had been effectuated, and hence the necessity for the state to secure the assistance which was obtained.

In addition to these considerations, the laws of congress under which the dona-

tions were made (the acts of May 20, 1826, and February 26, 1859) specially provided for such indemnity, and are the foundation of the state laws referred to. Those acts were by the revision of the statutes merged into sections 2275 and 2276 of the United States Revised Statutes in December, 1873, which repealed all antecedent laws on the same subject-matter. We quote section 2275. It is as follows, viz.: "Where settlements with a view to pre-emption have been made before the survey of lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors, and other lands are also appropriated to compensate deficiencies for school purposes where sections sixteen and thirty-six are fractional in quantity, or when one or both are wanting by reason of the township being fractional, or from any natural cause whatever." The state assumed control of the school lands donated under the act of congress, and on the 20th of December, 1843, the general assembly enacted a statute "to secure the location of school lands." To that law the act of 1855 is a supplement, and it fixed the price at which school lands should be sold; the authority for their sale having been specially delegated to the state by the act of congress of February 15, 1843. See 5 St. at Large, 600.

The question as to the legal destination of the title to school indemnity lands has been determined by this court in several well-considered opinions of recent date. In *Board v. Ober*, 82 La. Ann. 418, our predecessors disposed of the whole question in one short paragraph. They say: "These lands were donated by congress to this state for public school purposes. By act of February 15, 1843, the legislature was authorized by congress to provide for their sale, and the conveyance of a fee-simple title to the purchaser; and the manner of sale and disposition of proceeds was prescribed by our legislative acts of 1855. The state is a trustee of the lands, or of the proceeds of their sale, for the use of the inhabitants of the townships wherein they are located." This statement is consonant with that announced by us in *Bres v. Louviere*, 87 La. Ann. 786, in which we held: "It is clear that, when the state sold the indemnity warrant, she parted with what right, title, and interest she had, or could have had, in and to any part of the public domain to which she would have been entitled by the location of the warrant, and that, when the location was effected, approved, returned, and acted upon by the delivery of the patent by the governor, the divestiture was complete." It was so held, in effect, in *McCastle v. Chaney*, 28 La. Ann. 720, in *Bradley v. Case*, 3 Scam. 604, (interpreting similar statutes,) and in *Cooper v. Roberts*, 18 How. 181. In this last case the supreme court expressed the opinion that "the trusts created by these compacts relate to

a subject certainly of universal interest [and] of municipal concern, over which the power of the state is plenary and exclusive." The foregoing is deemed perfectly conclusive as to the legal title of such lands being in the state, with the right of sale, and of making perfect and complete titles to purchasers from her, and the right of dedicating the proceeds of sale to the inhabitants of such townships as may be entitled thereto.

On account of the great public importance of the question involved, and the stress laid upon it in the argument of the attorney general, we have dealt with it as *res nova*, and examined it most carefully and thoroughly; and our conclusion is that the statute is broad enough, and sufficiently ample in terms, to authorize the contract in this respect between the relator and the governor; that the laws of congress, and the prior statutes of the state, authorized the recovery and selection of the indemnity school lands; that the right existed in, and the duty was imposed upon, the state, through appropriate legislative action, to make sale of them, and dedicate the proceeds to school purposes; and that the authority in the legislature to confer upon the governor the power to convey a part of said lands, when recovered, to such person as should aid in their restoration to the state, is likewise ample. In so far as the right of relator to a part of the internal improvement lands recovered, and to one of the two indemnity swamp-land certificates, are concerned, there is nothing said by the attorney general; and it must turn upon the theory that the governor is wholly without authority in the premises to stand in judgment for the state, or at least until additional legislative action is had in the premises.

4. Recurring to the answer of the respondents, we observe that seeming stress is laid by the attorney general upon the alleged want of authority on the part of the governor, as well as of the register of the state land-office, to stand in judgment for the state. This we consider a misconception of the issues involved in this case. In no proper sense is the state a party to this suit, and no judgment or relief is asked for against her; for, if such were the case, this proceeding would have to go out of court immediately, for it is a familiar principle "that the sovereign cannot be sued in his own courts without his consent." (*State v. Burke*, 34 La. Ann. 548; *State v. Lazarus*, 40 La. Ann. 859, 5 South. Rep. 289; *Louisiana v. Jumel*, 107 U. S. 728, 2 Sup. Ct. Rep. 128,) and no such consent is averred in this case. In our conception, this is a suit or proceeding, by way of the extraordinary remedy of *mandamus*, taken on the part of a private citizen against the chief executive officer of the state government, and against one of the subordinate officers of that department, for the purpose of obtaining specific relief by coercing them to carry out and complete a contract in the ordinary form which he had entered into with the predecessor of the respondent governor, upon the completion and fulfillment of which, said citizen, as relator, has large and valuable interests depending,

and in the performance of which a specific duty is imposed upon the governor by a special act of the legislature, and wherein he was wholly without discretion. The denial of right on the part of the governor and on the part of the register rests upon like grounds, and involves like principles of law, because they are both executive officers of the state government; and, while there is no specific denial of the jurisdiction of this court to pass upon and decide the question thus raised, yet there are averments to the effect that the duties imposed upon them, if any, come clearly within the definition of executive acts which, so far as they devolve upon the governor, are within the exercise of his discretion, and therefore their performance cannot be coerced by *mandamus*.

Preliminary to the discussion of this question, we will say that we regard the act in question as sufficiently complete and concise to cover the case in hand. We cannot discover any necessity for additional legislation in order to the complete execution of the relator's contract, at least so far as the register is concerned; and if, indeed, the same is *ultra vires* on the part of the legislature, (though we do not think it is,) from what source could the *vires* be obtained, if not from the congress? In so far as the performance on the part of the relator of all the requisites antecedent and necessary to entitle him to compensation under his contract is concerned, there is complete proof in the record, and it consists in an admission "that the lands described in the advertisement embrace the school indemnity lands and the internal improvement lands recovered." Those lands were doubtless patented to the state, and the register of the state land-office is in possession of them. After their surrender into the power and possession of the register, no further or other duty was imposed upon the register than merely to partition or allot the recovered lands as he proposed to do, and no other or further duty devolved upon the governor than that of signing and delivering patents to the relator for the portion of said lands to which he was entitled, as he is requested to do. In their answers there is no charge of illegality in relator's contract, or want of due compliance on his part with all of its terms. Neither is there any charge of unconstitutionality of the law under which it was made. Therefore, neither of the respondents are called upon to examine and pass upon this contract in any way, or in any way to pass upon the law. Neither of them are required or are charged with the duty of examining into the services of the relator in the premises, or of determining whether they are within the contract and the law, and of approving the same. The law directed the governor to do a certain specific thing, viz., "to take the necessary steps to institute proceedings, to employ counsel, and to make the necessary agreement or agreements to recover for the state" certain lands. To this end, he was authorized to make an "allowance * * * out of the lands, money, or scrip that may be recovered," to the attorney employed. In the contract the allowance was fixed at "fifty

per centum of the lands, money, or scrip recovered." The contract stipulates that this allowance is to be paid as provided in Act 23 of 1880, and it provides that the governor is especially authorized to make all agreements and contracts necessary to carry out its provisions.

While the question of *mandamus* going to the governor has been practically eliminated from the case, the relator's right to the writ as against the register is still insisted upon; and, as there are duties which are specifically imposed upon him by law in the premises, we must ascertain whether or not they are ministerial. Neither the general provisions of law, nor those of the particular statute in question, confer the power, or make it the specific ministerial duty of the register, to sign patents to lands. The law has imposed that duty on the governor. Rev. St. §§ 2920, 2983; section 2, Act 816 of 1855. We do not understand this to be a proceeding to enforce by *mandamus* an ordinary contractual obligation. For that purpose the writ could not lie. *State v. Railroad Co.*, 37 La. Ann. 589. The rights which relator seeks to enforce flow out of Act 23 of 1880, by the terms of which the governor was selected as the mandatory of the legislature to carry its will into effect. Without legislative authority, he would have been absolutely powerless to enter into any contract in the premises with relator, or with any one else. In stipulating with relator, the governor was merely the agent of the general assembly as the contracting party, and in whose stead it could, with equal propriety, have selected any other person. Hence the relief herein prayed for is simply the execution of the legislative will, and for which, in respect to the register of the state land-office, *mandamus* is an appropriate remedy; for it is elementary that he is charged with the performance of all duties which precede and are prerequisite to the sale of public lands, and the issuance of patents therefor. The general law of the state imposes on the register the specific duty of ascertaining in what particular townships there were no reservations, or in which there were deficiencies, and, "under the superintendence of the governor," to apply for and secure the location of other lands in their stead. Rev. St. § 2951. Act 23 of 1880 charges that officer with the duty of issuing scrip or certificates to such person as may be employed by the governor in pursuance of its provisions for the amount of his compensation when lands are recovered in kind. Inasmuch as the relator has obtained from the land department of the general government patents to the state for the whole of the lands in question, and under the very letter of his contract he is entitled to half, no argument is necessary to show that it was the register's duty, plain and ministerial, to prepare all the *data*, and perform all the acts incident and prerequisite to the issuance of patents therefor, as the evidence of relator's right is perfect and complete; and to that end and effect his right to a *mandamus* is also complete.

Whatever uncertainty of opinion may have at one time existed on the subject,

it is now a settled principle that a peremptory *mandamus* will go to state officers, such as auditor, treasurer, and register of state land-office, for the purpose of coercing performance of purely ministerial duties devolving on such officers by law. In *State v. Jumel*, 30 La. Ann. 861, our predecessors said on the subject: "The state is a sovereign, and cannot be sued by her citizens in her own courts without her permission; but a civil proceeding by which one officer of the state seeks to compel another officer of the same state to perform a ministerial duty is not, in the proper sense of the words, a suit against the state. Nothing is more common than for a party who has a claim against the state, whether for salary as an officer, or for money due on other account, to have his right to payment adjudicated through and by means of a *mandamus* against the auditing officer. It is recognized by us continually as a legitimate mode of ascertaining what are the rights of persons who have, or who prefer, claims against the state." In *State v. Burke*, 33 La. Ann. 969, we said that, "while fully recognizing the independence, and all the rights, of the co-ordinate branches of the government, it is only necessary to say that it is the province and duty of the judiciary, whenever the question is properly brought before it in judicial proceedings, to decide whether duties sought to be enforced at the hands of officers are or are not ministerial, and that it is of the essence of the judiciary to adjudicate such questions," etc. In keeping with this recognized principle, we made *mandamus* peremptory in *State v. Steele*, 37 La. Ann. 353. Our predecessors did likewise in *State v. Clinton*, 28 La. Ann. 47, and in *State v. Clinton*, Id. 72. Those decisions are in line with those pronounced in *Marbury v. Madison*, 1 Cranch, 137; *Kendall v. U. S.*, 12 Pet. 608; and *Board v. McComb*, 92 U. S. 541. Indeed the attorney general has made no question as to our authority in this respect. The district judge entertained this view, and made the *mandamus* peremptory as to the register, and we think correctly.

Judgment affirmed.

MCENERY, J., recuses himself on account of relationship to the relator.

STATE ex rel. MOWER v. JUDGES OF THE COURT OF APPEALS.

(Supreme Court of Louisiana. May 5, 1890.
43 La. Ann.)

PETITORY ACTIONS—JURISDICTION.

1. Where a party brings a petitory action, and the defendant answers, claiming less land than demanded in the petition, but is the possessor of the whole tract described in plaintiff's petition, the controversy cannot, for the purpose of jurisdiction, be restricted to the land claimed by the defendant.

2. A defendant, by acknowledging a part of a demand against him, cannot defeat the jurisdiction of the court as to the entire demand.

(Syllabus by the Court.)

Application for *mandamus*.

W. R. Richardson and Wise, *Hundan & Stubbs*, for relator.

MCENERY, J. This is a *mandamus* proceeding to compel the court of appeals of the first circuit to take jurisdiction. From a judgment rendered against relator by the district court of Bienville parish, the plaintiff and relator appealed to the court of appeals of the first circuit. The defendant filed a motion to dismiss the appeal, as the appellate court was without jurisdiction *ratione materiæ*. The motion was sustained, and the appeal was dismissed. We are asked to compel the court of appeals to take jurisdiction of the case.

The relator and plaintiff instituted a petitory action against the defendant, claiming title to property valued at \$1,200, and for timber destroyed on the land by defendant valued at \$500, and rent for two years, \$400, amounting to \$2,100. The defendant answered, pleading a "general denial to all of the allegations contained in plaintiff's petition, except that he is in possession of the land described therein." He sets up title in the United States government or the state of Louisiana. He filed an amended answer, in which he adopted all the allegations contained in his original answer. In his amended answer he alleges that he moved upon the land described in the petition for the purpose of homesteading 160 acres. The relator contends that by filing this amended answer the controversy was narrowed down to the title to the 160 acres, which would bring the amount down to less than \$2,000, the upper limit of the jurisdiction of the court of appeals.

On the face of the petition the amount of plaintiff's demand exceeds \$2,000. For this amount the defendant was sued. The defendant, by claiming less, cannot reduce the amount so as to give jurisdiction. The plaintiff relinquished no part of his demand.

The defendant was in possession of the land. This he admits in the original and amended answers. He was in possession of the whole tract sued for. The plaintiff was compelled to sue him as the possessor. He did not surrender any part of the land to plaintiff; and as to the defendant, regardless as to true ownership, the action must be prosecuted against him while he is the possessor of the property. Code Prac. art. 43.

It is therefore ordered that the *mandamus* be refused, at relator's cost.

GODWIN v. NEUSTADT.

(Supreme Court of Louisiana. April 21, 1890.
43 La. Ann.)

FRAUDULENT CONVEYANCES—PLEADING—EVIDENCE—INTERROGATORIES.

1. The authentic act is full proof between the parties thereto; and, in absence of fraud, error, violence, or other matter affecting the consent, the parties to such acts can only assail their validity and reality in two modes, viz.: (1) By a counter-letter; (2) by the answers of his adversary to interrogatories on facts and articles.

2. When the plaintiff, having no counter-letter, proceeds *in limine* to probe the conscience of the defendant by evoking his answers to interrogatories, such answers stand as part of the pleadings; and, if they are destructive of plaintiff's action, an exception of no cause of action will lie.

3. Though answers to interrogatories on facts and articles may generally be contradicted, yet, when evoked in such a case, as a substitute for a counter-letter, to prove what could otherwise be proved by nothing but a counter-letter, such answers cannot be contradicted by anything but a counter-letter.

4. Plaintiff, having no counter-letter, is bound to stand either on the authentic act or on defendant's answers; and, either of these being destructive of her action, it is to the interest of both parties that the litigation should be terminated at once, without useless costs and delays.

(*Syllabus by the Court.*)

James C. Molise, for appellant. H. E. Upton and R. H. Lee, for appellee.

FENNER, J. Appeal from the civil district court for the parish of Orleans. The plaintiff sues to recover title to certain immovable property, which had been conveyed by her by an authentic act of sale to defendant, on the ground that said sale was a simulation executed for the purpose of protecting the property from seizure under a judgment which might be rendered against her in a suit then pending. No fraud, error, violence, or other matter affecting the validity of plaintiff's consent to the authentic act of sale, is alleged; nor does she pretend that she has, or that there exists or ever existed, any counter-letter. Plaintiff attached to her petition interrogatories on facts and articles addressed to defendant, and designed to probe his conscience as to the truth of the facts alleged. Defendant answered, setting up an entirely different state of facts from that propounded by plaintiff, denying the simulation of the transfer, and averring that it was a real transaction intended to secure the *legitimate* of defendant's wife as forced heir of her father, and with the understanding that he (defendant) was ultimately either to convey the property to his said wife, or to sell it and devote the proceeds to her benefit. After the filing of these answers, defendant filed three exceptions, viz.: (1) That the petition discloses no legal cause of action; (2) that the action cannot be maintained, because based on considerations illegal, immoral, and contrary to public policy; (3) that the action seeks to enforce an obligation founded on a false and unlawful cause. After trial of these exceptions, the judge *a quo* rendered judgment maintaining the exception of "no cause of action," from which this appeal is taken.

Although the judgment on its face purports to maintain only the first of the exceptions above stated, it is treated here as maintaining all of the exceptions, and counsel on both sides devote their discussion mainly to the question whether or not plaintiff should be sent out of court because the cause of action set forth in her petition discloses a fraudulent and immoral transaction, the purpose of which was to defeat her creditors, and subject to the rule that "courts of justice will not aid parties to enforce, or relieve them from the effects of, contracts made in violation of law." Under the view we take of the case, we do not find it necessary to decide this question.

The plaintiff makes part of her petition the authentic act of sale which she seeks

to contradict and destroy. The Code declares that "the authentic act is full proof of the agreement contained in it against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery." Rev. Civil Code, 2236. It is horn-book law in our jurisprudence that the verity and reality of authentic sales can be assailed by the parties thereto only in two ways, viz.: (1) By means of a counter-letter; (2) by the answers of the other party to interrogatories on facts and articles. *Forest v. Shores*, 11 La. 418; *Hewlett v. Henderson*, 9 Rob. (La.) 379; *Succession of Thomas*, 12 Rob. (La.) 215; *Semere v. Semere*, 10 La. Ann. 704; *Tesson v. Gusman*, 27 La. Ann. 266; *Newman v. Shelly*, 36 La. Ann. 100; *Crozler v. Ragan*, 38 La. Ann. 154. The same authorities show that the answers of a party to interrogatories stand in lieu, and as the equivalent, of a counter-letter, and are received on the same principle. See, particularly, 36 La. Ann. 100; 10 La. Ann. 704; and 9 Rob. (La.) 379, *supra*. Such answers, when made, stand as part of the pleadings. Same cases last quoted.

Although answers to interrogatories on facts and articles are generally subject to contradiction, yet, when they are resorted to for the purpose of supplying the place of a counter-letter, and to make proof which nothing else but a counter-letter could make, they are evidently not subject to contradiction, otherwise, at least, than by a counter-letter. This principle is substantially announced in *Semere v. Semere*, 10 La. Ann. 704, and is an evident corollary of the reasons on which such answers are admitted.

Now, in the case at bar, it is conceded that there exists no counter-letter. Plaintiff, to supply its absence, appealed to the conscience of her adversary; and his answers stood in the record as part of the pleadings at the time when the exception of no cause of action was filed. The case stands precisely as if plaintiff had attached to her petition a counter-letter to the same effect as the answers of defendant. It is obvious that if the latter had been the case the exception of no cause of action would have been good, because the counter-letter so alleged would have been totally inconsistent with the relief sought in the action, and destructive of it. So the answers of defendant evoked by her, and standing as part of the pleadings, must be given the same effect. They destroy her cause of action, and throw her out of court. It is for the interest of plaintiff that the litigation in its present shape should be terminated, since it can have but one result. Unless plaintiff has a counter-letter, which is not pretended, she must stand either on the authentic act or on the answers of defendant; and either of them is fatal to her action. Had plaintiff, in her petition, simply propounded the simulation of the authentic act, without declaring on any counter-letter, and without appealing to the conscience of her adversary, the exception here raised would have found its place under objections to testimony. But when the plaintiff declares on a counter-letter, or when, as in this case, having none, she resorts to in-

terrogatories to defendant, the answers to which are given, the counter-letter or the answers form part of the pleadings; and, if they are destructive of the cause of action, an exception to that effect properly lies *in limine*.

Judgment affirmed.

SCHMITT V. RABASSE. GUINAULT V. SAME.
TRAPAGNIER V. SAME. BERBA V. SAME.
(Supreme Court of Louisiana. March 17, 1890.
43 La. Ann.)

**APPEAL—DISMISSAL—WANT OF CITATION—WAIVER.
ON MOTION TO DISMISS.**

1. In cases of appeal taken by petition not filed in open court, in presence of adverse party, citation is essential.

2. The law requires appellant to furnish the necessary stamps for the citation of appeal, and when, owing to his failure so to do, the citations are not issued and served, this is imputable to his fault.

3. Want of citation imputable to appellant's fault entails dismissal of appeal.

4. Appearance of appellee in lower court to urge dismissal of appeal before the return-day thereof does not operate a waiver of citation.

5. The law requires the appellees in this court to file all their grounds for dismissal of appeal within three days. Hence, provided they plead want of citation as the first ground, it will not be waived by the subsequent addition of other grounds.

ON REHEARING.

1. An appellee has a right to urge in a motion to dismiss want of citation and other grounds. All the grounds in the same appearance must be considered as urged in the same alternative.

2. By relying on the grounds supplementary to that of want of citation the appellee does not waive the first ground of such want.

3. Were he required to urge want of citation alone, and remitted to the other grounds in case of the overruling of the first ground, he might come too late afterwards.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

Chas. Louque, for appellant. A. J. Villere, W. E. Murphy, and Omer Villere, for appellee.

MOTION TO DISMISS.

FENNER, J. The motion is based on three grounds, of which the first is that by the fault of appellant appellees were not cited. The appeal was not by motion in open court, but by petition, and, under the plain terms of the Code of Practice, citation was necessary. Appellant's contention—that the concluding sentence of article 574, Code Prac., which says, "in such case no citation of appeal or other notice shall be necessary," applies as well to appeals by petition as to those by motion in open court, provided the petition be filed at the same term with the judgment—has no merit. The article has been too often construed in a contrary sense to leave such question open. The failure to cite the appellees is stated in the clerk's certificate to be due to appellant's failure to furnish the necessary stamps therefor. The law requires such stamps, and made it the duty of appellant to furnish them. The absence of citation is therefore clearly imputable to his fault. It is elementary that when, by appellant's fault, the ap-

pellees have not been cited, the appeal must be dismissed. Appellant claims a waiver of this exception by two causes: (1) That in the lower court, before the return-day of the appeal, appellees appeared in the lower court, and moved the dismissal of the appeal on grounds cognizable there. As this took place before the time for service of citation had expired, and before the appellees knew that there would be a failure to cite, it is clear it cannot operate any such waiver. (2) That in the motion to dismiss he embodied other grounds than that of want of citation. The first ground urged is the want of citation, and the other grounds stated follow. The rule that appearance for any other purpose than to except to want of citation is, in ordinary suits, a waiver of the latter defect, cannot apply in this case. The law required the appellee to file all their grounds for dismissal within the limited delay of three days. He could not, as in ordinary suits, stand on the plea of want of citation, and abide its determination before filing other pleas. Any grounds which they failed to file within the three days were irrevocably abandoned. The law imposed no such penalty upon the exercise of their right to urge the absence of citation. It only required that they should urge such exception first, and in advance of any other. They have the right to have it decided, and, if overruled, then to have other grounds passed upon. As we conclude that the want of citation is sufficient grounds for dismissing the appeal, the other grounds pass out of view. Appeal dismissed.

ON PETITION FOR REHEARING.

BERMUDEZ, C. J. The grounds on which the appellees moved to dismiss the appeal were logically set forth,—want of citation, insufficiency in amount of the bond, etc. They were considered as urged in the alternative. The appellees had to object to the want of citation, at the very threshold, before resorting to any other means. Had this not been done, but had the other grounds been presented alone, they could not have subsequently objected to want of citation, which would have had to be considered as waived. The appeal was dismissable on the first ground, and if it was not valid, it might have been for those next stated. Obviously the court was called on to pass upon the grounds in the order in which they were preferred. As the court deemed that the appellees had not been cited by the fault of the appellant, it became unnecessary to inquire into the other objections, which could have been examined only had the first ground been found untenable. The appellees were not bound to urge the want of citation alone, and reserve the other objections for another appearance. There are some grounds which must be set forth within a certain delay after the return-day, and which, if not then filed, could not afterwards be entertained as coming too late. The appellees could have urged, as they have done, the want of citation at first, and next eventually *seriatim*, and in the alternative the other grounds of dismissal in the same first appearance. This they

did consistently. We have not been shown in what respect the previous decree is erroneous. Rehearing refused.

RAY v. JACKSON et al.

(*Supreme Court of Alabama. May 1, 1890.*)

ASSUMPT — EVIDENCE — POSSESSION OF PERSONALTY.

1. The plaintiff having given her father money which three years before she received from him, and the circumstances tending strongly to show that it was put in her hands for safe-keeping, it is not material error to charge, in an action against the father's estate for money lent, that the plaintiff's possession does not raise the presumption of ownership.

2. Declarations made by one in possession, as to how he acquired title, are not admissible in its support.

Appeal from circuit court, Lauderdale county; H. C. SPEAKE, Judge.

J. B. Moore, for appellant. *Simpson & Jones*, for appellees.

STONE, C. J. This action was brought by the appellant against the appellees, as administrators, and sought the recovery of \$1,250, which, in the original complaint, was alleged to have been loaned to the defendants' intestate. The amendment to the complaint counted on the common counts. The defendants pleaded the general issue and the statute of limitations of three years. On the trial of the case, there was but one witness examined, and this witness was the husband of the plaintiff. The evidence, as thus brought out, showed that the defendants' intestate, who had been twice married, was the father of the plaintiff, she being a child by his first wife; that on the 15th October, 1882, A. E. Jackson, the intestate, came to the house of witness, and the plaintiff, who was sick in bed, directed witness to let said A. E. Jackson have the "money that was in a bag in her trunk," which amounted to \$1,250; that witness delivered the money to said A. E. Jackson, who left without giving his note for the same, or giving any receipt therefor; that he never gave any note or receipt for said money, and nothing was said about the repayment of said money, or whether it was to be repaid at all. The witness further testified "that said money had been in possession of plaintiff three years theretofore, she claiming it as her own." On cross-examination, the witness testified that the plaintiff "told him that her father, the intestate of defendants, had given her the money with the request that she divide it between her full brothers and sisters. The witness further testified that the said A. E. Jackson lived five years after the money was delivered to him; and that, "so far as he knew," no demand or request had ever been made of said A. E. Jackson during his life-time for the payment of said money, or any interest thereon; that during the time the plaintiff had said money in her possession it was never used by her or witness; and that he (witness) "managed her business for her, and if said money had been used by her, or any demand made upon said A. E. Jackson for the payment of said money, he would probably have

known it," and that he did not know of any effort on the part of plaintiff to distribute said money among her brothers and sisters, nor of any notice being given to them that she had said money.

Upon this evidence the court charged the jury, at the written request of the defendants: "If the jury believe from the evidence that A. E. Jackson put the \$1,250 sued for in the possession of the plaintiff, then the mere possession of the money does not raise the presumption of ownership." While the phraseology of this charge is not very certain, and the terms, as used, assert a proposition too broad to be regarded as a correct general principle, yet, when applied to the facts of this particular case, it cannot be considered erroneous. "Although a charge states the law too broadly to be a correct general proposition, yet, if correct as applied to the facts of the particular case, it cannot be held erroneous." *Pepper v. Lee*, 53 Ala. 34. It was the privilege of the plaintiff to ask a qualifying or explanatory charge, which she did not do. We have repeatedly held that when either party can, by an explanatory or qualifying charge, restrict the meaning of a charge asked by the other party to the facts of the particular case, and fails to do so, the giving of the charge asked will not be considered a reversible error.

Upon the examination of the only witness introduced, the defendants, on cross-examination, asked him, "How did your wife, the plaintiff, obtain said money?" to which the witness answered: "That plaintiff told me that her father gave it to her." On motion of the defendants, and against the objection and exception of plaintiff, the court excluded this answer. It did not appear that this was part of the same conversation which had been called out by defendants as evidence against plaintiff. There was no error in this ruling. This was clearly illegal testimony. It was hearsay evidence, and could not be admitted as *res gestæ*. Declarations as to the source or manner of acquiring title are narrations of past transactions, and are therefore inadmissible. "A declaration as to how title was acquired is not admissible." *Vincent v. State*, 74 Ala. 274; *Daffron v. Crump*, 69 Ala. 77, and cases cited; *Rawles v. James*, 49 Ala. 183. We discover no error in the record, and the judgment is accordingly affirmed.

**NEW ORLEANS & A. COAL & MIN. CO. et al.
v. MUSGROVE et al.**

(*Supreme Court of Alabama. May 2, 1890.*)

RESCISSION OF CONTRACT—FRAUD—LACHES.

The vendees intending to purchase about 8,000 acres, a deed was prepared containing more, and the number to which title would be approved being unknown, they agreed to pay for any excess. The lands were described by legal subdivisions, and the number of acres in each stated, but not in the total. The vendees' attorney had the deed for two months, examining the title, after which it was delivered on payment of the price of 8,000 acres. The lands were examined by one or more of the vendees, and by an expert sent by them, and were shown not to lie in a compact body by a map given them by the vendors. *Held*, in a suit to enforce a lien for the balance of the purchase money,

in which the vendees seek to rescind for false representations that the excess of acreage was inconsiderable, and that the lands lay in a compact body, rescission could not be granted, the vendees having, with the means of information at hand, purported to make an investigation, which but for their own negligence would have led to the truth.

Appeal from chancery court, Walker county; THOMAS COBBS, Chancellor.

Taliaferro & Smithson and Smith & Lowe, for appellants. *Hewitt, Walker & Porter and Gunter & Sowell*, for respondents.

CLOPTON, J. No principle is better settled, or more uniformly recognized, than that a court of equity will interfere to rescind a contract of sale of land into which the purchaser has been induced to enter by the vendor's false representations of material facts, not patent or open to his inspection, upon which he had a right to rely, and did rely, whereby he was injured, and without the existence of which the contract would not have been made. But the rescission of a contract is not a matter of discretion. The court must be governed by established rules and precedents. Essential elements of misrepresentation, to be rendered available to rescind a contract, are that the party to whom it is made must be justified in relying, and must rely, upon the representation, and it must be an immediate cause of his entering into the contract. If he did not rely upon it, or was not misled by it, or if it was a fact equally open to the inquiries of both parties, and nothing done to prevent or obstruct or lull inquiry, the court will not interfere to grant relief. *Crown v. Carriger*, 66 Ala. 590. In *Slaughter v. Gerson*, 18 Wall. 379, it was ruled, where the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations; and that the same rule obtains when the complaining party does not rely upon the representations, but seeks means of verification of the statements from other sources, and acts upon the information thus obtained. And in 2 Pom. Eq. Jur. § 893, the rule is stated as follows: "If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied on the misrepresentation, and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the

end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled."

The deed executed by appellees to Fred Sloss, trustee, expresses the consideration of \$100,000, which was intended as the payment for 8,000 acres of mineral lands; but the deed really conveyed more than that quantity. The lands to be accepted were dependent upon the approval of the titles by the attorney of the purchasers; and, the number of acres being unascertained and uncertain, a written contract was entered into by which Sloss agreed that, should the lands conveyed by the deed exceed 8,000 acres, he, as trustee, in addition to the \$100,000, was to pay for the excess at the same price,—\$12.50 per acre. Appellees having filed the bill to enforce a vendor's lien for the purchase money of the acreage in excess, defendants, by way of defense, filed a cross-bill, seeking thereby to have the contract rescinded, the deed of complainants set aside and annulled, and a lien on the land declared for the repayment of the sum of \$100,000 paid by them to complainants. The main grounds upon which the rescission is sought are that complainants made false representation as to the situation and location of the lands, and the quantity of the excess of acreage; the alleged representations being that the lands were situated in a contiguous, compact body, and the excess of acreage was inconsiderable and trifling. There is also an allegation that complainants had no title to a small portion of the lands, but this is disproved by the evidence.

The proof clearly establishes the following facts: (1) The lands were purchased by individuals who proposed to organize as a corporation, and were subsequently incorporated under the name of the "New Orleans and Alabama Coal and Mining Company," and the deed was made to Sloss as trustee for the use and benefit of the corporation, when formed, to which the lands were subsequently conveyed by him. The promoters originally intended the purchase of about 8,000 acres, but the deed which was prepared containing more than that quantity, and, the number of acres the titles to which would be approved being unascertained, the written contract was entered into, by which Sloss, as trustee, agreed to pay for the excess of 8,000 acres at the same price. (2) In the deed, which contains a large number of tracts, the lands are described by section and subdivisions of sections according to the government survey; the number of acres in each tract being stated, but not the aggregate amount. The deed was open to the inspection of defendants, and their attorney employed to examine the title, for two or more months, during which time the latter was engaged in examining the title, and complainants in curing the defects found therein. The attorney drew the form of the deed in the first instance, and, after it was filled up with a description of the lands, made several corrections by striking out lands to which the title could not be perfected, and inserting those to which they had been perfected; and, after the final corrections

were made, it was executed by the complainants, and with the conveyance of Sloss, describing the lands in the same manner, was delivered to the defendant corporation upon the payment of the \$100,000. (3) One or more of the purchasers examined the lands. Also an expert was sent to examine them; and upon his report, and the recommendation of Sloss, the lands were purchased. During the negotiations the complainants placed before the purchasers a map showing the situation and location of the lands, and clearly showing that they did not lie in a contiguous, compact body. This map was retained and produced by defendants.

The deed and written contract, being contemporaneously executed, must be read and interpreted as parts of the same transaction, and as constituting and showing the terms of the contract of sale. The contract was written by the attorney of defendants, and there is no pretense that by inadvertence or mistake it contains more than the parties intended, or anything materially different from their intention. It is impeached on the sole ground that the vendors misrepresented the excess of acreage. The deed upon its face showed the number of acres, the only requisition to ascertain the aggregate amount being the addition of the separate amounts in each tract, as stated in the deed; and the map fully disclosed the relative location of the tracts. The evidence does not clearly and satisfactorily show that the vendors made the representations as alleged by defendants; and Sloss, who signed the contract, testifies that they stated the excess would be a few hundred acres. That there would be an excess was understood by all the parties; the misunderstanding relating only to the amount. If admitted that they made the representations, it clearly appears the purchasers did not rely on act upon them, but sought information from other sources. They had at hand the means of knowledge, and of verification of the statements; the sources of information being furnished, and attention directed to them. They had ample opportunity of learning the real facts, and purported to make an investigation. There was no concealment of the facts, examination was not prevented, and the representations do not appear to have been made in a manner calculated to lull inquiry. If defendants failed to use the means of ascertaining the excess of acreage, and the situation and location of the lands, a court of equity will not interfere to relieve them from the consequences of their own want of ordinary care and diligence. Affirmed.

O'CONNOR v. McHUGH *et al.*

(Supreme Court of Alabama. May 5, 1890.)

EQUITABLE ASSIGNMENT OF MORTGAGE—RIGHTS OF ASSIGNEE—INJUNCTION.

A mortgagor's wife, to whom the mortgagee has delivered the mortgage and evidence of indebtedness as a gift, without executing a written assignment thereof, has not the legal title to the mortgage, and she cannot enjoin the purchaser of the land under foreclosure proceedings instituted by the mortgagee's executor from maintaining

ejectment against the mortgagor, her husband; her remedy being either a legal action for the recovery of the proceeds of the sale, or an equitable action to have it set aside.

Appeal from city court of Montgomery; T. M. ARRINGTON, Chancellor.

Bill by Bridget O'Connor against Michael McHugh and others to enjoin an action of ejectment. On the hearing, the chancellor dissolved the temporary injunction previously granted by him, and complainant appeals.

Rice & Wiley, for appellant. *Graves & Blakey*, for appellees.

CLOPTON, J. This appeal is taken from an order of the city court dissolving an injunction, sued out by appellant, to restrain the defendants from prosecuting an action of ejectment against John O'Connor, the husband of complainant, to recover the land described in the bill. The facts on which the right to the injunction is based, as averred in the bill, are that her husband mortgaged the land to Mary Murray as security for a note for \$2,528.90, who, in October, 1884, delivered the mortgage and the evidence of indebtedness to complainant, saying she wished her (complainant) to have the land, adding: "And I now give you the mortgage debt." She also stated that she had made a will leaving the bulk of her property to defendant, telling complainant to keep the mortgage, and consider the land as her own property. The bill avers that complainant has held the mortgage debt ever since. After the death of Mary Murray, Michael McHugh, who is executor of her will, advertised the land for sale, and sold the same under the power of sale contained in the mortgage, at which sale James McHugh became the purchaser, and suit was instituted against the mortgagor to recover possession of the land. Mary Murray was aunt of complainant and defendants, who are brothers and sister. The land was originally purchased by John O'Connor, the mortgagor, from J. C. Gibson, who conveyed to him. The answers deny all the material allegations of the bill, especially that complainant has had possession of or has any right to the note whatever, and aver that the same has been continuously in the possession of Michael McHugh.

Assuming the truth of the allegations of the bill, having no regard to the denials of the answer, what equity arises in favor of complainant? A transfer of a note by delivery, secured by a mortgage of lands, will, in a court of equity, be deemed a transfer or assignment of the mortgage also, and effect will be given to it according to the intention of the parties. But unless the mortgage is assigned with suitable words of conveyance, either on a separate paper, or indorsed on the mortgage, it does not operate to pass the legal estate in the lands. *Dacus v. Streety*, 59 Ala. 183; *Welsh v. Phillips*, 54 Ala. 309. It is apparent from the bill that both note and mortgage were transferred by delivery merely. This entitled complainant to foreclose the mortgage for her benefit either in equity or under the power of sale contained therein; but she acquired no estate

in the land. The legal title remained in the mortgagee, clothed with a trust for the benefit of complainant. *Prout v. Hoge*, 57 Ala. 28. Complainant obtained thereby the beneficial interest in the note, and an equity to the mortgage as an incident. Mrs. Murray could not have given complainant the land had she attempted to do so by a regular conveyance. All she could have done would have been to assign to complainant her defeasible estate as mortgagee with the right to enforce the payment of the debt by a foreclosure. If the executor sold the land under the power of sale in violation of her rights and to her prejudice it may be that she has an equity to have the sale set aside and the mortgage foreclosed in her interest; notice of her claim having been given at the time of the sale. A recovery of the land from her husband by the executor or the purchaser at the mortgage sale cannot prejudice her claim as transferee of the note and mortgage, or impair her rights. They are the same whether the land is in possession of the mortgagor or of the defendant. Were the action of ejectment enjoined, this would not determine the real controversy between the parties, which relates solely to the ownership of the note and mortgage. If the facts be as averred in the bill, and the executor undertook to sell under the power in the mortgage, against the wish, and in disregard of the rights of complainant, her proper remedy was to enjoin the sale; but having suffered it to be made, and having no title to the land, she cannot enjoin the purchaser from prosecuting an action to recover possession from the mortgagor. She may elect to claim and take the proceeds of the sale, for the recovery of which she has a full and adequate remedy at law, or proceed in equity to have the sale annulled. Affirmed.

KING V. STATE.

(*Supreme Court of Alabama.* April 28, 1890.)

MURDER—COMPETENCY OF JUROR—EVIDENCE.

1. A juror, on examination on *votr dire*, stated that he heard the evidence at a previous investigation, and had formed an opinion as to the guilt or innocence of the accused; that "evidence would have to be very strong to change it;" and that "it would be a hard matter to set aside the evidence he had based his opinion on." Held, that he was not a qualified juror.

2. On a trial for murder, evidence that deceased had said, on the night previous to the killing, "I am going to win some money to-night, or kill some son of a bitch," where there was no reference to the accused, was inadmissible.

3. It is proper to leave to the jury inquiry as to whether defendant was reasonably free from fault in having brought on the difficulty, however strongly the evidence may tend to establish the fact.

Appeal from city court of Mobile; O. J. SEMMES, Judge.

The defendant in this case, Tom King, was indicted for the murder of Thomas Popham by shooting him with a pistol, was tried, and convicted of manslaughter in the first degree, and sentenced to the penitentiary for a term of five years. During the organization of the jury for the trial, the name of E. R. Quattlebaum was drawn; and, upon being duly sworn, he

was asked if he had a fixed opinion which would bias his verdict, to which he answered: "Qualifiedly, I have; that is, as to the killing. I am satisfied as to that." He was then asked, "Is your opinion such that it would bias your verdict?" and he answered: "I think the evidence would have to be very strong to change my opinion. I heard the previous evidence in the case, and I think it would be a pretty hard matter to set aside the evidence I based my opinion on. As to the classification of the killing, of course, my opinion is not made up." The juror being then challenged for cause by the defendant, his examination was further continued by the court, by question and answer, as follows: "Question. If the evidence is different from what you have heard as to the killing, would the opinion you now have in any way bias your verdict, or could you lay aside the opinion you now have, and try the case fairly and impartially upon the evidence alone, without the opinion you now have having any influence whatever upon your verdict; or would the opinion you now have in any way influence your verdict, in one way or the other? Answer. Well, I think it would not. I think I would be impartial enough to render a verdict according to the positive evidence in the case. The only thing I could not certify to would be that I would be unprejudiced as the case now stands. Q. Would that prejudice influence you? A. As far as it goes, I think I would be perfectly free to set aside any preconceived idea I have in regard to it, with sufficient evidence to override that present conviction. Q. Suppose the evidence is not such as you have heard, and there should be any conflict in the evidence as between what you have heard and what was sworn here, and it had fallen short simply of what you had heard, then would what you have heard lead you to make up any gap in the evidence? A. No, sir; I think I could give a verdict. I am not prejudiced at all in the case, and would be perfectly free to set aside any evidence that I have previously heard with evidence,—unquestionable evidence. Q. Suppose a witness got on the stand who was to testify to a fact which was different from the fact as you had heard it, and suppose the state should put upon the stand a witness to impeach that witness, and to show that he was not worthy of belief. Would you allow what you now know to have any influence as to whether the witness had been impeached? A. I would not. Q. You would try it upon the evidence, without reference to what you know? A. I would." The court then held the juror competent, and overruled the challenge for cause, to which ruling the defendant excepted, and challenged the juror peremptorily.

It was shown on the trial that the killing occurred on Sunday night, March 17, 1889, in a small yard in the rear of an engine-house, No. 8, where a party of 12 or 15 persons were gambling,—"shooting dice for money." The game was played on a small, three-legged table, which was propped up against a tree, and was lighted by a lamp suspended from one of the limbs of the tree. The defendant, King, Wal-

cott, his brother-in-law, Ed Russell, and others were playing, when Popham came in, and joined in the game, being at the time under the influence of whisky; and he bet only small sums, until he lost about 60 cents. During the further progress of the game, \$30 were at one time on the table, of which \$5 belonged to King and \$15 to Russell; and, occasional gusts of wind blowing, which moved or blew the money, Popham laid his hand on it. King at once called out that he withdrew his bet, saying, "My bet is off," or words to that effect. Popham then said to him, "Do you mean to say that I will steal your money?" to which King replied, "I don't know about that," or "I don't know whether you will or not." Popham at once sprang on the table, cursing him, and kicked or struck at King; but the table was overturned, and he was caught and held by Walcott, who tried to prevent the difficulty. While Popham was struggling to get loose, he was cursing King, and shaking his fist in his face, and, as some of the testimony tended to show, did get loose and start towards King, when King drew his pistol and fired at Popham twice, each shot taking effect, and killing Popham in a very few minutes.

Edgar Harvey or Harding, a witness for the defendant, testified that, at 12 o'clock on the Saturday night before the killing, as he was shutting up his shop, Popham passed, and he heard him say to two or three persons whom he met on the sidewalk, "I am going to win some money to night, or kill some son of a bitch." The court excluded this evidence on the objection by the state, and the defendant duly excepted. Several other questions and exceptions were reserved to the rulings of the court on the evidence, but they do not require any special mention or notice.

Among other charges in writing, the defendant requested the following: "(1) Under the evidence, if all believed, the defendant did not encourage the difficulty after it had been commenced. (2) The evidence, if all believed, shows that the defendant was not in fault in bringing on the difficulty that resulted in the death of Popham." The defendant duly excepted to the refusal of the court to give these charges, as well as to the court's refusal to give each of the charges requested by him.

G. L. & H. T. Smith and *Sam. B. Browne*, for appellant. *W. L. Martin*, Atty. Gen., for the State.

SOMERVILLE, J. We are all of one opinion that the juror Quattlebaum, under the principles laid down in *Long v. State*, 86 Ala. 36, 5 South. Rep. 443, was not a qualified juror, on the ground that he had formed a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict. Code 1886, § 4331. He had heard the evidence on a previous investigation or trial, and admitted in his direct examination, on *voir dire*, that he thought "the evidence would have to be very strong to change his opinion," and again, that "it would be a pretty hard matter to set aside the evidence he had based his opinion on." The assertion that he had not made up his mind as to the

"classification of the killing" was, moreover, an implied reaffirmation of the fact that he had formed an opinion as to all other issues involved. The cross-examination does not, in our judgment, remove the disqualification thus made to appear, especially if the evidence upon the trial should be substantially the same as that heard by the juror on the former trial. For the error of refusing to sustain the challenge to this juror the judgment must be reversed.

The court committed no error in excluding the testimony of the witness Harvey in reference to the threat alleged to have been made by Popham. We can see nothing in the evidence justifying the inference that it was capable of being so construed as to have any reference to the defendant. If he had killed King in the encounter with him, instead of being killed, this threat would not have been competent evidence against him on an indictment for murder. No more is it admissible in the present case. *Redd v. State*, 68 Ala. 492; *Jones v. State*, 76 Ala. 8; *Ford v. State*, 71 Ala. 336; *Harrison v. State*, 79 Ala. 29.

The rules of evidence bearing on the question of proving character, both on the direct and cross-examinations, are fully discussed in *Moulton v. State*, 88 Ala. 116, 6 South. Rep. 758; and a proper application of the principles settled in that case will avoid all difficulties touching this branch of the case on another trial. See, also, *Morgan v. State*, 88 Ala. 223, 6 South. Rep. 761.

We think the court did not err in declining to take from the jury all inquiry as to whether the defendant was reasonably free from fault in having brought on the difficulty, however strongly the evidence may tend to establish this fact. The conversation between defendant and the deceased, according to the version of one or more witnesses at least, is reasonably susceptible of the construction that the defendant impliedly intimated that deceased was disposed to steal his money when he put his hand upon it at the gaming-table.

The questions raised by the other charges have been discussed by us sufficiently in our past decisions, and are deemed to be too well settled for further agitation.

The judgment is reversed, and the cause remanded. In the mean while the defendant will be retained in custody until discharged by due process of law.

McDERMOTT et al. v. EBORN et al.

(Supreme Court of Alabama. May 1, 1890.)

FRAUDULENT CONVEYANCE—STOCK IN TRADE—PRIORITIES—CREDITORS' BILL.

1. A bill of sale of a stock of goods, by tacit agreement to be kept secret, and not registered, given as a security by a debtor, who is permitted to sell at retail, and apply the proceeds to his own use, is fraudulent and void against subsequent, as well as existing, creditors; it being "made in trust for the use of the person making the same," within Code Ala. 1886, § 1730, declaring all transfers of goods so made void against creditors existing or subsequent.

2. Such a bill of sale is fraudulent and void, though the holder take possession before an attach-

ment or execution is levied or a creditors' bill filed.

8. The lien of creditors, who have filed a bill to set aside a mortgage of goods for fraud, is superior to that of an attachment in favor of the mortgagee, levied after he was cited to appear.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

Creditors' bill to set aside for fraud a sale of a stock of goods. The debtor borrowed money of a bank, and gave a bill of sale as security. He was left in possession, and permitted to sell at retail, and to dispose of the proceeds. The bank, hearing that an attachment was about to be issued, demanded possession, and left a representative in the store, while its attorney brought detinue for the goods. This bill was filed, and, after the bank was cited to appear, the detinue suit was dismissed, and an attachment in its favor levied. The chancellor held the sale void as to existing creditors, and dismissed the bill as to subsequent ones, who appeal.

Mountjoy & Tomlinson and Sayre, Stringfellow & Le Grand, for appellants. *R. H. Sterrett, W. C. Ward, and Webb & Tiltman*, for respondents.

SOMERVILLE, J. Section 1730 of the present Code of Alabama, (1886,) corresponding to section 2120 of the Code of 1876, provides that "all deeds of gift, all conveyances, transfers, and assignments, verbal or written, of goods, chattels, or thing in action, made in trust for the use of the person making the same, are void against creditors existing or subsequent of such person." In the case of *Benedict v. Renfro*, 75 Ala. 121, 51 Amer. Rep. 429, and again in *Murray v. McNealy*, 86 Ala. 234, 5 South. Rep. 565, we had occasion to discuss at some length, in connection with the above section of the Code, the subject of mortgages on stocks of merchandise, where the mortgagor was permitted to remain in possession, and to sell the goods, in due course of trade, for his own benefit. We held that such transfers were virtually "made in trust for the use of the person making the same," within the meaning of this statute, their inevitable tendency being to hinder and delay the creditors of the mortgagor. They were said, therefore, to be fraudulent *per se* as against such creditors. As said by the United States supreme court in *Robinson v. Elliott*, 22 Wall. 518, where the subject is fully discussed, such a transaction on its face shows that the legal effect of it is to delay creditors, and for this reason "the law imputes to it a fraudulent purpose." The statute in question makes transfers of this character void equally against subsequent creditors as against those who exist at the time of the transaction. It is sufficient, without more, that such is the legislative fiat, apart from any satisfactory policy which, in the opinion of the courts, might justify the enactment of such a law. There is ample reason, however, for such an enactment. The apparent evidence of ownership in the mortgagor tends to disarm suspicion, and to draw subsequent creditors into lending their money, or selling their goods, to one who is thus armed by the mortgagee with

means of practicing a deception. The transfer of the grantor's stock of merchandise, made to the Jefferson County Savings Bank by Eborn, on June 7, 1886, was in form a bill of sale, but the evidence clearly shows that it was intended as a security for a debt of \$1,500, and it was therefore but a mortgage. There is no controversy on this point. The mortgagor was permitted to remain in possession of the goods for over three months, and to daily sell and appropriate the proceeds of sale to his own use. The evidence satisfies us, moreover, that there was an implied agreement to keep the matter secret, and not register the mortgage upon the public records. The chancellor, as we understand his opinion, held that there must have existed an actual intention to defraud, established by evidence extrinsic to the transaction itself in order to defeat the transfer as against subsequent creditors, apparently following the rule declared by us in the case of a mortgage on real estate, accompanied by an agreement to withhold it from registration. *Bank v. McDonnell*, 87 Ala. 736, 6 South. Rep. 703; *Tryon v. Flournoy*, 80 Ala. 321; *Blennerhassett v. Sherman*, 105 U. S. 100. This view was incorrect. The case falls within the scope of section 1730 of the Code, having reference to personal property only, and this stamps the transaction as fraudulent *per se*, or in law fraudulent as against subsequent creditors, as well as those already in existence. In other words, such a transaction, being pronounced by statute fraudulent in law, carries with it the inherent element of an intent to hinder and delay creditors; and this is the very definition and essence of actual fraud. There is another and distinct class of cases where voluntary conveyances by a debtor have been held to be void against debts subsequently contracted only where actual fraud was proved. The present case is obviously not of that class. *Williams v. Avery*, 88 Ala. 115; *Smith v. Vodge*, 92 U. S. 183. It follows from these views of the law that the fraudulent mortgage given by Eborn to the bank conferred no title on the mortgagee which would avail anything as against creditors of the mortgagor, existing or subsequent.

It is contended, however, that although the title of the bank acquired by the mortgage may be pronounced worthless by reason of its fraudulent nature, yet the title to the goods obtained by the bank under the attachment sale is valid, and should be protected by the court. The bill appears from the record to have been filed, and the summons to have been served on the defendants prior to the levy of the attachment. If this was so, the lien of the complainant would be superior to that of the bank. But a motion having been made to have the return of the sheriff amended so as to show a priority in the levy of the attachment, and this motion not having been acted on, we reverse the decree, and remand the cause in order that some action may be taken on it. We need not decide, in the present *status* of the case, whether the attempt to sell the equity of redemption under process issued

on the mortgage debt passed to the mortgagee any title by virtue of such sale. It may be that this sale operated to waive the mortgagee's title to the goods subject to the lien of the mortgage, although it would not have such effect in the case of real estate. We leave this question open, merely citing the authorities bearing on the subject, lest its decision might, in the present state of the record, do injustice to the parties litigant. *Barker v. Bell*, 37 Ala. 354; *Powell v. Williams*, 14 Ala. 476; *Atkins v. Sawyer*, 1 Pick. 351; *Camp v. Cox*, 1 Dev. & B. 52; Code 1886, § 2892; *Acker v. Bender*, 33 Ala. 230; *Wallis v. Long*, 16 Ala. 788; *Fash v. Ravesties*, 32 Ala. 451. The decree is reversed, and the cause remanded.

STATE v. STONEWALL INS. CO.

(*Supreme Court of Alabama*. May 8, 1890.)

TAXATION—CORPORATE STOCK—EXEMPTIONS.

1. The taxation of the capital stock of a private corporation is a taxation of its property, and not of its franchises and privileges; and Code Ala. § 478, requiring that the chief officer of such a corporation shall make return of all taxable property, stating the number of shares of stock, their par and market value, and the items of property in which its capital stock is invested, was not intended to be determinative of the character of the capital stock, but only to prescribe a method of listing the property of the corporation, and furnish data from which to ascertain the assessable value of whatever its capital was invested in.

2. Code Ala. § 453, subd. 2, providing that the capital stock of private corporations, etc., shall be taxable, except so much thereof as may be invested in property otherwise taxed, was only intended to prevent double taxation of taxable property, and does not render taxable such portion of the capital stock of an insurance company as is invested in Alabama state bonds, which, by section 451, subd. 2, are made non-taxable.

Appeal from circuit court, Mobile county; WILLIAM E. CLARKE, Judge.

In the matter of the assessment of escaped taxes against the Stonewall Insurance Company for the years 1885-'89, inclusive; the question being the liability of the company for taxes on the amount of its capital stock invested in non-taxable Alabama bonds. It appeared among the agreed facts that the corporation, in December, 1884, went before the board or court of county commissioners, and claimed a deduction from its capital stock, as assessed for taxation, for the amount invested in Alabama state bonds; and, the claim being allowed, the amount so invested in such bonds during each of the subsequent years was not returned for taxation. In August, 1889, the tax collector of the county, deeming this deduction erroneous, returned the amount so excepted as property which had escaped taxation, and notified the corporation of his action. The corporation again appeared before the county commissioners, and claimed exemption as before; but the commissioners decided against it, and assessed the tax as reported by the collector. An appeal was taken to the circuit court, where judgment was rendered in favor of the corporation. The same issue was made in a separate proceeding as to the taxes for the year 1889. In addition to the agreed state-

ment of facts, it was admitted that the following should be added to the special finding of facts by the court: "It appears from the books of the tax assessor of Mobile county that, whenever the shares of banks are assessed in said county, the assessor enters in his book not only the number of shares in which the capital stock is divided, but also the names of the several shareholder, and the number of shares held by each, with the market value thereof, and that the shares are listed and assessed against the shareholders, respectively, and not against the bank. But the state objects to these facts as irrelevant." The state appeals, and now assigns the judgment of the circuit court as error.

Hannis Taylor and *J. Little Smith*, for appellant. *Overall & Bestor*, for respondent.

CLOPTON, J. The record presents the single issue whether a private corporation is entitled to deduct from the value of its capital stock, when assessed for taxation, such portion thereof as is invested in bonds of the state under subdivision 9 of section 453 of the Code, which levies a tax upon "the capital stock of all corporations, companies, or associations created or existing under any law in force in this state, except such portions of the capital stock as may be invested in property which is otherwise taxed as property, the same to be paid by the corporation, company, or association; but when such corporation, company, or association pays the taxes in this chapter levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation, company, or association shall only be required to pay the taxes levied on the real and personal estate owned by it, unless its investments are otherwise herein taxed."

A controlling question, which presents itself at the outset, is whether the tax levied upon the capital stock is a tax upon the property, or upon the privileges and franchises of the corporation? Appellant insists it is a franchise tax. This insistence is based on the theory that section 478 prescribes, as the rule for determining the value of the capital stock for the purpose of taxation the aggregate market value of the shares into which it is divided. If the contention be well founded, the case of *Hamilton Co. v. Massachusetts*, 8 Wall. 632, and the next two preceding cases in the same volume, apparently support the contention; but a careful examination of the opinion in the case cited above shows that the conclusion of the court is based on the settled course of decisions of the state court on the constitution and laws, by which the statute under which the tax is laid was construed as imposing a franchise tax. It is said: "Separated from the peculiar provision of the state constitution, and the long practice under the original decision, the present decision of the state court upon the subject might well be criticized as founded in unsubstantial distinctions; but when weighed as an exposition of that peculiar clause, and in view of the long practice of the state, commencing long before the prior decision was

made, it is not possible to withhold from the conclusion a full and unqualified concurrence." Notwithstanding the course of decision of the state court, the chief justice and two associated justices dissented, on the ground that the tax was a tax on property.

But we do not concur in the construction of the section urged by counsel. By it the president or other chief officer is required to return all the taxable property of the corporation, in which return he shall state the market value of the capital stock, the items of property in which it is invested, with the value thereof, and the number of shares into which it is divided, with the par value and actual market value of each of such shares. The primary object of the section is to prescribe the mode for listing the property of the corporation. The requirements as to the statements to be made in the return are evidently intended to furnish the assessor data—the elements which largely enter into the market value of the capital stock—from which he may be enabled to form a correct opinion of its assessable value for taxation; not to lay down as an arbitrary and inflexible rule that the value shall be determined from the aggregate market value of the shares or of the items of property, or both. The assessor may resort to other information. But, if the construction of the section insisted upon be conceded, nevertheless the purpose is the ascertainment of the market value of the capital stock, according to which the tax is imposed. Owing to the difficulty of distinguishing between the capital, and the property in which it is invested, tests for determining whether a tax is on the property or the franchises may be regarded, generally, as uncertain and unsatisfactory; yet its determination is often necessary, for, if a franchise tax, the property in which the capital is invested becomes immaterial. The usual and most certain test is whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation in whatever it may be invested. If the former, it is a franchise tax; if the latter, a tax upon the property. *Bank v. New York City*, 2 Black, 620. In the *Bank Tax Case*, 2 Wall, 200, it was ruled that a tax laid on banks, on a valuation equal to the amount of their capital stock paid in, or secured to be paid in, is a tax on the property of the institution, and when that property consists of stocks of the federal government the law levying the tax is void. Our own decision accords with this ruling. In *Magnire v. Board of Revenue*, 71 Ala. 401, *STONE, J.*, says: "But a tax on the capital stock of a bank whose capital is invested in government securities, not allowed to be taxed, would be a tax on such securities, and illegal."

From the decisions, it follows that the tax levied upon the capital stock of corporations under section 453, subd. 9, is a tax upon the property of the corporations. But there is no need to rely upon judicial construction. The exception in the section of such portions of the capital stock as may be invested in property otherwise taxed as such was designed to prevent double taxation, which cannot occur if

the tax is not upon the property of the corporations. The language of the first and general clause of the section is "for the use of this state; and, to raise revenue therefor, there is levied an annual tax of sixty cents [the rate has since been reduced] on each hundred dollars in value, upon the following property." This clause is followed by 13 separate paragraphs specifying land, and separate and distinct species of personal property, including the capital stock of corporations, and closing with the expression, "all other property, real and personal, not otherwise specified herein." This must be regarded as a legislative declaration that the tax is imposed upon the capital stock of corporations as property, and according to its value.

Regarded as a tax upon property, the question, then, is, whether, under the revenue law, the corporation is entitled to a deduction from the assessed value of its capital stock of such portion as is invested in bonds of the state. It is contended that the deduction can be made under the statute, except of such portions as may be invested in property otherwise taxed. The argument is that the capital stock includes everything in which it is invested, and that expressly excepting the portion of its investments in property otherwise taxed is the exclusion of such portions as may be invested in property non-taxable. It may be conceded that such would be the proper construction if the subdivision be disassociated from the other sections; but all the sections of the revenue law contained in the Code were passed at the same time and should be construed as continuous sections of the same act, each in harmony with the others, and so as to give effect to each without rendering nugatory any other, if practicable. The general rule, almost universal, in the interpretation of statutes *in pari materia*, is that the legislative intent, collected from all the statutes relating to the same subject, shall prevail over the letter, especially if, in giving the precise words their ordinary meaning, manifest injustice would ensue.

Section 451, subd. 2, declares that all bonds of the United States and of this state shall be exempt from taxation; and such bonds are also excepted from the tax levied by subdivision 10 of section 453 on "all investments in bonds,"—both a general declaration of exemption, and an exception from the special tax on bonds. It will be conceded that the portion of the capital stock invested in taxable bonds is excepted by subdivision 9 of section 453 from the tax on such capital stock, because invested in property otherwise taxed. This is done, as admitted, for the purpose of preventing duplicate taxation. If the portion invested in bonds of this state are not also excepted, duplicate taxation may be the consequence; for, by subdivision 10 of section 453, it is provided: "But all capital invested in bonds or currency which are exempt from taxation shall be liable to be taxed under this section, should such capital, at any time during the year, be reconverted into money, bonds, or property which is taxable, unless it is made to appear that the money,

bonds, or property into which such reversion may be made has been assessed for taxes for such year." Unless a deduction from the assessed value of the capital stock of the portion invested in bonds of the state is allowed, then there exists the anomaly of taxing, in the form of capital stock, investments expressly exempted from all taxation. If a part of the money capital of an individual be invested in state bonds, it will be conceded that such part is not liable to taxation. Why, then, should it be held that the portion of the capital of corporations so invested is taxable, in the face of the constitutional mandate, "the property of private corporations, associations, and individuals of the state shall forever be taxed at the same rate," which includes not merely the technical rate, but also the mode of assessment. Const. art. 11, § 6. The sections declaring the exemptions should be regarded as exceptions to the section specially levying the taxes. Any other construction of the revenue law nullifies the provisions as to the exemptions, discriminates against corporations in the matter of taxation contrary to the letter of the constitution, and violates the uniformly observed and maintained policy of the state as to the non-taxability of its bonds—a policy founded on good morals and public justice and honesty, and to which the state is impliedly pledged. When the revenue laws are considered as constituting an entire and complete system of taxation, the legislative intent that the portion of the capital stock of corporations invested in bonds of the state should be excepted from the tax clearly appears, though no precise words of the paragraph levying the tax declare the exception. This construction harmonizes all the provisions and sections of the revenue law, and gives effect and operation to each.

Affirmed.

MCCLELLAN, J., not sitting.

BEARDEN *et al.* v. STATE.

(Supreme Court of Alabama. May 1, 1890.)

BAIL—SURRENDER OF DEFENDANT.

Under Code Ala. 1886, § 4429, providing that bail may, at any time before they are finally discharged, exonerate themselves by surrendering the defendants, they are released from all liability by a surrender made after default and judgment *nisi* requiring them to show cause why it should not be made final.

Appeal from circuit court, Chilton county; J. R. DOWDELL, Judge.

A defendant in a criminal case made default, and judgment *nisi* was entered against him and his bail, requiring them to show cause at the next term why it should not be made final. The bail having before that time surrendered, the defendant asked to be discharged. Final judgment was entered against them for \$25, the bond having been for \$150, from which they appeal.

W. A. Collier, for appellant. W. L. Martin, Atty. Gen., for the State.

STONE, C. J. Bail is a delivery of a person to his sureties, upon their giving, to-

gether with himself, sufficient security for his appearance; he being supposed to continue in their friendly custody instead of going to jail. 2 Amer. & Eng. Enc. Law, 1. So, when bail is given for a defendant's appearance at court, the sureties on the bail-bond become bailees or custodians of the person of their principal, and they, at any time, before default against them is fixed, may surrender their principal in full discharge of their obligation for his appearance at court. This is a common-law right, older than and independent of our statute on the subject. 1 Tidd, Pr. 281, 282; 2 Amer. & Eng. Enc. Law, 25; 1 Bish. Crim. Proc. § 250. The doctrine of arrest, bail, and surrender of the principal in exoneration of the sureties originally pertained alike to civil and criminal proceedings. It ceased as to the former when imprisonment for debt was abolished. Section 3685 of the Code of 1852 provides that, "at any time before the bail [in criminal cases] are finally discharged, they may surrender the defendant in exoneration of themselves." Section 3686. "For this purpose they may arrest the defendant on a certified copy of the undertaking at any place in this state, or may, by a written authority indorsed on such copy, authorize another person to do so." This is the first time in Alabama legislation when the foregoing provision made its appearance in criminal procedure. Since then it has been retained in every codification of our statutes without material change. In the special Penal Code of 1866, § 699, the language is: "Bail may, at any time before they are finally discharged, exonerate themselves by surrendering the defendant." Code 1867, § 4250; Code 1876, § 4859; Code 1886, § 4429.

We have endeavored to trace the history of this legislation to its source, but have found no mention of it in our criminal jurisprudence earlier than the Code of 1852. We have said the common-law rule of arrest, bail, and surrender of defendant in discharge of his sureties was the same in civil and criminal proceedings. By the "Act making further regulations in judicial proceedings," approved December 24, 1812, (Toulmin, Dig. 33,) it was provided "that the bail shall have liberty, at any time before final judgment obtained against him on *scire facias*, to surrender to the court from which such process issued, or to the sheriff, returning such process during the sitting of such court, or to the sheriff, in the recess of such court, the principal in discharge of himself." Aiken, Dig. p. 54, § 18; Clay, Dig. p. 75, § 20. These statutory provisions remained substantially unchanged, so far as we have discovered, until, by the adoption of the constitution of 1868, imprisonment for debt was abolished. Code 1852, § 2188; Code 1867, § 2539. May we not suppose that by the insertion of section 3685 the authors of the Code of 1852 intended to confer on bail in criminal cases the same means of exonerating themselves as bail in civil suits had so long enjoyed? The statute (Code 1886, § 4429) declares that by surrendering the defendant bail may exonerate themselves. This can have but one meaning. They thereby relieve themselves

of the burden or obligation of the bond. It ceases to be a burden or obligation resting on them. And so the statute declares that this surrender may be made at any time before they (the bondsmen) are finally discharged. When are they finally discharged? Certainly not before a conditional judgment is rendered against them. Certainly not while a conditional judgment stands against them, which the state is seeking to make absolute. They can be finally discharged only in one of two ways,—they must pay the amount of the bond, or the judgment of the court must be pronounced in their favor. The bail had not been finally discharged. They delivered the defendant to the sheriff, and the statute declares that they thereby exonerated themselves. This leaves us without discretion. If our ruling works an injustice, the remedy is not with us.

If it be contended or supposed that our decision goes the length of holding that the sureties in a bail-bond may exonerate themselves by surrendering their principal, even after final judgment against them, our answer is that that question is not before us, and we do not decide it. It may be that other principles would control in the case supposed.

The judgment of the circuit court is reversed, and a judgment here rendered discharging the sureties, who will go hence without day. This judgment does not affect the defendant Bearden. His *status* remains unchanged.

LOVELL v. DE BARDELABEN COAL & IRON CO.

(Supreme Court of Alabama. May 1, 1890.)

DEATH BY WRONGFUL ACT—INFANT—PARTIES—PLEADING.

1. A father, the death of whose minor son, in the service of another, is caused by the negligence of a fellow-servant, cannot sue the master; his liability for injury so caused having been created by the employer's act of February 13, 1885, (Code Ala. 1886, §§ 2590-2593,) and section 2591 providing that, if such injury results in the death of the servant, his personal representative may sue therefor, and that the damages recovered shall be distributed according to the statute of distributions. The action so given by this section is not extended to the father, also, by virtue of Code Ala. 1886, § 2588, Act Jan. 23, 1885, providing that, where the death of a minor is caused by the wrongful act of another, his agents or servants, the father or the personal representative may sue.

2. If in a suit for the death of a minor son in the service of another, caused by the negligence of a fellow-servant, the father would rely on the hiring having been without his consent, or the son put at work whose dangers he could not appreciate and avoid, by reason of his youth and want of experience, those facts must be pleaded.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

The plaintiff sued for damages for injuries resulting in the death of his minor son while in the defendant's service, alleged to have been caused by the negligence of a fellow-servant. A demurrer to the complaint was sustained on the ground that the action could be maintained by the personal representative only. The plaintiff appeals.

Chisolm & Whaley, for appellant. *Weatherly & Percy*, for appellee.

MCCLELLAN, J. If the employment of the plaintiff's minor son by the defendant was against the will of the former, his rights would thereby be made to appear in a more favorable light. The complaint alleges the employment, and is silent as to whether it was with or without the father's consent. In this absence of averment, a familiar rule of pleading requires us to construe the complaint most strongly against the plaintiff, and to hold that the contract of service was entered into by the son with the consent of the father. Moreover, the averment is that the defendant employed the minor. This, without more, implies a legal employment, involving the parent's consent. Similarly, the complaint is silent as to the age of the son, further than that he was a minor. Hence it does not appear but that he was over the age of 14 years, from and after which period the *prima facie* presumption that he was capable of the exercise of judgment and discretion is indulged. Had he been under that age, the opposite presumption would be indulged, and might have had an important bearing, favorable to the plaintiff, on the claim for damages he now asserts. *Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 South. Rep. 555. The proper observance of the rule adverted to above imposes on us the duty of reading the complaint as if it had averred the minor to be over the age of 14, as, had the fact been otherwise, we must assume it would have been so laid. *City Council v. Hughes*, 65 Ala. 201.

The case presented, therefore, by the complaint, involves a contract, to which the father assented, made by the defendant with a minor "of sufficient discretion to comprehend and guard against the dangers of the employment, when fully explained to him." The authorities are uniform at common law to the proposition that, by such a contract, both the son and the father assume all the risks incident to the service, and that neither can recover against the employer for any injury resulting to the employee from the negligence of a co-employee in and about the common service. *Hamilton v. Railway Co.*, 54 Tex. 556; *Railway Co. v. Carlton*, 15 Amer. & Eng. R. Cas. 350, note 355; *Pennsylvania Co. v. Long*, Id. 845; *Greenwald v. Railroad Co.*, 13 N. W. Rep. 513; *Railway Co. v. Byerle*, 11 N. E. Rep. 6; 1 *Shear & R. Neg.* § 218.

Thus the question stands, and is settled, at the common law. Has the doctrine been modified by statutes in this state? Appellant insists that it has. Section 2588 of the Code is relied on, of its own force, and also in connection with what is known as the "employee's act," now constituting sections 2590 to 2593 of the Code, as authorizing a recovery by the father for injuries resulting in the death of his minor son, occasioned by the negligence of fellow-servants in an employment such as the complaint discloses. It is unnecessary, we think, to go into an exhaustive history of this legislation to arrive at a just interpretation of it. A brief *résumé* will suffice. At common law, and under

our statutes prior to the passage of the act of January 23, 1885, the father in no case had a right of action for the killing of his child; a former attempt by the legislature to give him the right having aborted by reason of the unconstitutionality of the act passed to that end. Just prior to that attempt the act "to prevent homicides" had been enacted, giving to the personal representative of any person whose death was caused by the wrongful act or omission of another a right of action for the recovery of damages in all cases in which the deceased, had the injury fallen short of death, could have recovered. This act (now section 2589 of the Code) applied as well to infants as adults, but it did not and does not create any right of action in the father or mother. Conceiving, doubtless, that the parents of minors were entitled to their services absolutely during minority, and hence had a more direct and tangible interest in their lives than that to be subserved by a distribution of their estates, the general assembly attempted in 1872, and again, with success, in 1885, to allow the parents or personal representative to sue for a wrongful act causing the death of a minor. Acts 1884-85, p. 99; Code, § 2588. The sole purpose and effect of this statute was to extend the right of action already lodged in the personal representative to the father, and in certain contingencies, to the mother. Its reference to the personal representative was necessary, on the one hand, to give the parents priority of right over him, and on the other to exclude a construction which might have defeated the representative's right to sue under section 2589 of the Code in a case where the parents had died after right of action accrued, and before suit brought; and, while there is no express limitation in this statute to cases in which recovery might have been had by the party injured had not death ensued, we can conceive of no possible reason upon which to base a construction other than this. Why should the infant dead be allowed to recover when the infant living could not? If punishment was the object of the enactment, should it be confined to fatal results, while acts equally reprehensible in themselves, but not so disastrous in consequences, should go unwhipped of justice? If, as counsel suggest, this absolute liability was inflicted for the wrongful employment of infants in hazardous callings, why visit it upon persons who have not been guilty of this offense, but have caused the death of minors with whom they have no contractual relations? We cannot concur in the construction which would make this statute entirely *sui generis* in legislation, and take away defenses which are coeval with the right of action it extends to the parents of minor children. Pierce, R. R. 399. But, were we of a different mind, we would still feel constrained to follow the former rulings of this court, which, in effect, measure the father's right of recovery under this section of the Code by a consideration of what the child's right would have been had he survived, at least to the extent of confining the former to cases in which the latter might have recovered, though not

extending it to all such cases. Iron Co. v. Brawley, 83 Ala. 371, 3 South. Rep. 555; Railroad Co. v. Donovan, 84 Ala. 141, 4 South Rep. 142.

So much for section 2588 of the Code. Under it, neither the minor living, nor, death having ensued from the injury complained of, his father, can recover for an injury occasioned by his co-employee in a service for which he has contracted with the father's consent. Does the employee's act (Code, §§ 2590-2593) authorize the father to sue under such circumstances? The question must be determined on the terms of that act itself, and without reference to section 2588 of the Code, or any other statute. It relates to a class of cases in which before no cause of action existed, to a class of injuries, the damages for which, at common law and under our statutes, had been bartered away before they accrued. The statute was one of enlargement purely. No existing right was curtailed, limited, or taken away. The only limitations in the act were upon causes of action created by the act, and having no existence outside of it. Giving its limitations the fullest interpretation, the broadest significance, they do not trench upon any right a father who has consented to his minor son's entering an employment in which he is injured by a co-employee has to sue the employer for such injury, since he never had that right. Increasing this new cause of action, it was, therefore, not only entirely competent for the legislature to confine it, in cases where the injury produced death, to the personal representative; but, in doing so, no existing right to sue was taken away from the parents. If the minor's employment was against the will of the father, he could maintain the action before the employee's act and afterwards, though not under it. If with his consent, as in this case, he could sue neither before nor after, nor under nor without, the statute, if we are to give any force whatever to section 2591, which designates the only person who may sue under the act where the injury results in death, and particularly and peremptorily makes provision for the disposition of the recovery, which can only be carried out by the personal representative. Why the law-makers ingrafted this limitation on the prosecution of the cause of action created by the act is not for us to inquire. It is wholly immaterial. It provides for all servants and employees, —infants as well as adults. Had either class been omitted, that class would have been without remedy for the negligence of co-servants. Neither class was omitted, either in giving the remedy, or in requiring suit, in case of death, to be brought by the personal representative. To avoid judicial legislation, we must and do hold that the father, under the averments of this complaint, has no standing in court to recover damages for the death of his minor son resulting from the negligence of fellow-servants. Stewart v. Railroad Co., 83 Ala. 493, 4 South. Rep. 373.

A critical examination of the complaint demonstrates that each of its four counts is framed under the employee's act, and seeks to recover for the negligence of fellow-servants of plaintiff's minor son.

The first count, in its averment with respect to the failure of the defendant to provide a sufficient number of brakemen, etc., appears at a casual view to charge negligence on the part of the defendant; but a closer reading develops the absence of any averments that the injury was caused by this failure to provide the requisite number of brakemen.

The demurrers, which were based on the theory that the suit could only be prosecuted by the personal representative, were properly sustained, and the judgment of the city court is affirmed.

EVANS v. SAVANNAH & W. R. Co.

(Supreme Court of Alabama. May 2, 1890.)

EMINENT DOMAIN—DEDICATION—DAMAGES.

1. In an action against a railroad company for damages to property, it appeared that plaintiff's grantor purchased a block with reference to a map showing that part of the street on which it was situated was reserved for railroad purposes, and sold a half interest in part of it to plaintiff, who, after the railroad had been built, purchased the other half interest, and the balance of the block. *Held*, that the reserved right was the only interest essential to be acquired by defendant as against plaintiff; and, being acquired, plaintiff cannot complain of the construction of a necessary embankment by defendant as a nuisance.

2. Damages for the taking, and injury to the land, belong to the owner at the time of the injury, and did not pass to a grantee with the title to the land.

Appeal from circuit court, Jefferson county; JAMES B. HEAD, Judge.

Webb & Tillman and *J. M. McMaster*, for appellant. *Chisolm & Whaley*, for appellee.

CLOPTON, J. Appellant sues to recover damages for injuries alleged to have been done to his property by defendant's construction, operation, and maintenance of a railroad track along a public street fronting on his property, designated as "Twenty-Ninth Street." Plaintiff's lot and the adjacent lands were formerly owned by the Elyton Land Company, which company divided the lands into lots, and caused two maps to be made,—one in 1871, and the other in 1886,—showing the various lots, streets, and avenues. Upon each of the maps a street was sketched, and designated as "Twenty-Ninth Street." On September 28, 1886, the company sold and conveyed to R. W. Boland a block of land described on the maps as "Block Numbered 485," which was bounded on the west by Twenty-Ninth street. On October 1, 1886, Boland conveyed to plaintiff an undivided half interest in a part of the block, and on January 1, 1888, conveyed to him the other half interest, and his entire interest in the remainder of the block. The railroad track, and the embankment on which it is placed, were constructed by the Columbus & Western Railroad Company in 1887, and completed in October of that year, which company, and the Savannah & Western Railway Company, were subsequently consolidated, and merged into a single corporation, under the name of the latter company. On his title thus acquired, and on the theory that the street had been dedicated

to the public use, plaintiff asked the court to instruct the jury that he had the right in this action to recover the entire damage done to the lot by the construction of the embankment, notwithstanding his title may have been acquired since its construction. This charge the court refused to give, and instructed the jury that plaintiff was not entitled to recover for any damage or injury which may have been done to that part of the lot which was conveyed by the deed of Boland dated January 1, 1888, by the erection of the embankment prior to that date, or by its subsequent maintenance. These charges present the main and only material questions requiring consideration and decision.

So far as concerns the part of the block to which plaintiff subsequently acquired title, the *gravamen* of the action—the sole ground on which plaintiff can be entitled to recover damages—is that the embankment was unlawful, and therefore a nuisance which defendant had maintained and continued. The complaint does not aver that the work was done in an improper or negligent manner, and the evidence shows that the embankment was constructed with care and skill, and in a manner conforming to the grade of other railroads at crossings on First avenue. A railroad authorized by law to be built is not a nuisance, if constructed with proper care and skill, and the right of way is first obtained. Defendant was incorporated under the General Laws, and was authorized by its charter to construct a road from Goodwater to Birmingham, Ala. Section 21 of article 14 of the constitution provides: "Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points in this state." The statutes prescribe the mode in which corporations for the construction of railroads shall be formed. They require that the terminal, and such other points along the line of the proposed railroad as may be deemed proper, shall be set forth in the written declaration required to be filed with the secretary of state. They invest such corporation with power to acquire and hold, by gift or purchase, or by condemnation in the mode prescribed by law, such lands as may be necessary for a way and right of way, not exceeding 100 feet in width throughout the entire length of the road. Code, §§ 1578, 1574-1580.

Twenty-Ninth street is not within the corporate limits of any town or city, and has been declared a public road by the court of county commissioners. Hence the cases of *Railway Co. v. Witherow*, 82 Ala. 190, 3 South. Rep. 23, and *Perry v. Railroad Co.*, 55 Ala. 413, are not applicable. The defendant being authorized by its charter, granted in accordance with the statute, to construct a railroad between fixed and terminal points, stated in the declaration of incorporation, if, in constructing the road, it becomes necessary to take a part of a highway dedicated to the public use by the original owner, and not within the corporate limits of a town or city, the authority to do so arises from necessary implication. *Mobile & G. R. Co. v. Alabama M. Ry. Co.*, 87 Ala.

501, 6 South. Rep. 404. The right of way along Twenty-Ninth street was granted to the Columbus & Western Railroad Company by the Elyton Land Company; at what time the bill of exceptions does not state, but certainly before the erection of the embankment, in 1887. Defendant obtained the public right by the co-operative effect of the constitution and the statutes, and the right or interest in the street of the Elyton Land Company by its deed.

It then remains to inquire whether plaintiff or his grantor had any right or interest in the street which it was necessary for defendant to obtain; for, if a railroad is built in a public street or highway, not only must the public right, but also the private rights or interests in the street or highway of individuals be acquired. Otherwise, as to them, the railroad is unlawful, and may be a nuisance. Plaintiff contends that the Elyton Land Company had dedicated the street to the public use, beyond its power of interference, prior to the conveyance of the right of way to the Columbus & Western Railroad Company. This contention is founded on the facts that the map of 1871 does not contain any indication that a portion of the street was intended for railroad uses, and that the company had sold lots on other portions of the street as far back as 1874. It cannot be questioned that when a landowner lays out his land into lots, setting apart certain portions as streets, with a view of establishing a town, a sale of the lots with reference to a map defining and delineating the streets is a complete dedication to the use of the purchasers and the public. Such dedication, when complete, is irrevocable, and divests the owner of the right to pervert the street from its original purposes, or to impose an additional, inconsistent servitude. But the mere laying out the lots, and making a map showing streets, do not, of themselves, deprive the owner of the right to use the property as his own. There must be an acceptance of the dedication, of which the sale and purchase of lots is sufficient proof. The sales and conveyances of lots, describing the streets as boundaries, constitute covenants with the purchasers that the streets are dedicated to their use, and the use of the public. *Rowan v. Town of Portland*, 8 B. Mon. 282. On this principle rests the legal presumption that by such conveyance the ultimate fee is vested in the purchaser to the center of the street, subject only to the public easement. This constructive extension of the title confers on the owner of the abutting property a right to prevent or redress any obstruction or perversion of the street to uses other than those for which it was dedicated; and in such cases a railroad corporation, in order to lawfully acquire the right of way over the street, must obtain the private right or interest of such owner.

The bill of exceptions does not state at what time in 1886 the map of that year was made; but, construing the bill against the party excepting, we must presume it was made before Boland purchased the block, and was the map referred to in the conveyance to him. On this map, dotted lines running along Twenty-Ninth street

are delineated, showing the designation of a portion thereof for railroad purposes. With this exception, the street is designated as it was originally laid out in the map of 1871. According to the map of 1886, the company dedicated the whole street to the width of 80 feet, reserving a right to impose on a portion of it the burden indicated by the dotted lines. In *Ayres v. Railroad Co.*, 48 N. J. Law, 44, 3 Atl. Rep. 885, the map of the plan of the town contained similar indications. It is said: "From all the circumstances, the plain intent was to dedicate to public use, as a highway, the whole width of one hundred feet, subject to an easement for railroad purposes over a portion of the center reserved to, and to be designated by, the grantor. * * * When that portion should be designated and devoted to railroad purposes, the easement of the public highway would be suspended over it, and continue suspended so long as it was devoted to such purposes." The nature of the covenant with Boland as an individual purchaser is that he should have all the use and benefits of the street as defined and delineated on the map with reference to which he purchased. The deed to the Columbus & Western Railroad Company, having been made after the previous dedication, must be regarded as made and accepted subject to that dedication. But this case, as made by the record, does not involve the right and authority of the dedicant to impose additional burden on the street as against the purchasers of other lots or the public. The direct question is, what was the nature and extent of the title or interest in the street which passed by the company's conveyance to Boland, plaintiff's grantor. Having purchased with reference to a map, on which there were dotted lines showing the reservation of a right to devote a portion of the street to railroad purposes, such reservation is valid and operative as to him, and limits and qualifies the nature and extent of his title to the center of the street; that is, insubordination to such reserved right. Until lots were sold, the title to the street resided in the Elyton Land Company; and, if the conveyance to the Columbus & Western Railroad Company had been made prior to the sale of any lots, the company, having statutory authority to acquire a right of way over the street, would then have lawfully acquired it, and subsequent purchasers could not have complained. Boland having purchased the lot subject to the reserved right to devote a portion to railroad uses, this reserved right was the only private right or interest essential to be obtained by defendant as against him, and, being obtained by the deed to the Columbus & Western Railroad Company, the embankment is not a continuing nuisance. Plaintiff's right to recover damages fails, so far as rested on this ground.

But it is insisted that, notwithstanding the Columbus & Western Railroad Company may have lawfully acquired the right of way without taking any part of the right or interest of Boland in the street, the defendant, as its successor, is bound, under the constitution, to make just com-

pensation for the injury caused to his adjoining property by the construction of the embankment, and that the right to the damages passed to the plaintiff by his deed. We so construed the constitution in *City Council v. Townsend*, 80 Ala. 489, 2 South. Rep. 155, but the damages accrue to the then owner of the property, and are not assignable so as to authorize the transferee to sue in his own name. "The claim for damages, and of title to land, may be distinct. Damages for taking and injury to land belong to the owner at the time of the injury, and do not pass to a subsequent vendee. * * * The owner alone can take advantage of a claim for damages; and, if he does not claim, his subsequent vendee cannot." *Mills*, Em. Dom. § 66.

Affirmed.

SOUTHERN COTTON OIL CO. v. HENSHAW et al.

(Supreme Court of Alabama. May 1, 1890.)

MESNE PROFITS—IMPROVEMENTS—POWERS—DEED.

1. A defendant in ejectment, holding in good faith under color of title, who takes the benefit of a defense under Code Ala. 1886, § 2706, limiting his liability for mesne profits to one year, cannot receive compensation for his improvements under sections 2702-2706, *Id.*, and is chargeable only with the value of the use and occupation of the land, as it came to him, without regard to the increase by reason of the improvements.

2. A conveyance of the interest of a deceased partner, in land held by the members of the firm as co-tenants, is not authorized under letters of attorney by his heirs giving power to the surviving partner "to settle all matters growing out of the firm business, to settle up and divide his estate, and to do all acts necessary to accomplish that end."

3. The legal title to an undivided interest in land passes to each of two partners by a deed, which recites the payment of the consideration by them individually, and conveys to them and their heirs by a firm name containing the surnames of both.

4. One who defends on the merits in ejectment by his co-tenant, and denies his title, cannot object that there was no ouster nor demand of possession before action.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Ejectment. The plaintiffs claim as heirs of Ferrie Henshaw, whose relation to the land and the other facts are sufficiently stated in the opinion. The court refused to charge the jury that if the defendant had held adverse possession for three years, under color of title and in good faith, and made permanent improvements exceeding the value of the use and occupation, including the increase by reason thereof, then the plaintiffs were not entitled to recover any rents. The defendant appeals.

Code Ala. §§ 2702-2705, giving a defendant in ejectment, who has been three years in adverse possession, the benefit of his permanent improvements, provide, *inter alia*, that the jury must assess their value and also that of the use and occupation, not including the increase by reason thereof, which value shall be set off one against the other.

Tompkins & Troy, for appellant. *Brickell, Semple & Gunter* and *Watts & Son*, for appellees.

SOMERVILLE, J. 1. The deed of Morris, executed on June 14, 1873, to Beebe & Henshaw, conveys an undivided one-half interest in the lands to the grantees, and vests in each one of them an undivided fourth interest as tenants in common. The consideration received by the grantor is recited as moving from Eugene Beebe and Ferrie Henshaw, and the conveyance is "to Beebe & Henshaw, their heirs and assigns." This being the case, although a partnership existed between Beebe and Henshaw, upon the death of the latter the legal title of his undivided fourth interest descended to and vested in his heirs, also as tenants in common with each other, and with Beebe. All the owners must therefore join in order to transfer the legal title to a purchaser. The surviving partner alone had no capacity to make any transfer such as a court of law would recognize. *Espy v. Comer*, 76 Ala. 501; *Lang v. Waring*, 25 Ala. 625; *Caldwell v. Parmer*, 56 Ala. 405; *Yeatman v. Woods*, 27 Amer. Dec. 452, note, p. 454; *McCormick's Appeal*, 98 Amer. Dec. 191, note, p. 197. The deed from Beebe to the grantor of the appellant, executed in January, 1887, purports to convey the entire interest of himself as well as of Henshaw's estate, being signed by him both individually and as surviving partner of the late firm of Beebe & Henshaw. Under the principle above declared it operated only to convey Beebe's undivided one-fourth interest, unless the conveyance can derive some force from the power of attorney given to Beebe by Henshaw's heirs, bearing date August 5, 1879.

2. This instrument, in our opinion, confers no authority to sell these lands. It only appoints Beebe attorney in fact to "settle up all matters growing out of the business of the late firm of Beebe & Henshaw," and to "settle up and divide the estate of the said Ferrie Henshaw among those entitled thereto according to their several rights at law and in equity," and invest him with authority "to do all acts which may be necessary to accomplish said result." Such powers of attorney are ordinarily subject to a strict construction, so as to preclude the exercise by the agent of all authority not expressly given or necessarily implied, as usual and proper in order to execute the agency. *Cummins v. Beaumont*, 68 Ala. 204. It cannot be implied that the sale of the lands was necessary in order "to settle up and divide" the estate of Henshaw among those entitled. *Dearing v. Lightfoot*, 16 Ala. 28; *Wood v. McCain*, 7 Ala. 800; *Scarborough v. Reynolds*, 12 Ala. 252; *Ashley v. Bird*, 1 Mo. 640; *Rossiter v. Rossiter*, 24 Amer. Dec. 62, note, 65, 66; *Hay v. Mayer*, 8 Watts, 205. The deed executed by Beebe, moreover, makes no reference to this power of attorney, and does not purport to have been executed under its authority. In claiming to convey "a surviving partner" it strongly repels such an inference.

3. The suggestion that the action of ejectment cannot be maintained in the present case without proving a prior demand for possession by the plaintiffs is not sustainable. It is very true that one tenant in common cannot ordinarily maintain such an action against a co-tenant

without proving an actual ouster, or its legal equivalent; but when the defendant sets up an adverse holding, especially under a written conveyance, and thereby repudiates the existence of a co-tenancy with the plaintiff, as is done here, no proof of a previous demand for possession is necessary. He will not be permitted in one breath to deny the relationship of co-tenant, and in the next to claim the benefits incident to its existence. *Harrison v. Taylor*, 33 Mo. 211; *Peterson v. Laik*, 24 Mo. 541.

4. All the other assignments of error, not covered by the principles above announced, with the exception which we last consider as to recoverable rents, are, in our judgment, settled adversely to the appellant by the principles declared in *Turnipseed v. Fitzpatrick*, 75 Ala. 297, and since reaffirmed in *Hairston v. Dobbs*, 80 Ala. 589, 2 South. Rep. 147, and *Dobbs v. Hairston*, 80 Ala. 594, 2 South. Rep. 880. These cases construe sections 2702-2705 and section 2706 of the Code, (1886,) and distinctly assert that a defendant cannot at one and the same time claim the advantage of a defense under each of these provisions. He may (1) make a suggestion of adverse possession for three years next before the commencement of the suit, and obtain the benefit of the provisions embraced in sections 2702-2705, which includes the full value of all permanent improvements made by the defendant; or (2) he may set up the fact of possession under color of title, in good faith, and thus acquit himself of responsibility for rents or damages for more than one year before the commencement of the suit, as authorized by section 2706; but, if he claims the benefit of one of these defenses, he must relinquish the other. The two are inconsistent, and cannot be simultaneously asserted. See, also, *Kerr v. Nicholas*, 88 Ala. 346, 6 South. Rep. 698. Under the pleadings contained in the record the defendant was authorized to set up the second defense so as to reduce the recoverable rents to one year before suit brought. Code 1886, § 2706.

The question is, however, how shall such rent be computed? Shall it be on the land before or after the erection of the improvements? The statute does not say, and we are left to solve this inquiry on principles of reason and justice and by authority. The precise point arose in *Doxier v. Mitchell*, 65 Ala. 511, a case in equity, where a mortgagee, having purchased the mortgaged lands at his own sale, conveyed them to a purchaser, who was shown to have held possession under color of title, and in good faith. The purchaser made valuable permanent improvements on the premises. He was held chargeable, like the mortgagee himself, with rents upon the estate as it came into his hands, and not upon the increased value of the property arising from improvements. The same rule is held, also, to apply to actions at law, according to what we deem to be the more just view, especially where no allowance has been made the defendant for the value of the improvements. In *Jackson v. Loomis*, 4 Cow. 168, a leading case on this subject, which was trespass for

mesne profits, a *bona fide* purchaser was allowed the value of permanent improvements made to the extent of the rents and profits due the plaintiff, but it was said by *Savage, C. J.*: "Most clearly the defendant should not be compelled to pay an enhanced rent in consequence of his own improvements." In Iowa, where there is a statute similar to our own, the occupant is held not to be chargeable with rents on improvements made by himself, but only on the land itself. *Dungan v. Von Puhl*, 8 Iowa, 265. The same ruling has been made in Indiana, Wisconsin, and other states. *Elliott v. Armstrong*, 4 Blackf. 424; *Davis v. Louk*, 30 Wis. 308. In Mississippi it is held that the defendant in possession is not to be charged with increased rent by reason of improvements made by him, and for which he has been allowed no compensation. *Phillips v. Chamberlain*, 61 Miss. 740; *Tatum v. McLellan*, 58 Miss. 352. But a distinction seems to be made where the defendant has obtained compensation for such improvements, and the plaintiff recovers against him in ejectment. *Miller v. Ingram*, Id. 510. The supreme court of Texas, in *Evetts v. Tendick*, 44 Tex. 570, held the defendant liable for rents on the land in its improved condition, (following former decisions,) but observed that the contrary rule was more equitable. The more just rule, and the one sustained by a preponderance of authority, is believed to be that the *bona fide* occupant should not be charged with income from his own improvements where he is so situated as not to be entitled to claim allowance for his expenditures in erecting them. *Sedg. & W. Tr. Title Land*, (2d Ed.) § 678, and cases cited. That is this case, and we need not at present extend the principle any further. It is very true that there is no evidence contained in the record to repel the idea that the improvements in the present case may have been made after the commencement of the present suit, and where such is the case no recovery can be had for the improvements. *Gordon v. Tweedy*, 74 Ala. 232. But the charge given by the court assumes the contrary to be true. It asserts that "if the jury believe the evidence the plaintiffs are entitled to recover as damages the rental value of the land sued for, as the same has been improved by defendant, for one year before the commencement of the suit to date." This charge was equivalent to an instruction authorizing the jury to assess rents on the improvements and land, commencing one year before the commencement of suit. Under the principles announced above, this ruling was erroneous, as were several others relating to the same phase of the case. Reversed and remanded.

NIXON *et al.* v. KILLAIN.

(*Supreme Court of Alabama. May 2, 1890.*)

RIGHT TO JURY TRIAL—DEMAND.

Acts Ala. 1888-89, pp. 816-823, establishing the city court of Decatur, which provide that a plaintiff in a civil action, who wishes a jury trial, must demand the same "at the commencement of the action" by indorsing such demand in writing on the summons or complaint, are suffi-

ciently complied with on appeal from a justice's court to the city court, by a plaintiff who indorses a demand for a jury on the complaint filed by him in the city court before any trial could possibly have taken place under the rules and practice of that court.

Appeal from city court of Decatur; W. H. SIMPSON, Judge.

Action on account by Nixon Bros. against S. M. Killain. The action was begun in justice's court, from whose judgment defendant appealed to the city court. Plaintiffs filed a complaint in the city court, indorsing thereon a demand for a jury trial. On motion of defendant the court struck the complaint from the files, and entered judgment for defendant. Plaintiffs appeal.

Kyle & Skeggs, for appellants.

MCCLELLAN, J. The act establishing the city court of Decatur (Acts 1888-89, pp. 316-323) provides that a jury trial in civil cases must be deemed to have been waived unless it is "demanded by the plaintiff at the commencement of the suit, or by the defendant at the time of the filing of his plea or demurrer, by indorsing such demand in writing on the summons and complaint, plea, or demurrer: * * * provided, that when a cause is transferred to said city court, the demand for a jury shall be made at the time of the application for such transfer." It is manifest that the section quoted does not in terms cover all jury causes which may be pending in said court, but only such suits as are "commenced" therein, or are transferred thereto from the circuit court of Morgan county, and as to these latter the demand provided for is that only of the party who applies for the transfer. Actions begun before justice's court, and brought into the city court by appeal, are clearly not within the language employed, nor in them can the demand be made in the manner required, since no summons issues in that court in such cases, and it is not essential that any complaint should be filed therein, where a complaint was filed before the justice, though it may be done. And so, with reference to such transfer, the statute makes no provision for demand by the party who does not apply for the transfer, and, as in such case, a summons and complaint must, and the plea or demurrer may, already have been in the court from which the cause is transferred, the requirement as to the time and manner of making the demand, *i. e.*, by indorsement on the summons or plea, etc., when filed, could not be complied with. Under these exigencies, what shall be considered a waiver of the constitutional right of a trial by jury? The failure to make a certain demand at a given time, and in a particular manner, shall, the statute provides, be deemed and held a waiver. It makes no other provision as to waiver. That demand, in a case like this, cannot be made at the time and in the manner required. Shall a party be held to have lost a right, deemed of such vital importance as to be secured by the organic law, by his failure to do a thing which the law affords him no opportunity to do? A statute which would have this effect would be

palpably unconstitutional. The act under consideration must be given a construction which will avoid that result. It would seem that the present is *casus omnisus* from the terms of the statute, and hence that the plaintiff was entitled to a jury unless he did some act (of which there is no pretense in the record) which, wholly apart from the statute, would have amounted to an affirmative waiver of a jury trial. The facts of this case do not, however, require us to go to this extent. Here the plaintiff did file a complaint in the city court,—though under no necessity of so doing, as the record discloses a sufficient complaint filed before the justice, upon which the trial on appeal might have been had,—and therein demanded a jury. It further appears that this demand was made before any trial of the cause could possibly have taken place under the pending orders and the rules of practice of the court. Our opinion is that, even conceding a demand was necessary to entitle the plaintiff to a jury, this demand was seasonably made, and a jury trial should have been accorded him. The city court, therefore, erred in striking out the complaint on which the demand was indorsed, and in rendering judgment without a jury, and that judgment will be reversed, and the cause remanded.

ALABAMA G. S. R. CO. v. THOMAS *et al.*
(Supreme Court of Alabama. May 5, 1890.)

CARRIERS—CONNECTING LINE—AMENDMENT—
LIMITATIONS.

1. A railroad company, which, without giving the shipper an opportunity to attend to the loading, puts cattle carried over its own line in cars furnished by another company, hauls them over a connecting track, and then delivers to it, is liable, in tort for breach of duty growing out of the contract of shipment, for injuries in transit over the second line, caused by negligence at the time of the transfer in not supplying bedding and partitions, and in overcrowding, though the contract of shipment limits the carrier's liability to "gross or wanton negligence," and to that of a forwarding agent only in delivering to the next line, and provides that the shipper is to load and unload and care for the cattle.

2. An agent at a station at which cattle are to be turned over by one railroad company to another, who has authority to keep them in the original cars, or to transfer to others, acts in the scope of his employment in telling the shipper that there will be no change, and thereby relieves him of the duty imposed by the bill of lading of preparing and loading the cars.

3. In tort against a common carrier for the negligent breach of a duty growing out of a contract of shipment, Code Ala. 1886, § 2619, limiting the action to one year, does not bar new counts added by amendment after the year, which correct a mistake as to the destination or other imperfect statement of the subject-matter, and add new facts more clearly showing the negligence, or otherwise varying the mode, in which the defendant has violated its duties as a carrier.

4. The courts of Alabama have jurisdiction of a suit in tort against a domestic railway corporation for the breach in another state of a duty imposed by a contract of shipment made in Alabama. *Central R., etc., v. Carr*, 76 Ala. 338, distinguished.

Appeal from circuit court, Sumter county; S. H. SPURTT, Judge.

Tort against a common carrier for breach of duty growing out of a contract

for the shipment of cattle, which it carried over its own road and delivered to a connecting line, having first transferred them to cars furnished by it. The negligence relied on was in not supplying bedding and partitions to keep the cattle apart, and in overcrowding, which resulted in damage to the cattle during the transit over the second line. The following instructions, among others, asked by the defendant, were refused: "(8) The liability of the defendant as common carrier ceased when it safely carried the cattle to Meridian, and for its acts in forwarding the cattle from Meridian it is only liable as the agent of the shipper, which liability cannot be enforced in this action. (9) The counsel for plaintiffs insist before you, gentlemen, that under the contract it was Thomas' duty to unload and load at Meridian, and that Reeder, as agent of the defendant, had it done against the protest of Thomas, and upon his [Reeder's] promise not to have it done, and in the absence of Thomas, and without his knowledge. The court charges you, that if such were the duties of Thomas, and he was prevented from discharging them by Reeder, as such agent, then the defendant is not responsible in this action for the acts of Reeder in that regard."

Judge & De Gruffenried, for appellants.
Altman & Patton, for appellees.

SOMERVILLE, J. The suit is for damages claimed by the owner and shipper of certain cattle for injury to the animals, which is alleged to have been the result of the defendant's negligence, growing out of a violation of duty imposed by the contract of shipment. The agreement of the railroad was to receive the cattle at Eppes station, in this state, and to transport them to Meridian, each of these points being on its own line, and, as agent of the shipper, to forward the animals from the latter place to New Orleans. The shipper agreed to load, unload, and take proper care of the cattle while *in transitu*. The contract also attempts to limit the defendant's liability to injuries caused by "gross or wanton negligence," and to that of a mere forwarding agent of the shipper in the matter of delivering the cattle to the next connecting line. The complaint was amended several times, and some questions are raised, both by demurrer and plea, as to the legality of these amendments as properly coming within the *lis pendens* and the effect of the statute of limitations, which was interposed as a defense to them.

1. Before considering these points, we formulate the following principles as governing some of the most important issues involved in the case: (1) Where a railroad or other common carrier receives goods consigned beyond the terminus of its own road, with the agreement to deliver to a connecting line, the contract of shipment imposes not only the duty to transport safely over its own road, but to safely deliver to the next connecting carrier. The duty assumed, in other words, is both to safely carry and to safely deliver. *Wells v. Thomas*, 72 Amer. Dec. 228, note pp. 236, 237; *Railroad Co. v. Thomas*, 83 Ala. 343,

3 South. Rep. 802. (2) In such case the liability of the first road or carrier does not necessarily terminate with the arrival of the goods at its own terminal depot, although its responsibility as carrier may terminate there, if there is no further duty of carriage, in order to make the connection with the other road over which the goods are to be transported. If there be any duty to carry the goods over an intermediate short line, connecting its own terminal depot with the other connecting road, in order to complete the act of delivery, its liability on the intermediate line obviously is that of a carrier, and not of a forwarder, especially if this line be a part of its own road. *Goold v. Chapin*, 20 N. Y. 259. (3) The carrier, in undertaking to forward goods beyond the terminus of its own route, is bound to obey all reasonable instructions of the shipper or consignor not in conflict with the terms of the contract of shipment, and if he disregard such instructions, and the goods be lost by reason of this act of negligence, he will be liable for their value, although the loss may occur in the possession of another carrier or person. *Johnson v. Transportation Co.*, 88 Amer. Dec. 416. If, in forwarding, shipments are made in a manner prohibited by the sender, the carrier so forwarding is liable as an insurer for the safe delivery of the articles so sent." *Id.* 418, and cases cited in note; *Maghee v. Transportation Co.*, 45 N. Y. 514. (4) The carrier cannot limit his liability so as to evade responsibility for injuries which may occur through the negligence of his own servants, such contract being deemed contrary to public policy. *Railroad Co. v. Thomas*, 83 Ala. 343, 3 South. Rep. 802; 3 Brick. Dig. p. 119, § 39, and cases cited. (5) The liability of a common carrier, except so far as lawfully limited by special contract, is that of an insurer against all losses except those occasioned by the act of God, the public enemy, or the contributory negligence of the consignor. *Railroad Co. v. McGuire*, 79 Ala. 395; *Railroad Co. v. Little*, 71 Ala. 611; *Railroad Co. v. Sherrod*, 84 Ala. 178, 4 South. Rep. 29. (6) In so far as the carrier acts as a mere forwarder, assuming as agent of the consignor to have the goods forwarded by a connecting line, he is liable only as bailee for the exercise of ordinary care, or such care as persons of ordinary prudence exercise in reference to their own property under like circumstances. *Railroad Co. v. Schumacker*, 96 Amer. Dec. 510; *Hooper v. Wells*, 85 Amer. Dec. 211; *Story*, Bailm. § 444. (7) In construing a bill of lading, given by the carrier for the safe transportation and delivery of goods, shipped by a consignor, the contract will be construed most strongly against the carrier, and favorably to the consignor, in case of doubt in any matter of construction.

In the present case the duty imposed on the defendant railroad was not only to carry the cattle safely from Eppes station to its depot at Meridian, but to deliver them safely for transportation to the agents of the connecting road. It is immaterial whether the cattle were delivered in the original cars in which they were stored, belonging to the defendant's road,

or in cars furnished by the connecting road. If the defendant accepted such cars, and had the cattle transferred to them for shipment, preparatory to delivery to the connecting road, the duty devolved on its agents to do one of two things: *First*, to permit the consignor, Thomas, to put the cars in proper condition to safely transport the cattle, as he had agreed to do; or, *second*, to itself perform this duty with reasonable care and diligence. This duty included, as the evidence tends to show, the act of providing suitable bedding for the cars, partitions to keep the cattle apart, and the exercise of proper care in not unduly crowding the animals together in too great numbers in any one car. The defendant's depot agent at Meridian, one Reeder, attended to the matter of transferring the cattle. The Alabama Great Southern Railroad, and the Mobile & Ohio Railroad, to which the cattle were delivered, connected with each other at a union depot in the town of Meridian, where the roads intersected or crossed. The freight depots of the two connecting roads were each about a quarter of a mile from the Union depot, or crossing. The intermediate line of delivery was therefore a half mile in length connecting the two freight depots.

2. The conversation between the plaintiff and Reeder, to which objection was taken by the appellant, was perfectly competent to prove that the plaintiff had used all proper diligence in seeking to perform his part of the shipping contract as to taking due care of the stock, and that the defendant's agent had relieved him of the duty of bedding cars and otherwise preparing them for shipping the cattle. That this was within the scope of the agent's authority there can be no doubt. The authority to keep the cattle in the original cars, or transfer them to others furnished by the Mobile & Ohio road, involved by implication the duty to put the cars in suitable condition for this transfer, or else to allow the plaintiff to do so under his contract. *Railroad Co. v. Johnston*, 75 Ala. 596.

3. The evidence scarcely admits of more than one reasonable inference as to the cause of the injury to the cattle. This injury was obviously the result of the negligent manner in which the cattle were placed in the cars,—the failure to furnish bedding and partitions, and perhaps the act of overcrowding the cattle in one of the cars. Such injury was of a kind likely to happen in the ordinary course of things, and was therefore the natural and proximate consequence of the negligence complained of, in the absence of some intervening cause which may have produced it. The duty thus violated by the defendant was the duty to deliver the cattle in a safe condition, to be transported by the connecting road, this having been undertaken by the defendant under circumstances to relieve the plaintiff of such obligation. There was no duty on the connecting road to do more than to transport, and this it did. It was under no liability for failing to take care of the stock during the period of transportation. The evidence further tends to show that the plaintiff did all in

his power to avert the damage which resulted from the negligence in question, and hence no act of contributory negligence can be imputed to him. In this view of the case, all of the charges requested by the defendant were properly refused.

4. This is manifestly not a suit for a tort perpetrated by a foreign corporation in another state, based on a violation of duty growing out of a contract made in such foreign jurisdiction, as was the case of *Railroad, etc., Co. v. Carr*, 76 Ala. 388. The defendant is a domestic corporation, and the contract, made the basis of the alleged breach of duty, was also made in this state. There can be no doubt of the proposition, therefore, that the courts of this state have jurisdiction of the case made by the pleadings and evidence.

5. As to the rulings of the court on the pleadings, we may observe that we discover no error. The various amendments allowed to the complaint do not, in our opinion, introduce a new cause of action different from that stated in the original count of the complaint. The *gravamen* of the action is an injury caused to 12 head of cattle shipped by the plaintiff on the defendant's railroad on April 29, 1886, which injury was alleged to be the result of the defendant's negligence. The several amendments each make a case based on some alleged violation of duty growing out of the undertaking to ship these same cattle. They may correct a misdescription of the contract as to the agreed point of destination of the cattle, or otherwise cure an imperfect statement of the same subject-matter, or add new averments of facts, more clearly showing the negligence complained of, or otherwise altering the grounds of recovery, or varying the alleged mode in which the defendant has violated his duties growing out of the agreement embraced in the bill of lading, but they go no further. The identity of the matter upon which the suit is founded is fully preserved. The amendments all fall within the *lis pendens* proper, and only subserve the purpose of accomplishing substantial justice between the parties, and of deciding the pending controversy on its real and true merits. This is the main design of all statutes allowing amendments to pleadings. The statute of limitations of one year was, for these reasons, no sufficient answer to the new counts added to the complaint by way of amendment. *Railroad Co. v. Chapman*, 83 Ala. 453, 3 South. Rep. 813; *Stevenson v. Mudgett*, 34 Amer. Dec. 155, and note, pp. 158-160; *Dowling v. Blackman*, 70 Ala. 303; *Long v. Patterson*, 51 Ala. 414; *Albright v. Mills*, 86 Ala. 324, 5 South. Rep. 591. The assignments of error not particularly considered are not, in our judgment, well taken. We discover no error in the record, and the judgment is affirmed.

LADD V. SHATTOCK.

(Supreme Court of Alabama. May 2, 1890.)

LANDLORD AND TENANT—WASTE.

1. A tenant of a farm, instructed to take care of the timber, with permission to cut and use the wood from such part as he wanted to clear for cultivation, has no authority to sell trees from land which he is not clearing.

2. One who takes timber from the land of another, and justifies under a contract with a tenant, has the burden of proving the latter's authority.

Appeal from circuit court, Jackson county; JOHN B. TALLY, Judge.

Trespass for cutting and hauling away a number of trees. The land was in the possession of a tenant, who was to take care of the timber, and had permission to cut and use the wood from such part as he wanted to clear. He had sold the trees to the defendant, but they were taken from land which he was not engaged in clearing.

Hunt & Clopton, for appellant. *J. E. Brown and Watts & Son*, for appellee.

SOMERVILLE, J. The authority conferred on the tenant by the landlord to clear land for cultivation clearly conferred on him no authority to make merchandise of the timber on such parts of the premises as he did not clear. It is equally manifest, also, that the authority "to use the land, and take care of it," did not confer the power to make merchandise of growing timber on the premises. The first and second charges given by the court were free from error in asserting these propositions.

So the third charge correctly postulated that one who deals with an agent is bound to know the extent of his authority; and, therefore, if the defendant knowingly and intentionally cut growing timber on the plaintiff's premises, under a claim of authority from the tenant in possession, he must show, to the reasonable satisfaction of the jury, the authority of the tenant from the landlord to give such permission.

The rulings of the court were all free from error, and the judgment must be affirmed.

STATE V. POLLARD *et al.*

(*Supreme Court of Alabama. May 5, 1890.*)

LIABILITY ON BOND.

The principal and sureties in a bond to secure performance of a contract, dated February 28, 1876, for the hiring of convicts for more than one year, are not liable thereon for a default in payment for labor employed after the first year; the contract being illegal and inoperative for any longer term.

Appeal from city court of Montgomery; T. M. ARRINGTON, Judge.

W. L. Martin, Atty. Gen., and *Tompkins & Troy*, for the State. *Watts & Son*, for appellee.

STONE, C. J. The contract made by Pollard, dated February 28, 1876, with Bass, warden of the penitentiary, is, in all respects material in the present investigation, identical with the one construed in *Comer v. Bankhead*, 70 Ala. 136. Pollard paid all the hires due from him for the labor of convicts he had the services of during the one year that contract was lawful and binding. The present suit is upon the bond he executed, with sureties, for the faithful performance of that contract on his part, and claims a recovery for

convict labor he was permitted to employ after the expiration of the first year. The complaint consists of a single, special count on the bond. The court gave the general charge in favor of the defendant. There was no error in this. Under no sound canon of interpretation can the obligors of the bond be held liable for the performance of any part of Pollard's contract which was illegal. In *Comer's Case*, we held that such contract was illegal and inoperative for any term beyond the first year, and the same rule must be applied to the contract in this case. Sureties may stand on the very letter of their contracts, and an agreement which the law does not authorize to be made cannot be the foundation of a recovery. Whether Pollard can be made to pay for the services he had the benefit of, on a complaint properly framed, is a question not raised by the present record.

Affirmed.

MCCLELLAN, J., not sitting.

RICE *et al.* v. TOBIAS.

(*Supreme Court of Alabama. May 5, 1890.*)

DEFAULT—SETTING ASIDE—RELEASE.

1. Defendant testified positively in a proceeding to set aside a judgment by default that he was not served with summons. It appeared that he was absent from the county at the time, and for two days before, and one after, the date of the purported service of the writ. He showed as a defense a release by plaintiffs, which he had been at great pains to acquire. The evidence of the officer in whose hands the writ was placed was indefinite and uncertain, and only to the effect that no returns were made except upon personal service; that it was a frequent custom to send process to persons not officers to serve, and to make returns on their statements of service; and that he had no independent recollection of having served the summons in question. *Held*, that a decree perpetually enjoining the enforcement of the judgment was proper.

2. Former partners both testified to the fact of a release of the retired partner from liability for a firm debt. The retired partner was insolvent at the time of dissolution, and the other took the entire stock, assumed the debts, and continued the business. He had an expectancy by inheritance, of which the creditor was aware. The creditor, in trying to force payment from him, never mentioned the retired partner as being held for the debt. His name was not at first in the affidavit to the account when suit was brought, but was subsequently interlined. He declared to the sheriff having the execution issued on the judgment that the creditor and his copartner fully understood that it was not his debt. The testimony of the creditor was confused and inconsistent. *Held*, that the release was established.

3. Objections to evidence on the ground of incompetency cannot be made for the first time on appeal.

Appeal from city court of Montgomery; T. M. HARRINGTON, Judge.

The bill in this case was filed on the 14th of October, 1886, by W. W. Tobias, against Rice & Wilson, a partnership, and sought to perpetually enjoin a judgment at law which the defendants had obtained against him and S. B. Matthews as late copartners. The bill alleged that the complainant was not served with process in the suit, and had no notice of it, and that he had a valid defense to the action, having

been released from the debt by the plaintiffs therein. The judgment was rendered by default on the 13th day of June, 1882, and the sheriff's return on the summons showed due service on each of the defendants. An answer was filed by Rice & Wilson, denying the alleged release on positive knowledge, and averring the due service of process on information and belief. On final hearing the court rendered a decree perpetually enjoining the judgment as prayed, from which respondent appealed.

E. P. Morrissett, for appellants. *A. A. Wiley*, for respondent.

MCCLELLAN, J. When this case was here on a former appeal, it was settled that the equity of the bill depended upon the establishment of two facts: (1) That the judgment sought to be enjoined was taken by default without the service of any process on the complainant, Tobias, who was a defendant in the judgment; (2) that the debt upon which the judgment was rendered had been discharged by release prior to the recovery. 83 Ala. 348, 8 South. Rep. 670. On a second hearing in the city court, the chancellor found the existence of both of these facts, and rendered a final decree perpetually enjoining the judgment at law. The present appeal brings under review the correctness of these conclusions on the facts.

From a very careful examination of the record, our opinion is that a clear preponderance of the testimony supports the finding as to each fact, and hence sustains the decree rendered. The complainant himself testifies, unequivocally, emphatically, and consistently, that Rice & Wilson released him from all liability in respect to their claim against Matthews & Tobias, and agreed to look solely to Matthews, who continued in his own name the business in which the debt was incurred; and this he does with a degree of circumstantiality, so to speak, calculated to induce belief. He is directly supported by Matthews, whose interest lay in defeating the release, who also testifies that, in their efforts to collect from him by compromise or otherwise, Rice & Wilson, after the time of the alleged release, never mentioned Tobias as being also bound for the debt. He is also supported by the pregnant circumstance that the affidavit to the account on which judgment was had was first written so as to have reference alone to a liability of Matthews, and interlined so as to include complainant. He is also supported by the testimony of Sheriff Herbert to the effect that, when approached by him in regard to the execution on the judgment, the complainant at once said that it was no debt of his, but that of Matthews; that the whole matter had been turned over to Matthews; that he had no further interest in it; and that Rice & Wilson understood, and could tell him, all about it. The theory of release derives plausibility also from the consideration that it was not an improbable thing to be done under the circumstances, involving as they did the insolvency of Tobias, his turning over all his interest in the stock of goods to Matthews, and the lat-

ter's expectancy, known to Rice & Wilson, that he would receive a very considerable property from his mother. Against all these facts and circumstances is offered only the confused, unsatisfactory, and inconsistent testimony of Wilson. We do not hesitate to affirm on this showing that the fact of release is fairly and clearly shown.

In considering the question as to whether service of the summons and complaint on which judgment was had was ever made on Tobias, the fact of the release is pertinent and important. It appears that Tobias was very solicitous to procure the release. The judgment was by default. Is it at all reasonable to suppose that he, having a perfect defense to the action, and having been to the trouble to acquire that defense, would have allowed judgment to go against him, had he known of the pendency of the suit? We think not. This consideration therefore strengthens his positive denial that service was ever made on him. Moreover, it is shown beyond controversy that he was not in the county of Montgomery on the day—nor for two days before nor for a day after—the service purports to have been made on him. The conduct of Tobias before and after judgment is wholly inconsistent with the theory of service. In support of the service is the return made by the deputy-sheriff, which could not have been entered for more than two weeks after the writ purports to have been executed, and which is clearly falsified, as we have seen, as to the date of service. The testimony of the deputy, taken altogether, amounts to no more than an affirmation that personal service was made, based on the custom and usage of the sheriff's office, and of himself, to make personal service in all such cases, and to return no process as so executed without personal service. It was shown on cross-examination that this witness had no independent recollection whatever of the service on Tobias. His testimony was weakened, moreover, by the admission that it was the habit of the sheriff's office to send process for service by persons not connected with the office, and enter returns on their statement that copies had been left with defendant, etc., and that he could not say he actually served every paper put in his hands to be served, and which purported by the return to have been served by him. We think this testimony insufficient to overturn the strong showing made by complainant's evidence against the fact of service; and we accordingly concur with the chancellor in holding that this part of complainant's case, as well as the fact of release, is made out.

The sixth assignment of error, based on the supposed incompetency of certain evidence, cannot be sustained. It is immaterial whether the evidence was competent or not. No objection to it was made in the court below, and no ruling invoked or had on it. Such objections will not avail when taken for the first time in this court, either for the purpose of putting the lower court in error in admitting the testimony, or for the purpose of having this error ex-

clude it in passing upon the sufficiency of the proof to support the decree. *Seals v. Robinson*, 75 Ala. 863; *Binford v. Dement*, 72 Ala. 491; *Glennon v. Mittenight*, 86 Ala. 455, 5 South. Rep. 772.

The decree of the city court is affirmed.

WILDER v. WILDER *et al.*

(*Supreme Court of Alabama*. May 6, 1890.)

MARRIED WOMAN—ESTOPPEL—VENDOR'S LIEN

The power of a married woman, under Code Ala. 1876, §§ 2707, 2708, to convey, by joint deed of herself and her husband, her separate interests in realty, implies a power to arrange for the security of the purchase money; and where one, upon the sale of land, and under an express agreement, permitted her vendee to obtain a first mortgage loan, a portion of which was paid her as a first installment, and to secure the purchase money took a second mortgage, she will be estopped to deny a waiver of her lien, and to enforce it as against the first mortgagee, who loaned the money on the faith of her agreement.

Appeal from chancery court, Lowndes county; JOHN A. FOSTER, Chancellor.

Bill to have a vendor's lien enforced in favor of the complainant, and declared superior to the mortgage given by the defendant Wilder to the American Freehold Land Mortgage Company of London. The facts are sufficiently set forth in the opinion. Upon final hearing the chancellor refused the relief prayed, and decreed her lien to be subordinate to the mortgage. The complainant appeals.

Clements & Brewer, for appellant. *Webb & Tillman*, for respondent.

SOMERVILLE, J. The controlling question in this case involves the doctrine of equitable estoppel, or estoppel *in pais*, in its application to a married woman, where she appears as a complainant in a court of equity, seeking affirmatively to enforce a right inconsistent with her previous conduct, upon which one of the defendants in the suit has relied and acted. The subject is one in regard to which there is no little conflict of authority, and the magnitude of its importance grows with the changed policy of modern legislation, removing to a great extent the iron-clad disabilities of married women imposed by the rules of the common law.

The specific question here involved is whether a married woman is estopped to enforce a vendor's lien on land sold and conveyed by joint deed of herself and husband, in due form, prior to the Code of 1886, when she and her husband were active in making the sale, and by their declarations and conduct induced a third person to advance to her vendee a part of the purchase money, with the understanding that her lien should be waived in favor of such person. In other words, if she agrees to have secured the unpaid installment of her purchase money on the land by a second mortgage, subordinate to a first mortgage of a third person, who, on the faith of such superior security, advances the money to her vendee to enable him to pay the first installment to her, can she afterwards repudiate this waiver of her vendor's lien, and enforce it as a prior lien over this other incumbrance, the superior-

ity of which she had admitted, and on the faith of which admission she procured the money? We may add that the transaction is conceded to be governed by the law as it existed under the Code of 1876. This court has uniformly held that the doctrine of estoppel *in pais*, by conduct or admissions, cannot, when unaccompanied by fraud, be invoked against married women, so as to preclude them from denying the validity of conveyances of their statutory separate estates which do not conform to the requirements of the statute governing the mode of its alienation. This prescribed mode, under the Code of 1876, was by the joint deed of husband and wife, attested by two witnesses, or acknowledged in due form. Code 1876, §§ 2707, 2708. The reason upon which these decisions rest is that the statute prescribes and restricts the mode of alienation by married women of their separate estates; and to allow title to be conferred by equitable estoppel would introduce a new mode of alienation, different from that thus prescribed, and would result in sanctioning indirectly the conveyance by *femes covert* of their property, when they were prohibited by statute from doing directly the same act in the mode attempted. *Canty v. Sanderford*, 37 Ala. 91; *Alexander v. Saulsbury*, Id. 375; *Drake v. Glover*, 30 Ala. 390; *Harden v. Darwin*, 77 Ala. 472; *Scott v. Battle*, 85 N. C. 184. So it has been held in a former decision of this court that, where a husband and wife conveyed lands, with covenant of warranty, to which they had no title, the wife would not be estopped from setting up against the grantee a title to such land afterwards acquired by her. *Gonzales v. Hukil*, 49 Ala. 280. The act of warranty, being purely contractual, could not operate by way of estoppel, because a married woman then labored under a legal disability to make such a covenant. But there are decisions of other courts opposed to this view. *Nash v. Spofford*, 10 Metc. 192.

In the case of *Drake v. Glover*, supra, where the property of the wife was held not to be governed as to its mode of transfer by the statute, because it was not her statutory separate estate, and might, therefore, be conveyed otherwise than by the joint deed of the husband and wife, it was held that the fraudulent silence of the wife when her personal property was sold in her presence by her husband would estop her from afterwards repudiating the sale. But her mere silence, unaccompanied by fraud, would have no such effect.

In *Strong v. Waddell*, 56 Ala. 471, a married woman who had purchased land, and executed, jointly with her husband, a mortgage as security for the payment of the purchase money, was held to be estopped from denying the title of her vendor, or to interpose her coverture in bar of the foreclosure of the mortgage. The practical effect of such a transaction is that the vendee takes the property burdened with the mortgage, being an estate on condition, to become absolute only on the payment of the purchase money. *Marks v. Cowles*, 53 Ala. 499. The estoppel is against claiming the estate, and re-

puddling the incumbrance by which it is burdened.

In *McCaa v. Woolf*, 42 Ala. 389, the doctrine of equitable estoppel was applied to a married woman so as to preclude her from asserting title to certain personal property which the husband, under the rules of the common law, had reduced to possession and suffered to be sold, and which she, after his death, claimed by right of survivorship.

Mr. Bigelow, in his work on Estoppel, (page 490,) asserts that the weight of reason and authority confines the doctrine, when applied to married women, to cases of "pure tort," and excludes from its operation all cases where the "action sounds in contract."

Mr. Pomeroy, after calling attention to the conflict of authority on this subject, observes: "The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation, there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right or maintain a defense." And he adds: "There are, however, decisions which hold, in effect, that, since a married woman cannot be directly bound by her contracts or conveyances, even when accompanied with fraud, so she cannot be indirectly bound through means of an estoppel; and the operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct, upon which the other party has relied. These decisions seem to be in opposition to the general current of authority." 2 Pom. Eq. Jur. § 814, and cases cited in note.

There are many cases, both English and American, which support this view of the law. *Boyd v. Turpin*, 94 N. C. 137; *Hodge v. Powell*, 96 N. C. 64, 2 S. E. Rep. 182; *Shivers v. Simmons*, 28 Amer. Rep. 372, and note, 374-377; *Bradley v. Snyder*, 58 Amer. Dec. 564, note, 569; *Lowell v. Daniels*, 61 Amer. Dec. 448, note, 453; *Nash v. Spofford*, 43 Amer. Dec. 425, note, 426; *Benson v. Eveland*, 26 N. J. Eq. 471; *Connolly v. Branstler*, 3 Bush, 702; 1 Story, Eq. Jur. § 385; *Kelly*, Cont. c. 6, § 4; 2 Pom. Eq. Jur. § 814, and cases cited.

A vendor's lien for unpaid purchase money is not such an interest in land as to require an instrument in writing in order to waive or alienate it. It is a mere incident of the contract of sale implied by law, and it may be waived or abandoned by any suitable act or oral declaration showing an intention to do so on the part of one competent to contract. *Woodall v. Kelly*, 85 Ala. 368, 5 South. Rep. 164; *Ramage v. Towles*, 85 Ala. 588, 5 South. Rep. 342.

A married woman, as we have said, was at the time of this transaction invested with the power, under the laws of Alabama, to sell and convey her separate estate by the joint deed of herself and husband, duly attested or acknowledged. Code 1876, §§ 2707, 2708. It is justly argued that this power to sell embraces the power to sell for cash or on credit, or partly for both cash and credit. It includes the authority to retain the legal title as security for the payment of the purchase money, or to convey the legal title and take in return a mortgage from the vendee to secure it, or to take personal security on the notes for the purchase money. In other words, she may sell, and fix the terms of sale, according to any of the modes sanctioned by common usage. It is our judgment that she may, as an incident to this right to sell, waive her right to enforce her vendor's lien, if not by mere oral agreement, at least by conduct, which would preclude her from subsequently asserting such lien upon the principle of equitable estoppel. If she could be estopped in no instance, the morality of the law would be placed upon a very low plane, and the disability of coverture, instead of being, as it ought to be, a shield for her protection against legal wrong, would become a sword of injustice for the license of fraud. While, therefore, a married woman may not always be estopped to deny her capacity to contract, especially so as to convey her property in a mode prohibited by law, she may be estopped by any positive act of fraud, as a person *sui juris* would be. Whether, in any case not involving a transfer of title to property in a mode prohibited by law, she may be estopped by acts *in pais*, unaccompanied by fraud or other tort, we do not now decide.

The application of these principles to the facts of this case do not seem to us to be attended with any great difficulty. The complainant, Mrs. Savannah Wilder, a resident of Texas, and a married woman, agreed to sell to the defendant Sidney B. Wilder, her brother-in-law, certain lands in Lowndes county, Ala. The correspondence was conducted on the one hand through the complainant's husband, at Bartlett, Tex.; but she asserts in her testimony that she in fact supervised this correspondence, and controlled the terms of the trade. It was conducted on the other through the defendant Sidney Wilder and H. C. Semple, Esq., practicing attorney at Montgomery, Ala., who acted for the complainant. It was first agreed that the vendee should pay as much as \$4,000 cash, and \$500 on credit, for the land. The deed was drawn by Semple, sent to Texas, and, being executed in due form, sent back to him for delivery on compliance with the terms of sale. The consideration was recited in the deed, but was not stated to have been paid. The vendee, Sidney Wilder, was to obtain the money which he expected to pay from the American Freehold Land Mortgage Company of London, which had an agent in Alabama, so as to comply with the law as to foreign corporations doing business in this

estate, but did all business, in fact, through an agency in New York. To secure the loan from this company, he was to give a first mortgage on the land. The company declined to advance him more than \$3,500. Of this sum, he needed all but \$2,000 to carry on his farming business, and pay other expenses. He thereupon proposed, through Semple, to modify the contract so as to pay Mrs. Savannah Wilder only \$2,000 cash, and to secure the balance by a second mortgage. This was communicated to the complainant by letter to her husband, and they authorized the delivery of the deed on these terms, telegraphing Semple to that effect. The deed was delivered accordingly, a second mortgage being taken to secure the deferred payments, which contained the recital that it was to be subordinate to the mortgage given to the London company. This mortgage was received by Semple as the agent of the complainant. The cash payment was transmitted to her, and she received it with a knowledge of the facts. We need only say that the testimony in the case satisfies us that, when the complainant received this money, she either knew, or was charged with notice of, the fact that her vendor's lien was abandoned by the taking of this second mortgage subordinate to that of the American Freehold Land Mortgage Company of London, which advanced the money on the faith of the assurance that its mortgage was to be superior to hers. The deed executed by the complainant and her husband to Sidney Wilder, and the mortgage executed by the latter to his vendors, reciting that it is subordinate to the first mortgage of the London company, being contemporaneously executed, would in equity constitute but one transaction. "The two are read together, as if they were but parts of a common instrument." *Marks v. Cowles*, 53 Ala. 502, 508, supra.

As matter of contract, therefore, the vendor's lien would seem to be waived. But, apart from this, these papers contain within themselves a positive representation that the lien is waived by the declaration that a second or subordinate mortgage was taken to secure the unpaid purchase money. The complainant, as we have said, had notice of this fact, and authorized the transaction in order to induce the London corporation to advance the money, which was to come to her through her vendee, Sidney Wilder. The company did act on it, and was drawn in to lend their money on the faith of its truth. To allow the complainant now to repudiate the transaction, by gainsaying the truth of the fact that such lien had been waived, as the papers in question import, would be a fraud on this corporation which equity and good conscience ought not to permit. In our opinion a court of equity ought to prevent the complainant from affirmatively asserting the alleged priority of this lien, as she now attempts to do, in contravention of her conduct, upon which the defendant company has relied, and been induced to act. 2 Pom. Eq. Jur. §§ 814, 815; *Bradstreet v. Clarke*, 12 Wend. 602.

The decree of the chancellor subordi-

nates her lien for the purchase money to the first mortgage of the defendant corporation. There is no error in this decree of which she can take advantage on this appeal, and the decree is accordingly affirmed.

ROBERTSON et al. v. DURDEN.

(*Supreme Court of Alabama*. May 8, 1890.)

FRAUDULENT CONVEYANCE—POSSESSION.

Where one of two joint owners of lands conveys his interest therein to his wife a month before, but retains the deed in his possession, without recording it, until nearly a year after a judgment is rendered against him and his former joint owner, and it does not appear that either of the parties to the deed were in possession, or asserted a right thereto, until seven months after judgment was rendered, such deed is void as against the judgment plaintiff.

Appeal from circuit court, Montgomery county; JOHN P. HUBBARD, Judge.

Action to recover the possession of a certain tract of land. The plaintiff bases her claim upon a sheriff's deed. On June 18, 1887, she recovered judgment against the defendants, W. J. Robertson and Charles E. Robertson, upon which an execution issued; and on September 17, 1888, the sheriff sold the lands in controversy and the plaintiff became the purchaser, and received a deed. W. J. Robertson was in possession of the said land at the time of the recovery of the judgment; he and C. E. Robertson having inherited the land from their mother. Immediately after the will of their mother was probated, Charles E. Robertson conveyed the lands in controversy to his wife by deed bearing date April 18, 1887. This conveyance was not recorded, but was kept in the possession of the said C. E. Robertson until May 5, 1888, when it was filed for record, and was recorded. Upon the evidence as adduced on the trial, the court charged the jury, at the request of the plaintiff, in writing, that, if they believed the evidence, they must find for the plaintiff. The defendants excepted to the giving of this charge, and to the court's refusing to give a general affirmative charge for themselves. There was judgment for the plaintiff, and the defendants appeal, and assign the ruling of the court in giving the charge, and refusing the charge asked, as error.

Moore & Finley, for appellants. *Graves & Blakely*, for respondent.

STONE, C. J. When Mrs. Durden recovered her judgment against William J. Robertson and Charles E. Robertson, June 18, 1887, William J. was in possession of the land in controversy. It was not shown that Charles E. ever was in possession, or that any actual control over the land had been asserted for, or in the name of, Mrs. Cloe L. Robertson, until the lease to Varner was executed, January 17, 1888, seven months after Mrs. Durden's judgment was recovered. There is nothing decided in the case of *Brunson v. Brooks*, 68 Ala. 248, which can benefit Mrs. Cloe Robertson in this suit. The appellant, Mrs. Cloe L. Robertson, derived all the title she has to the lands in controversy under the deed of her husband, Charles E., dated April 18, 1887.

It is not, and cannot be, denied that Charles E. had become the owner of the land under the will of his mother. Being its owner, the land was liable to Mrs. Durden's judgment, unless the title had passed out of him before her lien attached. The deed of appellant, not being recorded nor filed for record until May 5, 1888, was inoperative, and constructively fraudulent, as against Mrs. Durden's judgment, recovered more than 10 months before. *Wood v. Lake*, 62 Ala. 489; *Watt v. Parsons*, 73 Ala. 202; *Tutwiler v. Montgomery*, Id. 263. Affirmed.

HOLLAND V. BERGAN.

(*Supreme Court of Alabama*. May 6, 1890.)

ACTION ON NOTE—HARMLESS ERROR.

In an action on a note dated in another state, and containing a waiver of exemptions, defendant contended that the waiver referred only to the laws of such state. *Held*, that the exclusion of evidence offered by defendant to show that the note was executed and delivered at the place of its date, and that he was then living in the state where suit was brought, if error, was harmless.

Appeal from circuit court, Lee county; J. R. DOWDELL, Judge.

This was a suit brought by the appellee against the appellant, and was founded on a promissory note which was made by the defendant in Columbus, Ga., and made payable to the plaintiff. The point excepted to, and the point raised, are sufficiently set out in the opinion. There was judgment for the plaintiff, and the defendant appealed, assigning the ruling on the evidence as error.

J. J. Abernombie, for appellant.

SOMERVILLE, J. The language of the note sued on, so far as it relates to the waiver of exemptions, reads as follows: "I hereby, for myself and family, expressly waive all homestead rights and exemptions which by the laws, state and federal, are allowed to me and my family in any of said described property, and all other property, real or personal, which I now own, or may hereafter own or acquire, until this debt is fully paid." The instrument also contains an additional clause waiving exemption of wages from garnishment. The court entered judgment declaring the waiver operative against all personal property of the defendant. Code 1886, § 2570; *Terrell v. Hurst*, 76 Ala. 538; *Wagnon v. Keenan*, 77 Ala. 519.

It is contended by appellant that, as the note was executed in the state of Georgia, the waiver of exemptions must be construed to have reference only to the laws of that state, and not to the laws of Alabama. If we felt authorized to decide this point, we are inclined to the view that the waiver would be good against any claim of exemption to personality in any state of the Union where the debtor might reside, and be sued. But the record does not necessarily raise this precise question. The only error assigned is a single one, based on the exclusion of certain evidence offered by the defendant, by which he proposed to prove that the note was signed and delivered in Columbus, Ga., and that the defendant then, and on

the day of the trial, lived in Lee county, Ala. The exclusion of this evidence was of no possible injury to the defendant. The note, being dated in Columbus, Ga., was presumptively signed and delivered there, without any extrinsic proof of this fact; and the fact of the defendant's residence in Alabama tended, rather than otherwise, to corroborate the view of the trial court that the waiver of exemptions referred to the laws of Alabama,—the forum of his residence,—where he was liable to be sued, and where the claim of exemption would probably arise and be litigated. The ruling of the court on this point, therefore, if error, was error without injury to the appellant.

Affirmed.

MCCALL V. MASH *et al.*

(*Supreme Court of Alabama*. May 6, 1890.)

MORTGAGES—SALE UNDER POWER—DISAFFIRMANCE.

A sale of land under a power contained in a mortgage, at which the mortgagee himself becomes the purchaser, is not void as to the mortgagor, but only voidable; and, until the latter disaffirms the sale, he has no interest in the land which he can convey.

Appeal from chancery court, Butler county; JOHN A. FOSTER, Judge.

The bill in this case was filed by the appellant against the appellees, and sought to have a sale under a power contained in a mortgage vacated and set aside, and the appellant be let to redeem. The facts as averred in the bill, and shown in the record, are sufficiently set forth in the opinion. Upon final hearing upon the pleadings and proof, the chancellor sustained the demurrers to the bill, and, granting the motion of respondents, dismissed the bill for want of equity. This decree is now appealed from, and the same is assigned as error.

Richardson & Steiner, for appellant. Ed. Crenshaw, Gamble & Powell, and Stalling & Wilkinson, for appellees.

CLOPTON, J. While the equity of redemption constitutes the beneficial estate of the mortgagor in the land subject to the incumbrance, and, being regarded a valuable right and property, may be conveyed in the same manner as the land itself, clothing the grantee with the right to discharge the incumbrance, so that the estate may be rendered valuable and beneficial, in order to be the proper subject of conveyance, it must be a subsisting estate and interest, and the right of redemption must be exercised while the mortgage is redeemable, before a foreclosure by decree of the court, or by sale under power contained therein. A seeming, but not real, exception to this general rule is where the mortgagee purchases at his own sale without the consent of the mortgagor. In such case the mortgagor, or persons claiming under him in privity of title, may disaffirm the sale and redeem; the election to do so being seasonably expressed. *Thomas v. Jones*, 84 Ala. 302, 4 South. Rep. 270; *Downs v. Hopkins*, 65 Ala. 508.

Under a power of sale contained in a mortgage executed by S. P. McCall in May, 1886, to Nathan Mash, the mortgagee sold

the lands conveyed thereby, and became the purchaser at the sale. After the sale, and without taking any steps to disaffirm it, the mortgagor sold and conveyed the lands to appellant, who thereupon filed the bill to vacate the sale, and to be let in to redeem, and for an account of the rents and profits. In the absence of fraud, a foreclosure by a sale under power conferred by the mortgage as effectually cuts off the equity of redemption as a decree of strict foreclosure in a court of equity would do. *Childress v. Monette*, 54 Ala. 317. If a mortgagee purchases at his own sale, it is binding on him; and his only right or remedy is to apply in equity, if the mortgagor does not come in to avoid it, to clear his title of doubt and uncertainty by a confirmation of the sale, or a resale under a decree of the court, as may appear equitable. The mortgagee acquires the beneficial interest of the mortgagor, subject to be defeated by his election to avoid the sale, expressed in a proper proceeding, and in due time. As to the mortgagor, the sale is not absolutely void, but merely voidable, and is valid for all the purposes intended until the mortgagor, or some one claiming under him, whose existing rights are injuriously affected thereby, does some act legally sufficient to render it void. So long as there is no disaffirmance, the equity of redemption is as effectually cut off as if a stranger were the purchaser. If no proceedings are taken by the mortgagor, or any one claiming under him, to become reinvested with his equity of redemption, and to restore it to its original *status*, within a reasonable time, no further act is required to give validity to the sale. It has full force and effect from the time when made, and establishes all the rights incident to a valid foreclosure. The equity of redemption being cut off some proceeding to which the mortgagee is a party is essential to restore it to the state and condition in which it was prior to the sale. Until the disaffirmance, the mortgagor has no subsisting estate which he can convey. There remains in him only a naked right or privilege to disaffirm, and become reinvested with his beneficial interest, for the purpose of redemption.

At law the sale, if it has been regular and without fraud, is valid; the mortgagee being regarded as clothed with the legal estate. The sale can be disaffirmed only in a court of equity. That which remains in the mortgagor, therefore, lies in action,—a mere right to sue. A right which exists only in action is incapable of assignment and conveyance so as to authorize the assignee to sue in his own name. The complainant took no estate in the lands by the conveyance of the mortgagor, and did not acquire a right to disaffirm the sale in order to redeem. *Bernstein v. Humes*, 60 Ala. 582; *Crocker v. Bellangee*, 6 Wis. 645.

Affirmed.

MILLER v. SWANN *et al.*

(Supreme Court of Alabama. May 2, 1880.)

GRANTS IN AID OF RAILROADS.

Lands granted by act of congress to the state of Alabama, to aid in the construction of

certain railroads, and afterwards conveyed by the state to defendant railroad company, were mortgaged back to the state by an instrument containing a provision, authorized to be inserted by Act Ala. 1869-70, pp. 89-92, that defendant should have the privilege of "selling said lands, or any part thereof, in accordance with the acts of congress granting the same." *Held*, that one who derived title to a portion of such lands from a subsequent sale by defendant, made in direct violation of said acts of congress, took subject to the lien of the mortgage.

Appeal from chancery court, Jefferson county; THOMAS COBBES, Judge.

The bill in this case was filed by the appellant, D. B. Miller, against the appellees, and sought to divest the legal title to a tract of land out of the appellees, and to enjoin an action of ejectment, which had been instituted to recover possession of said land. The facts in the case on this appeal are the same as they were on a former appeal, and as found in the report of the case in 82 Ala. 530, 1 South. Rep. 65; and reference is made to these reports. On the reversal of the decree by the court, and the remandment of the cause, the complainant amended his bill by alleging that the Alabama & Chattanooga Railroad Company had completed its road to a certain point in Jefferson county, Ala., and was running trains thereon; that a contract for the sale of said land was made between one Bagley and the said Alabama & Chattanooga Railroad Company in accordance with the act of congress granting the said lands; and that the said contract of sale has been ratified and confirmed by the said railroad company, the state of Alabama, and the appellees as trustees, and that no action has been taken by the United States government either through its legislative body or judiciary, to have a declaration of forfeiture made. And the complainant further avers by amendment, that the said Bagley, before his death, had made payments to the said Alabama & Chattanooga Railroad Company on his notes for the purchase money of the said land, and that, if there is anything remaining, the complainant is able and willing to pay whatever may be ascertained to be due. The other facts not mentioned here are sufficiently set forth in the opinion of this court. Upon the final hearing upon the pleadings and proof, the chancellor held that there was nothing in the amended bill and the additional testimony that takes the case out from under the influence of the former decision of this court, as found in 82 Ala. 530, 1 South. Rep. 65, and thereupon decreed that the complainant was not entitled to the relief prayed for, granted the motion of defendants, and dismissed the bill for want of equity. This decree is now appealed from, and the same is here assigned as error.

Watts & Son, for appellant. *Sam F. Rice and John Phelan*, for appellees.

SOMEVILLE, J. This case has once before been decided by this court, at a former term. The facts of the case remain essentially unchanged. The chancellor now decides that there is nothing in the amended bill, or in the additional testimony, which takes the case out of the operation

of the former decision, as it appears reported under the title of *Swann v. Miller*, 82 Ala. 530, 1 South. Rep. 65. The decree might well be affirmed upon the authority of that case. The printed argument filed in the case by the able counsel of the appellant, and his oral argument at the bar, are but reproductions of the one filed on his application for a rehearing on the former appeal. This argument was then considered by us, and we saw nothing in it which, in our judgment, required us to modify or recant the opinion then announced. In view of the importance of the questions raised, and the magnitude of the interests involved, however, we have held the cause up for further examination, in the light of one or more recent decisions of the supreme court of the United States which are asserted to bear on the subject in dispute.

The contest of title is between *Swann* and *Billups*, on the one hand, who derive their interest in the land from the state, and *Miller*, on the other, who claims through one *Bagley* under the Alabama & Chattanooga Railroad Company. The common source of title is admitted to be the state; the lands in controversy being a portion of those granted to the state of Alabama by the act of congress approved June 3, 1856, (11 U. S. St. at Large, pp. 17, 18,) to aid in the construction of certain railroads in this state. This grant was renewed and extended by another act of congress, approved April 10, 1869, (16 U. S. St. at Large, 45, 46.)

Much time and space may be saved by disposing of some points urged in the argument of appellant's counsel, as to which there can be no room for reasonable controversy.

So far as the question of forfeiture is concerned, it may be admitted that if the railroad company had the authority to sell the lands, and did so, prior to the legally authorized time, the condition violated would be a condition subsequent, and no one could take advantage of the violation of a condition subsequent except the United States government. The rule is unquestionable that ordinarily no one but the grantor, or his heirs or successors, can set up a failure to perform a condition subsequent.

The question of forfeiture does not, however, enter the case, as we view it. If there had been a forfeiture for violation of a condition subsequent, and the government had claimed the benefit of it, the title of *Swann* and *Billups* as trustees, as well as that of the state, under which they claimed, would also be divested. The plaintiffs in ejectment would have no title; and this fact would of itself defeat their action, unless the defendants were estopped to deny the fact by reason of claiming through the Alabama & Chattanooga Railroad Company, which corporation held under the state by grant, and solemnly admitted its title by so holding, and executing a mortgage back to the state on these lands to secure certain bonds loaned by the state, to expedite the construction of the road. Acts 1869-70, pp. 89-92. The basis of the defense to the bill, which seeks to enjoin the ejectment suit, is that the

title of the plaintiffs in ejectment is good, and therefore there necessarily could have been no forfeiture. The only issue is whether such title has been divested by a lawful and authorized sale by the railroad company under the power conferred by the state, and under the acts of congress in question.

It has often been held, in the numerous cases of this class which have come before this court for consideration, as follows: (1) That the title to these lands was vested by congress in the state, as trustee, for the purposes mentioned. (2) That the state had the right to transfer the lands to the railroad company, subject to the restrictions imposed by the acts of congress, which made the grant, and that the transfer was subject to these restrictions on the grantee's power of disposition. (3) That the legal title to the lands was to remain in the state until the road was completed, which event occurred on May 17, 1871; the state never having conveyed the legal title up to this time, unless to *Swann* and *Billups* as trustees for the creditors. (4) The state had no authority to sanction any sale of these lands except such as might be made in substantial compliance with the terms imposed by congress, and that it has made no attempt to do so. These propositions are fully supported by the decisions of this court, and by those of the United States supreme court. *Swann v. Lindsey*, 70 Ala. 507; *Swann v. Larmore*, *Id.* 555; *Doe v. Larmore*, 116 U. S. 198, 6 Sup. Ct. Rep. 365; *Standifer v. Swann*, 78 Ala. 88; *Ware v. Swann*, 79 Ala. 331; *Swann v. Miller*, 82 Ala. 530, 1 South. Rep. 65; *Swann v. Gaston*, 87 Ala. 569; *Doe v. Same*, 6 South. Rep. 386.

The interest in the lands claimed by the railroad company was derived from the state through the joint resolution of the general assembly, approved January 30, 1858, granting them to certain railroads, under which corporations the Alabama & Chattanooga road claims by privity of title. Acts 1857-58, p. 430; *Swann v. Lindsey*, 70 Ala. 507. The railroad company, on March 2, 1870, mortgaged these lands back to the state under the authority conferred by the act of the Alabama general assembly approved February 11, 1870. Acts 1869-70, pp. 89-92. The sales to *Bagley* were made after the execution of this mortgage, and *Miller* claims no better title than *Bagley* acquired. Unless the lien of the mortgage was released, it is manifest that the title acquired under it would be superior to that acquired from the mortgagor; or, in other words, that *Swann* and *Billups'* title would be superior to *Miller's'*. *Wilson v. Boyce*, 92 U. S. 320.

A mortgagor, ordinarily, has no power to sell the mortgaged property free of the incumbrance created by the mortgage. He may do so, however, if allowed by the contract of the parties; the rights of no creditors intervening. Or he may be permitted to do so by express legislative authority. Such authority is claimed in this case. The act of February 11, 1870, expressly permits a reservation to be made by the railroad company in the mortgage to be executed to the state, providing that "the said Alabama & Chattanooga Rail-

road Company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the act of congress granting the same." Acts 1869-70, pp. 89, 90, § 1. This reservation was incorporated in the mortgage; and its construction, as applied to the facts of the case, is the controlling question for us to decide. The power retained by the mortgagor was not an unlimited power to sell. It was a power to sell only in accordance with the terms and conditions of the act of congress making the grant, which, we have said in a former decision was "a law as well as a grant." If these terms and conditions were followed, then the lien of the mortgage was, by agreement, to be released. If they were not followed, as to the mode or time prescribed or otherwise, then the contract of the parties is that the lien of the mortgage was to remain unaffected. Compliance with the essential requirements of the act of congress became thus a condition precedent to the divestiture of title out of the state as mortgagee. This, we repeat, was the express contract between the parties. It is sufficiently shown in the former opinion in this case that the attempt to sell to Bagley was in direct violation of the terms of the law of congress, and therefore, necessarily, also in violation of the agreement of the parties to the mortgage, which was based on that law. 82 Ala. 530, 1 South. Rep. 65. The lien of the mortgage, for this reason, remained undischarged. This we understand to be the natural and just construction of the mortgage agreement, and of the act of the Alabama general assembly approved February, 1870, above cited. The case of *Railway Co. v. McGee*, 115 U. S. 469, 8 Sup. Ct. Rep. 123, is not, in our opinion, in conflict with the conclusion reached in this case. The question there discussed involved the construction of no mortgage, or other contract between the state and the railroad to which the grant was made, analogous to the one here construed, which governs the relative rights of the contracting parties.

The act of congress conferring title to these lands, moreover, was not a mere grant. As said on the former appeal in this case, "it was a law as well as a grant." 82 Ala. 540, 1 South. Rep. 65. Its policy was to prohibit either the state or its grantees from selling any of these lands except in the mode and at the time authorized. Its prohibition was against such sales. An express act of the general assembly attempting to legalize these sales would have been void for repugnancy to the letter and policy of the law. An agreement between the state and the railroad company having in view such a violation of the congressional statute would have been equally void. Can the actual doing of the illegal thing be less invalid than the agreement to do it, or than a law which is void because it purports to authorize it to be done? In *Pettit v. Pettit*, 32 Ala. 288, this court properly held that a lease of lands belonging to an Indian reservation under a treaty with the Chickasaw nation was illegal and void because in violation of the provisions and

policy of the treaty of 1832; and it was further held that it "was incapable of confirmation, because it falls within the influence of the general rule that a contract which is void either by a positive law, or upon principles of public policy, is deemed incapable of confirmation." We have once before so declared the law of this case, and we adhere to the conclusion reached. *Swann v. Miller*, 82 Ala. 530, 540, 1 South. Rep. 65; *Bish. Cont.* §§ 542, 614, 620, 846; 2 Pom. Eq. Jur. § 964.

There is another view of this question of ratification. No one could ratify the sale in question, except the state, so as to discharge the lien of its mortgage. This could be done only by legislative authority. *Van Dyke v. State*, 24 Ala. 81. The laws enacted on this subject protect only the titles of *bona fide* purchasers, and Bagley was not of this class. *Swann v. Miller*, 82 Ala. 530, 540, 1 South. Rep. 65. The receipt of the purchase money for the lands by the officers of the railroad company was no estoppel to preclude the rights of the state.

One suggestion more. It is argued that, inasmuch as the railroad was fully completed, the purposes of the act of congress have been carried out, and this confers a strong equity on the purchaser of the land, which was a part of the fund intended for this trust. It may be answered that the equity of the state is the stronger, in view of the fact that the road was constructed with her bonds advanced to the company, for the security of which the very mortgage in controversy was given.

The decree of the chancellor is accordingly affirmed.

WINTER v. MONTGOMERY GAS-LIGHT CO.

(*Supreme Court of Alabama.* May 7, 1890.)

CORPORATIONS—TRANSFER OF STOCK.

A *bona fide* purchaser of certificates of stock, upon which a power of attorney, authorizing their transfer to any person, is indorsed by the person in whose name the certificates were issued, and who was the last registered stockholder, takes them relieved of a trust existing back of the registry, though the transfer to such purchaser is not registered.

Appeal from city court of Montgomery; THOMAS M. ABRINGTON, Judge.

The bill in this case was filed by the appellee, the Montgomery Gas-Light Company, and prayed to have the defendants, appellants here, interplead as to the rightful ownership of five shares of stock in said company. The facts upon which the claim to the said stock was based are sufficiently set forth in the opinion. Upon the final hearing by the chancellor, on the pleadings and proof, he decreed that the complainant, Montgomery Gas-Light Company, should register the said stock to the respondent, A. T. London, as administrator of the estate of D. S. Schanck, deceased. It is from this decree that the present appeal is prosecuted, and the same is here assigned as error.

Geo. F. Moore and John Gindrat Winter, for appellants. *Tompkins, London & Troy and A. R. Wiley*, for appellee.

CLOPTON, J. The uncontroverted facts are: That on March 30, 1871, there stood

on the books of the Montgomery Gas-Light Company, a corporation, 30 shares of its capital stock in the name of "J. S. Winter, trustee for Mary E. Winter." On that day J. S. Winter, trustee, assigned these 30 shares to J. Gindrat Winter, which transfer was registered on the books of the company. On August 21, 1871, certificates for the five shares in controversy, being part of the 30 shares, were issued by the company to J. Gindrat Winter, who, on the 25th day of the same month, delivered them to J. S. Winter, indorsing on each a power of attorney, authorizing him to transfer, set over, and assign on the books of the company the shares to such person or persons, and for such consideration, as he may elect, with full power to appoint one or more persons with like powers and authority to make and effect the transfer of the shares. On August 26, 1871, J. S. Winter, by instrument in writing, assigned and transferred the certificates of shares, with all dividends, to D. S. Schanck to secure the payment of three notes, amounting in the aggregate to \$500, his individual debt, with irrevocable power of attorney to Schanck to surrender the stock and have the same issued to him in his own name. It appears from the pleadings and evidence that the stock was the statutory separate estate of Mrs. Winter. It is insisted that the transfer to J. Gindrat Winter is void, for the reason that under the statutes then in force no valid sale or conveyance of the separate estate of a married woman could be made other than by an instrument in writing, executed by her husband and herself jointly, attested by two witnesses, or acknowledged, as provided by law. It will be admitted that J. S. Winter, holding the stock as trustee for his wife, and as her statutory separate estate, had no right or authority to sell and transfer or to pledge it for his individual debt; also that, J. Gindrat Winter having notice of the trust, both of them are responsible to the *cestui que trust* for the unauthorized use and disposition of the stock. The insistence of counsel would be sustained if the question involved only the validity of the transfer to J. Gindrat Winter or his transferee with notice. But the question presented by the record reaches beyond this, and is, when a certificate of stock is accompanied by a power of attorney indorsed thereon, by the person in whose name it is issued, authorizing the attorney to transfer it to any person, and for such consideration as he may elect, will the title of a purchaser for value, without notice of any intervening equity, be protected? The general rule is that when the legal title and apparent unlimited power of disposition is vested in a person, the rights of a purchaser from him, for a valuable consideration, without notice of a secret trust upon which the property is held, are unaffected. The purchaser, in such case, acquires an equity equal in dignity to the outstanding equity of which he has no notice. This principle is applicable to the sale and transfer of certificates of stock. It has accordingly been held that a power of attorney on a certificate of stock, authorizing its transfer to any person, renders the stock transferable by

delivery, and if the holder of such certificate is shown to be a purchaser for value, without notice of an outstanding equity from the person to whom it was issued, or his transferee, his title as such owner cannot be impeached. This principle, so far as we have discovered, is uniformly sustained by the authorities. We cite a few: *Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Nutting v. Thomason*, 46 Ga. 34; *Brewster v. Sime*, 42 Cal. 139; *Weaver v. Barden*, 49 N. Y. 286; *Bank v. Wayman*, 5 Gill, 336. The rule is that as between two equities merely the prior equity will prevail; hence, in order to give the purchaser precedence, unless under exceptional circumstances, the legal estate must be annexed to his equity. It is contended that the purchaser of a certificate of stock obtains the legal title only by a registry of the transfer on the corporate books, and that the transfer to Schanck not having been registered, the equity of Mrs. Winter is superior. By an examination of the cases in which it has been expressed that a transfer on the books of the corporation is essential to pass the legal title, it will be seen that the expression was used in reference to the construction and purpose of the statute, making the stock of corporations transferable on the books, and to protection against creditors and subsequent purchasers. In *Bank v. Hartwell*, 84 Ala. 379, 4 South. Rep. 156, we said that to this end, and for this purpose, the transfer must be made in the mode prescribed by the statute; and while a transfer on the books is essential to pass the legal title, and operate as notice, a purchaser of the stock, though no registry is made on the books, may acquire such right thereto as a court of equity will enforce and compel its transfer on the books. And in *Campbell v. Iron Co.*, 83 Ala. 351, 3 South. Rep. 369, speaking of the transfer of a certificate of stock without registration on the books, it is said: "If in proper form, and otherwise unobjectionable, such a conveyance is good and valid between the parties, although it may be void as against *bona fide* creditors, or subsequent purchasers without notice, and although as against the corporation itself it may convey only an equitable title, conferring no right to vote, draw dividends, or other like incidents of ownership." *Bank v. Pinckard*, 87 Ala. 577, 6 South. Rep. 364. What title passes, as between the parties, is a different question. The registry on the books of the company of J. Gindrat Winter, as the owner, and the issue of new certificates in his name, vested the legal title in him, and clothed him with all the *indicia* of ownership and the apparent right of disposition. As between him and Schanck, his transfer passed to the latter the title he possessed, and armed the latter with power to compel a transfer on the corporate books, and his representative demanded, October 5, 1886, the transfer to be registered. Whether, in such case, the title of Schanck will be upheld against intervening equities arose and was expressly decided in *Dodds v. Hills*, 2 Hem. & M. 424, in which case Smith, at the time he took the transfer, had no notice that Hills held the stock in trust, but received notice before he sent it for registration. It is said:

"Although it is true that, as between him and the company, Smith did not become the owner until after registration, nothing but his own act was necessary to make him complete master of the shares. His position was like that of a person to whom an estate is conveyed, to become legally vested on the performance of some condition, such as the making of a demand, or the like; and in such a case notice of a trust would not prevent the subsequent performance or effect of this condition." And in *Cook, Stocks*, § 325, the author, after alluding to the rule in England, remarks: "In this country a different rule prevails, and it is accepted and assumed as elementary that a *bona fide* purchaser for value of stock belonging to a trust-estate, and sold in breach of trust, is nevertheless protected in his purchase, although he has not registered the transfer on the corporate books." The case of *Land Co. v. Dennis*, 85 Ala. 585, 5 South. Rep. 317, does not militate against this view. In that case, on the principle that a certificate of stock, indorsed in blank by the person to whom it was issued, is not a negotiable instrument, which may be regarded as well settled, it was held that, such certificate having been lost or stolen from the owner without fault on his part, his right to it is superior to that of any other person who may acquire it by purchase for value from any other holder. It will be observed that the finder or thief had no apparent right or claim; no color of title. The blank in the power of attorney was not filled in. The transferor was not possessed of the legal title, or any *indicia* of ownership, or the apparent power of disposition. Schanck derived title to himself directly from the last-registered stockholder. The cases are not parallel. By J. S. Winter's transfer to J. Gindrat Winter, causing it to be registered, and by the issue of new certificates in his name by the company, the transferor to Schanck was vested with the legal title regular on its face, without any indications to awaken suspicion. He acquired the title which his transferor had, but no better, except that it was discharged from the trust,—a legal title sufficient to his protection against prior latent equities. In *Mills v. Townsend*, 109 Mass. 115, it is said that while a transfer of shares by an assignment of the certificates can be effective only between the parties to the assignment, it has been held, in accordance with the usages of trade, that the indorsement of the certificates invests the assignee with the legal title to the interest so assigned as against all persons except the corporation. It was ruled that a *bona fide* purchaser, through mesne conveyances, starting from a trustee who sells the stock in breach of trust, is protected. While certificates of stock are not negotiable instruments, when indorsed in blank, they are nevertheless intended to pass from hand to hand by delivery. The purchaser looks to the genuineness of the certificates, and, the *indicia* of ownership appearing on their face, he is without means to ascertain the rights of his vendor. If the purchaser were required to look beyond the last registry on the books of

the corporation to ascertain whether there are any equities, or whether the stock was held in trust, facility in disposing of them would be greatly obstructed, if not destroyed. Hence a purchaser for value from the party who is the last-registered stockholder, and to whom new certificates have been issued without notice, is not affected by the rights of holders back of the registry. *Cook, Stocks*, §§ 369, 443. There is no pretense that Schanck had any notice of Mrs. Winter's equity, and in the instrument assigning the certificates to him J. G. Winter covenants and agrees that he is the lawful owner and holder of the stock, and has just right and authority to sell and dispose of the same. The company is estopped to deny Schanck's right and title, and to his equity a legal title was annexed sufficient to give him precedence over the equity of Mrs. Winter, of which he had no notice, and which was back of the registry to J. Gindrat Winter. *Mandlebaum v. Mining Co.*, 4 Mich. 465. This conclusion renders unnecessary the consideration of the question arising on the statute of limitations. Affirmed.

OLMSTEAD v. STATE.

(Supreme Court of Alabama. May 1, 1890.)

INTOXICATING LIQUORS—ILLEGAL SALE—INDICTMENT.

Code Ala. § 4087, provides that on indictment for the illegal sale of intoxicating liquors it is sufficient to charge that defendants sold without license, and contrary to law, and on the trial any act in violation of the law may be proved; and that such form shall be sufficient for the violation of any special or local laws. *Held*, that on such indictment, though the solicitor may elect to prosecute defendant under the general statute, he may, on proper evidence, be convicted under the special statute applicable to the place.

Appeal from city court of Anniston, B. T. CASSADY, Judge.

The appellant, Percy Olmstead, was indicted by the grand jury of the city court of Anniston for selling spirituous, vinous, or malt liquors without a license, and contrary to law, and was tried and convicted therefor. On the trial of the case, as shown by the bill of exceptions, the defendant moved to compel the solicitor to elect under what statute he was prosecuting the defendant. Thereupon the solicitor stated that the defendant was prosecuted under section 4036 of the Code of 1886, the general law prohibiting "retailing or selling vinous or spirituous liquors without a license." The state introduced a witness whose testimony tended to prove that he had bought a pint of lager-beer from the defendant in the city of Anniston, Calhoun county, Ala., but a short time before the finding of the indictment; that he paid the defendant for the said beer, and drank the same in the defendant's presence, and on the defendant's premises. The defendant thereupon moved to exclude the testimony of the state's witness, on the ground that section 4036 of Code of 1886 "was not in force in precinct 15, Calhoun county, where said offense was alleged to have been committed." In support of this motion the defendant introduced in evidence and read

the act of the general assembly of Alabama, approved January 23, 1872, entitled "An act to prohibit the sale of spirituous liquors in the town of Oxford, and within five miles thereof;" and the defendant also introduced evidence tending to show that all of the city of Anniston was within five miles of the town of Oxford. The state thereupon introduced and read in evidence the act of the general assembly of Alabama, approved March 19, 1875, entitled "An act to authorize probate judges in the counties of Jackson, Clarke, Shelby, * * * Calhoun, Sanford, Jefferson, * * * Blount, and Morgan to order elections in certain cases to prevent the sale or giving or other disposition of vinous or spirituous liquors within certain limits in such counties." The court overruled the defendant's motion to exclude the evidence offered by the state, and the defendant thereupon excepted. The defendant oftentimes renewed his motion to exclude the state's evidence on the same ground as above stated, and in support of each motion he offered and read in evidence several local and special acts having reference to Calhoun county or to the city of Anniston, and at the same time introduced the proceedings had under each of these acts, which sought to establish prohibition in the county of Calhoun or in the city of Anniston. The court overruled each motion, and defendant duly excepted. The principal acts, and proceedings thereunder, above referred to, are seen from the reports and opinions of the two preceding cases. Upon the introduction of all the evidence, the court charged the jury, at the request of the state's solicitor, in writing: "If the jury believe the evidence beyond all reasonable doubt, they must find the defendant guilty as charged in the indictment." The defendant excepted to this charge, and also reserved an exception to the court's refusing to give the general charge in his favor.

Caldwell & Johnston and Kelly & Smith, for appellant. *W. L. Marton*, Atty. Gen., for the State.

CLOPTON, J. Whether the general criminal statute against retailing without a license, or a special and local law prohibiting the sale of spirituous, vinous, or malt liquors, was in force in the locality where the offense was committed, is immaterial. In either event, defendant sold malt liquors without a license, and contrary to law. Section 4037 of the Code declares that in an indictment for such offense "it is sufficient to charge that the defendant sold spirituous, vinous, or malt liquors without a license, and contrary to law, and on the trial any act of retailing in violation of the law may be proved; and for any violation of any special and local laws regulating or prohibiting the sale of spirituous, vinous, or malt liquors within the place specified such form shall be held good and sufficient." Under this section the indictment, which is in the general form allowed by the Code, is sufficient in either case. *Ulmer v. State*, 61 Ala. 208; *Sills v. State*, 76 Ala. 92. The city court did not err in refusing to exclude the testimony of the witness. Affirmed.

OLMSTEAD V. CROOK, Judges.

(Supreme Court of Alabama. May 1, 1890.)

INTOXICATING LIQUORS—LOCAL OPTION—CONSTRUCTION OF LAWS—REPEAL.

1. Act Ala. Dec. 7, 1886, provided for the holding of an election in the county of Calhoun for the purpose of determining whether the sale of intoxicating liquors therein should be prohibited. In case a majority of the votes cast at such election was in favor of prohibition, it was made the duty of the probate judge to give notice of that fact by publication for 30 days. Sections 5 and 6 further provided that after the completion of such notice the selling or giving away of intoxicating liquors should be a misdemeanor punishable by fine and imprisonment. Section 9 provided that, if an election was held under the provisions of the act in 1887, the provisions of the fifth and sixth sections "shall not take effect until after the 80th day of April, 1887," which was more than 60 days after the adjournment of the legislature. *Held*, that this section took the provisions of the act on the subject of the election out of the operation of Code Ala. 1876, § 4448, providing that no penal act shall go into effect until 80 days after the adjournment of the legislature, and that part of the act was in effect from the date of its approval.

2. The mere fact that the order appointing such election recites that it was made by the court, while the statute in terms confers authority to make it on the judge, is not sufficient to avoid the election where the order is signed by the judge, and professes to be made under the statutory authority.

3. A publication of the result of the election in all the newspapers of the county being a condition precedent to the taking effect of the prohibition of the act, notice which is not published in all of them is ineffectual; but, where the proper notice is published as soon as the invalidity of the former has been determined, the prohibition will take effect thereafter, as provided by the terms of the act.

4. Act Ala. Feb. 23, 1889, § 7, subd. 10, which authorizes the mayor and city council of the city of A., situated in said Calhoun county, "to license, tax, and regulate * * * retailers," does not of itself repeal the former general act prohibiting the sale of intoxicating liquors in the county, but such repeal can only be effected by the passage of an ordinance under the later act, licensing retailers of intoxicating liquors.

Appeal from circuit court, Calhoun county; *LEROY F. BOX*, Judge.

Gordon McDonald and Kelly & Smith, for appellant. *Brothers, Willett & Willett and Caldwell & Johnston*, for appellee.

CLOPTON, J. The appeal is taken from an order of the judge of the seventh judicial circuit, denying appellant's application for a *mandamus* to compel the probate judge of Calhoun county to issue to him a license to retail spirituous liquors within the corporate limits of the city of Anniston. The application to the probate judge substantially conformed to the general laws regulating the manner in which such licenses may be obtained, and was refused by the judge of probate on the sole ground that the sale of such liquors in Calhoun county is prohibited by law. The appeal brings for consideration the validity and effect of the proceedings instituted and completed to put into operation "An act to prohibit the sale, giving away, or otherwise disposing of spirituous, vinous, or malt liquors, or intoxicating bitters, or patent medicines having alcohol as a base, in Calhoun county," approved December 7, 1886. Acts 1886-87, p. 671. The first four

sections provide that, whenever 50 or more resident householders and freeholders of the county file in the office of the judge of probate a petition in writing, praying for an election, to ascertain the wishes of the people as to the prohibition of the sale of intoxicating liquors in the county, it shall be the duty of the judge to order an election, and fix the time of holding the same not more than 60 nor less than 30 days from the time of filing the petition; and thereupon the sheriff is required to give, by publication, notice of the time of holding, and the purpose for which such election is held, for 40 days. Provision is made for the appointment of inspectors and returning officers, and for holding an election in the several precincts of the county, at the time appointed, which shall be governed in all respects, with an immaterial exception, by the general election laws which may be in force at the time. All persons who are at the time qualified voters shall be entitled to vote at such election; and if, upon the return and count of the votes cast, it is found that a majority of all the votes cast is for prohibition, "then it shall be the duty of the probate judge to record the result in his office, and to give notice for thirty days, by publication in all the newspapers published in the county, that a majority of the qualified voters who voted at said election voted for prohibition." Section 4. The fifth section declares "that, after the expiration of said thirty-days notice, it shall be unlawful for any person, firm, or corporation to sell, give away, or otherwise dispose of any spirituous, vinous, or malt liquors, or intoxicating bitters, or any brand of bitters or medicines with sufficient alcohol or spirituous liquors therein to make a man drunk, within the county of Calhoun;" and the sixth section makes a violation of the provisions of the fifth section a misdemeanor, punishable by fine and imprisonment, or hard labor for the county. The constitutionality of the act is not assailed, but it is contended that it has not been legally put into operation. On December 28, 1886, a petition in writing, signed by more than 50 resident householders and freeholders, substantially conforming to the requirements of the act, was filed in the probate court, and on the same day the judge of probate, reciting therein the filing of the petition, the title of the act, and the provisions of the first section, made the following order: "It is therefore ordered by the court that the prayer of said petitioners be, and is hereby, granted, and that an election be held in each and every precinct of said county of Calhoun, in pursuance of said act, on the 17th day of February, A. D. 1887. It is further ordered that the sheriff of said county shall give notice of said election, as required by said act." An election was held on the day appointed, and a majority of the votes cast were for prohibition. The petition was filed, the order for an election made, and the election held before the adjournment of the general assembly.

It is contended that these proceedings, having been taken before the act could go into effect under the general statute, are nullities. The contention is rested on the

penal character of the act, and on section 4448 of the Code of 1876, then in force, which provided: "No penal act shall go into effect until thirty days after the adjournment of the legislature at which such act may be passed." The legislature adjourned February 28, 1887. The constitutions of many states contain a clause prohibiting any public act or law of general nature from taking effect until the expiration of a specified time after its passage, or from the end of the session at which the same was passed, or after its promulgation, unless the general assembly shall otherwise direct in the prescribed manner. The courts, in construing such constitutional prohibition, have held that such direction must be in a clear, distinct, and unequivocal provision, and cannot be aided by intendment or implication, and must direct that the act, as a whole and entirety, shall take effect at a different time than provided in the constitution. *Wheeler v. Chubbuck*, 16 Ill. 861; *Rice v. Ruddiman*, 10 Mich. 125. These and other decisions cited by counsel, construing these constitutional provisions, and determining the time when certain acts under their operation took effect, shed but a dim light on the question involved, and afford but slight assistance in its solution. The legislature could not disregard or repeal them. The rule in this state is a mere legislative enactment,—a statutory rule,—which the general assembly is competent to abrogate entirely, or to specially exempt a new enactment from its operation, by prescribing a different time at which it shall take effect, expressly or by clear implication,—a partial repeal or suspension. *Henback v. State*, 58 Ala. 523. A comparison of the ninth section of the act with the other provisions will solve all doubt as to the time when it was intended the different provisions should go into operation. That section provides "that this act shall be so construed that, if an election is held in pursuance of its provisions during the year 1887, the prohibition provided for by the fifth and sixth sections of this act shall not take effect till after the 30th day of April, 1887, and that the probate judge of Calhoun county shall not issue to any person or persons a liquor license from the 1st day of January, 1887, for a longer period than the 30th day of April, 1887; and, if the result of the election be in favor of 'against prohibition,' then the said judge of probate can issue liquor license from the 30th day of April, 1887, under the law as it now is." Manifestly, it was contemplated that an election might be held in 1887, the result ascertained, and the requisite notice thereof given, so as to put the penal sections of the act into operation prior to the 30th day of April, 1887; hence the express provision that the fifth and sixth sections shall not in any event take effect until after that date. Unless the provisions providing the mode for ascertaining the wishes of the people had force and effect from the passage of the act, notice of the time of holding the election, the ascertainment of the result, and notice thereof for 30 days in all the newspapers could not have been effected so as to put the act into operation by the 30th day of April.

Whether the act should take effect at all was dependent upon the wishes of the people ascertained by an election; and, though the result might be in favor of prohibition, the fifth and sixth sections, which constitute the penal parts, could not have taken effect until after the 30th day of April, 1887, more than 60 days after the adjournment of the legislature. By the terms of the act the sections providing and regulating the proceedings for ascertaining the will of the people and the punitive sections took effect at different times. By prescribing a different time for the penal sections to take effect, the act is exempted from the operation of section 4448, and the first four sections under the general rule took effect from the date of its approval by the executive.

It is also insisted that the election is a nullity for the further reason that the order therefor purports on its face to have been made by the court, whereas the authority to make the order and fix the time for holding the election is conferred upon the judge, not the court. The mere recital in the order, "It is therefore considered by the court," is not conclusive. Conceding that the authority is conferred on the judge, then he may exercise it in term-time or in vacation. In this instance it was at a special term. It recites all the jurisdictional facts substantially in the language of the statute, including the duty of the judge to order an election and fix the time for holding the same. It is signed by the judge, and professes to have been made under the statutory authority, to which it must be referred. That it was in fact made by the judge sufficiently appears to sustain its validity against a collateral attack.

The election was held February 17, 1887. Soon after the result was found to be in favor of prohibition, the judge of probate gave notice thereof in all the newspapers in the county for 30 days, excepting two. In *Toole v. State*, 88 Ala. 153, 7 South. Rep. 42, (decided during present term,) the sufficiency of the notice to put the act into operation was called in question for the first time. It was ruled that the provision requiring notice of the result of the election by publication in all the newspapers published in the county for 30 days was mandatory and imperative, and a condition precedent to the operative force and effect of the punitive clauses of the act. Within a few days after this decision was announced, the judge of probate, on December 27, 1889, again published notice of the result of the election in all the newspapers then published in the county, and continued the publication for 30 days.

We are not clearly informed on what ground it is contended that the last notice is unauthorized and ineffectual. Though non-user may be continued so long that the course and character of the intervening legislation may be such as to render its provisions nugatory, or they may become purposeless, it does not of itself effect the repeal of a statute. The act made it the duty of the probate judge, ministerial in its nature, to give the required notice of the result of the election upon its ascertainment; the purpose being that the peo-

ple might have full time to become acquainted with the terms of the statute which they are required to obey. Neither the failure nor refusal nor abortive attempt of the judge to give notice can operate to defeat the will of the legislature and the people. The act does not limit the time in which the notice must be given. The only effect of a failure to give notice immediately, or in a reasonable time after ascertainment of the result of the election, is to suspend the force and operation of the penal provisions. The judge undertook to discharge this duty, but failed; and when it was decided that the first notice was insufficient, he at once gave the requisite notice. The duty imposed on him by the statute remained imperative, the performance of which could have been compelled. The act took effect after the expiration of the 30 days' notice last given.

"An act to amend an act entitled 'An act to incorporate the town of Anniston, Calhoun county, Alabama,' approved February 4, 1879, and the various acts amendatory thereof," was passed by the general assembly, and approved February 23, 1889. Acts 1888-89, p. 601. By this act, which seems to be a complete revision of all previous acts, and to cover the entire subject of the powers of the municipal government, the city of Anniston was incorporated. By the seventh section power is conferred upon the mayor and city council "to license, tax, and regulate auctioneers, grocers, merchants, retailers, * * * and all other privileges." The legislative intent, that the term "retailers" should be used in the legal and ordinary signification which by long-continued use it has acquired in our statutory vocabulary, is too clear to admit of doubt. Unless so, the term, as employed, is without distinctive meaning; for merchants, grocers, confectioners, and other persons engaged in mercantile pursuits, who sell at retail, are specially named. *Harris v. Intendant*, etc., of Livingston, 28 Ala. 577. It is contended that this act, being a later enactment, operates to repeal the act of December 7, 1886, prohibiting the sale of intoxicating liquors in the county. Undoubtedly, when the provisions of a special act in respect to a particular municipality, passed subsequent to an act of a general nature, are so inconsistent with the provisions of the latter as that they cannot operate together within the same territorial limits, the effect is to take the municipality out of the operation of the general law. But the conferring of power on the municipal authorities to tax, license, and regulate the retailing of spirituous liquors does not, *ipso facto*, repeal the general law prohibiting the sale of such liquors in the county. When an ordinance is passed for that purpose, its effect is to suspend the operation of the general law within the corporate limits, which suspension continues so long, and only so long, as the ordinance is continued in force,—a temporary repeal. Until such ordinance is passed, the general law prevails. In such case, it is the by-law or ordinance passed by legislative authority which operates to repeal *pro tanto* the general law. *St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. Rep. 571.

Counsel for appellant cite the case of *State v. De Bar*, 58 Mo. 395. In 1870 the charter of the city of St. Louis was amended so as to confer power to regulate or suppress bawdy-houses. In consequence of a decision of the supreme court, the charter was again amended in 1874 by substituting the words "to suppress, but not to license, bawdy or disorderly houses." After this last amendment, the defendant was indicted under the general law of the state for keeping a bawdy-house in the city of St. Louis. The court ruled that the amendment of 1874, which repealed the amendment of 1870, did not revive the general criminal statute in the city, on the ground that the general law contained a provision that the repeal of a law should not by implication revive a former law. In speaking of the case of *State v. De Bar*, Judge Dillon says, in his work on Municipal Corporations, § 88, note 2: "This last decision seems to the author to be erroneous, on the ground that the act of 1870 did not *ipso facto* repeal the general law in the city, but such repeal, or suspension rather, was only effected when the city passed the ordinance. If so, a repeal of the ordinance by the council, without the act of 1874, would have left the general law of the state in force within the city, and its repeal by the act of 1874 would have precisely the same effect." These remarks, which appear to us sound and conservative, are *apropos* to the question here involved. It not appearing that any ordinance licensing, taxing, and regulating retailers had been passed by the mayor and city council of Anniston, the act of December 7, 1886, prohibiting the sale of intoxicating liquors in Calhoun county, remains in force in that city.

The application for the license, not having been made until after the act took effect, was properly refused by the judge of probate. Affirmed.

Ex parte MAYOR, ETC., OF ANNISTON.

(Supreme Court of Alabama. May 1, 1890.)

INTOXICATING LIQUORS—ILLEGAL SALE—ORDINANCES.

Act Ala. Feb. 23, 1889, incorporating the city of Anniston, in section 7 confers on the mayor and council power to provide for the punishment of any offense punishable under the laws of the state. The same section confers special power "to license, tax, and regulate * * * retailers," etc. *Held*, that as to retailers of intoxicating liquors the general provision is limited by the special one, and, under the authority to license and regulate, the council cannot pass an ordinance prohibiting the sale of liquor.

Certiorari.

An affidavit was made out before the recorder of the city of Anniston, charging Mrs. Untreiner with a violation of an ordinance passed by the mayor and city council of Anniston on June 14, 1889, "to punish the retailing or selling of vinous, spirituous, or malt liquors within the corporate limits of the city of Anniston." Upon a warrant issued upon said affidavit Mrs. Untreiner was arrested and placed in prison. She thereupon made her application to the judge of probate of Calhoun

county, praying for a writ of *habeas corpus*. Upon the hearing of the application the probate judge adjudged the said ordinance null and void, and thereupon ordered the discharge of the petitioner. The mayor and council of Anniston now petition this court to grant a writ of *certiorari*, or other appropriate writ, to the judge of probate.

Agée & Micon, for petitioners. *Gordon McDonald*, for respondent.

CLOPTON, J. The ordinance, for the violation of which Mrs. Untreiner was arrested under a warrant issued by the recorder of the city of Anniston was passed June 14, 1889, and reads as follows: "Be it ordained by the mayor and city council of Anniston that any person who, without license as a retailer, sells spirituous, vinous, or malt liquors within the police jurisdiction of the city of Anniston in any quantity less than a quart, or in any quantity, if the same, or any portion thereof, is drunk on or about the premises, must, on conviction, be fined one hundred dollars, or be imprisoned not less than one nor more than six months." It is contended that the purpose of the ordinance is to punish the offense of retailing without a license, and power to pass it is claimed under a provision of the seventh section of the act of February 23, 1889, incorporating the city of Anniston, which confers on the mayor and city council general power "to provide for the punishment, by fine or imprisonment, the commission of any offense punishable by the laws of the state of Alabama." Another provision of the same section confers special power "to license, tax, and regulate auctioneers, grocers, merchants, retailers, * * * and all other privileges." Acts 1888-89, p. 601. The general power is limited and qualified by the special provision specifying the particular purposes for which an ordinance may be passed. In 1 Dill. Mun. Corp. § 816, the rule is stated as follows: "When there are both special and general provisions, the power to pass by-laws under the special or express grant can only be exercised in the cases and to the extent as respects those matters allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject-matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the constitution and general laws of the state." On this principle the authority to pass ordinances in respect to the subject-matters of retailing is derivable only from the special provision conferring power to license, tax, and regulate retailers. The municipal authorities had not at the time of the passage of the ordinance, nor have they since, provided any legal mode by which a retailer can obtain a license. And in *Olmstead v. Crook*, ante, 776, (present term,) we decided that the act of December 7, 1886, prohibiting the sale of spirituous, vinous, or malt liquors in Calhoun county took effect before the alleged violation of

the ordinance and arrest of Mrs. Untrein-er, and is in force in the city of Anniston, no ordinance in respect to such matter having been passed by the municipal authorities under the special power granted by the incorporating act. No mode having been provided by which she could have obtained a license to retail, the ordinance is prohibitory in its nature. Power conferred on a municipal corporation to grant licenses to retailers, and to regulate them, does not confer power to prohibit the sale of spirituous liquors. *Miller v. Jones*, 80 Ala. 89. In reference to the charter of the city of Anniston it is said in *Ex parte Reynolds*, 87 Ala. 188, 6 South. Rep. 335: "It confers the power to 'license, tax and regulate grocers, merchants, retailers,' etc., but it confers no power to prohibit the sale of liquors." The ordinance, being prohibitory, is invalid for want of power in the municipal authorities. Mrs. Untrein-er was illegally restrained of her liberty, and was properly discharged on *habeas corpus* by the judge of probate. *Ex parte Burnett*, 30 Ala. 461. *Certiorari* denied.

Succession of MEYER.

(*Supreme Court of Louisiana. May 19, 1890.*)

SPECIFIC PERFORMANCE—SUIT BY TUTOR—PARTIES.

1. It is the duty of the under-tutor to act for the minor, whenever the interest of the minor is in opposition to the interest of the tutor.

2. If, in a proceeding to compel a purchaser to comply with the adjudication to him of succession property, at the instance of the administrator, who is the father, but unqualified tutor of a minor, that minor is a necessary party, the minor is legally represented therein by the under-tutor.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

H. P. Dart, for appellant. Jas. D. Coleman, for appellee. H. H. Bryan and T. R. Rosier, for minors.

BERMUDEZ, C. J. This is an appeal from a judgment dismissing a rule taken to compel compliance with an adjudication of succession property judicially ordered to be sold, at the instance of the administrator, to pay debts. The adjudicatee filed a return to this rule as follows: "Now comes Mrs. Julia Donahue, made defendant in rule herein taken to compel compliance with adjudication of property herein, and for exception says that the records and proceedings herein show that one Julia Aicklen Meyer, a minor, is interested as owner of an undivided half of the property in question, and charged by the father as his debtor, and is therefore a necessary party to these proceedings which vitally affect her interest; that said minor has no legal representative whom this respondent can make party hereto; that, in the interest both of said minor and this respondent, it becomes necessary that these proceedings, which involve the alienation of the entire property of said minor, should be conducted contradictorily with said minor legally and properly repre-

sented; that there is therefore a want of proper and necessary parties for a proper determination of the issues herein. Wherefore exceptor prays that plaintiff be required to cause a representative to said minor to be named and qualified, or that this honorable court will make such appointment after due proceedings, and that plaintiff be required to make said minor party to this rule, or that respondent and exceptor be afforded an opportunity to make said minor a party hereto." The court having ordered the under-tutor to be made party, this was done, and the case came on for trial. After hearing argument on the exception, it dismissed the rule, reserving to the father the right to qualify as tutor of his minor child, under orders of the court. Before the entering of the said judgment, counsel for plaintiff in rule offered to introduce oral testimony to maintain the truth of the allegations of the petition, on which the rule on the adjudicatee is based, considering that all defenses against the said rule should be urged prior to the judgment dismissing the rule. The defendant in rule objected to any testimony showing liability of the community to the father and husband and master of the community, upon the ground that the said liability was in reality the debt of the child and minor, and that such liability should not be shown, except contradictorily with the minor, though a proper representative now exists, as is shown by the record in this proceeding. The court having sustained the objection, a bill was reserved to the ruling. As the record does not contain the proof required to support the rule, it is evident that this court cannot pass upon the merits of the rule to determine whether the defendant in it should or not be made to comply with his adjudication. The only question with which it is now concerned is that raised by the exception, which is to the effect that, as the minor is interested in the issue before the court, and is not represented at the trial of the same, the court cannot adjudicate upon the same. It appears that the administrator is the surviving husband of the deceased, and the father of the minor in question, and that he had not qualified as tutor. From his omission thus to qualify, the defendant in rule infers that the minor is not a party to the proceeding. This is an error, for, had the father qualified as tutor of the minor child, he would have had no right to represent her in the proceeding, owing to the alleged conflict of interest between them. In such a case, the law makes it the duty of the under-tutor to act for the minor. Rev. Civil Code, art. 275. As the question does not arise, we are relieved from the necessity of deciding whether, the father not having qualified, an under-tutor can be legally appointed. It is therefore apparent that, if it be true that the minor is a necessary party to the proceeding, she was therein sufficiently represented by the under-tutor. The trial of the rule ought to have been proceeded with. It is therefore ordered that the judgment appealed from be reversed, and that the rule herein taken on the adjudicatee be reinstated, and re-

manded to the lower court for further proceedings according to law.

Rehearing refused.

HART V. DREYFOUS.

(*Supreme Court of Louisiana.* May 19, 1890.
42 La. Ann.)

CONTRACTS—ACTION ON—EVIDENCE—EXPERTS.

Where several experts are employed to estimate the cost of a building, and they differ materially in their estimates of the value of material furnished and labor performed, the trade in most cases may be found in the lowest estimate made by one of them.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

Rice & Armstrong, for appellant. H. P. Dart and B. Fitch, for appellee.

MCENERY, J. In 1881 the plaintiff employed the defendant to tear down an old building and erect a new one on the premises Nos. 472, 474 Camp street, in the city of New Orleans. There were several written contracts entered into between the parties. The house was constructed by the defendant. There was a disagreement between the parties as to the value of the work, its character and price. The plaintiff, alleging he had overpaid the defendant, brought suit against him for the amount which he alleges he paid the defendant in excess of the value of the work, including cost of material, etc. The plaintiff abandoned the written contracts between him and the defendant. The nature of the suit may be determined by the prayer of his petition, which is as follows: "That after due proceedings had, the determination of the fair and just price and compensation due to said defendant Dreyfous for the materials, labor, services, and commissions as set forth in this petition, that petitioner have judgment for the sum paid by him to said Dreyfous in excess of the fair and just price of said materials, services, and commissions." The defendant answered denying plaintiff's demand, and also prayed for a valuation of work and materials furnished, with 10 per cent. for builder's commission. He reconvened and prayed for a judgment of \$3,800 against the plaintiff for a balance due him. There was judgment for the defendant for the sum of \$3,853.24. The plaintiff appealed. There may be experts employed to examine the building in order to estimate the cost of tearing down the old building and erecting a new one. Among the number were three who were employed several weeks in making a detailed and careful estimate of the value of the workmanship done by the defendant, the cost of material furnished by him, and the costs of removing the old building. These architects and builders were selected by both parties to this litigation, when it was postponed to arbitrate their differences. John K. Collins was selected by the plaintiff. His estimate of the entire cost of the tearing down the old building, and the work, material, and labor employed in the new building, with the commission added, was \$13,672.17. We deem

it just to accept this estimate, being the lowest. In the opinion in Villalobos v. Mooney, 2 La. 333, the supreme court used language very appropriate to the present controversy, as follows: "The witnesses who were examined in this cause, most of them architects and undertakers by profession, differ materially in their estimates of the value of materials furnished and labor performed by the defendant. It is the interest of such men to value services which they are in the habit of performing at the highest possible rate, and there is sometimes an *esprit de corps* prevailing among them formidable to the interests of proprietors when any collision occurs between the latter and one of their body. Taking these circumstances into view, the truth will, in most cases, be most probably found in the lowest estimate made by any one of them. When called on to value services rendered by men of their art, considered, all of characters equally unexceptionable and uninfluenced by circumstances having a peculiar tendency to operate more on one than another of them." The principle here announced was affirmed. Succession of Duclos, 11 La. Ann. 406, and Collins v. Graves, 13 La. Ann. 96. The amount stipulated in a contract thus may be correctly used as a means to ascertain the just value of the work performed, but ought not to be considered in exclusion of all other testimony. Villalobos v. Mooney, 2 La. 333. But in the instant case the departure from the original plans and estimates, which is recognized by plaintiff and defendant, was to such an extent but little information can be obtained from the written contracts as to the value of the materials furnished and the work performed by the defendant. We will therefore follow the course pointed out by both parties, and estimate upon a *quantum meruit*, and adopt the estimate of Collins, which was for the sum of \$13,672.17. To this must be added the sum of \$275 for mason-work, which was admitted by plaintiff, and not estimated, and \$820 difference in favor of defendant on the pavement. We are of the opinion that the judgment of the lower court does substantial justice between the parties. Judgment affirmed.

STATE V. NATAL.

(*Supreme Court of Louisiana.* May 5, 1890.
42 La. Ann.)

CITY ORDINANCES—CONSTRUCTION—SQUARES AND BLOCKS.

The term "square," as employed in city ordinance No. 4796 A. S., meant what is generally understood by that word; and the term "block," as employed in city ordinance No. 4145 C. S., means the same thing. These terms are convertible and are used synonymously.

(*Syllabus by the Court.*)

Appeal from first recorder's court of New Orleans; W. B. MURPHY, Judge.

H. S. Belden, for appellant. T. McHyman, for appellee.

WATKINS, J. The defendant's appeal is taken from sundry judgments pronounced against him in the recorder's court, for sundry violations of city ordinance No. 4-

145, which is known as the "Private Market Ordinance." It provides that no private market shall be established "within a walking distance of six blocks of any public market," and the only question for us to determine is whether defendant's private market, which is established at the corner of Liberty and Erato streets, is within the prohibited distance of Dryades market. This and similar questions have been recently examined and decided by us. In *State v. Barthe*, 41 La. Ann. 46, 6 South. Rep. 531, we had under consideration, and interpreted, city ordinance No. 4798 A. S., founded on Act No. 100 of 1878, which prohibits private markets "within a radius of six squares of any public market;" and we held its true meaning and import to be, "a distance of six squares, over which customers would be able to walk from one market to another." In reaching that conclusion, reference was had to the provisions of Act 116 of 1888, on which the city ordinance now under review is founded, and the identical language of which is employed. It was referred to, not as controlling that case, but as illustrating the theory entertained by the court, and to exhibit any possible difference there might be between it and the one announced in *State v. Berard*, 40 La. Ann. 172, 3 South. Rep. 463. The *Barthe* Case was closely followed by that of *State v. Schmidt*, 41 La. Ann. 27, 6 South. Rep. 530, in which we treated of ordinance 7498 A. S. again, and held that the various charges against the defendant must fail because his market was not within "six walking squares of St. Mary's market, counted the nearest way." The *Berard* Case states: "It is further apparent that when the legislature used the language stated it meant what was generally understood by the word 'square.'" 40 La. Ann. 174, 3 South. Rep. 464. Thus we have it effectually proved, by three opinions, that the word "square" in the former ordinance and law meant what was generally understood by that term; and that the word "block" in the latter ordinance and law meant just the same thing. In other words, "square" and "block" are, strictly speaking, convertible terms. To the transcript is appended a sketch made of the *locus in quo* by the draughtsman in the city surveyor's office, plainly showing that defendant's private market is within the prohibited distance, counting the squares or blocks, or by making the estimate by feet. Other testimony fully confirms the correctness of the sketch. Judgments affirmed.

STATE V. BELLOW.

(Supreme Court of Louisiana. May 19, 1890.
43 La. Ann.)

CRIMINAL LAW—CONDUCT OF JURY—DRINKING WINE—SEPARATION.

1. The use of wine in moderate quantity at a meal will not *per se* vitiate the finding of the jury, when not attended by circumstances of misconduct, and it is not shown that any member was under the influence of an intoxicating liquor.

2. Separation of a juror from his fellows, a moment, to wash his hands, in one of the jury-rooms, the door of which was open in the court-

room, in view of the officer in charge, is not cause for a new trial.

(Syllabus by the Court.)

Louis P. Paquet and *Paul C. Lassalle*, for appellant. *The Attorney General*, for the State.

BREAUX, J. Appeal from the criminal district court, parish of Orleans. The accused was charged with having committed a rape. He was found guilty of assault with intent to commit rape, and sentenced to two years' imprisonment at hard labor. From the verdict and sentence, he appeals. The appeal rests on the overruling of a motion for a new trial. The grounds are the misconduct of the jury, in that, without an order of court, they were permitted to have wine brought to them in such a quantity as to have occasioned misbehavior; also, that they separated after the judge's charge, and before returning into court with their verdict. To sustain the grounds of the motion, a number of witnesses were examined at the instance of defendant; none on the part of the state.

The record discloses that one of the jurors wrote an order for two gallons of wine, which he handed to the deputy-sheriff in charge of the jury. The wine was provided. At dinner it was served by another deputy, in about equal quantity, to each juror except one, who did not drink. Two of the deputies also drank of the wine. The whole quantity used was about one gallon. The remainder was taken away after dinner by one of the deputies. The jury did not have any wine before the meal. An attempt was made to prove that one of the jurors was not sober in the room of deliberation. This failed. Three witnesses for the defendant testify, in positive terms, that he was not under the influence of liquor. Two others of the witnesses testify that this juror was ill, or had an appearance of illness; and one of the two adds that he did not have an entirely sober look about him. These witnesses at the time were not near this juror. They did not speak to him. The three other witnesses were the deputy-sheriffs in charge of the jury. They unhesitatingly assert that he was sober.

The trial judge, in overruling the motion for a new trial, said: "At this time it is, and that he is informed that it has been for years past, the habit to allow juries to have claret for their dinner." The wine should not have been sent to the jury without a special order from the presiding judge. As it was not the cause of any misconduct on the part of the jury, nor is it shown that it has had the least influence, the verdict will not be annulled. It would be decidedly preferable if, while jurors are intrusted with the consideration of questions involving the life and liberty of a fellow-being, nothing but necessary food were provided. At any rate, if intoxicating liquors are deemed necessary, they should be procured only on the judge's order. We will avail ourselves of the opportunity to state that we adhere strictly to the cases of *State v. Broussard*, 41 La. Ann. 81, 5 South. Rep. 647; *State v. Demarest*, 41 La. Ann. 413, 6 South. Rep. 654,

—on this subject, and that, in the cases at all similar, our conclusions would be the same as that arrived at in those cases.

The next ground of the motion for a new trial is not supported by the facts. It is alleged that one of the jurors was permitted to separate from the jury. The testimony shows that one of the number, at the time while the jury was being conducted by deputies from one apartment to another, was a little slow in following. The deputy who was following in the rear, urged him on. This cannot give rise to serious complaint. At another time, while the members of the jury were standing on the gallery projecting in the court-room, one of the jurors stepped into one of the jury-rooms, and washed his hands. The three deputies in charge of the jury testify that he was followed by one of their number, and in a few minutes returned. There is conflicting testimony as to the immediate presence of the officer in the room. It is unimportant; for, if the juror was absent at all, it was only for a moment, within this view of an officer. *State v. Johnson*, 30 La. Ann. 921; *State v. Kennedy*, 8 Rob. (La.) 590.

The motion for a new trial was legally denied. Judgment affirmed.

WATERBURY et al. v. ATLAS CORDAGE CO.
(*Supreme Court of Louisiana. May 19, 1890.*)

TAXATION—EXEMPTION—MANUFACTURES—SUBSIDIARY.

1. The capital, machinery, and other property employed in the manufacture of cordage, rope, and twine is exempt from taxation.

2. Temporary interruptions in the operation of the factory employed in manufacturing articles enumerated in article 207 of the constitution do not subject the property and machinery employed therein to taxation.

3. Where the factory is leased, and the object of the lease is to prevent the manufacture of the articles required to be manufactured to exempt the property from taxation, the object of the lease is in direct opposition to the declared purpose of article 207, and the property and machinery become subject to taxation.

4. State taxes, privileges, and mortgages for the years 1883, 1884, are prescribed by five years, under Act 96 of 1882.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

W. B. Sommerville, for appellant. Wynne Rogers, for tax collector. Henry C. Miller, for appellee.

McENERY, J. The plaintiffs were mortgage creditors of the defendant company. They obtained a writ of seizure and sale against the property of the company for their debt. The property was sold, and adjudicated to plaintiffs. The price bid was paid into the hands of the sheriff. After the sale of the factory, L. Waterbury & Co. took a rule against the city of New Orleans and the state to cancel and erase the inscriptions of the tax mortgages and privileges of the city and state. The grounds for the rule were that the property of the company, the lots and buildings and machinery, were exempt from taxation under article 207 of the constitution of the state; that the taxes, tax priv-

ileges, and mortgages were prescribed under Act 96 of 1882. The taxes alleged to be due the city of New Orleans have been paid, except those for 1888. The only questions, therefore, presented, are whether or not the property of the Atlas Cordage Company was exempt from taxation in pursuance of article 207 of the constitution; and, if not, have the taxes been prescribed as against the state?

The defendant company was established in the city of New Orleans in 1882. Article 3 of the act of incorporation of the company says: "The purpose for which this corporation is established, and the nature of the business to be carried on by it, are declared and specified to be the conversion or manufacture of any fibrous or other substance into cordage, twine, rope, and other goods, wares, and commodities, and the sale of such products, either as raw material or in a manufactured state, and, in the execution of such objects and purposes, to erect and operate or conduct manufactories therefor." Property was acquired, and boilers, engines, and machinery placed therein, and the manufacture of rope was begun and continued, with interruptions. A large amount of capital was invested; and the factory, when running, employed over 100 hands.

The meaning of the article of the constitution is very plain. It was intended to cover all textile material, and the work of converting it into manufactured articles, such as rope, fish-lines, and other articles of like nature, either twisted or woven, or worked into another shape or condition, so that it becomes a manufactured article from the exempt material. The property and machinery, therefore, employed in the manufacture of rope and twine in a factory which works more than five hands, is exempt from taxation. *City v. Arthurs*, 36 La. Ann. 98.

During the years 1883, 1884, the company ceased operations, and was not engaged in the manufacture of any taxable material into articles for which it was created. In 1885, 1886, 1887, the factory was in operation. In 1888 it was not manufacturing for prudential reasons, on account of the high price of hemp, and the difficulty of procuring the raw material in Mexico.

The object of the constitutional exemption was to encourage the introduction into the state of machinery for the purpose of manufacturing the articles enumerated in article 207. As long as the factory exists, and the property and machinery are dedicated to the purpose required by article 207, the reasons for the exemption exist. It was not the intention of the framers of the constitution that the state should supervise the management of the factory, and inquire into the reason for any interruption of its business, in order to subject its property to taxation. This course would destroy the object and purposes of the constitutional exemption, as it is not likely that capitalists would be willing to subject themselves to such inquiries. The property and machinery, up to the time of the dissolution of the corporation, except for the years 1883, 1884, are exempt from taxation, as the interruptions

in the operation of the factory were for satisfactory reasons.

In 1883, 1884, the company leased its factory to Waterbury & Co. The object of the lease was to close the property, so that no rope could be manufactured. It was evidently done for the purpose of stopping competition, and reducing the supply of rope. The closing of the factory for these years, for this purpose, was in opposition to the declared object of article 207. The property and machinery were not employed for the purpose for which the exemption was granted. It is liable for taxation during these years, as it then abandoned the business of manufacturing rope. The prescription of five years is pleaded against the taxes for these years. No interruption of prescription is shown. The plea must therefore prevail. Section 34, act 96 of 1882.

Judgment affirmed.

HERNSHEIM V. ATLAS STEAM CORDAGE CO.

(*Supreme Court of Louisiana.* May 19, 1890.
42 La. Ann.)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

Bayne, Denegre & Bayne, for appellant.
Wayne Rogers and W. B. Sommerville, for tax collector. *Omer Villers*, for appellee.

McENERY, J. The issues involved in this case are identical with those in *Waterbury v. Cordage Co.*, ante, 783.

For the reasons assigned in that case, it is ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and it is now ordered and decreed that the rule taken by the state tax collector be discharged, and the rule taken against the city be made absolute. Appellees to pay costs of both courts.

STATE V. EUZEBE.

(*Supreme Court of Louisiana.* May 19, 1890.
42 La. Ann.)

MURDER—EVIDENCE—DECLARATIONS—SENTENCE—BILLS OF EXCEPTIONS.

1. Whenever there is a difference, in the recitals of a bill of exceptions, between the statement made by the trial judge and the statement of counsel, the former is accepted as correct.

2. Declarations made by the party shot, immediately after the shooting, are a part of the facts of the case, and of the events, inseparable from the crime, and are admissible in evidence as part of the *res gestæ*. They are instinctive words, and not words of narration.

3. The term of the district court did not conflict with a term of the court of appeals, when an accused was convicted on a day previous to the time fixed to hold a term of that court, and sentence was passed upon him six days afterwards, at a time when it was not shown that the court of appeals was still in session.

(*Syllabus by the Court.*)

Edward Seymour, for appellant. *The Attorney General*, for the State.

BREAUX, J. Appeal from the twenty-seventh judicial district court, parish of St. Martin. The defendant appeals from a sentence of two years' imprisonment at hard labor. He is charged with having shot one John Davis with intent him to kill and murder.

During the trial, he objected to the testi-

mony of three witnesses on the ground that it was hearsay. The court overruled the objection, admitted the testimony, and held that it was part of the *res gestæ*. To the court's ruling a bill of exception was reserved. In the recital of the testimony in this bill, there is disagreement between the court and counsel about the facts. The recitals of counsel are different from those of the judge. The latter, under the decisions of this court, will be accepted as correct. *State v. Young*, 40 La. Ann. 483, 4 South. Rep. 481. The trial judge, in his recitals in the bill of exceptions, states: "The facts related occurred on the spot where the offense was committed. At the same time the parties [witness and accused] were standing from each other a distance of about twenty feet."

The defendant presented a motion for a new trial, and another in arrest of judgment. In the former he alleges that the term of court at which he was tried necessarily lapsed, owing to a term of the third circuit court of appeals, fixed by law for the fourth Tuesday of April. The accused was found guilty prior to that time. He was sentenced after that date. In this motion he also sets forth that he was not allowed sufficient time to prepare his defense. In the motion in arrest of judgment, his counsel alleges that the special jury was summoned for the week beginning April 21, 1890; that the case was set for trial previous to that time. It was, in the first place, set to be tried on that day. When the case was called, it was reassigned for trial *instantly*. The minutes disclosed that the defendant expressed himself as ready to go to trial.

1. The doctrine of *res gestæ* is not reduced to certain rules as to the interval of time between the moment the crime was committed and the declaration. If it is, in certain cases, it has no bearing on the case at bar, for the trial judge states in the bill reserved that the declaration was made "at the same time." The facts as presented leave no possible ground for discussion. The objection was overruled, and the testimony admitted as part of the *res gestæ*.

2. The defendant pleads that the court's term came to an abrupt end on the 21st of April, as the term of the court of appeals is fixed under the law for the 22d of that month in St. Martin parish. On the 21st, when the case was called, the defendant expressed himself as ready for trial. He took the chances of an acquittal, but, instead, he was on that day found guilty. He was sentenced on the 23d of April. It may be that the court adjourned from the 21st to the 28th to avoid conflict with the term of the court of appeals, or it may be that the latter did not hold a session that term. No evidence has been introduced, and no proof has been made. The records do not show when the term of the district court commenced, nor when it adjourned. We have no ground to conclude that its terms were fixed to conflict with the terms of the court of appeals. We take notice of the fact that the court of appeals holds a term commencing at the time mentioned, but we will not presume that it was in session the day on

which the accused was sentenced. There is no reason why a district court cannot adjourn to a day subsequent to the term of an intervening court of appeals. The objection has already been decided. *State v. Boyd*, 38 La. Ann. 375.

3. The complaint urged with reference to the haste shown in the trial has no merit, for it is disclosed by the minutes that the "state and the accused signified that they were ready to go to trial." The minutes of court are evidence of the highest rank, and are conclusive of the facts mentioned. No objection was presented before conviction.

Judgment affirmed.

SAGORY v. BOUNY.

(*Supreme Court of Louisiana*. May 19, 1890.
42 La. Ann.)

PURCHASE OF LAND BY AGENT—EVIDENCE—INVENTORY OF SUCCESSION.

1. In a suit brought against the widow and heirs of a deceased person for the recovery of real property standing in his name at the time of his death, on the theory that deceased was agent for plaintiff, and improperly took title in his name, *held*, parol evidence is inadmissible to prove fraud in taking title in his name, that deceased was plaintiff's agent to buy real estate, or for the purpose of establishing title in the plaintiff.

2. In case the widow of the deceased signs a declaration, contained in an official inventory of the husband's succession, declaring that certain real estate is property of her husband's principal, she will be concluded thereby, unless she alleges and prove that the declaration was signed in error.

(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; RIGHTOR, Judge.

Oner Villere, for appellant. *Hy. L. Lazarus*, for appellee.

WATKINS, J. Plaintiff, as universal heir of Charles Sagory, deceased, claims ownership of four improved lots in the city of New Orleans, standing in the name of Emile Bouny, deceased husband of the defendant. The defendant is sued in her own right as widow in community, and as the tutrix of the minor children, issue of her marriage with the deceased.

The plaintiff charges that, during his life-time, Emile Bouny was his duly-authorized agent, and as such held a large amount of money of his in hand for investment on mortgages, and that, among others, he negotiated two loans, of \$1,000 and \$2,000, to Peter and John Jones, on the property in suit; that, the said mortgagors failing to pay their notes at maturity, Bouny foreclosed, and at the sale took title in his own name, and never accounted for the notes or the proceeds; that the title stood in his name at his death; and that his widow and heirs are in possession without title.

The position assumed by Mrs. Bouny in the litigation is that she does not know whether the property belonged to her husband or to Charles Sagory, but that it stands in the name of her husband, and, unless Mrs. Sagory can establish, by positive, written evidence, that it belonged to her husband, it should remain undisturbed in her possession.

v.780.no.27—50

From a judgment in favor of plaintiff the defendant has appealed.

There is not much dispute about facts. Bouny was agent, as stated; and, at a judicial sale of the property in foreclosure of the Jones mortgage, he took title in his name. He never accounted to his principal for the notes, or the proceeds of the sale of the mortgaged property. Prior to his death, he made sale to one Jules V. Charpentier of his effects, not including the property in suit; and the latter took charge of his business, and continued the agency for Sagory. The accounts rendered by Bouny to Sagory do not disclose a purchase in the former's name; but they disclose, as do the subsequent accounts of Charpentier, many evidences of that fact. Objection is made, however, by defendant's counsel, to the admissibility of any evidence which is eked out of Charpentier's accounts for the purpose of affecting the title to real property; and it is our opinion that the objection was well taken, and should have been sustained, and the evidence rejected, at least so far as the interest of the heirs of Emile Bouny is concerned.

So far as relates to this question, the facts are these: Bouny was Sagory's agent from 1880 to the time of his death, 28th December, 1885, about which time Charpentier took charge. After Bouny's death the plaintiff, for a valuable consideration, confirmed Charpentier's continuation of the business of her deceased husband. When he took charge, he commenced his account current where Bouny ceased, carrying to his debit the exact balance he was indebted to Sagory, and subsequently continued to render stated accounts of his business, very much as Bouny had done. All of the accounts of Bouny appear to be in the handwriting of Charpentier, who had been for many years his clerk, as well as his own. His first account was rendered to Sagory only six days subsequent to Bouny's death. These are but circumstances and incidents pointing to Sagory as the owner of the property. But the rights of Bouny's heirs were fixed and determined at the instant of his death, and no parol declarations of his assignee after his death could divest them of title.

This question was raised and decided in *Hackenburg v. Gartskamp*, 30 La. Ann. 898. In that case the claim was that Gartskamp was plaintiff's agent, and purchased the property for him, taking title in his own name. He brought suit against the widow and heirs of the deceased agent after his death, alleging this state of facts, claiming ownership of the property. The allegations of his petition are "that Gartskamp took title in his own name, without the knowledge or consent of petitioner, and concealed said fact from [him] for a long time, in fraud," etc. These averments plaintiff sought to prove by parol, but the testimony was, on objection, disallowed. The court says: "Plaintiff seeks to prove by parol the acknowledgments and extrajudicial confessions of Gartskamp in support of a demand 'of which testimonial proof would be inadmissible,' which is not permitted.

Rev. Civil Code, art. 2290. If plaintiff's pretensions were admissible, the last barrier of safety for titles of real estate would be gone; for it would be then, by false swearing, possible to defeat every title." In *Perrault v. Perrault*, 32 La. Ann. 635, the case of Hackenburg was recognized and applied; and the court approved the ruling of the district judge in disallowing parol evidence for the purpose of proving the fraud of an agent in taking title in his own name, to establish the agency to buy in the principal's name, and for the purpose of establishing title in the plaintiff. Those cases are strictly applicable to the instant case. It is not claimed that Bouny had written authority from Sagory to buy real estate for him. The contention is that he was general agent for him, with authority to negotiate loans of money; to accept securities, and mortgages therefor; to collect rents, disburse expenses, and collect interests; and of all his dealings and transactions to render an account to his principal. That, in the course of his business, as such, he had occasion to resort to judicial proceedings for the foreclosure of the Jones mortgage, and took title in his own name, attributing the price to the extinction of the mortgage notes. It is clear that Bouny either owes Sagory the net amount of the proceeds of sale, or holds title to Sagory's property in his name. Under the authority of the cases cited, it is manifest that, in a suit for the recovery of the property from the widow and heirs of Bouny, parol proof is inadmissible. Hence any declarations of Charpentier cannot affect the title, made, as they were, after Bouny's death. Of course, any admissions of Bouny, couched in a writing of any kind, or in the accounts he rendered to his principal during his life-time, must be given full effect as to his widow in community and his heirs. They are bound to take title *cum onere*,—subject to all its burdens and defects; the property being, presumably, an asset of the legal community.

Disregarding all of Charpentier's accounts, and all parol proof of transactions subsequent to Bouny's death, and there is no proof in the record sufficient to sustain the plaintiff's claim of title, in so far as the heirs of Bouny are concerned. But the case is different in respect to the one-half interest claimed by Mrs. Bouny. She knew that, for several years before her husband's death, he was Sagory's agent, and was acquainted with the business relations that existed between them. After his death, she knew that Charpentier had taken his place, and she assented in writing to his continuation of her husband's business, for a consideration. When an inventory was taken of her husband's property, Mrs. Bouny appeared before the notary, and joined in the act, and made this declaration, viz.: "Here the said L. E. Emile Bouny declared that, although the properties thirdly and fourthly described have been purchased in the name and by the late Emile Bouny, the truth is that said properties were really purchased,—the one thirdly described, for account of, and belongs to, Charles Sagory; and the one fourthly described for ac-

count of, and belongs to, Athalie Raspier,—and are here inventoried only as a memorandum." In her answer Mrs. Bouny avers that this declaration was made at the suggestion of Charpentier, in whom she had entire confidence, and without ascertaining what the inventory contained; that, had she known that her husband left no counter-letter relating to said property, or had she been advised that, under the law, title to real property cannot be proved by parol evidence, she would not have made it. The notary who prepared and executed the inventory says Mrs. Bouny came to his office to sign the inventory; that he read to her the part quoted above, and that he supposes she understood it; that she made no objection. It is in testimony that, some time afterwards, Mrs. Bouny went to see Mr. Sagory, during his illness, and, in substance, told him that she knew that the property belonged to him, and that he need not worry about it. This parol proof was admissible with respect to the question of error, but is insufficient to prove it.

On the whole, our conclusion is that plaintiff has made her claim good to the undivided one-half interest in the property claimed by Mrs. Bouny only, and to that extent judgment should be reduced, and affirmed.

It is therefore ordered and decreed that the judgment appealed from be so amended as to recognize and maintain plaintiff's title to the one undivided one-half interest in the property claimed by Mrs. Bouny, and no more, and that, as thus amended, same be affirmed, and that plaintiff and appellee be taxed with costs of appeal.

ON APPLICATION FOR REHEARING.

BREAUX, J. Verbal declarations of the tatrix, and her unauthorized admissions, with reference to title to immovable property, cannot affect the interests of her minor children as owners of one half, which was inherited by them under the condition of things existing at the time of the death of their father. The court sees no error in the reasons assigned for the decree rendered. Plaintiff prays in the application that her rights be reserved. Our decree is supplemented by reserving the right she may have, if any, to recover against the heirs of E. Bouny half the value of the notes described in her petition in this case. This right being reserved, rehearing is refused.

POLLICH *et al.* v. SELLERS *et al.*

(*Supreme Court of Louisiana.* May 12, 1890.
42 La. Ann.)

MASTER AND SERVANT — NEGLIGENCE OF MASTER
— CONTRIBUTORY NEGLIGENCE — ASSUMPTION OF RISK.

1. When the plaintiff proves that the defendant's negligence has caused the injury, the defendant must prove that the plaintiff, by his want of care, contributed to the cause of the injury, and that he, by the exercise of ordinary prudence, might have avoided the accident and the injury.

2. The employer, although not blameless, cannot be made to answer for all accidents without regard to the care the employee should have exercised. To recover, there must not be any willful contributory cause on the part of the injured.

3. An employe should not voluntarily expose himself to imminent and apparent danger. If he does, and suffers injury, the negligence of the defendant will not excuse his imprudence and the consequence of his rashness.

4. The employe, by remaining in the employer's service after the discovery of imminent and threatening danger incident to his work, is deemed to have assumed the risk.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

H. H. Hall, for appellants. Chas. S. Rice, for appellees.

BREAUX, J. The causes of the fatal accident, whereby three men lost their lives while at work in demolishing the Exposition buildings in this city, are fully recounted in two cases decided by this court. The first case, that of Faren v. Sellers, 39 La. Ann. 1011, 3 South. Rep. 363, is similar in some respects to the case at bar. John Faren, whose death gave cause for this suit, met his death two days before Casey and Pollich fell. In the case of Faren, the injury was occasioned by the fall of a purline, which slipped from its support, and precipitated him some 75 feet to the ground. The defect was not patent. It was therefore held that it was not an assumed risk incident to the service. In the case of Carey v. Sellers, 41 La. Ann. 500, 6 South. Rep. 813, the injury was received by the falling of a row of trusses under which he was working. The building had been stripped to the danger point; the purlines had been taken down; the skeleton of the structure remained. In this case, the accident was occasioned by the falling of the timbers that killed Casey at the same time that it occasioned the death of Pollich. The status and the extent of defendant's fault are established. Only the question of contributory negligence is to be settled at this time. Complete statements of the facts having been made in the decisions reported, it only remains necessary to state those not proven in those cases.

The deceased was working on the roof of the building, taking down the trusses, on the 13th of August, 1888. Lynch, his employer, who had contracted with the defendants to take down what remained standing of the main building and the government building, in the prosecution of his work had advanced a derrick to the trusses, and had commenced taking down from Magazine street towards St. Charles street. The derrick was made secure by wire guys. Those on the side of the building were placed under the trusses. They extended from near the top of the derrick to the ground, and were made secure below at the point under the trusses known to be unsecurely attached to the building. A row of trusses fell. One of them fell upon the guys which held the derrick in place. They had been so weakened by the slipping of the building that they fell of their weight, without the least touch. The span nearest to the derrick was attached and swung to it, and was about to be lowered to the ground. While the span or truss was so attached and swung to the derrick, one of the inside trusses suddenly fell, carrying down other trusses, one of which fell on the guys which held

the derrick in position, and carrying down with the derrick the span attached, and which was about to be lowered to the ground. At the time the derrick fell, Pollich was standing on the truss which was swung to it. The fall carried him down, and was the occasion of his death.

The dangerous condition of the building, and the danger incident to the work of demolishing it at that particular time, are settled questions. It only remains to be ascertained whether the fall of the trusses on the wire guys, and the consequent fall of the derrick, were accidents which the deceased by ordinary care could have foreseen, and which he might have avoided. In Carey's Case this court has decided that he (Carey) might, by the exercise of ordinary care, have avoided the consequence of defendant's negligence, and that he by his own act contributed to the cause of the injury. In the case at bar the danger was more imminent and apparent. Casey was below at work when the trusses fell upon him. Pollich at that time was aloft in a position which at once suggests imminent peril. There was fatality in the imprudence of trusting his weight on a derrick secured by wire guys, placed under insecure trusses, of an unsafe building, at an elevation of 75 feet from the ground. After the first fatal accident, which had resulted in the death of Faren, two of the men left the work. They refused to expose themselves longer to the threatening danger. It had been discerned; the men were warned; Pollich had been at work about three weeks; the large structure had been made quite unsafe by stripping it. It was the part of an ordinary prudent man to take heedful precaution at every step of the work. In continuing, he assumed a risk of which he was informed, or of which he would have been informed, had he given himself the concern required by ordinary prudence. He must have known of the defect and danger. It is held that the servant, by remaining in the master's employment after discovering the defect, or after knowledge, is deemed to have assumed the risks incident to the service, and to have waived any claim for damages in case of injury. Whit. Smith, Neg. (note) 397. The causal connection between the employer's negligence and the injury is broken at the time the danger becomes so plain that a person of ordinary care would not assume the risk of continuing to work at the place of danger. Judgment affirmed.

RIGGS et al. v. BELL et al.

(Supreme Court of Louisiana. May 19, 1890.
42 La. Ann.)

INJUNCTION—DISSOLUTION—DAMAGES.

Nothing but actual damages will be allowed because of the issuance of an injunction, subsequently dissolved, when it is apparent that the party obtaining it had plausible rights threatened with invasion, and acted in good faith, under advice of able and experienced counsel, and without malice or intent to harass, but solely in the vindication of the same.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

B. K. Miller, for appellants. *S. L. Gilmore* and *Jas. D. Hill*, for appellees.

BERMUDEZ, C. J. This is a suit in damages. The fundamental allegations are that Mrs. Bell, maliciously instigated by Mr. A. Hill, had issued against the plaintiffs an injunction which was subsequently dissolved, and that by reason thereof they have sustained injuries which, itemized, aggregated \$7,000. The answer of Mrs. Bell admits the institution of the suit in which the writ issued, but denies that the plaintiffs have sustained any damage, and charges that, in consequence of the acts of plaintiffs, she is entitled to indemnity, which she reserves the right hereafter to claim. Hill denies the charges against him, averring his absence abroad when the suit was brought, and pleads the prescription of one year. From a judgment condemning Mrs. Bell to pay \$325, and exonerating Hill, the plaintiffs appeal.

It appears that Mrs. Bell, who is the usufructuary of certain property which she occupies, in this city, brought suit, coupled with an injunction, to prevent Riggs & Bros., who are cistern makers, from using certain wooden or frame structures, and putting up an engine and boiler, on a lot belonging to them and adjoining hers. She alleged that the buildings had been constructed within the fire limits, contrary to municipal regulations and prohibitions, and that the putting up of the steam engine and boiler, though authorized by the city council, would be in violation of her right to the secure and peaceable possession and enjoyment of said property; that on said premises there are at all times large quantities of seasoned cypress and pine lumber, heaps of shavings, highly inflammable in their nature, and that the erection of a steam engine, etc., upon said premises, or in said frame building, and in the midst of said lumber and shavings, will place the property and the lives of herself, children, and servants in constant and imminent danger of fire; that the noise, smoke, and escaping steam therefrom will injure the property, and her family's health and comfort, and a permanent nuisance be thereby established. She prayed for a provisional injunction, asking that, after due proceedings, it be perpetuated. The injunction sought issued. It remained in force for some time, until, by the failure of Mrs. Bell to furnish an additional bond, it ceased to be operative. When the case was tried on its merits, there was judgment dissolving the injunction, which on appeal was affirmed. 38 La. Ann. 555.

An examination of the record satisfies us that Mrs. Bell acted in good faith under the advice of able and experienced counsel, in the vindication of what she plausibly conceived to be her rights, which were kindred to similar ones, which had been to some extent previously recognized, in a somewhat analogous case, which may have been construed as authorizing her complaint, and the relief judicially sought. *Blanc v. Murray*, 36 La. Ann. 162. But, the injunction having been dissolved, she remains under the obligation of repairing

the actual damages which it has undoubtedly occasioned. The suit does not belong to that category of cases in which a plaintiff whose injunction is dissolved may be either exonerated from all indemnification, or condemned to constructive or exemplary damages. The district judge has patiently heard all the testimony adduced, and, in an elaborate opinion, impressed with a strong desire to do justice, has assigned satisfactory reasons to allow \$325 only as damages.

As regards the liability sought to be affixed on Mr. Hill, we find that there is nothing to show that he advised, suggested, instigated, or fomented the injunction suit, and that the charge of malice against him is entirely gratuitous. The district judge came to the same conclusion.

The sum allowed covers attorney's fees, the cost of a temporary building, the rent of certain premises, and the hauling of machinery. The district judge has assigned sufficient reasons to reject the two items for \$3,520 and \$2,990 for loss of time, profit, business, etc., set up by the plaintiffs. It would serve no useful purpose, and be of no general interest, to justify further his conclusions in this opinion.

It is ordered and decreed that the judgment appealed from be affirmed, the appellants to pay costs of appeal.

Succession of GAINES.

(*Supreme Court of Louisiana*. May 19, 1890.
43 La. Ann.)

TUTORS—APPOINTMENT—NON-RESIDENTS—ADMINISTRATION.

1. A district court having probate jurisdiction has authority to appoint a non-resident mother tutrix of her minor son, domiciled out of the state, where she has not forfeited her right to the natural tutelage by marrying again, and where the minor has interest in the state to assert or defend.

2. This appointment confers upon her the care of the person and the administration of the property of the minor here, and makes her amenable to the court making the appointment in a proceeding by the minor for his full emancipation, to be relieved from all disability, etc.

3. The judgment emancipating such minor is valid, and clothes him with the right of being appointed, on a proper showing of capacity and solidity, administrator of a succession in which he is a beneficiary heir present.

4. The court, in contests for the administration of successions, is not bound unnecessarily to appoint two administrators to settle the estate, even where they have equal claims.

5. The exercise by the district judge of the discretion with which the law vests him will not be disturbed, unless manifestly wrong.

(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; KING, Judge.

E. H. McCaleb and *White & Saunders*, for appellant. *A. Goldthwaite*, *Semmes & Legendre*, *Bayne*, *Denegre & Bayne*, *Gus. A. Breaux*, *Charles Carroll*, and *T. B. Lee*, for appellee.

BERMUDEZ, C. J. This is a contest for the administration of this succession. It arises between two guardians, descending, the one from a daughter, the other from a son, of the deceased, who died unmarried. The application of Christmas is opposed

by Whitney, who claims a preference. The succession assets are represented as being quite large, consisting in a claim against the city of New Orleans. After hearing, the district judge has appointed Whitney, and Christmas has appealed. The contention is that Whitney cannot and must not be appointed, because he is a minor. The charge is that the decree of full emancipation by which he claims to have been relieved from all the disabilities which attach to minors is an absolute nullity, because the court which rendered it had no jurisdiction *ratione personarum*. Proof was offered to show that Mrs. Whitney and her son were non-residents of the state, but it was objected to on the ground of absence of any issue involving the validity of the judgment of emancipation, which could not be attacked collaterally. The court overruled the objection as going to the effect, and not to the admissibility. A bill was reserved, and is insisted upon. The district judge, however, attached no weight to the proof thus administered.

On its face the emancipation proceeding is regular. It is a suit which began by a partition, to which a formal answer consenting to the prayer was filed, resulting in a judgment for the applicant. There was a plaintiff and a defendant. The plaintiff was a minor approaching the age of majority, and the defendant was his mother, a widow of mature years. There is no charge, and nothing to prove, that the court was imposed upon. The objection is not that the court had no jurisdiction *ratione materię*, for it surely could render valid emancipation judgments, under the laws of this state, in proper cases; but it is that the court had no jurisdiction *ratione personarum* of the plaintiff and of the defendant in the case.

The fact that Mrs. Whitney was appointed by the civil district court for the parish of Orleans tutrix of her son, the opponent here, is not denied. The record shows that, together with James Y. Christmas, the father and tutor of the applicant, she was appointed with him to administer the succession of Mrs. Gaines, which had been opened before that court, and that she has with him acted in that capacity. It might be answered that this appointment cannot be attacked collaterally, even before the court which made the appointment, (Succession of Keller, 39 La. Ann. 582, 2 South. Rep. 553, and cases referred to, adding Succession of Gorrisson, 15 La. Ann. 28, and Succession of Hawkins, 35 La. Ann. 591.) but it is preferable that the question of the validity of the same be not thus shut out, and that it be inquired into; for, if it be true that the court could not make the appointment, the emancipation proceeding against one who had no capacity to stand in court necessarily would be an absolute nullity, and the judgment rendered would lapse and be of no avail.

In order to justify the appointment of a tutor or tutrix, it is not an indispensable legal prerequisite that the person appointed, when such person is the father or mother of the child, be domiciled in the state. The appointment, recognition, or

compensation of tutors must be made, as a rule, by the judge of the minor's domicile, if he has any in the state; but, if he has none in the state, it may be made by the judge of the parish where the principal estate of the minor is situated. Rev. Civil Code, art. 307. If the father and mother of the minor reside out of the state, and are not represented in it, and the minor be also absent, he may be provided with a tutor by the judge of the place where he has interests to assert or defend. Code Prac. art. 946. Such an appointment cannot, however, take place where the tutor, though a non-resident, is present in the state. Succession of Lewis, 10 La. Ann. 791. If the father claim the tutorship, the judge shall confer it on him. Code Prac. art. 949. If the father be dead, and the mother claim the tutorship, the judge shall confer it on her, if she has not entered into a second marriage. Id. art. 950. In the Matter of the Minors Dobb, the right of a grandfather, who was a non-resident, to be appointed legal tutor, the father and mother being both dead, was contested. His appointment, after being made, was rescinded; a resident maternal uncle, claiming its nullity and a preference, being substituted; but, after hearing, it was held that the grandfather, although a non-resident, should be appointed in preference to all others, and he was reinstated. In the case of Hoggatt v. Morancy, 10 La. Ann. 170, the mother, who was a resident of another state, was permitted to qualify and act as tutrix of her children in this state. In the more recent case of Succession of Foley, 34 La. Ann. 129, this court held that a non-resident mother could not be appointed tutrix, not because of her non-residence, but because she had married again, and the law did not authorize the appointment of a non-resident dative tutor, which she would have been, if appointed, notwithstanding the marriage. In Succession of Lewis, a non-resident testamentary tutor, appointed abroad, was recognized and allowed to act in this state 10 La. Ann. 789.

Considering that the minor had large interests in New Orleans, where the succession of Mrs. Gaines had been opened; that his unmarried mother was present petitioning for her confirmation as his tutrix by nature; that the law authorized her appointment, although she was a non-resident,—it follows that the attack on its validity cannot avail. As such tutrix, she was suable before the court which had appointed her, to answer the petition for emancipation. Rev. Civil Code, art. 385. The judgment of emancipation remaining unaffected, the applicant and the opponent stand on the same footing. The opponent, being considered as of full age, has a qualification for appointment. Succession of Lyne, 12 La. Ann. 155; Proctor v. Hebert, 36 La. Ann. 251.

The question next to be decided is whether the applicant or the opponent or both shall be appointed. Article 1043, Rev. Civil Code, provides that, if there be two or more beneficiary heirs of age, and present in the state, the judge shall select one or two, whom he shall consider the most solid, for the administration. It is the

settled jurisprudence of this court that the judge is not bound to appoint two administrators, even with equal claims, (Succession of Martin, 13 La. Ann. 557;) and that, where two beneficiary heirs are contestants, a large discretion is left to the judge in the choice to be made, which will not be disturbed, unless manifestly wrong, (Succession of Chaler, 39 La. Ann. 308, 1 South. Rep. 820.)

The record shows that the main assets of the succession consists in the claim against the city of New Orleans, apparently recognized by the United States supreme court and eventually good, which was appraised at \$650,000, and that the opponent Whitney, who was appointed by the district court, has furnished a bond with solvent sureties for \$450,000, to secure the faithfulness of his administration. The two aspirants are present in this city, (Succession of Penney, 10 La. Ann. 290,) and are shown to be intelligent, correct, and efficient. Christmas is a few years older than Whitney, who will soon be 21.

It does not appear that either has a special or greater experience in the administration of the property of others or of their own. So far, fortune has not favored them, except in the present case, in which they are called to an inheritance. They are both represented by able counsel, who would not fail surely to advise and direct them properly as to the management of the business of the succession. Whitney has, however, shown that his appointment is derived by the distributees and creditors of this estate, and that he is able to furnish a large bond, with unassailable sureties, therein. The fact is that he has apparently furnished such bond.

The books do not show, that we have been able to find, that two administrators have ever been appointed to manage a succession like this. The tendency has been to appoint only one. At one time, two creditors could be appointed to a vacant succession; but the legislature of 1854 determined that one only should be appointed, finally intrusting the settlement of vacant estates to one public administrator, even in the parish of Orleans. There may be cases, however, in which two administrators should be appointed, as where a man dies leaving a large estate consisting of plantations, factories, stores, urban property, or other species demanding the special attention and separate superintendence of more than one manager. In the present instance the only asset consisted of a claim, which, however judicially recognized, has not been as yet liquidated, and may not be reduced to cash for some time to come. Where this event happens, the only thing to be done will be to distribute the amount among the parties entitled to share in the same. If there be litigation on the subject, it will be a matter concerning rather the attorneys than the administrator. To maintain that Whitney is not entitled to the appointment would be to recognize that Christmas has better rights to it, and to reverse the judgment of the district judge, who is vested with primary discretion over the matter, and who, after hearing the witnesses and evidence, has reached the conclusion that,

all things equal, Whitney is the more solid.

An examination of the transcript authorizes this conclusion, and satisfies us that the district judge has not misused the discretion with which the law primarily clothes him, and that the circumstances of this succession do not require the appointment of an additional administrator, whose adjunction might, in cases of disagreement, engender trouble, and complicate and entangle the settlement in different manners.

Judgment affirmed.

PETERS *et al.* v. PACIFIC GUANO CO. *et al.*,
(THORNDYKE *et al.*, Interveners.)

(Supreme Court of Louisiana. May 19, 1890.
42 La. Ann.)

ATTORNEYS—PRINCIPAL AND AGENT—PLEDGE—
DISCHARGE.

1. Attorneys, investing moneys intrusted to them as trustees, and receiving a note payable to their own order as attorneys, may sue thereon in their own names as attorneys, although one of the parties whose funds were so invested may have been a foreign succession.

2. A corporation which employs a firm, a member of which holds a controlling share of its stock, and of which the leading member is its own president, as its commercial and selling agent, making advances on and receiving, under contract, its entire product, with power to control, sell, pledge, and dispose of the same and its proceeds, is bound by the dealings of such firm with regard to such product.

3. A pledge is not impaired when the possession of the thing has been passed to the pledgee, and has not been parted with except to a third person agreed on by the parties.

4. Where such person has remitted a sum sufficient to discharge the pledge of the common agent of two concurrent pledgees, the receipt by such agent would, ordinarily, discharge the pledge; but when pledgeor himself intervenes, and by false representations induces the agent to believe that one of the pledgees has consented to waive payment out of the remittance, and to extend his loan, and the agent diverts part of the fund to payment of another debt of the pledgeor, such a transaction operates only a partial payment and discharge of the debt and pledge, and leaves them in full force for the balance due.

(Syllabus by the Court.)

John M. Baldwin, for appellant. H. H. Hall, for appellee.

FENNER, J. The facts of this case are undisputed. The Pacific Guano Company was a joint-stock company, engaged in the manufacture of guano. A majority of its stock was owned and controlled by the commercial firm of Glidden & Curtis, and John M. Glidden, the senior member of that firm, was also president of the company. The firm acted as the commercial agents of the company under a contract between the two, by which all the product of the company was consigned to the firm, which made advances thereon, and had full authority to sell, pledge, and dispose of the same. The evidence makes it clear that the firm was invested with all the powers of ownership over the product, and its dealings therewith were binding on the company so far as its rights in the product were concerned. These powers embraced the right to pledge the product for advances made to the firm. This is not disputed with any seriousness even in

argument. The firm, in January, 1889, shipped about 1,000 tons of this guano by the schooner Henry Sonther, consigned to W. P. Richardson, at New Orleans, under some arrangement with the latter that he was to remit to the firm \$10,000 against the cargo. While the cargo was *en route*, the firm, in Boston, borrowed \$10,000, viz., \$5,000 from W. T. Glidden, and \$5,000 from Thorndyke & Clark, attorneys, for which it executed separate notes to each of the lenders, and to secure the same it pledged the bill of lading of the cargo by delivering the same to W. T. Glidden, who received and held it for the benefit of both lenders. An arrangement was then entered into between W. T. Glidden and the firm of Glidden & Curtis by which the latter gave to the former a letter addressed to W. P. Richardson, the consignee, informing him that he borrowed this money on the bill of lading; that W. T. Glidden would forward the bill with the letter; and instructing Richardson, on receipt of same, to remit to W. T. Glidden "the \$10,000 you propose to send against this cargo." W. T. Glidden thereupon wrote to Richardson, inclosing the bill of lading and the above letter, and requesting him to send the \$10,000 as directed. Richardson, on receipt of these documents, borrowed \$10,000 on pledge of the bill of lading, from the New Orleans National Bank, and remitted the sum to W. T. Glidden. The remittance was duly received by W. T. Glidden, but before he had seen or settled with Thorndyke & Clark, John M. Glidden called upon him and told him that his firm had made arrangements with Thorndyke & Clark to wait on their loan, and instructing W. T. Glidden to apply the whole \$10,000 to the payment, first, of his own advance on the cargo, and the remaining \$5,000 to taking up a prior note of the firm held by him. The relations between the parties were very intimate. W. T. Glidden was the father of John M., and Thorndyke was the legal adviser of W. T. Glidden. Trusting in John M.'s assurance of the consent thereto of Thorndyke & Clark, W. T. Glidden applied the \$10,000 as directed, and surrendered both the notes held by him. Thorndyke & Clark never gave such consent, and no part of their loans has ever been repaid.

The controversy in this case is exclusively between Thorndyke & Clark and the Pacific Guano Company. The New Orleans National Bank has been paid out of the proceeds of sale of the cargo, and no other creditor is before us. There is held in the hands of the court a portion of the said proceeds of sufficient amount, which Thorndyke & Clark claim, by virtue of their rights as pledgees, should be applied to their debt, while the Pacific Guano Company denies that claim, and asserts the right to hold proceeds free therefrom. On the merits the contentions of the Pacific Guano Company are threefold: *First*, that Glidden & Curtis had no authority to make the pledge; *second*, that the pledge of Thorndyke & Clark has been lost, because they had parted with possession of the thing pledged; *third*, that the pledge has been extinguished by payment.

The first contention is not seriously

urged, and is clearly overthrown by the evidence. The second is based on article 3162, Rev. Civil Code, which declares that the pledge is destroyed unless the thing "has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties." It seems to us perfectly clear that when the bill of lading was delivered to W. T. Glidden, as the common agent of himself and of Thorndyke & Clark, it operated a putting in possession of both creditors. When the bill of lading was remitted to W. P. Richardson, the correspondence clearly shows that the thing pledged was passed into his possession as a "third person agreed on by both parties." When Richardson pledged the bill of lading to the New Orleans National Bank, he no doubt so used the powers confided in him as to give the bank a right superior to that of the original pledgees, but the possession of the bank was still the possession of Richardson, and did not divest any rights attaching to the thing in his hands except so far as to subordinate them to the bank's rights. When the bank was paid, the possession of Richardson was reinstated with all accompanying rights and liens. These propositions seem to us too self-evident to require further argument or illustration.

The third contention is that, when the \$10,000 was remitted to and received by W. T. Glidden, that operated an immediate discharge of the pledge. There can be no doubt that Glidden had authority to receive payment and to release the pledge. Had he, of his own motion, diverted the funds, Thorndyke & Clark would, nevertheless, have been bound by such discharge, and would have had no recourse against any one except W. T. Glidden; but when the pledgee himself steps in, and, by false representations, induces the common agent of the pledgees to believe that one of the latter has agreed to extend his loan, and thus secures a diversion of part of the fund, a very different question is presented. Suppose W. T. Glidden had been the sole pledgee for the whole \$10,000, and Glidden & Curtis had proposed to him to credit only \$5,000 on his pledge, and to extend his loan for the balance, would that have extinguished the pledge for the amount of the loan so extended? Clearly that would have been simply a partial payment, which would have extinguished the loan and pledge *pro tanto*. Such, we think, was precisely the effect of the transaction between Glidden & Curtis and W. T. Glidden in so far as Thorndyke & Clark were concerned. It simply operated a partial discharge of the debt and pledge, and left it in full force for the balance. John M. Glidden himself says, in effect, that such was the intention, saying that "a further remittance was expected for the purpose of repaying the loan of Mr. Thorndyke." Counsel for the guano company insists very strenuously upon the difference in personality between the company and the firm of Glidden & Curtis; but we do not think this difference has any weight in this case. The evidence makes it very clear that the firm was vested with all

the powers of the owner over this cargo and its proceeds, including the power to sell, to pledge, to receive, and dispose of the proceeds. If the \$10,000 had been devoted to the payment of the entire pledge, the firm might have executed a new pledge for the other debt due to W. T. Glidden, which would have bound the proceeds of the cargo, and have left the company in the same position practically which it now occupies. The pledgees had no dealing and no concern with the guano company, but dealt and were entitled to deal safely with the firm of Glidden & Curtis; and the action of the latter, in so far as it affected this property, was the entire equivalent of the action of the company.

It only remains to refer to an exception interposed by the defendants. It appears that in making this loan Thorndyke & Clark intended it as an investment of certain funds held by them in a fiduciary capacity, part of which belonged to the estate of W. H. Gardner, in Boston. The transaction, however, was made in their own names, as attorneys, and the note taken was payable to their order. Of course, they had the right to sue on this note, here or elsewhere, in their own names, and they have done so; but, no doubt out of abundant caution, and in order that their action as trustees might appear of record, they made the quite unnecessary statement that the loan was of funds held by them as trustees of one Charles Foster and of the estate of W. H. Gardner. On these allegations defendants base an exception, to the effect that a foreign succession has no capacity to stand in judgment in this state unless represented by an administrator or executor appointed or recognized by a Louisiana court. We think that, as the loan was made by them as attorneys, and the note given to them as such, they have full power to sue on it in that capacity, regardless of the principals whom they represent, which is no concern of defendant. The judge *a quo* ruled on all points in accordance with the above views. Judgment affirmed.

DANDIE v. SOUTHERN PAC. R. CO.

(*Supreme Court of Louisiana.* May 19, 1890.
42 La. Ann.)

INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

1. The servant assumes the ordinary risk and dangers of his employment, and cannot hold the master responsible for any injury sustained in consequence of one of the risks incident to said employment.

2. The servant cannot recover where his own want of care has contributed to the injury. If among the different modes of performing a duty he selects the most dangerous, which unnecessarily exposes him to danger, he is responsible for the selection.

3. When the master does not increase the risk assumed by the servant, and there are no defects in any of the appliances provided by the master for the performance of the duties of the servant, the servant cannot hold the master responsible for injury received in the course of his employment.

4. Where the evidence shows contributory neg-

ligence on the part of the injured party, he cannot recover damages for the injury.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

Leovy & Blair, for appellant. *J. C. & S. L. Gilmore*, for appellee.

MCENERY, J. The plaintiff alleges that her son George J. Dandie on the 14th June, 1889, while employed as flagman on yard locomotive No. 711 of the defendant company at the Morgan ferry, in the city of New Orleans was run over and instantly killed, while performing his duty as flagman, by said locomotive; that the death of her son was due to the fault and negligence of defendant and its employees in running the engine at a high rate of speed, without having a lookout in the cab, and failing to make proper provisions for the safety of her son while employed in the capacity of flagman. She prays for damages in the sum of \$15,000. The defendant's answer is a general denial, with the exception of certain admissions, and alleges that the death of plaintiff's son was accidental, and was contributed to by imprudence, fault, and want of care on the part of the deceased son. There was judgment for the plaintiff on the verdict of the jury for the sum of \$5,000. The facts are that the plaintiff's son was at the time of his death in the service of the defendant company as flagman. His duties were of such a character as are required on all railroads. The engine which ran over the deceased was used for the purpose of taking cars from the ferry-boat at the Morgan landing, and moving them backwards and forwards, forming them into a train, or placing them in position to be loaded. The flagman rode on the car when backing, and when going forward in front of the engine on a foot-board placed there for that purpose.

When the train approached a crossing it was the duty of the deceased to jump down, go to the crossing, and protect it with a red flag. When a switch was approached, which needed attention, he jumped down, ran to it, and turned it. When the engine came near him, he jumped on it, ready again to perform the same duties. Dandie, the flagman, had been engaged in this work in the service of the defendant for some nine months. He was familiar with his duties, and had been instructed to get off the engine on the side of the track, either the right or the left, as occasion required. This was the safest manner for him to perform his duties. By standing near the end of the foot-board, the flagman can be seen by the engineer if he is on the right, and by the fireman if he is on the left. If he stands in the center, he can be seen by neither. If the engine is going too fast for the flagman to jump, it is his duty to signal the engineer, if he is on the right of the foot-board, and, if on the left, the fireman, who immediately communicates with the engineer. This signal is made with the flag, hat, or hand. It is immediately obeyed, and the speed is slackened, so that the flagman can jump with safety. If it is not slackened, he is not compelled to jump, but it is his duty

to stand on the foot-board. There were no obstacles to prevent him from jumping to the side of the track, which was in a condition that he could do so with comparative safety. The foot-board for the flagman extends all the way across the front of the engine, in order that he may pass from one side to the other, to alight on either side of the track, according to the position of the switch or crossing.

There is a wide difference of opinion as to what rate of speed the engine was going. Some of plaintiff's witnesses put it at a high rate, while defendant's witnesses fix the rate at not more than six miles per hour. On the day of the accident, George Dandle was standing near the center of the foot-board, where the engineer and the fireman could not see him. When about 50 feet from the switch, which he had to turn, Dandle jumped in front of the engine between the rails, and was overtaken, and run over by it. The duties which the deceased, George Dandle, had to perform necessarily involved risks of a dangerous character. All occupations do not offer the same immunities from danger. They differ in this respect very materially. The employee must judge of the risks, and determine whether he will undertake them. The deceased entered the employment of the defendant company as a flagman and switchman with a full knowledge of the character of the service required of him, and the dangers incident to the employment. He assumed all these risks when he entered into the service of the defendant company. The defendant company did not increase the risk assumed by the deceased, and to which he subjected himself. There was no defect in any of the appliances provided by the defendant company for the performance of the duties required of him, and there was therefore no negligence. *Satterly v. Morgan*, 35 La. Ann. 1166; *Wallis v. Railroad Co.*, 38 La. Ann. 159; *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166; *Whart. Neg.* § 214; *Hart v. Coke Co.*, (Pa.) 18 Atl. Rep. 1011.

The flagman, Dandle, had but one way to perform his duties with safety to himself. He selected another and a more dangerous one by getting down in front of the engine between the rails. The risk was unnecessarily assumed, and was at his own peril, and on his own responsibility. *Whart. Neg.* § 215. The deceased was a fellow-servant with the engineer and fireman. They were employed by the same corporation, and engaged in the performance of the same duty. The duties of one in this particular service were dependent upon the other. The switch had to be closed by the flagman before the engineer could drive his engine beyond it, and the flagman, by signaling the engineer, could regulate the speed of the engine so as to perform his duties with dispatch and certainty, and without unnecessary risk. The engineer and fireman were competent and skillful, and had been for many years in the service of the defendant company. The company was not in fault in this employment, and the continuing of them in its service. Conceding, therefore, that the engine was going at a high rate of speed,

the plaintiff cannot attribute this negligence to the defendant. The instructions to the engineer were not to go beyond six miles an hour. If the engine on the day of the accident exceeded this limit, it was the fault of the engineer, and not that of the company, so far as the plaintiff is concerned; and the plaintiff cannot recover for the negligence on the part of a fellow-servant of the deceased, when no fault can be attributed to the employer. *Towns v. Railroad Co.*, 37 La. Ann. 632; *Hankins v. Railroad Co.*, 8 N. Y. Supp. 272.

The evidence satisfies us that there were no imperfections in the appliances provided by the defendant for the performance of the duties required by the deceased, and that there was no lack of care on the part of the defendant in the employment and continuing in service of the engineer and fireman on the engine on which the deceased was in service as flagman, and that the deceased contributed to his unfortunate death by his own imprudence. When the evidence shows contributory negligence on the part of the injured party, the plaintiff cannot recover damages. This principle is well established in our jurisprudence. *Schwartz v. Railroad Co.*, 30 La. Ann. 15; *Childs v. Railroad Co.*, 33 La. Ann. 154; *Deikman v. Steam-Ship Co.*, 40 La. Ann. 790, 5 South. Rep. 76. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided, reversed, and annulled, and it is now ordered that plaintiff's demand be rejected, with costs of both courts.

Rehearing refused.

STATE v. GREEN.

(*Supreme Court of Louisiana.* May 23, 1890.
42 La. Ann.)

MURDER—INDICTMENT—CLERICAL MISTAKES.

1. An indictment for murder, charging that the defendant "feloniously, willfully, and of his malice aforesaid, did kill and murder," etc., does not meet the requirements of the statute. It should have charged malice aforesaid, clearly and unequivocally.

2. Recognizing the immateriality of the substitution of one word for another in such a case would be to carry too far, without plausible sanction, the doctrine on the subject of clerical errors.

(*Syllabus by the Court.*)

Appeal from district court, parish of Jefferson; Rost, Judge.

The Attorney General, G. Leche, Dist. Atty., and A. E. Billings, for the State. Jas. D. Séguin, for appellee.

WATKINS, J. The state is appellant from a judgment of the district court, sustaining a motion in arrest of judgment, and quashing an indictment for want of sufficient averment. The indictment is couched in the following language, to-wit: "That one William Green, with force and arms, one Joseph Prosper, feloniously, willfully, and of his malice aforesaid, did kill and murder," etc. The authority cited by counsel, and relied on by the judge below, is a provision contained in section 1048 of the Revised Statutes, to the effect that "it shall be sufficient in every indictment for

murder to charge that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased," etc. The provisions of this statute have undergone examination, and been interpreted by this court and its predecessors, in many cases. Some of those decisions it may be well for us to review. One of the first that has come under our observation is that of *State v. Phelps*, 24 La. Ann. 493, in which it was held that an indictment is sufficiently explicit to advise the accused of the charge against him if it charges "then and there did feloniously kill, slay, and murder," without containing the words "with malice aforethought." That opinion was, in the main, predicated upon a *dictum* of the court in *State v. Forney*, 24 La. Ann. 191, to the effect that the word "murder" implies of necessity the idea of malice aforethought. Those two opinions were confessedly opposed to *State v. Heas*, 10 La. Ann. 195, in which the court said, after a careful examination of authority, that "the doctrine that the malice aforethought must be specially charged in the conclusion of an indictment for murder we consider to have been well settled in the common law of England, and to have been adopted into our criminal jurisprudence by the act of the territorial legislature in 1805." In *State v. Thomas*, 29 La. Ann. 601, the authority of the *Forney* and *Phelps* Cases is doubted, though not expressly overruled. But in *State v. Green*, 36 La. Ann. 100, this court returned to the doctrine of the *Heas* Case, and said: "The words 'of his malice aforethought' are quite as essential as the word 'feloniously.'" In the same sense we held, in *State v. Williams*, 37 La. Ann. 776, that the omission of the word "willfully" was fatal to an indictment. In a still more recent case we said: "We therefore conclude that the indictment is defective in not charging that the shooting was done also willfully and with malice aforethought." *State v. Scott*, 38 La. Ann. 387. But not one of the cases examined or cited goes to the extent of holding that the mere omission from an indictment of the single word "aforethought" would render it invalid. In opinions of courts and other law writings, language is frequently met with from which it might be inferred that the word "malice" alone signifies the same thing as "malice aforethought." 1 Bish. Crim. Law, § 429; 4 Bl. Comm. 198; 3 Greenl. Ev. § 144, and cases in note in Bish. Crim. Law. It might perhaps be so considered in this state, where, by formal statutory provision, it is declared that "whoever shall commit the crime of willful murder, on conviction thereof, shall suffer death," and that "there shall be no crime known under the name of murder in the second degree," (Rev. St. §§ 784, 785;) but when it appears that the law also provides that the indictment should contain the words "did feloniously, willfully, and of his malice aforethought, kill and murder the deceased," must it not be admitted that the words "malice aforethought" are required as descriptive of the crime of murder, and as having the sense that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved,

and malignant spirit, a heart regardless of social duty, and deliberately bent on mischief? Russ. Crimes, bk. 3, p. 767. While considering whether or not the word "malice" alone will suffice, Bishop says that the better use makes a distinction, and assigns to it a meaning somewhat less intense in respect of wickedness than to the other two words, "malice aforethought." 1 Bish. Crim. Law, § 429. In the present instance the pleader no doubt intended to comply with the requirements of the statute, but committed a clerical error in the haste of the moment by writing the word "aforesaid" instead of "aforethought." It is probable that the *lapse* did no injury to the accused; but we think it is better to pursue strictly the letter of the statute, as the court, in *favorem vite*, readily accepts plausible, though nice, distinctions on the subject. It does, so, particularly as it has held that the statute having declared that "it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased," a charge for less would not be accepted. *Green's Case*, 36 La. Ann. 99. See, also, *State v. Williams*, 37 La. Ann. 776; and *State v. Scott*, 38 La. Ann. 387. Our conclusion is therefore that the motion in arrest was not improperly sustained. While commending the counsel appointed by the court to the accused for zeal, learning, and ability displayed by him in the vindication of the rights of his client, we cannot avoid deprecating the censurable looseness which some public officials, intrusted with the protection of social order, display at times in the performance of their important functions, and stimulating them to a more faithful compliance with their solemn duties. It is therefore ordered and decreed that the judgment appealed from be affirmed, and that this case be remanded to the lower court; the defendant to remain in custody until further action in the premises.

SUCCESSION OF DOUGART.

(*Supreme Court of Louisiana*. May 23, 1890.
42 La. Ann.)

APPEAL—JURISDICTIONAL AMOUNT.

The supreme court is without jurisdiction upon the claim against the succession in less than \$2,000, and the fund to be distributed does not exceed that amount.

ON REHEARING.

The supreme court has no jurisdiction over a controversy, the sole object of which is to recover as costs an amount below the inferior limit of its appellate jurisdiction, where the judgment, though rendered by it, with costs, has been satisfied and is defunct. The ruling in *Factors' & Traders' Ins. Co. v. New Harbor Protection Co.*, 39 La. Ann. 583, 2 South. Rep. 407, is inapplicable to this case.

(*Syllabus by the Court*.)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

A. L. Tissot, for appellant. Buck, Dinkelspell & Hart, for appellee.

MCENERY, J. The final account in this succession was filed in 1876. Oppositions were filed by the heirs. They were dis-

missed, and the account was homologated. On appeal to this court, the judgment of the lower court was amended, striking from the account the item to the credit of Louis Mathe, and in other respects it was affirmed. The succession was ordered to pay the costs of the opposition and the appeal. The cost-bill amounted to \$227.60. Mrs. Catherine Bengery filed a rule on February 20, 1889, on the executrix to file a final account of the administration of said succession, as she had filed none since the rendition of said judgment, ordering the succession to pay said costs. The defendant in the rule pleaded the prescription of one, three, and ten years, which was sustained, as there was judgment dismissing the rule. The plaintiff in rule appeals. This court must *proprio motu* dismiss the appeal. The entire fund of the succession was disposed of by the judgment homologating the final account. The amount for costs is the only sum to be distributed. This is the amount of the controversy. It is less than the lower limit of our jurisdiction. The appeal is therefore dismissed. Succession of Duran, 34 La. Ann. 585; Succession of Gohs, 37 La. Ann. 429; Harmony Club v. Gaslight Co., 41 La. Ann. —, ante, 538.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. The appellant contends that this court has jurisdiction, and relies on the ruling in *Factors' & Traders' Ins. Co. v. New Harbor Protection Co.*, 39 La. Ann. 585, 2 South. Rep. 407, as decisive. The cases are dissimilar. The court then decided that, as the matter in controversy was the construction of an existing judgment for more than \$2,000, involving the question whether or not it bore interest, the issue raised was whether the complainants were not entitled to the amount with interest, and thus the case was appealable. In the instant case, the judgment homologating the account at the costs of the succession is not sought to be construed. It has received its execution, is defunct, and is not sought to be enforced. The only remnant of it, which is the matter now in dispute, is the claim for costs set up by the plaintiffs in rule, for \$227.60 only, which were not fixed at that sum by the previous judgment, and to receive which they have instituted a new, independent proceeding, equivalent to a direct suit, in which from no aspect can the court render a judgment for an amount exceeding \$2,000, with costs, which it could have done in the case invoked, with or without interest, with or without costs. The refusal to take jurisdiction is well founded. Rehearing refused.

STATE v. WENGER.

(Supreme Court of Louisiana. April 21, 1890.
42 La. Ann.)

CONCERT HALLS—LICENSE TAX.

An establishment in the city of New Orleans, consisting of a bar-room and a restaurant, at which liquors and refreshments are sold, and to which customers are attracted by means of free vocal and instrumental concerts, of comical songs, character and mimicry songs and performances, and similar exhibitions, is liable to a license of

\$1,000 per annum under the provisions of section 10 of Act 101 of 1886.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; F. D. King, Judge.
Branch K. Miller, for appellant. Charles Carroll, for appellee.

POCHÉ, J. This is a proceeding by the tax collector to enforce payment of a state license of \$1,000 per annum for each of the years 1887, 1888, and 1889, under the provisions of section 10 of Act 101 of 1886. The portion of the section involved in the controversy reads as follows: "That for any place where cancan, clodoche, or other similar female dancing, or sensation performance, or statutory exhibitions, are shown, or any other fixed place for either theatrical, musical, minstrel, concert, dancing, or variety performance, exhibition, amusement, or show, the license shall be one thousand dollars in cities with a population of more than twenty-five thousand, and in cities and towns with less population the license shall be five hundred dollars; and nothing in this paragraph shall be construed as licensing or permitting any performance which is prohibited by other laws, ordinances, or police regulations: provided, that nothing in this section shall apply to any respectable and legitimate place of business, already paying a license under the provisions of this act, where free concerts may be given for the entertainment of guests by regularly organized officers only." The defense is a general denial, which puts at issue the affirmative allegation that defendant's business falls within the description contained in the first portion of the section as herein above transcribed, followed by the contention that defendant's business is protected by the proviso contained at the end of the section. From a judgment in favor of the state defendant appeals.

From a preponderance of the evidence, which is conflicting, it conclusively appears that defendant's place of business, known under the name of "Wenger's Garden," consists mainly of a bar-room and restaurant, at which liquors and refreshments are sold, and to which customers are attracted by means of free vocal and instrumental concerts, and other attractive performances therein given. Besides instrumental music, and songs both by male and female performers, there are exhibitions consisting of comical songs, either solos or duets, motto songs, and character songs, in which different typical characters are represented, by imitation of national idioms, mimicry of faces and of characteristics of individuals and of classes of individuals, by means of mimicry of the expression and appearance of sundry persons, even of those who are in the audience, and by means of rapid and numerous changes of costumes. Without going into the description of other details, many of which had better remain unwritten in this opinion, we are led to the conclusion that defendant's business is a place at which musical, concert, dancing, and variety performances are given, and that as such it is clearly liable to the license prescribed in section 10 of Act 101 of 1886.

In support of his second ground of defense, and of the contention that his case is that of a "respectable place of business, already paying a license under the provisions of this act, where free concerts are given for the entertainment of guests," the defendant has introduced a mass of testimony going to show that his establishment is much more respectable, both in the character of its performances and of its audiences, than several well known "concert saloons" situated in this city, and which are admittedly liable to the license prescribed by the section now under consideration. Even-handed justice to his establishment justifies the statement from us that in this he has succeeded; but a careful analysis of the testimony has forced on us the conclusion that he has entirely failed to make out a case entitling him to the protection of the proviso which he invokes. On this point, also, details had better be omitted from this opinion. Entertaining these views, we find it unnecessary to decide many points which are very ably discussed by counsel of both parties, and to judicially determine what the legislature meant by the expression of concerts "by regularly organized officers only." Judgment affirmed.

ON APPLICATION FOR REHEARING.

FENNER, J. We discover no reason to change our opinion on the general merits of this controversy; but one minor issue was so overshadowed by the larger ones that it escaped the attention of the vigilant judge who was the organ of the court. It is clearly proved by the answers of defendant to interrogatories of facts and articles, which are not contradicted, that he conducted the business in 1887 only from the 8th of October of that year; and section 15 of the Act 101 of 1886 contains the proviso "that any person commencing business after the 1st of July shall pay one-half the above rates." This necessitates a correction of our judgment by reducing by one-half the amount allowed for license of 1887. It is therefore ordered that our former judgment, affirming the judgment appealed from, be amended by now amending said judgment by reducing the principal of the license for 1887 from \$640 to \$320, and that in other respects said judgment be now affirmed, plaintiff to pay costs of appeal.

MARTINEZ et al. v. STATE TAX COLLECTOR, SECOND, THIRD, AND FIFTH DISTRICTS, et al.

(Supreme Court of Louisiana. May 23, 1890.
42 La. Ann.)

TAX-SALES—PURCHASE BY STATE—FORFEITURES.

1. Where property was adjudicated to the state under Act 98 of 1882, and afterwards sold under Act 82 of 1884, the purchaser acquires title only when he pays the taxes due on said property, and which he assumed. Until these conditions are complied with, title remains in the state. The property, therefore, is liable to be seized and sold under Act 80 of 1888.

2. Article 210 of the constitution was not intended as a prohibition against the state purchasing at tax-sales. It was intended to abolish the system of forfeiture for non-payment of taxes in force before the adoption of said constitution.

3. Act 98 of 1882 is not in conflict with article 210 of the constitution.

4. An adjudication of property to the state is not a forfeiture, within the meaning of article 210 of the constitution.

5. When a purchaser at a tax-sale in pursuance of Act 82 of 1884 assumes the payment of taxes in accordance with said act, he cannot evade his obligations by contesting the validity of the assessment.

6. When property has been adjudicated to the state, she can again sell the same, and impose her own conditions, without restriction as to the price. When adjudicated at tax-sale, she can, as a part of the price, stipulate that the purchaser shall pay all prior taxes due thereon. When sold in this manner, no plea of prescription can be urged against the taxes assumed by the purchaser.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; MONROE, Judge.

Harry L. Edwards, for appellants. *Spearling & Spearling, W. Rogers, W. B. Sommerville*, and *Jas. C. Moise*, for appellees.

MCENERY, J. Under the provisions of Act 80 of 1888 the tax collector of the second, third, and fifth districts in the parish of Orleans seized and advertised for sale certain immovable properties of the plaintiff and relator, described in his petition, for taxes due thereon, and which were assessed by him. The plaintiff purchased the properties at tax-sales made in pursuance of Act 82 of 1884. He enjoined the tax collector from proceeding with the sale of said property. There was judgment dismissing the injunction without damages, from which the plaintiff appealed.

There were several exceptions taken to the rulings of the district judge in the admission of evidence. The objection in each case went only to its effect. The reasons assigned for the writ of injunction are numerous. We will only examine those that are serious.

1. The plaintiff alleges that the taxes, tax liens, privileges, and mortgages are prescribed by three and five years. There is no ground for the plea of prescription. The plaintiff assumed the taxes due on the property. They were a part of the purchase price. If any prescription attaches, it is that of ten years.

2. Act 80 of 1888 is attacked as being in conflict with article 210 of the constitution. The reason for the alleged unconstitutionality of the act is that the adjudication of property to the state is equivalent to its forfeiture, which is prohibited by said article. The most conclusive answer to this proposition is the article itself. There is in the constitution no prohibition on the state to purchase property either at private, public, or tax sale. The object of article 210 was to prevent the state from acquiring property for taxes by forfeiture. It changed the mode of enforcing the collection of taxes, and provided for a direct seizure without suit. The state is not prohibited from purchasing at the tax-sales in pursuance of said article.

3. It is urged by plaintiff that the adjudication to the state in pursuance of act 98 of 1882 extinguished the taxes on said property by confusion, and that, when the property was adjudicated to him under Act 82 of 1884, he acquired said prop-

erty free from all taxes and tax incumbrances. Conceding that the taxes were extinguished by confusion when the state, in the absence of bidders, purchased the property at the sale under Act 98 of 1882, no reasons are urged, or can be urged, why the state, being the owner of the property, could not sell the same and fix the price, and impose such conditions on the sale as she deemed fit and proper. There is no restriction that can be placed upon the conditions which she may impose upon the sale of her property. In Act 82 of 1884 the state fixed the price of the property which had been adjudicated to her under Act 98 of 1882. The price fixed by said act for said property was the extinction, by cash payment, of state, city, parish, and municipal taxes due prior to December 31, 1879, with interest, costs, and charges, and the assumption of all unpaid taxes subsequent to the 31st of December, 1879. The plaintiff bid in the property, and agreed to pay this price as fixed by said act. We fail to perceive in what manner Act No. 80 of 1888 conflicts with the constitution of the state.

4. The plaintiff alleges that the taxes are illegal, null, and void, as they were not assessed in the name of the owner. Section 52 of Act 77 of 1880 is still in force, never having been repealed by subsequent revenue acts. Under this act the assessments were unaffected by the alienation of the property. The plaintiff is estopped from contesting the validity of the assessments. He assumed the payment of the taxes in the name of the person to whom the property was assessed. He purchased under these assessments. He cannot claim to be owner of the property, and repudiate the title under which he claims.

5. The plaintiff alleges that the seizure and advertisement under Act 80 of 1888 is illegal, null, and void on the ground that said act does not apply to property adjudicated to the state, and afterwards sold in pursuance of Act 82 of 1884. Where the parties who purchased property under said act complied with their bid, it undoubtedly has no application to the property so purchased. They obtained an absolute and perfect title as against the state. Act 82 of 1884 required the tax collector to sell the property adjudicated to the state, with the assumption on the part of the purchaser of taxes due subsequent to 1879. The price of the adjudication was the taxes prior to 1879, and the taxes due on the property thereafter. No other interpretation can be given to the act. The sale was to be made for cash. The object of the act was to make the taxes due on the property. It was not the intention of the legislature that there should be a credit sale for any portion of the price, as no time is stated in which the credit portion is to be paid, and there is no mode provided for the enforcement of its payment. The tax collector had no authority to make an absolute deed to said property until the terms and conditions prescribed by Act 82 of 1884 had been complied with. The deeds to the plaintiff are only *procès-verbal* of the adjudication. No title passed to the plaintiff, or could do so until he paid the price of the adjudication.

The title to the property, therefore, remained in the state, and Act 80 of 1888 applies to all property adjudicated to the state which had not been disposed of or redeemed. The plaintiff can only acquire title to the property adjudicated to him by complying with the terms and conditions of Act 82 of 1884. The plaintiff enjoined the sale of property to which he had no title. He knew that he had not complied with the bid. It was an attempt to get title to property without paying the price. We think this is a case in which damages should not be assessed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to allow 10 per cent. as special damages for attorney's fees, and in all other respects it be affirmed.

Mr. Justice BREAU, not having heard the argument, and the case having been submitted before he became judge, takes no part in this decision.

ON APPLICATION FOR REHEARING.

McENERY, J. Plaintiff, for a rehearing, has reduced his grounds to three, in as many paragraphs. We paragraph them as follows, viz.:

(1) That he cannot be made to pay the taxes due on the property assessed prior to the 31st day of December, 1879. The price bid by him operated a final discharge of all taxes due on the property prior to that date. The inscriptions for taxes due to that date were canceled by the sale.

(2) That there is error in holding that the validity and the legal effect of the assessment, which is the basis of the taxes sought to be enforced, should be tested under the provisions of section 52 of Act 77 of 1880; that there was no warrant for sale made to plaintiff but Act 82 of 1884, etc.

(3) He alleges further that the bid made him the absolute owner of the property. He took the property burdened with the taxes due since the 31st December, 1879, but that he was not bound to pay at the date of purchase; his contract being to assume, and to take the property subject to, all unpaid taxes on the same subsequent to December 31, 1879. That he acquired a perfect title, and such "taxes as may be exigible against him and his contract for part of the unpaid purchase price, for which the state has a vendor's lien on the property which may be enforced as such, but not summarily as taxes, and, above all, under the provisions of Act 83 of 1888, which apply exclusively to property adjudicated to, and not otherwise disposed of by, the state." That the property, having been disposed of, cannot be sold under the law authorizing the sale of property, and adjudicated to the state for taxes.

1. The first ground is at once disposed of without discussion, for it does not admit of any. Without changing the conclusion of this court, or the decree heretofore made, we will state that the defendant claims taxes from December 31, 1879, and that, under the plain letter of Act 82 of 1884, the taxes from December 31, 1879, are due by the plaintiff, and not the taxes assessed prior to that date.

2. Whether or not the legal effect of the assessment, upon which rests the authority to enforce the payment of taxes, should be tested under the provisions of section 52 of Act 77 of 1880 has no important bearing. The plaintiff bought the property as assessed. He cannot successfully question its legality. The state, to collect the taxes due, divested the tax debtors of their ownership of this property, and has given plaintiff the opportunity to become the owner, of which he availed himself. He does not contend that this assessment is not sufficiently legal to enable him to hold the property as against the former owners. He does not allege that he fears eviction, and that he will be made to lose the property on account of any illegality. If a vendor, seeking to realize a balance unpaid of the purchase price, is opposed with the objection that there is a defect in the title, but no allegation is made to the effect that the defect will give rise to any claim, the vendee will not be permitted to defeat the vendor's claim and privilege on technical grounds, serving no purpose, but pleaded only to escape payment. The illegality *per se* is of no consequence if a right is not asserted. If no right is claimed, there cannot be any price. The former owners having no claim on that ground, it not being possible for the state to set up any predicate upon an illegal assessment, and as the present plaintiff contends that he is the legal owner, questions with reference to assessment cannot arise.

3. The third ground contains the proposition upon which the plaintiff relies to be relieved from the payment of the taxes he has assumed to pay. He is the owner, is the burden of his pleadings, but suggests that he owns subject to a vendor's lien. When the property was adjudicated to him, he assumed the taxes assessed since 1879. The "purchaser shall, however, assume and promise to pay, and shall take said property subject to, all unpaid taxes." Act 82 of 1884. He is now pleased to contend that he should be decreed to be the owner of the property, and that the remaining price unpaid is secured by a lien. As a man binds himself, so must he be bound, is the principle from which he seeks to be relieved by contending that he owes an amount secured by a lien. We do not deny that the remainder is the unpaid purchase price; but, nevertheless, taxes which the purchaser assumed, and which are secured as to their payment as taxes, are secured under the provisions of law. We will not undertake to change a tax indebtedness to a nondescript claim, and an uncertain privilege, such as plaintiff would allow. Taxes are positive acts of the government. They are not a debt. *Desty, Tax'n*, 9. Properties were adjudicated to the state. The only purpose of the ownership was to secure the payment of the taxes. In adjudicating the property to the plaintiff, the state cannot be held to have defeated the object in view, to have abandoned the purpose of the divesting of title, (*i. e.*, the collection of taxes,) and to have relinquished any remedy for their collection. "The taxing power is inherent in every sovereignty, and there can be no presumption in favor of its relin-

quishment, surrender, or abandonment. The whole community is interested in retaining the power of taxation undiminished, and it has a right to insist that its abandonment shall not be presumed in any case where the deliberate purpose of the state does not appear. It is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms." *Id.* 79. It cannot be presumed to be abandoned or surrendered except by clear words, and for legal and adequate considerations. The plaintiff cannot successfully assume the attitude of an adjudicatee, and the rights of perfect ownership, without having complied with all the terms of his bid. Much less can he, by thus assuming, defeat the state in the collection of taxes, and in carrying out the policy that the "common burden" must be sustained by common contribution. There is no difference in reality about the liability. The question relates solely to the remedy to enforce payment.

It is objected that collection cannot be made by execution, and in accordance with the summary process provided for the collection of taxes. "The power to 'assess and collect taxes' implies the power to enforce their collection by execution." *Id.* 82. But, where the language will permit, statutes relating to taxes shall be so construed as to give effect to the obvious intention and meaning of the legislature, rather than to defeat this interest by a too strict adherence to the letter. "The sovereign right to levy and collect taxes grows out of the paramount necessities of government,—an urgent necessity, which admits no property in the citizen while it remains unsatisfied." *Id.* 51. The taxes are due on the property. The constitution, and all other laws on the subject, provide a summary process for their collection. Let us suppose that the portion paid of the purchase price had not been paid. The state would have the right to have the property seized and sold under the summary tax-collecting process. If this would be true of the amount paid if it had not been paid, it is correct interpretation as to the amount assumed. The state remains the owner only to carry out the intention of the legislature, and to collect the taxes due.

We are referred to the cases of *In re Lake*, 40 La. Ann. 143, 3 South. Rep. 479, and of *In re Douglas*, 41 La. Ann. 768, 6 South. Rep. 675, as decisive authorities in this case. For the sake of some brevity, we make a summary of the issues in the first: Nullity is pleaded. Insufficiency and illegality of the assessment. Want of notice. Act 82 of 1884 is unconstitutional. The property never was adjudicated to the state. It was advertised for sale to enforce the payment of delinquent taxes, but contrary to the provisions of said act, as it only provides for the sale of property that had been previously adjudicated to the state on the part of the defendant. The plea of no cause of action was filed. Among the defenses interposed is the following: "(5) That all of the prerequisites of the law were complied with by all the officers, from the assessment up to and including the execution and registry

of the deed of said purchaser. If only a portion of the taxes for which the property is sold are proved to have been paid, the sale and title to the purchaser shall nevertheless be good and valid, the same as if all the taxes for which it is sold have been paid." The court held as follows, viz.: "We think the law is constitutional, and the exception of no cause of action should have been sustained." In this case as well as in the case *In re Douglas*, it is decided that the tax-sale under Act 82 of 1884 is conclusive as against the former owner, but the right of the state to recover the unpaid taxes was not considered. No such question was presented. The tax has remained unpaid these many years. The ordinary process has not brought about a settlement. A warrant to enforce compliance on a sale is legal. Should he comply with the law, the sale, as between the state and the plaintiff, will come as absolute as it is now between the plaintiff and the former owner.

Rehearing refused.

NEWMANN v. IRWIN.

(*Supreme Court of Louisiana.* May 23, 1890.
43 La. Ann.)

MORTGAGES—FORECLOSURE—INJUNCTION.

1. When a defendant in executory proceedings for the seizure and sale of mortgaged property sets up a plea of compensation of the debt, and makes the requisite affidavit, he is entitled to a preliminary injunction as of right, and without bond.

2. Without some proof of alleged simulation, documents annexed to the defendant's answer, for the purpose of clearly showing the compensable character of his demand, will not be considered sufficient to authorize a refusal of preliminary order by the judge of first instance, unless their recitals are subject to no other reasonable interpretation.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

Fergus Kernan, for appellant. *White & Saunders*, for appellee.

WATKINS, J. This is an appeal from an interlocutory judgment or decree refusing the defendant an injunction against an order of seizure and sale, predicated upon his affidavit that the mortgage debt had become extinguished by compensation previous to plaintiff's acquisition of the mortgage notes. Defendant avers that, when Albert Meyer was the owner of the notes in suit, he acquired, by purchase from the Bank of Commerce of St. Louis, a \$6,000 interest in a judgment it held against Meyer, with due notice to him of the transfer for a much larger sum, and therewith said notes were compensated and extinguished; that this transaction occurred on the 2d of October, 1889, and the plaintiff acquired said notes on the 9th of said month, subsequent to their maturity, and subject to all equities between himself as maker and Meyer as payee, and that the plea of compensation is good against them in their hands; that H. & C. Newmann, as the holders of said mortgage notes, have petitioned for and obtained an order of seizure and sale against the mortgaged property, and will proceed to

seize and sell the same, unless restrained by injunction, and to which the seized debtor alleges himself to be entitled, as of right, without bond, and upon making the affidavit prescribed by law. Code Prac. art. 739. As illustrative of the manner in which he acquired an interest in the judgment of the bank against Meyer, the defendant avers that he executed to the bank a title to the mortgaged property, which he caused to be duly recorded, and of which the bank took immediate possession. The deed, with the accompanying certificate of the register of conveyances appended, was annexed to the defendant's answer. On this showing, the district judge declined to grant an injunction, without assigning any reasons in writing.

Counsel for the plaintiff insist, in argument and brief, that the judge grounded his refusal on the manifest simulation of the transaction between the defendant and the bank. In proof of such apparent simulation—and we employ the phrase "apparent simulation" because the judge refused the injunction upon the simple inspection of the papers, and heard no evidence, of course—we are cited to the concluding sentence of the deed, viz.: "The portion of the judgment so transferred is to be pleaded in compensation against these mortgage notes. The Bank of Commerce is to defray all legal expenses in making the plea of compensation. When said notes have been canceled as compensation, and the mortgage claim cleared from the property, the Bank of Commerce is to pay me \$300. cash." We are also referred to a supplemental statement, made in writing, and signed by the defendant contemporaneously with the deed, and which is as follows, viz.: "In consideration of the Bank of Commerce of St. Louis subrogating me to such portion of their claim against Katz & Meyer, as partners, and Albert Meyer, individually, as will compensate the mortgage notes held against me by Albert Meyer, I hereby agree that the Bank of Commerce shall receive all that may be realized out of their claim so subrogated."

From these documents we extract the three significant paragraphs illustrative of the view of plaintiff's counsel, viz.: (1) "The Bank of Commerce is to defray all legal expenses in making the plea of compensation." (2) "When the notes have been canceled, and the mortgage claim cleared from the property, the bank is to pay me \$300. cash." (3) "In consideration of the bank subrogating me to a portion of the judgment against Meyer, I hereby agree that the Bank of Commerce shall receive all that may be realized out of their claim so subrogated."

The theory of the defendant is that he conveyed to the Bank of Commerce the property mortgaged, in consideration of a \$6,000 interest in the bank's judgment against his mortgagee, Meyer. By this means defendant expected to extinguish, by compensation, his mortgage notes to Meyer, discharge the mortgage from the property he had conveyed to the bank, and thus secure to it an unincumbered title. Of course the defendant expected to lose the property, which was of insufficient

value to satisfy his debt, but he wished to obtain his discharge from the debt to Meyer and the plaintiff. The bank was to receive the property as compensation for a \$6,000 payment on its judgment against Meyer. In such a transaction it appears to us perfectly legitimate for the bank to agree to defray the expenses of a litigation by which it was to be so largely benefited, and to pay \$300 additional as a difference in value in the transaction when it should be concluded. And when, by a supplemental agreement of same date as the deed, defendant consented that the bank shall receive all that may be realized out of their claim so subrogated, he doubtless intended to convey the same idea in another form of words. We cannot readily perceive what other way the bank has to realize on its judgment against, confessedly, an insolvent person; and, if it had been possible for the bank to have realized otherwise, it would not have made the trade it did, when an execution could have served more efficaciously.

Without the light of any testimony other than that furnished by the answer and the annexed documents, we do not feel warranted in the assumption that the transaction was manifestly simulated, or apparently unreal. The defendant having distinctly and unequivocally set up a demand in compensation against an executory mortgage and notes, and made the requisite oath, we think him entitled to a preliminary injunction, on the showing made. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is now ordered that the cause be reinstated, and remanded to the court *a qua* for further proceedings according to law, and the views herein expressed; costs of appeal to be taxed against the plaintiff and appellee, and those of the lower court to await final judgment thereon.

IRELSON *et ux.* v. SOUTHERN PAC. RY. CO.
(*Supreme Court of Louisiana.* May 19, 1890.
43 La. Ann.)

CARRIERS—INJURIES TO PASSENGERS—NEGLIGENCE
—EVIDENCE.

1. In order to impose a liability on a railroad company for the consequences resulting from the omission of an act by one of its employees, the test is not whether, had the act been done, the accident would not have occurred, but whether the act omitted was one which it was the duty of the employee to perform.

2. A conductor, who is told by an ordinary passenger that he has heard an unusual loud noise, and felt a jolt which has made the coach jump and aroused him, and who, after reasonable inspection, inside and outside of the car, does not become conscious of a cause of alarm and danger, is not bound to stop the train for an inspection.

3. His failure to do so, and consequent injury sustained thereby to a passenger by the derailment and capsizing of the coach, caused by the breaking of a wheel under a car in front, is not such negligence as imposes on the company the obligation of indemnity for harm sustained. It is *damnum absque injuria*.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; KING, Judge.

Leovy & Blair, for appellant. L. L. Levy, for appellee.

BERMUDEZ, C. J. This is an action in damages for bodily injury sustained in consequence of the alleged negligence of employees for whose acts the defendant is liable. The plaintiff complains that on the 16th day of January, 1888, at 4 A. M., while she was a passenger on a sleeper attached to a train of the company, a wheel from under the coach in front of that in which she was riding broke; that her sleeper became uncoupled, derailed, and capsized; that, in the upsetting, she received two cuts above the collar-bone from the window-glass; that she became unconscious, suffered considerably, was subjected to humiliations, had to take care of her injuries, was disabled for months, and that scars remain, a permanent disfigurement of her hand. The charge is that the company failed to provide for careful servants, safe conveyance, and to use extraordinary diligence in the management and running of the train; that the accident occurred through the defectiveness of the fastenings, and lack of durable appliances in the cars, and giving way of the tracks, and other defects and acts of negligence in the direction of the train; and damages to the extent of \$2,500 are claimed as pecuniary compensation. In defense, the company contends that it did provide a safe conveyance, with proper equipments, as far as it could do so, with the exercise of the utmost care and skill, and that the accident was solely due to the latent defect in a wheel, which no human care or skill could have detected or prevented. From a judgment allowing plaintiff \$750, defendant appeals.

The district judge succinctly recites the following facts found by him: "The cause of the accident was the breaking of the wheel at a point about 135 miles from New Orleans. It had been carefully inspected at La Fayette, and showed no patent defects. The track was in good order. The train was properly equipped. The running-gear and fastenings of the car were in good condition. The train was not running at an unusual rate of speed. The wheel accidentally broke from some hidden defects or cause which human care and foresight could not prevent." We concur in this finding, but differ from the reasons assigned conducive to an allowance of damages, in which our learned brother labors to show that the conductor did not, after the breaking of the wheel, stop the train, and that, had he done so, the accident would not have happened, and the plaintiff would not have been injured. Under this theory, we think the duty of the conductor was extended too far.

There can be no doubt that, as it is shown that the wheel was manufactured in a proper manner, by respectable manufacturers, and that, like it, the axle was without blemish; that as no defect was revealed after the usual examination and test on the night of the accident, and shortly before its occurrence,—no fault could be imputed to the defendant from which liability for the injury sustained could be attached. *Hutch. Carr.* §§ 497, 508; *Railway Co. v. Beggs*, 85 Ill. 80; *Railway Co. v. Huntley*, 38 Mich. 546, 548; *McPadden v. Railroad Co.*, 44 N. Y. 481.

The plaintiff does not appear to contest the condition of things found by the district judge, or the law applicable to it; but her contention is, as the conductor of the train had been seasonably warned by a passenger who had heard an unusual loud noise and felt a jolt, which had made the coach jump, arousing him, and who had asked him to see about it, this official did not examine and stop the train, and that, had he done so, he would have discovered the broken wheel, provided against the consequent danger, and thus would have prevented the accident. The law seems clear that, when the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, there ought to be at least a consciousness of the facts which raise the duty on the part of the person charged with its performance. Railways are not liable for a mistaken exercise of judgment on the part of their employees in an emergency, nor for a failure on the part of their servants to act with the utmost promptitude when the circumstances are such as to afford no time for deliberation. *Patt. Ry. Acc. Law*, p. 111, § 115. In such cases, the party charging the omission must prove that the duty alleged existed, that the omission constituted a legal fault, and that, had it been performed, the accident would not have happened. The conductor, heard as witness, said that, upon the statement of the passenger, he immediately went back in the car, saw nothing unusual, stood on the platform, looked outside, and discovered nothing; that he had just stepped into the second-class coach, when he saw the bell-line jerk, and that he pulled the bell to stop; that he went back, and got the passengers out of the car. He also says that, in passing over a switch or a frog, a train makes a loud noise, and that it is not an unusual thing for passengers to become alarmed, and to report to him, in such cases, when there is no occasion for fear. It is evident that, had the conductor stopped the train, when the passenger told him of what he had heard and felt, and had he looked into the exciting condition of things, he could have discovered the broken wheel, and the accident would not have occurred; but the question is not to be viewed in that light or from that stand-point. The test of liability in such cases is not whether the conductor omitted doing something he could have done, and which, if done, would have prevented the injury, but whether he abstained from doing anything which, in the exercise of ordinary care and prudence, he consciously ought to have done, and did not do, the omission of which caused the accident producing the injury. The real and only question in the case is simply whether the conductor was conscious of the condition of things, and was bound, on the mere statement of the passenger, to have stopped the train, where he saw no occasion for it.

It appears from his statements, and from the testimony heard, that he did not know that any accident had happened; that, as soon as the passenger told him what he did, he took steps to inquire and ascertain, and afterwards discovered no

cause of apprehension. He was not, therefore, conscious. There is nothing to show who that passenger was; whether he belonged to the ordinary class of travelers, or whether he was an *habitué* or an experienced railroad man, to whose statements or meanings, in such a case, serious significations could be attached. The proposition is inadmissible that, on the simple statement of any first-coming passenger that he has heard a loud noise and felt a jolt, a conductor, who has not thus heard and felt, who, after instant search and examination, discovers no subject of apprehension, is bound to stop a train at night, for special and thorough inspection of its different parts. Were it so, there is no telling how often he would have to do so on the journey. We are therefore of opinion that, as it was not, under the circumstances, the duty of the conductor to have stopped the train, the company is not responsible for his failure to have done so, and that the injury sustained is *damnum absque injuria*, particularly as it consisted, as the plaintiff herself declares, of fright and a slight cut. It is therefore ordered and decreed that the judgment appealed from be reversed, and that there now be judgment for defendant, with costs in both courts.

CARDEN v. STATE.

(*Supreme Court of Alabama. May 23, 1890.*)

LARCENY—DESCRIPTION OF PROPERTY.

1. An indictment for larceny charged the taking of one \$10 bill and one \$5 bill in money of the United States of America, of the value of \$15. Held to sufficiently designate the kind, denomination, and value of the money stolen.

2. The description in the indictment being sufficient, it is not error to refuse charges based upon the assumption that the grand jury knew a more particular description.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

The indictment in this case charged that the defendant, Henry Carden, "feloniously took and carried away, from the person of Tom Powell, one ten-dollar bill and one five-dollar bill, in money of the United States of America, a more particular description of which is to the grand jury unknown, the same being of the value of fifteen dollars, and the personal property of said Tom Powell." The bill of exception states that the defendant demurred to the indictment, and that his demurrer was overruled; but the judgment entry only recites that the trial was on issue joined on the plea of not guilty. On the trial, Powell, having testified to the loss of his money, and stated circumstances tending to criminate the defendant, added: "Both of the bills were greenbacks. I know that fact, and have known it all the time." Defendant's counsel then asked the witness: "What did you tell the grand jury about it?" The court sustained an objection to this question, and the defendant thereupon excepted. The defendant also requested several charges to be given to the jury, based on the assumption that the grand jury knew, or by due diligence might have known, a more particular de-

scription of the money; and he duly accepted to the refusal of these charges.

W. L. Martin, Atty. Gen., for the State.

CLOPTON, J. When the larceny charged is of bills, intended to circulate as money, the description may be general; an indictment which describes them by kind, denomination, and value is sufficient. The indictment charges defendant with having feloniously taken and carried away, "from the person of Tom Powell, one ten-dollar bill and one five-dollar bill, in money of the United States of America," of the value of \$15. This description designates bills circulating as money by authority of the general government, and *ex vi termini* the kind or species of currency,—national paper currency. It identifies the things stolen, and shows them to be subjects of larceny. The kind, denomination, and value are sufficiently averred. *Sallie v. State*, 89 Ala. 691; *Grant v. State*, 55 Ala. 201; *Levy v. State*, 79 Ala. 259. The description in the indictment being sufficient, whether a more particular description was to the grand jury unknown becomes an immaterial inquiry. Such an averment in an indictment, sufficiently describing the things stolen, must be regarded surplusage. The court did not err in the refusals to charge as requested by defendant, nor in the rulings on the admissibility of evidence.

Affirmed.

RICE v. SCHLOSS *et al.*

(*Supreme Court of Alabama*. May 6, 1890.)

ACCOUNT—BURDEN OF PROOF—BILL OF EXCEPTIONS.

1. A charge that the retention, without objection, of an account rendered, is conclusive evidence that it is correct, is error which is not harmless, if there is any evidence tending to impeach it.
2. An account is sufficiently proved to go to the jury by evidence that the book-keepers of the plaintiffs and the defendant have examined it, and eliminated errors, and that it contains those items only which have been passed as correct.
3. In a suit on an open account, the burden is on the plaintiff to show the balance due after giving credit for all payments.
4. When copies of papers are made exhibits to a bill of exceptions which states that an offer was made to read in evidence the originals, which were identified by a witness, and referred to by others, and no objection to their competency appears to have been made, the papers will be considered as in evidence in the case.

Appeal from city court of Montgomery;
THOMAS M. ARRINGTON, Judge.

Moore & Finley and Rice & Wiley, for appellant. *Arrington & Graham*, for appellees.

MCLELLAN, J. It has been suggested in argument that certain papers evidencing payments by defendant's intestate to the plaintiffs, which are made Exhibits 1, 2, 3, 4, 5, and 6 to the bill of exceptions, do not appear to have been read in evidence, and hence cannot be considered in reviewing the charges given and refused on the trial below. It is true that the only positive statement contained in the bill of exceptions on the point is that "the defendant then offered to read in evidence to the jury the originals, of which said Exhibits 1, 2,

3, 4, 5, etc., are copies;" and it may be conceded that, if nothing else appeared in regard to them, we could not treat them as having been before the jury. But both the defendant's and plaintiffs' witnesses testify about these papers in a way that would have been inexplicable to the court or jury had they not been in evidence; and their exhibition to the bill of exceptions, with appropriate identification by a witness on the stand, can only be accounted for on the assumption that they were read to the jury. As no objection was made to them, no ruling of the court invoked or had on their competency, and they could have been exhibited for no other purposes than as a part of the evidence in the case, we shall also consider them.

Their tendency, though weak and inconclusive, was to establish credits on the account upon which the suit was brought to the extent of their several amounts. There was other evidence that the amount represented by these checks, drafts, etc., which purported to have been drawn in favor of, and paid to, plaintiffs, had not been credited on the account in suit, though the transactions were within the time covered by that account. Moreover, plaintiffs' witness does not appear to have very clearly explained why these drafts had no connection with the account sued on. These papers, and the oral evidence in regard to them, tended, we think, necessarily, to impeach the correctness of the statement of account which was made the basis of the action, at least in such sort that it was proper for the jury to consider them. Furthermore, the witness Englehardt had testified to discrepancies in plaintiffs' account of itself, and also between it and another statement of the indebtedness furnished him by plaintiffs' book-keeper. It may be that none of this testimony, nor all of it together, was sufficient to falsify the statement of indebtedness sued on; but whether it was sufficient or not was manifestly a question for the jury. The court in its general charge instructed the jury that "if the account or accounts of plaintiffs against Rice & Wilson [Rice being defendant's intestate] were presented to Rice & Wilson, and were retained by them without objection for an unreasonable time, then the law conclusively presumes that the accounts were correct." This charge was confessedly erroneous. A reversal on account of it is sought to be avoided by an invocation of the doctrine of error without injury; the theory of appellee necessarily being that there was no evidence upon which the jury might have based an impeachment or falsification in whole or in part of the account or accounts thus presented to Rice & Wilson, and not objected to by them. That theory, as we have seen, is unsound. There was such evidence. The charge erroneously took its consideration away from the jury by making a fact conclusive which was only *prima facie* evidence of correctness, and we cannot see that it operated no detriment to the defendant.

The paragraph in which is found that part of the general charge quoted above contained also the following: "And it

would be strange if there should have been errors in the accounts of Schloss & Kahn against Rice & Wilson, and, if they were in fact received monthly, that the latter should have kept on buying goods, and trading with them, if they did so." Both of these clauses are set out together in the bill of exceptions, and the exception is "to each and every part of the charge of the presiding judge which is set out hereinabove." This is a mere general exception to the whole paragraph; and, if any separable part of it states a correct proposition of law, proper to be given in charge, the exception will avail nothing. *Mayberry v. Leech*, 58 Ala. 339; *Holland v. Barnes*, 53 Ala. 87. But we are of opinion that no part of the charge was good. The first proposition was erroneous and injurious as we have seen. The last part did not assert any proposition of law. It was a mere argument to the jury, and not proper to be given them as an instruction on the law applicable to the facts. The charge, therefore, in every part, was bad and taken as a whole worked injury to the defendant.

As a reversal must result from the view we have taken above, only such of the other exceptions reserved as involve matters which will probably arise on a retrial of the case will be considered.

The fact that an account is shown to have been a correct transcript from the books of the plaintiff, without more, will not authorize its introduction in evidence. Its items must be proved, or it must be shown to have been rendered to the defendant, and kept, without objection to its correctness, for such a length of time as to raise the presumption that objection would have been made if any ground therefor existed; or it must be shown that the items have been gone over by plaintiff and defendant, and all errors eliminated, and all suggested corrections made, before it should be allowed to go to the jury. *Hirschfelder v. Levy*, 69 Ala. 351. The witness Marks did not testify to the correctness of the account, but only to its being a correct statement of the account as it appeared on the plaintiffs' books. Neither did he prove that the account had been delivered to defendant, and kept without objection. But, as we understand his evidence, he did swear that he and defendant's book-keeper had "checked off"—that is, compared—the mutual accounts between their employers, eliminated errors therefrom, and that the account offered was the result of this comparison and elimination, and contained only items which had thus been considered, and passed as correct. The court did not err in allowing it to go to the jury. The relevancy of those items of the statement furnished by Marks to Englehardt, which represented dealings after the death of Rice, does not appear. There is no pretense disclosed in the record that this part of the statement tended in any way to throw light on former dealings, or supplied any evidence of credits which should have been, but were not, allowed on the statement of the dealings involved in the suit. Its exclusion was proper. That part of the court's general charge to which

defendant's second exception is taken was free from error of which the defendant can complain.

Of the charges given at the request of plaintiffs, only the sixth, to the effect "that the burden of proving any payments on the account sued on, or any set-offs, is on the defendant," is open to criticism. Its fault lies in the assumption that the account is shown to have been a stated account, in which case only would the burden of proof as to payments rest on the defendant. Whether the account was stated or not was a question for the jury, as it cannot be affirmed that the evidence on the point was without conflict, and free from adverse inferences. If the account was not a stated or uncontroverted account, it was, of course, on the plaintiff to show the balance due on it after allowing credit for all payments.

For a similar reason, the third charge asked by defendant was properly refused. It assumed that the account was an open one, in which case only was the burden referred to in the charge on plaintiffs. If a stated account, it was for the defendant to surcharge and falsify it, and furnish the evidence showing what items were proper, and what improper, charges; the theory with respect to a stated account being that the defendant has agreed to pay it as it stands.

Charge No. 1, requested by defendant, is abstract and misleading. The witness Marks did not, as we understand the record, testify that there were discrepancies between the account sued on and the statements rendered to Englehardt. His testimony was that what appeared to be discrepancies were not discrepancies, in truth and in fact, but resulted simply from the off-setting of certain credits against certain debits. Had the charge been given, it would have tended to mislead the jury into the belief that real discrepancies existed.

The other charges requested by the defendant were of a class which has been frequently condemned by this court as being mere arguments to the jury. *Snider v. Burks*, 84 Ala. 53, 4 South. Rep. 225; *Hussey v. State*, 86 Ala. 84, 5 South. Rep. 484; *Bank v. McDonnell*, post, —.

The judgment of the city court is reversed, and the cause remanded.

STEINER *et al.* v. ELLIS.

(*Supreme Court of Alabama. May 6, 1890.*)

MORTGAGE—SATISFACTION—STATUTORY PENALTY.

1. In an action for a statutory penalty under Code Ala. §1869, providing that a mortgagee who, having received the sum secured by his mortgage, fails for three months after written request to satisfy of record his mortgage, shall forfeit to the mortgagor the sum of \$200, unless during that time a suit is pending in which the fact of satisfaction is in issue, a petition alleging payment, and a request to satisfy, and that for more than three months thereafter, though no suit contesting the payment was pending, the mortgagee failed to comply with such request, states a cause of action.

2. Where a mortgagee wrote, postpaid, and addressed, a letter to the mortgagees, at their usual place of residence, requesting the cancellation of the mortgage, it will be presumed that the letter was received by them.

3. Instructions requested by defendants, that, "although the presumption is that the written request was received if it was delivered to the mail, * * * that presumption is rebutted by the evidence of the defendants that they did not receive the request, unless the jury shall refuse to believe that evidence," and, "if the defendants have sworn that they did not receive it, * * * the fact that it * * * was placed in the post-office or mail * * * is not sufficient to show that the defendants did receive it, unless the jury believe that what they have sworn to is not worthy of credit," are argumentative, and properly refused.

Appeal from the circuit court of Montgomery county; JOHN P. HUBBARD, Judge.

This action was brought by the appellee against the appellants on May 3, 1888, and sought to recover damages for not canceling a mortgage on the records of the probate court. The complaint was in the following words: "The plaintiff claims of the defendants the sum of two hundred dollars for this: That on or about the 30th day of April, 1887, plaintiff executed and delivered to defendants a mortgage, * * * which * * * was duly recorded; * * * that * * * the mortgagees * * * received satisfaction of the amount secured by said mortgage, and that on or about the 10th day of January, 1888, plaintiff requested said mortgagees, in writing, (the defendants,) to enter satisfaction upon the margin of the record of said mortgage; * * * that, at the time of such request, there was no pending suit between plaintiff and defendants involving whether such mortgagees had received satisfaction of said mortgage. Plaintiff avers that the defendants failed, * * * for three months after said payment of said mortgage, and said request to enter satisfaction thereof, as aforesaid, to make the entry of satisfaction of said mortgage on the margin of the record thereof. Plaintiff avers that there was no pending suit between plaintiff and defendants, within three months after said payment and said request, involving whether such mortgagees had received satisfaction of said mortgage. * * * Whereupon he brings his suit." The defendants demurred upon the grounds: "(1) That the complaint does not aver that three months elapsed after the written request to enter satisfaction; (2) that it is not averred that the defendants failed for three months after the written request to enter satisfaction; (3) that the complaint sets forth no substantial cause of action." The court overruled these demurrers, and the defendant duly excepted.

Upon the trial of the case, as is shown by the bill of exceptions, the plaintiff introduced in evidence the mortgage involved, and also testified himself that he had paid the amount secured by the mortgage in full, and that, upon the payment of the mortgage, he requested the defendants to have the said mortgage marked "Satisfied" on the records, and, upon their failure to do so, he wrote them a letter, again making the request; that this letter was written at Union Springs, between the 10th and 15th January, 1888, was addressed to the defendants at Montgomery, Ala.; that he stamped and mailed it, but that the said mortgage was not

marked "Satisfied" until after this suit was commenced; that the defendants admitted that they had received the letter. And the sister of the plaintiff testified that she was in the store of the defendants in April, 1888, when the defendants told the plaintiff that they had received the letter, and would attend to having the mortgage marked "Satisfied." The evidence for the defendant was in direct conflict with the testimony of the plaintiff as to having received any written request from him to have the said mortgage marked "Satisfied;" and they denied ever admitting that they had received the letter referred to, and testified to, by the plaintiff and his sister.

Upon the evidence introduced, the court charged the jury that, "if the jury believe from the evidence that the plaintiff had written a letter dated at Union Springs, and paid the postage thereon, and mailed the letter, addressed to defendants at Montgomery, Ala., requesting that the mortgage be canceled, this created a presumption that the defendants received the said letter so mailed." The defendant reserved an exception to this part of the court's charge, and requested the following charges, the giving of which was refused, and defendants excepted: "(2) Although the presumption is that the written request was received by Steiner & Bro. if it was delivered to the mail at Union Springs, that presumption is rebutted by the evidence of the defendants that they did not receive the request, unless the jury shall refuse to believe that evidence. (3) If the defendants have sworn that they did not receive a written request to have satisfaction of the mortgage entered upon the records, the fact that such a request, in writing, was placed in the post-office or mail at Union Springs is not of itself sufficient to show that the defendants did receive it, unless the jury believe that what they have so sworn to is not worthy of credit."

There was judgment for plaintiff; and defendants appeal, and assign the ruling on demurrer, and the giving of the charge copied, and the refusal to give the charges asked, as error.

Code Ala. § 1869, provides: "If a mortgage which is of record has been fully paid or satisfied, the mortgagees * * * must, on the request in writing of the mortgagor, * * * enter the fact of payment or satisfaction on the margin of the record of the mortgage. * * * If, for three months after such request, the mortgagees * * * fails to make such entry, he forfeits to the party making the request \$200, unless there is pending, or there is instituted, a suit within that time in which the fact of payment or satisfaction is or may be contested."

Williamson & Williams and Watts & Son, for appellants. *Moore & Finley*, for respondents.

STONE, C. J. The complaint in this case avers every material fact the statute makes necessary to the maintenance of the action, and the demurrer to it was properly overruled. Code 1886, § 1869, and citations; *Williams v. Bowdin*, 68 Ala. 126;

Jarratt v. McCabe, 75 Ala. 525; Scott v. Field, Id. 419.

There was no error in the charges of the court. The charge given by the court of its own motion is strictly in accordance with the authorities. Rosenthal v. Walker, 111 U.S. 185, 4 Sup. Ct. Rep. 382; 1 Greenl. Ev. § 40; 2 Best, Ev. § 408; 1 Taylor, Ev. § 179. The charges asked by defendants were mere arguments, and two of them, if given, would have been a palpable invasion of the province of the jury. They were rightly refused. Lang v. State, 84 Ala. 1, 4 South. Rep. 193; Snider v. Burks, 84 Ala. 53, 4 South. Rep. 225; City Council v. Townsend, 84 Ala. 478, 4 South. Rep. 750; Fertiliser Co v. Reynolds, 85 Ala. 19, 4 South. Rep. 639; Hussey v. State, 86 Ala. 84, 5 South. Rep. 484; Perry v. State, 87 Ala. 80, 6 South. Rep. 425; Norris v. State, 87 Ala. 85, 6 South. Rep. 371.

Affirmed.

PARK v. LIDE.

LIDE v. PARK.

(Supreme Court of Alabama. May 8, 1890.)

EQUITY—PLEADING—FRAUD—VARIANCE—AMENDMENT.

1. A wife's land having been sold under a mortgage, and bid in by her husband's brother, who afterwards conveyed to him, a bill by her heirs, charging that he had paid the debt with her money, and that the foreclosure was collusive, cannot, on failure of proof that the mortgage was not a valid and subsisting lien, be amended so as to charge him as having purchased in trust for his wife, and to compel a conveyance on repayment of his expenditures in removing the incumbrance.

2. There can be no review on appeal of the action of the court on demurrer to a bill, when the record does not disclose what it was, except by what seems to be a mere docket direction of the chancellor to the register.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Chancellor.

Watts & Son and Tompkins & Troy, for complainant. *Graves & Blakey*, for defendant.

MCCLELLAN, J. This record does not sufficiently present the action of the chancery court on the demurrer to the bill to enable us to review it. No decree in that behalf appears in the transcript. What seems to be a mere docket memorandum of the chancellor is transcribed; but that is not a decree, but a mere direction of the chancellor to the register, which may or may not have been developed into a decree by formal incorporation into the minutes of the court. We cannot consider assignments of error based on it. *Baker v. Swift*, 87 Ala. 530, 6 South. Rep. 153.

This leaves for consideration only the final decree on the merits of the case. The undisputed facts may be stated as follows: At the inception of the transactions involved here, Alex. McDade owned the tract of land in controversy, containing 1,220 acres, worth about \$2,500. He executed three several mortgages on the land to secure the payment of debts,—one to Charles McDade, May 1, 1875, for \$720, of which \$250 remained unpaid when the facts involved in this dispute transpired;

another to his daughter Janie S. McDade, April 12, 1876, for \$1,125; and a third to Lemuel W. Park, February 1, 1877, for \$728. On April 12, 1877, he executed to his said daughter a deed of gift in fee to this land, covering also his personal property, to take effect on his death, which occurred a few days afterwards. Howard P. Park, a brother of L. W., referred to above, in June, 1877, married Janie S. McDade, who died intestate and without issue, and leaving no debts, in May, 1878; her husband having in the mean time taken possession of all the personalty which came to her from her father, and also the tract of land in controversy. Prior to her death, on the 6th and 7th of March, 1878, all of the mortgages, including that made to Janie S. Park, née McDade, were foreclosed under powers of sale contained in them, respectively; and at each sale Robert E. Park, another brother of the defendant, became the purchaser, bidding the amount of the mortgage debt in each instance. Each of the mortgagees executed conveyances to him; the deed of Janie S. Park, however, not being joined in by her husband. On October 11, 1878, Robert E. Park conveyed the land to Howard P. Park on a recited consideration just equal in amount to the aggregate of the several mortgage debts at the time of foreclosure, seven months before. The complainant, Frank W. Lide, was a half-brother of Janie S. Park, deceased, and her only heir at law, except the surviving husband. The bill avers that the defendant, Howard P. Park, before the 6th of March, 1878, had paid off the Charles McDade and L. W. Park mortgages with the proceeds of personal property belonging to his wife, but, by collusion with said mortgagees and Robert E. Park, fraudulently, and, with intent to cut off the rights of the complainant as the heir at law of said Janie S., had these mortgages, though fully satisfied, as also that of his wife, foreclosed; that Robert E. Park, as a part of the fraudulent scheme, became nominally the purchaser, under an agreement to reconvey to Howard P. Park, but that he never paid anything whatever for the land thus purchased to either of said mortgagees. Upon this state of facts, in part confessed, but in other part denied, the theory of the bill is that, the mortgages to McDade and L. W. Park having been paid with the proceeds of her property, they, as well as the one originally executed to her, belonged to said Janie S. Park, and hence said foreclosures were either absolutely void, and did not pass either the legal or equitable title out of her, or, being made under the supervision of her husband and trustee, were for her benefit, and the conveyances thereunder were in fact and law made to Robert E. in trust for her, and the estate, being so held by him at the time of her death, descended to complainant in remainder, the husband having a life-estate by curtesy. The prayer for final relief is that the foreclosure sales and conveyances to R. E. Park, and the conveyance by him to H. P. Park, be set aside, and held for naught; that the land be decreed to belong to the estate of Janie S. Park; and that complainant be ad-

judged entitled to a remainder therein after the death of Howard P. Park.

The decree rendered is not in line with the facts thus alleged; nor does it round out the theory of the bill, or provide for the relief prayed. On the contrary, it adjudges that the facts alleged have failed of proof; it finds another and different state of facts to be supported by the evidence; and it responds to that other and different state of facts, and grants relief which, whether appropriate to the facts found or not, is not appropriate to the facts alleged. We quite agree with the chancellor that the testimony does not establish that Howard P. Park paid off the McDade and Lemuel Park mortgages before foreclosure out of the proceeds of the wife's property. We are also of the opinion that all the mortgages were subsisting incumbrances on the land at the time they were severally foreclosed. Nor can we find justification in this record for the belief that the transactions involving the foreclosures, whether Robert E. or Howard P. Park was the real purchaser thereat, were infected with any covinous intent to cut off the rights of Lide as the contingent heir of Janie S. Park, if indeed he can be said to have had any rights during her life. We can discover no sufficient motive for such an effort in view of the youth, health, and pregnancy of Janie S., giving promise not only of long life, but of issue in the near future. It is more reasonable to suppose, as one of the parties testified, that "Frank W. Lide was not thought of at that time," or in that connection; and there is no evidence to the contrary. These conclusions leave open the question whether the purchase by R. E. Park at the foreclosure sales was a *bona fide* purchase by him on his own account, or was made as the agent and in the interest of, and under an agreement to reconvey to, H. P. Park. However that question may turn on the evidence, its determination cannot support the only relief which would be responsive to the allegation of the bill. The largest relief the complainant could be entitled to on account of Howard P. Park becoming, directly or indirectly, the purchaser at the foreclosure sales, would be to have the land decreed to him, charged with the amount Park had paid in removing the incumbrances, or at least with such part thereof as should be paid by the tenant in remainder, the balance being charged against the life-estate, (Clark v. Cantwell, 3 Head, 202;) and a bill to this end would be in the nature of a bill to redeem, and without equity, unless it offered to reimburse the purchaser. On the other hand, if the mortgages had been paid by the application to them of proceeds of the wife's separate property, the legal title *eo instanti* reverted in her, was in her at the time of her death, and then passed into her heirs. Nothing that the husband did after such reversion, in fraudulent foreclosing the satisfied mortgages, nor any expense he might have incurred or paid in that fraudulent consummation, could have affected the rights of the wife or her heirs, or operated any charge upon the land as against her or them. Had these been the facts shown in the testimony,

as they are the facts, and the only facts, alleged in the bill as a predicate for relief, the complainant would, we do not doubt, have been entitled to have all conveyances based on the foreclosure sales set aside, and the land decreed to belong to him in remainder over after the falling in of Park's life-estate. But these facts are not proved. The facts which are proved authorize a different kind and measure of relief. The allegations, in other words, are not sufficient to authorize the relief granted, nor is the proof sufficient to support the relief prayed. This state of things involves a variance between the averments and the proof which is fatal to the decree; the rule in this respect being especially stringent in those cases in which, like the present, the complainant relies upon the fraud of his adversary. 1 Daniels, Ch. Pr. 36 et seq., 383; Wilde v. Gibson, 1 H. L. Cas. 605; Glascock v. Lang, 2 Phil. Ch. 310, 322; Story, Eq. Pl. § 42, and note; Winston v. Mitchell, 87 Ala. 395, 5 South. Rep. 741; Dexter v. Ohlander, 89 Ala. —, ante, 115; Patton v. Beecher, 62 Ala. 579; Winter v. Merrick, 69 Ala. 86.

We are unable to see how the present bill can be amended so as to authorize the relief to which the facts proved would entitle the complainant without a departure from the case originally presented. It is true that an amendment proper in itself might be allowed even after reversal of a final decree, (Winter v. Merrick, 69 Ala. 86;) but at no time is it competent to make a different case by amendment. If, in addition to what the bill now contains, the case had also been presented in the aspect developed by the evidence, very clearly the complainant would not have been entitled to the same relief in either phase of his bill thus set forth; and, had the bill been taken as confessed, the court could not have responded to both aspects. This is the test to determine whether different states of facts may be presented together; and if the relief which is appropriate to one state of facts is not that, also, which the alternative averments demand, a demurrer will lie. Had the facts in evidence been laid in the bill alternatively with the averments the bill now contains, the case would have been one in which, in one aspect, title to the land, freed from all incumbrances, would have been in Janie S. Park before and at the time of the sales, the foreclosures would have been utter nullities, and the fee at her death would have passed into her heirs; and in the other aspect the mortgages were subsisting, the foreclosures valid, and the purchases thereat would be held to have been made for Janie S. Park, in such manner, however, as to charge the land, even as against her, with the sums paid in satisfaction of the mortgages. In the case alleged the complainant succeeds to and claims under the absolute legal title of Janie S. Park, and the *gravamen* of his bill is that a cloud has been put on that title through the fraud of Howard P. Park. In the case proved the complainant succeeds to and claims under the right of Janie S. Park to divest the legal title out of Howard P. upon the payment to the latter of the sums he had

paid in purchasing at foreclosure sales. Not only, therefore, is the title relied on by complainant, in the two aspects of the case presented by the bill and proof, respectively, entirely different, but the conditions of relief are wholly unlike. The defenses open to defendant in these different aspects would be essentially dissimilar. In the one, he could defeat recovery by showing that the mortgages were valid and subsisting charges on the land at the time of foreclosure, and as such were foreclosed in good faith, while in the other these facts would not avail him, but he would be further required to show that he did not himself either purchase at the sales, or redeem from the purchaser thereat, at least during the life of his wife, directly or indirectly; for in either case he would be held to have acted as her trustee, and entitled only to reimbursement, apportioned, it may be, on equitable principles, between the life-estate and the remainder in fee. So it is, we think, clear that the right asserted, the defenses against the right as asserted, and the relief to which the complainant would be entitled on proof of the right asserted, are each and all different from the right, defenses, and relief arising from and incident to the facts which are proved; and the two states of fact could not be alleged alternatively in the same bill. *Caldwell v. King*, 76 Ala. 149; *Gordon v. Ross*, 63 Ala. 363; *Lehman v. Meyer*, 67 Ala. 396; *Moog v. Talcott*, 72 Ala. 210; *Ward v. Patton*, 75 Ala. 207; *Corrugating Co. v. Thacher*, 87 Ala. 458, 6 South. Rep. 386. A matter which could not have been originally alleged in the alternative cannot afterwards be introduced into the bill by amendment. To do so would be a departure from the cause of action first presented, and is not allowed even under our liberal statute of amendments. *Ward v. Patton*, supra; *Ray v. Womble*, 56 Ala. 32.

The present bill, therefore, could not be amended, upon a remandment of the cause, so as to authorize the relief appropriate to the facts established by the evidence. Hence the decree will be reversed, and the bill dismissed. The costs of both appeals will be taxed against Frank W. Lide, and the judgment in his appeal will also go against the sureties on his bond for costs.

WHITE v. HOBART.

(*Supreme Court of Alabama*. May 8, 1890.)

GARNISHMENT—EXEMPTION.

The answer of the garnishee, which is not contested, disclosing a conditional liability only, a judgment, denying a claim of exemption, interposed by the debtor, is a nullity, and an appeal by him will be dismissed.

Appeal from city court of Decatur.

Kyle & Skeggs, for appellant. *Wert & Speake*, for appellee.

STONE, C. J. M. S. Hobart instituted suit before a justice of the peace against W. L. White for a sum less than \$100, and on April 6, 1889, L. M. Falk was summoned as a garnishee to answer as to his indebtedness to W. L. White. On May 20, 1889, he answered, denying any indebted-

ness to White, "but will be indebted in future in the sum of about one hundred and eleven 50-100 dollars when he [White] completes my [Falk's] house according to contract." There was no further answer by the garnishee, and no contest of his answer. The record is silent whether Falk's house has ever been completed according to contract, and it is not shown what it lacks of completion. After garnishment served, but before answer filed, White interposed a claim to Falk's indebtedness to him as exempt to him under the laws of Alabama. This claim was sworn to and filed April 25, 1889, and set forth, among other essentials to such claim, that White "is a resident citizen of Morgan county, Ala." The claim includes other items, not included in this controversy, the aggregate being less than \$1,000. This claim of exemption was controverted by Mrs. Hobart, through her agent, on April 29, 1889, he denying that the said White was a resident citizen of Alabama. An issue was thereupon made up before the justice of the peace to determine whether or not White was a resident of Alabama, and the issue was submitted to a jury, who, by their verdict, found that White was not a resident citizen of Alabama, and therefore found the issue in favor of the plaintiff, Mrs. Hobart. The justice thereupon adjudged that said property "be held subject to the payment of the judgment in favor of plaintiff against defendant, for which let execution issue. And the garnishee in this case, L. M. Falk, having answered, and admitting that he will be owing the defendant \$111 when he shall have completed the job of work on hands for him, judgment is hereby rendered against said garnishee for \$54.48 principal, and for \$7 costs, but execution is stayed until said job is finished." From this judgment White, the defendant, appealed to the city court. When the case reached the city court, and at the first term thereof, the defendant, White, filed a motion as follows: "Now comes the defendant, and moves the court to order the garnishee in this cause, L. M. Falk, to pay over the money in this cause, detained under the writ of garnishment, to the defendant." At the same time the garnishee moved for his discharge on several grounds, among them that the "contract [work] not having been completed at that time, no judgment could have been rendered against him in the lower [justice's] court." Thereupon the issue whether or not White was a resident of Alabama was tried before the city court, a jury being waived. After hearing the testimony, the following judgment was rendered by the city court: "The court is of opinion that defendant had not at the time of the service of said garnishment acquired a residence entitling him to the benefits of the exemption laws of Alabama. The issue is therefore found in favor of the plaintiff, Mary S. Hobart." From that judgment the present appeal is prosecuted.

We feel constrained to dismiss this appeal *ex mero motu*, for the following reasons: The answer of the garnishee, Falk, does not disclose any debt to White, and it does not appear that there ever will be

any debt to him by virtue of the contract brought to view in the answer. Taking that answer for our guide and only source of information, the inquiry whether he ever would become indebted depended on the further inquiry, would White ever finish the house according to his contract? If he did not, then the logical interpretation of the answer is that Falk would not become indebted to him; for aside from that contract he answered that he owed him nothing. 1 Brick. Dig. p. 179, §§ 355, 370, 371. The answer of a garnishee must be taken as true unless it is contested, and no contest or other issue is formed or tendered questioning the truth of Falk's answer. Id. p. 181, §§ 388, 389. It rested with White whether he would ever finish the house, and no court had power to compel him to do so. We cannot know or indulge the presumption that it ever will be completed. Till the house was completed, Falk owed no debt to White, and until he was shown to owe such debt there was nothing to condemn to Mrs. Hobart's claim, or to adjudge to White as exempt. Subject-matter is as essential to the maintenance of a suit as that there shall be parties litigant; and until it is ascertained that there is a subject-matter, there can be no legal issue tried. It is not our intention to assert that White's claim of exemption was interposed prematurely, or that the denial of its legal validity was premature. The claim of exemption, to avail anything, must precede condemnation in garnishment. Randolph v. Little, 62 Ala. 896; 1 Brick. Dig. p. 180, § 378. What we do decide is that, until, by further answer, or as the result of the contest of garnishee's answer, it was ascertained that he owed White, there was not shown to be *in esse* any subject-matter for an issue for a trial. We have decisions which hold that when a garnishee admits an indebtedness to fall due at a future time, the court may render judgment with stay of execution until the time when by the terms of the contract the debt will fall due. To justify such judgment, however, there must be no unascertained fact, no contingency upon the happening of which the question of indebtedness depends. Judgments are the logical sequence of ascertained, existent facts, and cannot be rendered to take effect on a contingency which may never happen. The so-called judgment rendered by the justice of the peace against the garnishee was a nullity, and for the same reason the similar judgment of the city court is a nullity, and will not support the appeal to this court. The trial of White's claim of residence was premature, for there was no ascertained fact of a debt from Falk which, in the then state of the litigation, could impart to that inquiry legal significance. For the same reason the trial in the city court had no real subject-matter which could authorize the contention. The whole proceeding as to the condemnation *vel non* of what the garnishee might owe, which took place subsequent to the filing of his answer, to the interposition of exemption claim, and to the denial of its validity, was premature, and is a nullity. Failing to contest garnishee's answer, the only course left to Mrs. Ho-

bart was to call on the garnishee for further answer, if she supposed the condition on which his indebtedness depended had been performed. If by further answer, or other authorized proceeding, it be shown that Falk is indebted to White, then the inquiry of the rightfulness of the latter's claim of exemption will have a subject for forensic contention, and not till then. Appeal dismissed.

ROACH V. PRIVETT.

(Supreme Court of Alabama. May 20, 1890.)

FOREIGN JUDGMENTS—COLLATERAL ATTACK—SET-OFF—PAROL EVIDENCE.

1. One who prosecutes an appeal from a judgment of a *nisi prius* court of a foreign state to the supreme court of that state, and who submits himself to the jurisdiction of the appellate tribunal, cannot impeach its judgment, in an action brought thereon in this state, on the ground that the *nisi prius* court had never obtained jurisdiction of his person, as the judgment of the supreme court merges that of the lower court.

2. Failure by a defendant to plead a set-off in an action brought against him in a foreign state will not prevent him from relying on such set-off in an action on the judgment brought in Alabama, where the settled doctrine is that defendant's failure to plead a set-off will in no wise affect or impair his right so to do in a subsequent action by the same plaintiff.

3. The fact that the original papers in an action tried before a justice of the peace cannot be found either by the party in whose favor the judgment was rendered, or by the justice, will not warrant the introduction of parol evidence regarding the judgment, in the absence of a showing that the justice had been in office continuously since its rendition, or that he had succeeded, after being out one or more terms, to the same justiceship that he held at the time of the rendition of the judgment; the presumption being that his docket and papers have been turned over to his successor in office, as required by law.

Appeal from circuit court, Jackson county; JOHN B. TALBY, Judge.

Action by Samuel P. Privett against Luther R. Roach on a judgment rendered by the supreme court of Tennessee on appeal from a *nisi prius* court.

The defendant pleaded the general issue, set-off, and specially pleaded that the *nisi prius* court, which first rendered the judgment against him in Tennessee, was without jurisdiction. The plaintiff demurred to this special plea on the ground that the plea showed on its face that the defendant prosecuted the appeal to the supreme court, and was there represented by counsel, and that said supreme court rendered the judgment here sued on. The court sustained the demurrer, and the defendant duly excepted. On the trial of the case the defendant offered a great deal of evidence to substantiate his plea of set-off; and this evidence tended to show that the plaintiff was indebted to the defendant in several small sums, and showed, also, that these sums were due when the first trial was had in Tennessee. One of the items sought to be set off against the judgment here sued on had been prosecuted to a judgment in a justice of the peace court; and, in attempting to prove the recovery of this judgment, the defendant testified that he had looked for the original papers, but could not find them, and that the justice before whom the judgment was

recovered had looked also, but could not find them, and on cross-examination the defendant testified that this same justice was now justice of the peace, but he did not know whether he had been continuously justice, and could not say that he was appointed to the very same justiceship as he held when said judgment was rendered before him, or whether he came in possession of his same docket. Upon motion of the plaintiff, all the evidence of the defendant in reference to the establishment of his claim of set-off was excluded, and also his evidence as to the recovery and the existence of a judgment before the said justice of the peace. The defendant excepted to this ruling of the court. At the request of the plaintiff, in writing, the court gave the general affirmative charge in favor of the plaintiff, and then refused to give the general affirmative charge in favor of the defendant, although requested by the defendant in writing. The defendant excepted to the giving and refusal of each of these charges. There was judgment for the plaintiff; and the defendant now appeals, and assigns the rulings of the court on the pleadings and evidence, the giving and refusal to give the said charges, as error.

J. E. Browne and W. L. Martin, for appellant. *Hunt & Clopton*, for appellee.

McCLELLAN, J. The judgment sued on was rendered by the supreme court of Tennessee on appeal from a circuit court of that state, and is not only an affirmance of the latter judgment, but is also, in terms, an original judgment in the appellate court, with order for execution out of that court for the amount there adjudged to be due. In the absence of proof of any law in Tennessee to the contrary, we must intend, not only that the judgment of the appellate tribunal is in accordance with the law of that state, but that it is the only judgment in force in the case in which it was rendered. *Hassell v. Hamilton*, 33 Ala. 280. Especially so as this ruling is in harmony with our own decisions as to the merger of judgments appealed from into judgments of affirmance on appeal. *McArthur v. Dane*, 61 Ala. 539; *Werborn v. Pinney*, 76 Ala. 291.

The special plea of the defendant below was an attempt to impeach the judgment sued on by showing that the *nisi prius* court which rendered the judgment appealed from, and which had thus merged into the judgment of the supreme court, was without jurisdiction; but it disclosed that the defendant had prosecuted the appeal, and submitted himself to the jurisdiction of the appellate tribunal. We concur with the circuit judge that this was fatal to the plea. It showed that the court which rendered the judgment sued on—the only subsisting judgment in the case—had jurisdiction of the defendant, whatever may have been the fact in this regard as to the primary court. The defendant could not thus invoke the jurisdiction of the appellate court, and speculate on the chances of its favorable action, without being bound and precluded by whatever judgment should be rendered in the exercise of that jurisdiction. If he

desired to avoid this result, and at the same time draw in question the jurisdiction of the primary court, his remedy was a writ of error *coram vobis*, under which it was open to him to show that the trial court had never acquired jurisdiction of his person, either by service of summons or attachment of his property. In that proceeding, upon a proper showing, the judgment below could have been expunged. Such is the course of the common law, which, in the absence of anything to the contrary, we are bound to presume obtains in Tennessee. *Steph. Pl. 119*; *Day v. Hamburg*, 1 Brown, (Pa.) 75. But, as he elected to hazard the rendition of a valid judgment against him by taking an appeal on a record which did not disclose the jurisdictional infirmity of which he complains, he cannot be heard to object that the judgment thus rendered in a proceeding instituted by him was void because of the absence of service on him in the primary court. The demurrer to the special plea was, therefore, properly sustained.

Our opinion is that the circuit court erred in excluding from the jury the evidence offered by the defendant in support of the set-offs claimed by him against the judgment debt. This ruling appears to have proceeded on the theory that, as the alleged counter-claims or items of set-off antedated the Tennessee judgment, and could have been pleaded in that action, the rendition of that judgment forecloses and precludes them. This view finds some support in some of our earlier cases. (*Crawford v. Simonton's Ex'rs*, 7 Port., Ala., 110;) but it is unsound in principle, and cannot be reconciled with later adjudications. The settled doctrine of this court now is that a set-off may or may not be pleaded, at the election of the defendant, and that unless it is pleaded the right to sue upon it as an independent cause of action, or to rely upon it in defense of another action by the same plaintiff, is in no wise affected or impaired by a judgment against the defendant. *Wharton v. King*, 69 Ala. 365; *Weaver v. Brown*, 87 Ala. 533, 6 South. Rep. 354. And this is in harmony with the ruling in other jurisdictions. *Freem. Judgm. §§ 277-280*. What the law in this regard is in Tennessee, we are not advised by anything in this record, and we cannot look elsewhere to ascertain it. *Johnson v. State*, 88 Ala. 176, ante, 253. In the absence of evidence on this point, the presumption is that the common law controls the question in that state; and at common law a set-off cannot be pleaded at all. *Wat. Set-Off, § 10*; *White v. Governor*, 18 Ala. 767. And hence, of course, a counter-claim, not a matter of recoupment, could not have been made an issue in the case, nor concluded by the judgment therein.

It is contended, however, that the error, if any, committed by the trial court in excluding evidence of set-off, was without injury, in that the defendant failed to sustain the plea; the ruling of the court having been made after all the testimony on this point had been adduced. We cannot pass upon the sufficiency of the evidence on any controverted issue of fact. That

question is for the determination of the jury. If there was any evidence, however weak and inconclusive it may have been, tending to support defendant's plea of set-off, the error in excluding it cannot be said to have involved no injury to him, as we cannot know what effect it would have had on the minds of the jury. That there was such evidence, the record before us clearly demonstrates.

Parol evidence of the judgment rendered by the justice of the peace should not have been received, on the showing made. It should, at least, have been made to appear that the justice had been in office continuously since its rendition, or that he had succeeded, after being out one or more terms, to the same justiceship which he held at the time of the judgment; otherwise, there is no presumption of loss or destruction of the papers, or the judgment entry, from a failure to find them or it in his office at the time of the search proved. *Non constat* but that the docket on which the judgment entry was made had, as required by law, been delivered to another justice, and never returned to the magistrate who rendered the judgment.

For the error pointed out above the judgment of the circuit court is reversed, and the cause remanded.

WHITLEY *et al.* v. DUNHAM LUMBER CO.
(*Supreme Court of Alabama.* May 9, 1890.)

INJUNCTION—BILL—SUFFICIENCY OF EVIDENCE.

1. Where a bill to enjoin a mortgagee from selling under a power in the mortgage averred payment, but offered to pay any amount that might be found due upon an accounting, and prayed cancellation, or, if something were found still due, to be allowed to redeem, a motion to dismiss for want of equity was properly denied.

2. A motion to dissolve the temporary injunction upon an answer which merely denied payment was properly overruled. Plaintiff was entitled to a continuance of the injunction upon its prayer for an accounting, and for leave to redeem.

3. Having acquired jurisdiction of the controversy, the court properly enjoined an action at law upon the notes secured by the mortgage.

4. It sufficiently appeared that a draft was taken as payment on a mortgage from the facts that the amount of its face, less discount, was credited upon the back of the mortgage, and also upon defendants' books as a payment thereon; that no objection was made by defendants to a statement rendered long after the draft was dishonored, in which they were charged with the amount thereof as a payment; and that defendants, after the dishonor, rendered three statements to plaintiffs in which the amount of the draft was credited as a payment.

Appeal from chancery court, Butler county; JOHN A. FOSTER, Judge.

W. R. Houghton, for appellants. *Richardson & Steiner*, for appellees.

McCLELLAN, J. The original bill alleged payment of a debt secured by a mortgage executed by the complainant, appellee here, and McKenzie & Perkins to the appellants, defendants below, that, notwithstanding such payment and satisfaction in full, the defendants had advertised the property covered by the mortgage, all of which belonged to the Dunham Lumber Company, for sale under a power of sale contained in

the instrument; that, unless they were enjoined, the sale would be made, and thereby the large saw-mill business of complainant, and a railroad operated in connection therewith, would be stopped, large numbers of employes thrown out of employment, complainant be prevented from filling orders and executing contracts it has from and with parties from outside of the state; that its credit and commercial standing with those with whom it has contracts, and in financial circles, will be impaired, and complainant be otherwise irreparably injured and damaged. Complainant embodies in its bill an offer to redeem its property from said mortgage, if it should be mistaken in its averments of payment and satisfaction thereof, and to pay whatever balance should be found due thereon. The prayer of the bill is for an accounting to ascertain whether, and if any what, sum is unpaid on the mortgage; that the same be canceled if found to be fully paid, and if not fully paid, that complainant be let in to redeem therefrom upon payment of the balance due, etc.; and that in the mean time defendants be enjoined from proceeding to sell under the mortgage, as they were threatening and preparing to do. An injunction issued as prayed. Subsequently the defendants instituted suit in the circuit court of Butler county on the note which evidenced the mortgaged debt, and upon this fact being brought to the knowledge of the chancellor, by an amendment in the nature of a supplemental bill, containing a prayer to that end, the suit at law was also enjoined. The answer denied the averments of the original bill as to satisfaction of the debt; and upon these denials a motion was made to dissolve the injunction. This motion was refused, as was also a motion to dismiss the bill for want of equity. Demurrers to the original bill and the amendment were also interposed and overruled, and on final hearing it was found that the mortgage debt had been fully paid, the mortgage was decreed to be canceled, and the injunctions against defendants were perpetuated.

There can be no question but that the original bill, averring payment of the mortgage debt, and yet offering to pay any balance that might be found due on a statement of the account, and praying, in the alternative, for a cancellation of the mortgage if the debt secured by it should be found to be fully satisfied, or for a redemption from the mortgage if a balance should be found against the complainant, contains equity. *Fields v. Helms*, 70 Ala. 460; *Gilmer v. Wallace*, 79 Ala. 464. The denials of the answer of the fact of payment and satisfaction did not entitle the defendants to a dissolution of the injunction of the threatened sale. The fact of payment was not essential to that aspect of the bill which sought an accounting and redemption from the mortgage, and the injunction was properly retained for the purposes of redemption, aside from the prayer for cancellation on the theory of satisfaction. In either aspect of the case, complainant was entitled to have the sale restrained until a final disposition of the case, in order that, whatever right it

should be adjudged to have, whether the right to cancellation or the right to redeem, might be effectuated. The answer contains no denial of any fact necessary to complainant's right to redeem. Moreover, this case comes especially within the doctrine of *Harrison v. Yerby*, 87 Ala. 185, 6 South. Rep. 3, in which it is held that the court of chancery is invested with wide latitude in acting upon motions to dissolve injunctions on the denials of the answer, and that whenever it appears that a continuance of the writ will probably cause less injustice and inconvenience to the defendant than would result to the complainant from its dissolution, this discretion is well exercised in denying the motion for dissolution. *Chambers v. Iron Co.*, 67 Ala. 353; *Railway Co. v. Witherow*, 82 Ala. 190, 3 South. Rep. 23; *Kinney v. Ensminger*, 87 Ala. 340, 6 South. Rep. 72. The chancery court having thus rightfully acquired jurisdiction of the controversy, and restrained the sale under the mortgage, it had the further right, as a matter of course, to protect and effectuate its jurisdiction by enjoining the suit at law, instituted, after bill filed, for the purpose of having one of the chief questions involved in the chancery case adjudicated and determined in the law court. *Railway Co. v. Barrett*, 65 Ga. 601; *Hadfield v. Bartlett*, 66 Wis. 635, 29 N. W. Rep. 639; 10 Amer. & Eng. Enc. Law, 908, 909. The view we have taken of the questions considered above, some of which, perhaps, need not have been decided, leaves but one point open in the case, namely, whether the draft of B. B. McKenzie on Raymond was taken by the mortgagees, Whitley & Trimble, as an absolute payment *pro tanto* of the mortgage debt. On this issue, McKenzie being jointly bound with the Dunham Lumber Company for the debt secured by the mortgage, the presumption of law is the draft was not given and received as a payment on the debt, but only as a means of raising funds to be applied to the debt as a payment when realized, and the affirmative of the issue is therefore upon the complainant. The company, in other words, must affirmatively show that the paper was a payment of the mortgage debt to the extent of its amount. *McWilliams v. Phillips*, 71 Ala. 80; *Lehman v. McQueen*, 65 Ala. 570. McKenzie swears that Whitley & Trimble, after satisfying themselves of the solvency of Raymond, upon whom the paper was drawn, took the draft in absolute payment of so much of the mortgage debt. On the other hand, Trimble testifies that the draft was not taken in payment at all, but only for the purpose of raising money to be applied when collected to the debt. Whitley corroborates Trimble in respect to subsequent conversations and transactions between them and McKenzie in reference to the amount for which the draft was drawn, which conversations and transactions, as testified to by them, tend to show that the draft was not taken in or considered as a payment in the first instance or afterwards. In respect to these matters Whitley's evidence is somewhat discredited by a former deposition given by him in the cause, in which he was not

nearly so full and explicit as on this reference. McKenzie, in rebuttal, contradicts all this evidence, or so explains what occurred or was said as to make it entirely consistent with the theory that the draft was a payment. So stands the issue on the testimony of these witnesses, and if this were all the evidence in the case, we could not affirm that the mortgage debt was reduced *pro tanto* by this transaction. But the complainant is very strongly supported by the following facts and circumstances appearing from papers put in evidence: (1) The face of the draft, less discount, is entered on the back of the mortgage as of date the day after it was drawn, along with and following two other items which are shown to be proper credits on the secured debt, and to constitute the only large payments that had been made up to that time. (2) The amount of the draft was charged to the defendants as a payment on the mortgage debt in a statement of the account which appears to have been rendered by complainant to defendants more than a year after it was drawn. This statement shows a balance due to complainant, which could have been the case only on the assumption that the draft was a payment; and, though the statement was delivered to and kept by defendants, no objection to it was seasonably made, nor at all in fact, except by taking steps long afterwards to sell under the mortgage. (3) Several months after the draft was drawn, and after it had been dishonored, the defendants rendered three several statements of the account to the complainant, and in each instance credited the net value of the draft as a payment thereon, and, so treating it, drew down a balance of which, and of which only, they demanded payment; and this balance was afterwards fully paid by the complainant. (4) On January 2, 1888, an account for \$137.98 was presented by the complainant to the defendants, and accompanied by a request to "please remit," which could have been accounted for only on the assumption that the mortgage debt had been fully paid, especially as theretofore accounts of this character had been credited on that debt; and this account was received by defendants, and, though not paid, no objection was ever made to it, or to its request for remittance. (5) And finally the fact that the net value of the draft in controversy was credited on the books of defendants as a payment on the mortgage debt as of its date. We cannot escape the conclusion to which these facts drive us, that the draft was taken by the defendants as an absolute payment on the mortgage debt, and to that extent released the Dunham Lumber Company and its property from the debt, and the lien by which it was secured. It is admitted that the balance of the original mortgage debt, after deducting the amount of this draft, had been fully paid. This conclusion may be safely rested on the evidence adduced before the register which was not open to any tenable objection, and wholly without consideration of any testimony, the relevancy or admissibility of which is even questionable. We therefore deem it un-

necessary to go into a consideration of the objections and exceptions filed to the register's report, and passed on expressly or impliedly by the chancellor in the final decree. The decree of the chancellor, confirming the results reached by the register, holding the mortgage debt to have been fully paid and discharged, so far as the complainant or its property was liable therefor, canceling the mortgage, and perpetually enjoining the suit at law and sale under the power, is free from error, and is in all things affirmed.

TRUSS V. DAVIDSON.

(Supreme Court of Alabama. May 9, 1890.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD—EVIDENCE—STIPULATION.

1. The fraudulent intent of the assignor did not avoid an assignment for the benefit of creditors when neither the assignee nor the creditors knew of, or participated in, the fraud.

2. The fact that, while a deed of assignment for the benefit of creditors was in course of preparation, the assignor, without the knowledge of the assignee or of the creditors, sold goods at reduced prices, and failed to pay over the proceeds to the assignee, does not avoid the assignment.

3. That an assignee for the benefit of creditors, pending a suit against a sheriff to recover goods attached after the assignment, agreed with the assignor that the sheriff might sell the goods at private sale, did not constitute an abandonment of the suit; and its only effect was to limit the amount of the recovery to the sum realized at the sale.

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

This action was brought by the appellee against the appellant, and sought to recover a stock of goods. The plaintiff claimed the same as assignee of one A. T. Palmer, while the defendant had possession of the said stock of goods, as sheriff, under several writs of attachment. The circumstances under which the assignment was made by said Palmer to said Davidson were that on one night the said Palmer went to Davidson's house, and said to him: "I understand that my creditors will be on me, and I want your advice." Davidson thereupon told him that he had better make a general assignment for the benefit of all his creditors. At this suggestion, Palmer got Davidson to go to Birmingham, and have the proper paper prepared for him to make an assignment. Davidson went the next day, and while he was gone, Palmer proceeded to sell goods from his stock, and offered them, as some of the evidence tended to show, at reduced prices. Upon the return of Davidson, Palmer executed the deed of assignment to said Davidson, making him his assignee, but did not turn over to him, or account to him for, the goods he had sold during his absence in Birmingham having the deed of assignment prepared. All the other facts and contentions are sufficiently set forth in the opinion. The case was heard by the judge without the intervention of a jury; and upon the testimony he rendered judgment for the plaintiff, assessing the value of the goods sued for at \$2,325. The defendant appeals, and assigns the various rulings of the court as error.

James Weatherly, Mountjoy & Tomlinson, and Garratt & Underwood, for appellant.

SOMERVILLE, J. The action is one of detinue, brought by the appellee, Davidson, as assignee of one Palmer, against the appellant, Truss, for a stock of merchandise levied on by the latter, as sheriff, under sundry writs of attachment. Unless the assignment under which the plaintiff claims title is void for fraud, there seems to be no good reason why he should not recover the goods, as this instrument of transfer was made and delivered on February 27, 1888, the day before the levy of the first attachment. The assignment, under the facts of the case, took effect, if at all, from the date of its delivery to the assignee; the latter having taken immediate possession of the assigned goods. *Brown v. Lyon*, 17 Ala. 659; *Warner v. Jaffray*, 98 N. Y. 248.

The rule in this state is settled to be that the assent of the creditors will be presumed to a deed of assignment which appropriates the property conveyed, absolutely and unconditionally, to the payment of the assignor's debts; the instrument being free from fraud or illegality, and containing nothing which can be construed to be prejudicial to the rights of the creditors. So, while the rule is otherwise in some of the states, the settled doctrine in this state is that the fraudulent intent of the grantor alone will not avoid a deed of assignment to creditors unless the assignee or the creditors knew of, or participated in, the fraud.

The decisions are numerous on the foregoing propositions. *Abercrombie v. Bradford*, 16 Ala. 560; *Governor v. Campbell*, 17 Ala. 566; *Rankin v. Lodor*, 21 Ala. 380; *Shearer v. Loftin*, 26 Ala. 708; *Walt, Fraud, Conv.* (2d Ed.) § 316 et seq.; *Burrill, Assignm.* (4th Ed.) § 295; 1 *Brick. Dig.* p. 129, §§ 87, 89; *Id.* p. 132, § 123.

We have examined the evidence in this case, and concur with the judge of the city court in his conclusion that the proof is insufficient to authorize the court to find the assignment void for fraud. The assignment cannot be made fraudulent by the fact that Palmer, the grantor, made sale of some of the goods embraced in his stock prior to the execution and delivery of the assignment, and afterwards retained the proceeds of sale. Conceding these sales to be fraudulent, they were independent transactions between the assignor and mere strangers, prejudicial to the rights of the very creditors intended to be secured in the assignment, who in no manner participated in them. Nor, so far as we see, did the assignee, Davidson, himself; the evidence showing that the sales were made before the execution of the assignment, and during Davidson's absence from Warrior, the place of Palmer's residence and business. The alleged fraudulent sales cannot, therefore, be treated as parts of the transfer here assailed as fraudulent, nor be permitted in any manner to vitiate the transaction. *Burrill, Assignm.* (4th Ed.) §§ 355-359.

The evidence excluded by the court, to which exceptions were taken, would not

change the conclusions reached by us, even were it all admitted. Hence its exclusion, if erroneous, was error without injury.

There being no fraud in the transaction, the principle announced in *Townsend v. Harwell*, 18 Ala. 301, has no application to the case.

There is no assignment of error based on the action of the court in overruling the demurrer to the complaint, and hence the argument on this point calls for no response. We may add, however, that we see no error in this ruling.

But one other point remains to be considered. The testimony satisfies us that there was an agreement on the part of both the plaintiff and the assignor that the sheriff might sell the goods without an order of court, and without advertisement, and at either private or public sale. The goods were sold by the sheriff, as agreed on, at private sale, and brought the sum of \$1,500. We do not construe this agreement to operate as an abandonment of the suit; for such was, clearly, not its intention. But, in our opinion, its effect must be to limit the recovery of the plaintiff to the amount for which the goods were sold by the sheriff. If the agreement does not have this operation, it can have none whatever. It must be supposed that, in consenting to this mode of sale, the plaintiff agreed, by implication, to abide by the result, and accept the price obtained by resort to such mode. The just result of the agreement is to reduce the alternate judgment of recovery to the sum of \$1,500, instead of \$2,325, rendered by the city court.

The judgment will be reversed, and a judgment rendered in this court for the appellee, in the sum of \$1,500. The appellee will be taxed with the costs of this appeal.

Reversed and rendered.

EAST TENNESSEE, V. & G. R. CO. v. WATSON.

(Supreme Court of Alabama. May 8, 1890.)

RAILROADS—KILLING STOCK—WITNESS—VALUE—DEPOSITIONS.

1. Negligence is alleged with sufficient certainty in a complaint against a railroad company for killing stock by stating that "because of the negligence or want of skill of the defendant's servants in the management and running of the train" it ran over and killed a colt.

2. On an issue as to the value of a horse the owner may testify that it was "a very fine colt," "fine stock," "sired by a trotting horse," "its mother a fine blooded mare," and he may use kindred expressions illustrating its qualities, including "beauty of form" and "gracefulness of movement."

3. Where it is impracticable to lay before the jury all the details bearing on the distance a horse can be seen along a railroad track, the opinions of witnesses may be received.

4. On cross-examination of a witness, who testifies that no whistle was sounded, an inquiry whether it might not have been and he not have heard it, may be excluded as mere matter of opinion for the jury to determine.

5. A railway company is liable for an animal killed by the failure of the engineer to keep a diligent lookout, though, after perceiving it, he used all possible means to avoid striking it.

6. The failure to ring the bell or blow the whistle to frighten away stock near the track may

be negligence; and an instruction that there is no duty to do either is properly refused.

7. Code Ala. 1886, § 2803, requires cross-interrogatories to be filed within 10 days after notice to take depositions, in order that a commission may then issue, and, if they are filed after that time, but before it is in fact issued, they cannot be stricken from the files.

8. A witness having used a diagram in testifying, opposing counsel may also use it in commenting on his evidence, though it was not formally put in evidence.

Appeal from circuit court, Cherokee county; JOHN B. TALLY, Judge.

Action against the railroad company for the killing of a colt. Negligence is averred in each count, in substance, as follows: "Because of the negligence or want of skill of the defendant's servants in the management and running of said train," it ran over and killed a colt. The company appeals.

Burnett & Smyer, for appellant.

SOMERVILLE, J. 1. The averment of negligence on the part of the defendant's employees, from which the accident of killing the colt is alleged to have occurred, and its connection with the result as a cause, are stated in each count of the complaint with sufficient certainty. The demurrer based on this ground was properly overruled. *Railway Co. v. Lazarus*, 88 Ala. 453, 6 South. Rep. 877; *Sistrunk's Case*, 85 Ala. 352, 5 South. Rep. 79; *Railway Co. v. Crenshaw*, 65 Ala. 566; *Railroad Co. v. Thompson*, 62 Ala. 494.

2. The motion of defendant to strike from the file the cross-interrogatories filed by the plaintiff on taking the deposition of Thomas, a witness for defendant, was properly overruled. The ground assigned for this motion was that this paper was not filed within 10 days after notice served on the plaintiff of the filing of the direct interrogatories by the defendant. The statute, it is true, requires the filing to be done within this time, but the purpose is only to enable a commission to issue after the expiration of 10 days from the time the notice is served. Code, 1886, § 2803. If it does not issue until the cross-interrogatories are filed, and this period extends over 10 days, this, in our opinion, is no ground upon which the deposition can be assailed for irregularity in the taking of it.

3. It was competent to prove that the right of way of the railroad was cut or cleared off for 100 feet, more or less, between the depot and the place of the accident, as a fact bearing on the question of the engineer's ability by diligently looking out to discover the animal, which was alleged to be near the track just before being injured.

4. The plaintiff testified that he was familiar with the value of stock, and he was properly allowed to give his opinion as to the value of the horse in controversy, of which he was the owner. To render such testimony competent, it was unnecessary that he should be shown to possess any peculiar skill to qualify him as an expert on this subject. *Ward v. Reynolds*, 82 Ala. 384; *Burks v. Hubbard*, 69 Ala. 379; *Rawles v. James*, 49 Ala. 183; *Lawson*, Exp. Ev. 17, 456.

5. The general rule is that witnesses

must testify to facts, not to inferences, opinions, or conclusions. Experts, or persons instructed by experience, are exceptions to this rule. They cannot, however, as experts, give mere opinions as to matters of common knowledge, which persons of ordinary intelligence, including jurors themselves, are just as capable of comprehending as the witnesses. *Hammond v. Woodman*, 66 Amer. Dec. 229, note. There are other exceptions to the general rule, also, as, for example, estimates of value, distance, time, quantity, and opinions as to handwriting, general identity, and the like. "So an opinion can be given by a non-expert concerning matters with which he is specially acquainted, but which cannot be specifically described." 7 Amer. & Eng. Enc. Law, 496. And, as expressed by Mr. Wharton: "An inference, necessarily involving certain facts, may be stated without the facts." 1 Whart. Ev. § 510. This is often called a conclusion, or inference in the nature of a collective fact, involving cases where it is not practicable to lay before the jury the primary facts upon which the inference is based. Under these principles it was competent for the plaintiff to testify that the animal killed was a "very fine colt," "fine stock," "trotting stock;" that it "was sired by Clipper, a trotting horse at Cave Springs;" that "its mother was a fine blooded animal,"—and other kindred expressions illustrating the qualities of the horse, including "beauty of form" and "gracefulness of movement."

6. The court also, with equal propriety, excluded the inquiry propounded to the plaintiff as to whether there might not have been a whistle sounded for the crossing, near which the accident occurred, without the witness hearing it. This is mere matter of opinion, and not the statement of a fact. *Marcott v. Railroad Co.*, 18 N. W. Rep. 874.

7. While it would be a matter of common knowledge how far one could ordinarily see an object as large as a horse, and therefore not the subject of an opinion, the jury being as competent to judge of this fact as a witness, this inquiry assumed a different aspect when applied to the particular locality on the railroad track, or right of way going from the depot towards the scene of the injury. It may have been impracticable to lay before the jury all the details upon which such a collective fact was founded. The soundness of the conclusion could be tested by the right of cross-examination.

8. Diagrams and maps illustrating the scene of a transaction, and the relative location of objects, if proved to be correct are always admissible, at the instance of either party, in order to enable the court and jury to more clearly understand and apply the facts in evidence. *Humes v. Bernsteiu*, 72 Ala. 546; *Moon v. State*, 68 Ga. 687. The defendant having allowed his own witness to use a diagram in aid of his testimony before the jury, there could certainly be no objection to the plaintiff's counsel being permitted to use the same diagram in discussing the same witness' testimony before the jury, although there had been no formal intro-

duction of the paper in evidence. It might, nevertheless, be properly considered by implication as a part of the witness' testimony, and therefore as in evidence.

9. The fourth and fifth charges requested by the defendant were based on the idea that no duty would devolve on the engineer to blow the whistle or ring the bell unless the horse was actually on the track of the railroad. It is very true that the requirements of the statute, (Code 1886, § 1144,) the violation of which is made a misdemeanor, do not absolutely originate or come into play until an obstruction on the track is perceived, (*Railroad Co. v. Bayliss*, 77 Ala. 429.) But railroad companies are made liable for any injury to persons or stock, or other property, resulting not only from a failure to comply with the statute, but from any other negligence on the part of the company. Code, § 1147. And there may be cases where the failure to ring the bell, or blow the whistle, in order to frighten away stock in dangerous proximity to the track, would be negligence, although the animals may not have been actually on the track. *Sistrunk's Case*, 85 Ala. 353, 5 South. Rep. 79; *Railway Co. v. Lazarus*, 88 Ala. 453, 6 South. Rep. 877. These charges, for this reason, were misleading, and were properly refused.

10. The sixth charge was also properly refused as misleading in tendency. The engineer may have been guilty of negligence in not keeping a diligent lookout for the animal killed, and this act of negligence may have been the proximate cause of the injury, although he may have been ever so diligent in avoiding the accident after he actually discovered the animal on the track.

11. There being no evidence tending to prove that the injury was willfully or intentionally perpetrated, the seventh charge, based on this assumption, was abstract, and its refusal was free from error. This charge is otherwise objectionable on grounds unnecessary to be discussed. The other exceptions have been examined, and are considered to be without merit. The judgment must, accordingly, be affirmed.

BORST et al. v. SIMPSON et ux.
(Supreme Court of Alabama. May 20, 1890.)

DEED—CONDITION—CLOUD ON TITLE.

1. Under a deed expressing a nominal consideration, but in fact having none, and granting land on condition that "the estate conveyed shall not vest until and unless the grantees shall on or before May 1, 1889, pay \$20,925, or shall, on or before Jan. 1, 1889, pay \$20,000," no title can vest unless one or the other of the payments is made on the day fixed therefor, though the grantors have then given notice that they revoke the option, and withdraw all the propositions therein contained.

2. Such a deed is an offer to sell only, and is revocable at any time before performance or an offer to perform.

3. After its revocation, or after the expiration of the time limited, without performance or an offer to perform, it is a cloud on the title; and its delivery and cancellation will be decreed.

Appeal from chancery court, Lauderdale county; THOMAS COBB, Chancellor.

J. B. Moore and B. M. Jackson, for appellants. Simpson & Jones, for appellee.

CLOPTON, J. The appeal is taken from a decree overruling a demurrer to the bill, by which appellee seeks to obtain the delivery and cancellation of a conveyance of lands made by herself and husband to appellants November 15, 1888. The language of the deed is: "For and in consideration of the sum of one dollar cash in hand paid, the receipt whereof is hereby acknowledged, we, R. T. Simpson and Mattie C. Simpson, of Lauderdale county, Ala., have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto J. W. Borst and S. J. Graham the following lands in Lauderdale county, Alabama, [describing them,] to have and to hold unto [them,] their heirs and assigns, forever, upon the following conditions, only, to-wit: The estate herein conveyed shall not vest in said [parties, their] heirs or assigns, until and unless he or they shall, on or before the 1st day of May, 1889, pay to said R. T. Simpson and M. C. Simpson \$20,925, or shall, on or before the 1st day of January, 1889, pay to R. T. Simpson and M. C. Simpson the sum of twenty thousand dollars. * * * Upon the happening of which condition the estate herein conveyed shall become absolute. But, if such money shall not be paid on or before said dates, then this instrument to become null and void, and all rights thereunder shall cease and determine." By the express terms of the deed, the condition of payment is a condition precedent to vesting the estate, and time is made an essential part of the contract. Language could not be more explicit. No estate did or could pass or vest unless there was performance on one or the other of the days named. *Tennessee C. R. Co. v. East Alabama Ry. Co.*, 73 Ala. 426.

The bill was filed in June, 1889. It avers that defendants have not paid or tendered any money, and have made no offer to take the property according to the terms of the instrument. Defendants contend that the averments of the bill show that performance by them was prevented by the act of complainant in repudiating the contract and revoking the instrument. It appears from the bill that complainant and her husband notified the defendants in writing, March 15, 1889, that they revoked the option given by the instrument, and withdrew all propositions therein contained. A waiver of the necessity of performance of a condition precedent in contracts is implied when the party entitled to performance prevents the fulfillment of the condition, or absolutely refuses performance. "But a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end." 2 Benj. Sales, § 860. The notice was not an absolute refusal, though it may be implied that com-

plainant would refuse to receive payment if tendered. It disclosed on its face that complainant regarded the instrument as reserving to defendants a mere option to buy. The revocation, if unauthorized, could not have affected the validity of the conveyance, or have impaired any rights of the grantees. By fulfilling the condition the estate would have vested, notwithstanding the act of complainant. It is difficult to see how an act which is ineffectual, and which would not have benefited complainant nor have injured defendants, could have legally operated to prevent performance; that is, to have rendered performance impossible. If the instrument be revocable in its nature, as defendants contend, the revocation itself did not constitute the condition impossible, so as to release defendants from the duty of fulfilling it, or at least of offering to do so. *Insurance Co. v. Bledsoe*, 53 Ala. 538.

But is such the character of the contract? It appears from the bill that complainant made the revocation, deeming the conveyance a mere proposition to sell, without consideration. The bill alleges that no consideration was paid; and, there existing no obligation or promise on the part of the grantees to pay the agreed price, the instrument, though in form a conditional conveyance, cannot be distinguishable in principle from an offer to sell, reserving to the other parties, without consideration, the privilege to buy or not to buy, at their option. Such being the nature of the contract, the proposition was revocable at any time before performance of the condition, or acceptance by an offer to perform; and the revocation terminated all the rights and privileges of the grantees. *Wilks v. Railroad Co.*, 79 Ala. 180.

Defendants further contend that if the conveyance is a mere offer to sell, coupled with an option which has been revoked, or if irrevocable, the condition not having been performed, it casts no shade upon the title of complainant. While a court of equity will not intervene to remove, as a cloud on the title, a deed void on its face, or when there is mere apprehension of a suit, or the mere assertion of a hostile title, it will intervene where the inherent defect which renders a conveyance invalid can be made apparent by extrinsic evidence only. The jurisdiction is "protective and preventive," and will be exercised whenever the deed may be injuriously used against the party complaining when the evidence to impeach it may be lost. Justice Story observes: "Cases also may occur where a deed or other instrument originally valid has by subsequent events, such as by satisfaction or payment, or other extinguishment of it, legal or equitable, become *functus officio*; and yet its existence may be either a cloud upon the title of the other party, or subject him to the danger of some future litigation, when the facts are no longer capable of complete proof, or have become involved in the obscurities of time." 1 Story, Eq. Jur. § 705. The bill avers that the conveyance has been recorded in the office of the judge of probate, and is in the possession of the de-

fendant Borst; that he is claiming an interest under it, and has taken special pains to so state to persons who were contemplating the purchase of the land, or a part thereof, thus preventing complainant from disposing of the property. Neither the revocation nor the non-performance of the condition appear on the face of the deed. The grant has become a nullity. Having been spread on the records, and being in possession of the grantees, the deed exposes complainant to future litigation, and embarrasses the future disposition of the property. It is inequitable and against conscience, if the averments of the bill be true, that the grantees should retain the conveyance for a sinister purpose. In such case the court will decree its delivery and cancellation. *Smith v. Smith*, 23 Wis. 176; *Larmon v. Jordan*, 56 Ill. 204.

Affirmed.

HOFFMAN V. WHITE.

(Supreme Court of Alabama. May 20, 1890.)

BOUNDARIES—ADVERSE POSSESSION.

1. Possession taken and held under a claim of right by one of the owners of adjacent lands to an erroneous line agreed on by them under a belief that it is correct is adverse, and, if continued for the statutory period, ripens into a perfect title.

2. The possession of one who makes a fence, intending to put it on the true line, and, believing that he has done so, holds up to it under a claim of right, is adverse, and, if open, actual, and continuous for the statutory period, it vests in him absolute title, though before the limitation had run in his favor he had doubts as to his title, or a belief that the strip next the fence did not belong to him.

3. Title once acquired by an adverse holding is not forfeited by a subsequent interruption, nor by an after possession, lacking in some of the characteristics essential to give title.

Appeal from city court of Decatur; W. H. SIMPSON, Judge.

Wert & Speake, for appellant. *E. W. Godbey*, for appellee.

MCCLELLAN, J. We are satisfied from the evidence in this record that about the year 1869 a fence was erected on what was supposed by the then owners of lots 23 and 32, respectively, to be the divisional line between said lots. We are further satisfied that from that time to the present the owners of lot 32 have been in the open, notorious, actual, and continuous possession thereof, as defined in part by said fence, which has been constantly maintained on the line of its original location. We are also convinced that this possession on the part of the defendant, and those under whom he claims, has always been under a claim of ownership of the whole of lot 32 up to the said partition fence, and that the rightfulness of such possession was never drawn in question until shortly before the institution of this suit by the owners of lot 23 or any other person. It may be conceded that the fence is not, and has never been, on the true line between the lots, but that, on the contrary, it was by mistake placed so as to inclose with lot 32 a strip seven feet in width off the west side of lot 23. Yet, if the erroneous line was agreed upon by the then proprietors, as we think the evidence shows, under the belief that it was the

correct line, and the owners of lot 32 entered on, and took possession of, lot 32 to such conventional line, and held under a claim of right, their possession is adverse in its character to the true owner, and if continued for 10 years ripens into a perfect title against all the world. *Alexander v. Wheeler*, 69 Ala. 332.

It is insisted, however, that the line between these lots was not established by agreement of the parties. We do not concur in this view of the evidence, but the position may be admitted, and the element of contract in the location of the fence be entirely eliminated. The fact would still remain that the owner of lot 32 intended to put the fence on the true line, believed he had done so, and that he and his successors for more than 10 years held up the fence under a claim of ownership hostile and adverse in its character. We do not doubt but that such possession, though not justified by an understanding as to the location of the fence, and originating in a mistake as to the true line, would, if open, notorious, actual, and continuous for the statutory period, vest absolute title in the holder. *Abbott v. Abbott*, 51 Mo. 584; *McNamara v. Seaton*, 82 Ill. 501. So that, whether the division line was established by agreement, or was marked out and fenced by the proprietor of lot 32, without consulting the proprietors of lot 23, and possession taken and held accordingly under a claim of right for 10 years by the defendant, and those through whom he holds, the defense of adverse possession in either aspect is fully made out.

The only evidence offered by the plaintiff bearing on this issue, which was excluded, went to the *bona fides* of the defendant's assertion of title to the strip, and tended to show that he entertained doubt as to his title thereto, or a belief that the strip did not belong to him. Had this testimony been admitted, it could not have availed the plaintiff. As was said in *Alexander v. Wheeler*, supra; "Knowledge by one in possession claiming title, that his title is defective, does not generally prevent such possession from being regarded as adverse. The test is the actual claim, and not the *bona fides* of it. *Riggs v. Fuller*, 54 Ala. 141; *Manly v. Turnipseed*, 37 Ala. 522." Moreover, the title of the defendant had long before become perfect by the continuance of the adverse possession in his predecessors, which had its inception in 1869. The 10 years relied on need not be those next before action brought. *Allen v. Mansfield*, 82 Mo. 688; *Unger v. Mooney*, 63 Cal. 586. And a title once acquired by 10 years of continuous adverse possession will not be forfeited by a subsequent interruption of the possession, or, it would seem, by an after possession which was lacking in some of the characteristics essential to give title of itself. *Sherman v. Kane*, 86 N. Y. 57; *Spofford v. Bennett*, 55 Tex. 293. The exclusion, therefore, of defendant's declarations to Skeggs as to the size of his lot, and the supposed infirmity of his title, whether erroneous or not, was without injury to the plaintiff. The other evidence offered for plaintiff, and excluded

on motion of defendant, had no bearing on the issue presented by the plea of the statute of limitations. Its exclusion could not have prejudiced the plaintiff, since, if every fact it tended to establish be admitted, the defense of adverse possession for 10 years would in no wise have been affected thereby. The trial below was had without a jury. The evidence, we think, fully supports the conclusion reached by the judge of the city court, and the judgment thereon is affirmed.

ECHOLS et al. v. HUBBARD.

(Supreme Court of Alabama. May 31, 1890.)

QUIETING TITLE—ADVERSE POSSESSION—EVIDENCE.

1. When plaintiff has only an equitable title, derived from an agreement between herself and her co-devisees to divide the estate, by which the lot in controversy was allotted to her, a bill to remove a cloud will lie, though defendants are in possession.

2. Defendants' deed embraced in its calls about half of the lot claimed by plaintiff. Both parties derived title from the same source; but the deed to plaintiff's lot was not in existence, though those through whom she claimed had been in possession for more than 40 years of part of the lot, and of the part in dispute they had during that 40 years once had 10 years' uninterrupted and adverse possession. Defendants had at no time been in possession of the disputed strip for 10 years. *Held*, that plaintiff had a good title by adverse possession, and was entitled to relief.

3. A deed is not shown to have been lost, so as to admit secondary evidence of its contents, by merely showing by one witness that it once existed, and that he last saw it in his desk at home.

Appeal from chancery court, Madison county; THOMAS COBBS, Judge.

D. D. Shelby, for appellants. *Humes, Walker & Sheffey*, for appellee.

McCLELLAN, J. Jurisdiction to remove a cloud from title is exercised by courts of chancery only in default of a remedy at law by which the question of the superiority of apparently conflicting titles may be tried and set at rest. The right to resort to equity arises only when, and for the reason that, the complainant is so situated with respect to the possession, or his rights so depend upon an equitable title, as that he cannot invoke the judgment of a court of law. If he is in possession of the land, as to which his title is under a cloud, he must resort to equity, since the only legal actions in which questions of title may be adjudicated, involving the possession, must be brought against the person in possession, and cannot be brought, of course, for a possession which is already in the plaintiff. But, if he is in fact out of possession, he may always maintain ejectment or the kindred statutory real action, and this wholly regardless of the circumstances of his disseisin. And, if he may sue at law, he must. In the case at bar the defendants were in possession of the land on the day the bill was filed. That their possession may have been acquired by trespass, that its acquisition may have been wrongful, surreptitious, or violent, is immaterial. However acquired, and however impotent a possession so acquired would be to break the

continuity of an adverse holding, the fact remains that it was held by the defendants at the time this suit was instituted, and an action of ejectment could then have been brought by the complainant; and in that action the cloud supposed to rest on any legal title the complainant had by reason of an apparently better title in the defendants would have been removed by a judgment for the plaintiff. If, therefore, complainant's right to maintain the present bill depended on the fact of possession being in her when it was filed, the theory being that defendants' alleged trespass was not sufficient to oust her, she would have no standing in court, and the bill ought to have been dismissed. *Gould v. Steinburg*, 105 Ill. 488; *Teague v. Martin*, 87 Ala. 500, 8 South. Rep. 362.

But equity jurisdiction is invoked on the further ground that the complainant holds under an equitable title, upon which her rights could not be asserted and effectuated in a court of law. This of itself is a sufficient predicate for the interposition of the chancery court, irrespective of possession. 2. Amer. & Eng. Enc. Law, 303; 3 Pom. Eq. Jur. § 1399, note 4; *Armstrong v. Connor*, 86 Ala. 350, 5 South. Rep. 451, and cases cited. We think the complainant brings herself within this exception in favor of equitable titles. The land in controversy is claimed by complainant through the late Reuben Chapman. By his last will all of his real and personal property was devised and bequeathed to his four living children and the complainant, who is a granddaughter of the testator, to be divided among them, share and share alike. On December 29, 1884, an agreement was entered into by the devisees for a partial division and distribution of the estate. This agreement is signed by Reuben Chapman, individually and as executor, by the surviving daughters of the testator and their husbands, and by Mrs. Humes for and as guardian of the complainant, who was and is still an infant. It evidences that a division and allotment had been made to and among the several devisees and legatees, and that a part of the share allotted to the complainant was the lot, a part of which is in controversy, at a valuation of \$900, it now being worth greatly more than that sum; and that all of said parties "do agree to the foregoing division and distribution of the property of said testator embraced herein, and do hereby agree that the same shall be of binding force and effect upon us as far as the same may be so made by this agreement." It was further agreed that the executor should proceed in the chancery court to have the agreement and the division, distribution, and allotment thereby made confirmed in all things, and also for a final settlement of the executorship, and a division and distribution of the remaining property of the estate. It does not appear that a decree confirming the allotment had been obtained, or that the estate had been finally settled at the time the present bill was filed. The agreement contains no words of conveyance whereby the legal title of the tenants in common could pass out of them and into the several devisees ac-

cording to the allotment, nor is it executed with the formalities requisite to the transmission of such title. The effect of this instrument, therefore, was only to raise up an estoppel in favor of the complainant against her co-tenants as to the land in controversy, upon which she could invoke the jurisdiction of the chancery court to the divestiture of the title out of them, and have it conveyed into her. *Carter v. Owens*, 41 Ala. 217. Very clearly this is nothing more than an equitable title, which she could not assert at law. Very clearly, also, a right to possession could not, in a legal forum, be predicated on this title, which, coupled to her prior possession, would enable her to prevail in ejectment over the paper title and actual possession of the defendants. *Standifer v. Swann*, 78 Ala. 88; *Woods v. Transportation Co.*, 84 Ala. 560, 3 South. Rep. 475. It may be that she could have maintained an action of forcible entry and unlawful detainer, but that would be a mere circuity, at the end of which her title would be as clouded as it now is, and her right to exhibit this bill would be the same that it now is. Nor is this conceived to be a case involving the relation of trustee and *cestui que trust*, in which it would be primarily the latter's duty to have the former sue at law, and inability to procure that to be done is required to be alleged and proved. The complainant has, we therefore conclude, no remedy at law for the adjudication of the issues presented in her bill, and, though out of possession, she is entitled to the relief prayed if the proof supports her averments of fact. To that inquiry our further consideration will be directed.

The strip of land in dispute, as well as the larger lot, of which it is a part, and the lots lying on each side and back of it, belonged, in 1839, to William H. Pope. This is conceded, and both parties to this controversy now claim under him. The complainant's claim of title to the strip in question is twofold: *First*, she says that Pope conveyed a lot embracing the strip to Alfred Moore about the year 1839; that Moore's executors conveyed the same to Chapman in 1858; and that she holds under Chapman, as we have indicated above. But, *second*, she says, if in fact there was no deed from Pope to Moore, covering the disputed strip, yet she, and those under whom she holds, have had adverse possession of the land for more than 10 years, and thereby have acquired a perfect title against all the world. On the other hand, the defendants claim under a deed dated February 5, 1849, from Pope's administrator to Charles H. Patton, the ancestor of the defendant Mrs. Echois. This conveyance is of a considerably larger tract of land, which abuts on the lot alleged to have been held by Moore, and embraces in its calls about one-half of the lot which complainant alleges had been sold by Pope in his life-time to Moore. It is this overlapping of description in the administrator's deed to Patton which is alleged to constitute the cloud on complainant's title, the theory being that the description in Pope's deed to Moore is not sufficiently specific and definite to operate of itself an

avoidance and nullification of the later deed to Patton in respect to the conflicting boundaries. We do not think there is any competent, direct evidence in this record of the existence and contents of a deed from William H. Pope to Alfred Moore. An effort was made to prove its loss, so as to authorize secondary evidence of its execution and contents. Two witnesses were examined for this purpose. One of them, Mrs. Moore, the widow of Alfred Moore, and executrix of his last will, does not testify either to the existence or loss of such deed. Her evidence amounts to no more than a supposition that a deed was executed, and a supposition that the supposed deed was destroyed when the court-house at Athens was burned by Federal soldiers, based on the assumption that the deed had been filed there along with papers connected with the administration of the estate. The other witness, George H. Moore, a son of Alfred Moore, and co-executor of the will, proves the existence of the deed, but utterly fails to establish its loss. He testifies that it came to his custody as executor of his father's estate, and that he left it, or the last he knew of it, it was in a certain desk or secretary at the family home in Huntsville. There is no evidence that any search was ever made for it, and *non constat* but that it was there at the time of the hearing in the court below, and was not lost at all. This was far from being a sufficient predicate for the introduction of secondary evidence of the execution and contents of the alleged deed. 1 Greenl. Ev. § 558; U. S. v. Sutter, 21 How. 179; *Woods v. Transportation Co.*, 84 Ala. 560, 3 South. Rep. 475.

But we do not understand it to be controverted that Moore owned a lot fronting about two acres on McClung street at this point. The deed from Pope's administrator to Patton, under which defendants claim, itself demonstrates the fact, in a way not open to denial by them, that Moore owned a lot of that width at that place. Nor is it controverted that Moore and his successors in right or claim have been for more than 40 years in possession of such lot. Under this state of fact, the execution of a deed by Pope to Moore to the land as to which his possession is thus uncontroverted will, after the lapse of so long a time, be presumed. Such deed, however, could be considered as embracing only lands as to which the conditions upon which the presumption arises exists. The presumption could not be indulged with respect to the lot in suit since the predicate for it—long-continued beneficial possession—is not admitted, but, on the contrary, is chief among the points of contest in the case. We cannot presume the existence of a deed embracing the disputed strip, and the evidence of Mrs. Moore and George H. Moore to the effect that the deed, which is attempted to be proved by them, did embrace the strip, being, as it must be, excluded, the complainant's right to the relief prayed must depend either upon proof of such conditions with respect to the strip, such long-continued possession of it under claim of ownership as will raise the presumption of a conveyance from Pope embracing it, or

upon proof of such adverse possession on the part of those under whom she claims as will of itself vest title in her. It would seem, in this view of the law, that the doctrine by which the execution of a deed will be presumed, in the sense in which we have been considering that principle, can be of no real advantage to the complainant here, since a possession which would entitle her to the benefit of that presumption would, without its aid, more than suffice to vest the legal title in those through whom she claims, under our statute of limitations. For all practical purposes, therefore, the case is narrowed down to the inquiry whether Moore or Chapman, or the devisees of Chapman, at any point of time, had title perfected in them, or either of them, by 10 years' continuous adverse possession of the strip of land in suit. We use the phrase "at any point of time" advisedly. The precise meaning we intend thereby to convey is that the 10 years relied on in any case to vest title by adverse possession need not be the 10 years next before action brought. On the contrary, we understand the law to be that any 10 years of continuous adverse possession before suit brought will vest title in the holder as efficiently and absolutely, for all purposes, as would an absolute conveyance from the holder of the fee. *Allen v. Mansfield*, 82 Mo. 688; *Unger v. Mooney*, 63 Cal. 586; *Hoffman v. White*, ante, 816. And a title once acquired by the lapse of the statutory period of adverse holding, standing, as it does, upon the same plane as a paper title in all respects regular, will not be defeated by an after interruption of possession, or by the subsequent holding of an adverse claimant, unless such holding itself be actual, open, notorious, hostile, and of sufficient duration to bar the entry of the true owner, *i. e.*, the owner of the title perfected by the previous possession for 10 years. *Sherman v. Kane*, 86 N. Y. 57; *Spofford v. Bennett*, 55 Tex. 293; *Hoffman v. White*, supra. Moreover, it follows from, and as complementary to, the principles just stated that a title so acquired is equally efficacious as a paper title in drawing to it the constructive possession, even against regular muniments, of the land which it covers after the actual possession by which it has been acquired has ceased.

Applying these doctrines to the case in hand, the inquiry is—*First*, was there any period of 10 years' adverse possession of the strip in controversy, by those under whom complainant claims, from 1839 to the institution of this suit? and, if so, *second*, have the defendants, or those under whom they claim since the lapse of such period, had adverse possession for a like time, and thereby reinvested the title in themselves? A very careful examination of the voluminous testimony in this record convinces us that the first inquiry must be answered affirmatively, and the second in the negative.

We will briefly refer to the evidence. It is not questioned, as we have seen, that Moore bought a lot at this point on McClung street from Pope in 1839, nor that he then took possession of it, nor that the

lot fronts about two acres on that street, nor that he and his successors have ever since been in possession thereof. Neither is it denied that he went into and held possession of that lot under claim of right and title. The point of contest is as to the depth of that lot, and hence the area of the possession of himself and his successors back from the street. On this point Mrs. Moore testifies that the lot as it came to her husband from Pope, and as it was possessed and controlled by Moore, extended one acre, or about 208 feet, back from the street, and to about where the present north fence is located, thus embracing the strip in dispute; and that her husband held the lot as thus defined till his death, in 1856. She further testified that after his death his representatives, having conveyed to Chapman, put him in possession of the lot limited as to its north boundary by a fence about on the line of the present fence, and that the latter went into possession accordingly. It is shown that Moore's grantor, under whom, also, defendants claim, in the year 1843 sold the lot abutting the lot in question on the west to A. F. Hopkins; that this lot was an acre square, and so extended back about 208 feet from McClung street, and the deed to Hopkins described the east line of that lot as being coterminous with the west line of the Moore lot, the language of the deed being that the Hopkins lot was bounded "on the east by a lot of Dr. Alfred Moore." Here, then, is a distinct recital and admission by the common grantor of the parties to this cause that the lot owned by Moore was about 208 feet in depth from the street. It was shown, also, by maps which are referred to in the deed of Pope's administrator to Patton, and otherwise, that the Moore lot was one of several of uniform depth, which were laid off by Pope, in his life-time, on McClung street; that the rear line of each of these lots was equidistant from the street; and that the distance between the street and the rear line of all the other lots was about 208 feet. George H. Moore testifies that the lot contained about two acres. Thomas W. White's testimony we regard as very important. It is full, explicit, and without material contradiction. He testifies that in 1845, '46, or '47,—certainly some time before Pope's death, which must have occurred prior to December, 1848,—he rented the lot from Moore, agreeing to pay the taxes on it for the use of it. He did pay the taxes on it down to and including the year 1855, as is shown by receipts for most of the years attached to his deposition. He says that the north fence of the lot was erected by Pope himself, and was then about where the present fence is; that the lot was also fenced on the east and west sides; and that he (witness,) in 1846 or 1847, built a fence on the south side along McClung street. As thus inclosed, the lot extended back from McClung street to the depth of about one acre, and included the strip in dispute. He used and cultivated this lot from 1846 or 1847 to about 1856, as Moore's tenant. Pope set up no claim to any part of it during his life-time. The sale by Pope's

administrator to Patton was made while witness was in possession, and Patton went into possession up to the north fence, as then and now located, and never during witness' holding, or afterwards, that he knew of, claimed any land south of that fence. About 1856 witness delivered possession of the lot to Moore. The fences were then intact all around it, and witness thinks they so remained for some time afterwards. There is no evidence that any of the fences were removed before 1858 or 1859, when, Mr. Wood testifies, that he does not remember there was any fence along the street, but that the other sides were still fenced; and the fence on the north line was about where it is at present. Here, then, we have the *status* of this property as to possession definitely fixed from 1846 or 1847 to 1856. There is nothing to show that that *status* was changed even to the extent of breaking the inclosure prior to 1858 or 1859. White, having the actual possession defined by complete inclosure, redelivered that actual possession to Moore. The presumption of law is that the actual possession thus defined continued till it is shown to have been changed in some way, and as no change is shown certainly prior to 1858, we must conclude that Moore, in any view of the case, and upon the strictest definitions of actual possession, had the actual possession from 1847 to 1858, a period of more than 10 years. *Clements v. Lampkin*, 34 Ark. 598; *Marston v. Rowe*, 43 Ala. 271; *Clements v. Hays*, 76 Ala. 280. The case for complainant might be rested here, but it need not be. We do not conceive that the mere fact that the inclosure was broken and removed from one side of the lot changes the character of the possession. Certainly it does not when reference is had to the evidence of several witnesses, who are not contradicted at all, that after his purchase, in September, 1858, Chapman was in actual possession of the entire lot, and erected buildings thereon, one of which was on that part of it not now in dispute, and the other on the strip in question. And, while the latter may not have been of a permanent nature, it remained there for some time, was intended as an auxiliary to the building of a large house on the lot, and its erection and continuance without objection from any source, so far as the record discloses, not only shows actual possession in Chapman, but is wholly at war with the claim now advanced by defendants. This use and possession of the lot by Chapman continued down to the war, when all the buildings then on the lot, and the fences around it, were destroyed or removed by Federal troops. Taking this evidence in connection with the well-established actual possession of Moore, and in connection with the presumption of law as to the continuance thereof, we are satisfied that the actual adverse possession of complainant's predecessors in right continued from 1846 or 1847 down to 1861 or 1862, and that thereby, whether originally there was a deed from Pope to Moore covering the

strip or not, a perfect legal title, with all the attributes and incidents of such title evidenced by formal writings, vested in Chapman, drawing after it the constructive possession of the land when the actual possession ceased, if indeed, it did cease. To defeat the claim now propounded by the complainant, it is upon the defendants to show that they have, since 1861 or 1862, had actual adverse possession of the strip in suit for 10 years continuously. Without discussing the evidence on this point, it will suffice to say that it falls far short of proving adverse possession at any time, or for any length of time, (except for the day on which this bill was filed,) in the defendants. *Wheeler v. Spinola*, 54 N. Y. 377; *Miller v. Downing*, Id. 631; *Pike v. Robertson*, 79 Mo. 615; *Rivers v. Thompson*, 46 Ala. 335; *Childress v. Calloway*, 76 Ala. 128.

This conclusion supports the chancellor's decree on the facts. In reaching it we have considered only competent evidence. If, therefore, any illegal evidence was admitted on the hearing below against the objection of the defendants, the error was without injury to them. And so with respect to the taking of testimony before the cause was technically at issue. The examination of witnesses covered every point in the case at the hearing, and if it be granted that in strictness witnesses should not have been called after demurrer sustained to certain features of the bill, and before amendment, the demurrers being partial in their nature, and leaving a cause of action before the court, there yet was no reversible error in overruling defendants' motion to quash the depositions. We do not doubt that this is a proper case for the relief sought by the bill, whether complainant's title is rested on paper muniments running back to Pope, or upon the adverse possession of her predecessors in right. In the former aspect, if a link in the chain of title is lost, or the description in any link of that chain is so indefinite and indeterminate as to require a resort to evidence *alunde* to identify the land really conveyed, the deed from Pope's administrator to Patton is a cloud on her title, "which would embarrass alienation, is calculated to engender a sense of insecurity, and may be the source of unfounded and vexatious litigation," and which a court of equity will remove while the evidence necessary to establish the real boundaries is yet at hand. In the latter aspect, where adverse possession is relied on by the complainant, which is the case we find in this record, the right, of necessity, must be effectuated by extraneous evidence, and equity may always be invoked, in the absence of a legal remedy, to quiet a title thus resting in parol. *Marston v. Rowe*, 39 Ala. 722; *Arrington v. Liscom*, 34 Cal. 365; *Moody v. Holcomb*, 28 Tex. 714. It is equally clear, we think, that complainant's claim to the relief she now seeks is not, under the facts presented, a stale demand. *Harold v. Weaver*, 72 Ala. 373. We find no error in the record, and the decree of the chancellor is affirmed.

HERSTEIN v. WALKER.

(Supreme Court of Alabama. May 20, 1890.)

APPEAL—REVIEW—PROCEEDINGS BELOW.

1. In an action to set aside a conveyance as made by a deceased debtor in fraud of his creditor, the grantee pleaded that the creditor had not filed his claim in the probate court within nine months after the debtor's estate had been declared insolvent, as required by Code Ala. 1886, § 2238. Held, that the creditor whose demurrer to this plea was overruled, and who suffered a final decree to be rendered against him without asking for leave to reply, cannot file a replication to the plea of non-claim, after the expiration of the term at which the decree was rendered, and after its affirmance on appeal by the supreme court.

2. On its affirmance by the supreme court, a chancellor's decree becomes merged in the judgment and decree of the appellate tribunal, and cannot thereafter be modified by him.

Appeal from chancery court, Madison county; THOMAS COBB, Chancellor.

Bill by Rosa Herstein, executrix, etc., against Leroy P. Walker, to subject to the payment of a debt due the estate of her testator certain real estate in the city of Huntsville formerly belonging to the deceased debtor, L. P. Walker, and alleged to have been fraudulently and voluntarily transferred by him to defendant. Defendant, *inter alia*, pleaded that plaintiff had not complied with Code Ala. 1886, § 2238, which provides: "Every person having any claim against the estate declared insolvent must file the same in the office of the judge of probate within nine months after such declaration, or after the same accrues, verified by the oath of the claimant, or some other person who knows the correctness of the claim, and that the same is due, or it is forever barred." Complainant's demurrer to this plea was overruled, and she appealed to the supreme court, where the decree of the lower court was affirmed. 4 South. Rep. 262. She then applied for leave to file a replication to the plea. From an order denying her application she again appeals.

Milton Humes and Watts & Son, for appellant. F. P. Ward, for appellee.

STONE, C. J. On May 25, 1887, the following order was made in this cause in the chancery court of Madison: "Came the parties by solicitors, and cause submitted upon defendant's pleas, and upon pleadings and proof noted by the register as follows, to-wit." Then follows a statement of the pleadings, exhibits, and some record testimony. On June 7, 1887, during same term, the chancellor rendered the following decree: "This cause, coming on to be heard at the present term, is submitted for decree on the pleadings and proof noted and filed by the register. After due consideration, it is adjudged, ordered, and decreed that the complainant's demurrer to defendant's pleas of *res adjudicata* numbered one and two be, and they are hereby, sustained; but complainant's demurrer to defendant's plea of non-claim, numbered three and four, are hereby overruled. It is further ordered that defendant's pleas of non-claim be, and the same are hereby, sustained. It is further ordered that the complainant pay the costs of this suit, for which execution issue, to be levied of the goods and chattels, lands and tene-

ments, of the estate of complainant's testator in the hands of complainant as executrix, unadministered." From said decree complainant prosecuted an appeal to this court. In this court the appellant assigned errors, commencing: "The appellant says the chancery court from which this appeal is taken committed the following errors to her injury in the final decree rendered in this cause." She then added three assignments of error. The appeal was taken June 8, 1887. On February 2, 1888, said cause was argued and submitted to this court for decision, and on May 22, 1888, this court affirmed the decree of the chancellor. Herstein v. Walker, 85 Ala. 37, 4 South. Rep. 262. In September, 1888, the complainant, Mrs. Herstein, filed her petition in the chancery court of Madison, praying for leave to file a replication to defendant's said plea of non-claim, and with it submitted the replication she proposed to file. The chancellor ruled that the petition and motion came too late, and disallowed the motion. From that ruling the present appeal is prosecuted, and the sole question is whether the decree of June 7, 1887, affirmed in this court May 22, 1888, was a final decree. The question, what constitutes a final decree in a chancery suit? has been so often decided in this court that it would seem to be almost needless repetition to restate the principle. A decree settling the equity raised by the pleadings, and adjudging the rights of the parties, on a submission for decree on the merits, is certainly a final decree. 3 Brick. Dig. p. 399, § 525; note to section 3611, Code 1886. The decree of June 7, 1887, not only settled every equitable question raised, but made final disposition of the entire costs of the suit; and it makes no difference that the ruling was on demurrer. When a demurrer is sustained or overruled, and a final decree suffered to be rendered, without asking leave to amend or reply as the case may be, and the term of the court is permitted to expire, this is to all intents a final decree on the questions raised, or which could be raised, on the proceedings; and, as to such questions, the losing party is without remedy save by appeal, or, in a proper case, by bill of review. Rule 84 of Chancery Practice; Ex parte Cresswell, 60 Ala. 378; Cochran v. Miller, 74 Ala. 50; Strang v. Moog, 72 Ala. 460.

But the present case goes beyond the principle stated. Not only were all the equities settled by the decree of the chancellor, but his decree, by the affirmance in this court, became merged in our judgment and decree. This placed it doubly beyond the power of the chancellor to modify it by any order he might subsequently make. Stephens v. Norris, 15 Ala. 79. Affirmed.

ORENDORFF *et al.* v. TALLMAN *et al.*

(Supreme Court of Alabama. May 20, 1890.)

EQUITY PLEADING—RESCISSON OF CONTRACTS—PARTIES.

1. A bill to rescind a contract of sale of land, which avers that defendants, by false representations that they had a sufficient title, induced plaintiffs to enter into the contract, when in fact

the title was in another, of which plaintiffs were ignorant, is sufficient without alleging the facts to show want of title in defendants.

2. Where the bill avers that complainants have not, nor ever had, possession of the land, it need not allege that they have abandoned or restored it to defendants.

3. An offer to rescind, six months after complainants learned of the vendor's want of title, is made within a reasonable time when it appears that complainants were strangers, and citizens of another state, and that yellow fever was prevalent where the vendors lived during the time between the discovery and the offer.

4. The vendor's mortgagee is not a proper party to a suit to rescind a contract of sale, as he is not concerned in the transactions between the vendor and vendee; the land being always subject to his claim.

Appeal from city court of Decatur; W. H. SIMPSON, Chancellor.

Bill in equity to rescind a contract of sale of land. Defendants demurred for want of equity, and for misjoinder of parties. First demurrer was sustained, and the second overruled.

E. W. Goodbey, for appellant Orendorff. *R. C. Brickell*, for Decatur Land Co. *R. A. McClellan* and *W. G. Hutcheson*, for appellees.

CLOPTON, J. It is well settled that a fraud committed on a vendee in the sale of land, by the false representations of the vendor, affecting the validity and sufficiency of his title, upon which the vendee had a right to rely, and did rely, and was thereby induced to enter into the contract, authorizes its rescission in equity, and a return of the purchase money paid. Whether the representation was made with or without knowledge of its falsity is immaterial. In either event the vendor is bound to make reparation for the injury. Neither does the fact that the purchaser has accepted a conveyance, with or without covenants of warranty, deprive him of his right to relief. *Bailey v. Jordan*, 82 Ala. 50; *Greenlee v. Gaines*, 13 Ala. 198; *Younge v. Harris*, 2 Ala. 108; *Rimerv. Dugan*, 39 Miss. 477; *Diggs v. Kirby*, 40 Ark. 420.

The bill alleges "that in the negotiation for, and in the sale and purchase of, the lots, said Orendorff fraudulently stated and represented to them [complainants] that he had a good and sufficient title, and a right to make a conveyance thereof, subject only to the purchase money mentioned, when in truth and in fact he had neither such title nor right; and the complainants, being at the time ignorant of the condition of such title and right, relied on, and were deceived by, the matters and things thus stated and represented, and were thereby induced to enter into such sale and purchase." It further avers that the vendors of Orendorff had no title, and that the title was in one Benjamin F. Bean. It is insisted that these allegations of the bill in respect to the title are merely averments of legal conclusions, and that the facts showing a want of title in the defendants, and paramount title in Bean, should have been stated. It is difficult to see how the facts could have been more directly and fully averred. The averment that the defendant had no title is the averment of a naked fact, unattended by cir-

cumstances, and that the title is in Bean is a collective averment of the facts essential to constitute title in him. These are subjects of proof.

This case is distinguishable from *Railway Co. v. Witherow*, 82 Ala. 190, 3 South. Rep. 23, cited by appellant's counsel. In that case the complainant derived title to a lot bounded by a public street by conveyance from the original owner, who dedicated the streets to the public, and claimed the ultimate fee to the center of the street. The answer denied this claim, and alleged that the fee remained in the original grantor. On the principle that a conveyance to a lot bounded by a public street, without any reservation, passes to the grantee the fee to its center, it was held that the answer contained nothing more than the denial of a legal conclusion unsupported by facts, and that nothing less than the averment of an express reservation of such fee in the deed of conveyance made by the original grantor, or its equivalent, would answer to rebut the legal inference to the contrary. This case would be analogous if it appeared that defendants derived title from Bean, which for any cause had become invalid. Then the facts rendering the conveyance invalid should be averred. The bill avers the representation, its falsity, complainants' ignorance of the state of the title, their reliance on the representation, and that they were thereby induced to make the purchase. Bills containing allegations less direct and explicit have been held to be sufficient. *Bailey v. Jordan*, supra. If the averments be proved on the hearing, the burden of proof being on the complainants, they would be entitled to relief.

It is also insisted that the bill is defective in failing to show that complainants have abandoned or restored possession of the lots. The doctrine settled by our decisions is that a vendee who has been defrauded, and paid part of the purchase money, need not restore or abandon the possession, but may retain it for his reimbursement. *Bailey v. Jordan*, supra. If, however, the bill does not aver fraud, as counsel contend, a sufficient answer to this objection is found in the allegation of the bill that complainants have not now, nor ever had, possession of the lots.

The right to rescission may be lost by failure to manifest an election to disaffirm the contract within a reasonable time. What constitutes a reasonable time must be determined from the circumstances of the case. *Foster v. Gressett*, 29 Ala. 393. Undue and unnecessary delay in exercising the power of rescission is regarded as evidence of an election to treat the sale as valid, but is dependent for its weight upon existing circumstances. According to the averments of the bill, the complainants had neither notice nor knowledge of the vendor's want of title until May 1, 1888, and made the offer to rescind November 21, 1888. Complainants were strangers, and citizens of the state of Georgia, and in the mean time yellow fever was prevalent in Decatur. Under these circumstances, we cannot say that the delay was sufficient to amount to acquiescence in the sale.

It appears that the Decatur Land Improvement & Furnace Company held a mortgage on the lots, given by Orendorff to secure a part of the purchase money due by him to the company, from whom he purchased the lots. In the contract of sale, complainants assumed to pay the mortgage. It is not averred that the company accepted complainants as their debtor in lieu of Orendorff. The company was in no way connected with the transaction between complainants and Orendorff, and has no interest in the result of the suit, or the relief sought by complainants. If the relief be granted, the rights of the company under the mortgage are in no wise affected. The fact that complainants purchased the property subject to the mortgage, and assumed with Orendorff to pay the same, does not make the company a necessary or proper party to any litigation between complainants and Orendorff arising out of their contract, with which the company had no connection.

The decree on the demurrer of Orendorff is affirmed, and reversed as to the demurrer of the Decatur Land Improvement & Furnace Company.

MEMPHIS & CHARLESTON RY. CO. v. ASKEW.
(*Supreme Court of Alabama. May 20, 1890.*)

**PERSONAL INJURIES—ENGINEER'S LICENSE—
PRINTED RULES—EVIDENCE.**

1. Acts Ala. 1886-87, p. 100, §§ 1, 2, require locomotive engineers to be licensed where they "operate or drive an engine on the main line or road-bed of any railroad in this state," and not otherwise; and therefore, in a suit by a brakeman against a railway company for an injury caused by the alleged negligence of an engineer who had no license, it was error to charge that he was required to have a license, and that the want of one tended to show the company's negligence, when the accident occurred in a freight-yard, in the use of a yard engine, and the engineer was employed only for yard work.

2. Under Code Ala. 1886, § 2590, which provides that a master shall not be liable to his servant for an injury caused by defective machinery unless the defect arose from, or was not discovered owing to, the negligence of the master, it was error to charge generally that, in the absence of contributory negligence, defendant was liable for an injury caused to an employee by a defect in the engine.

3. Where plaintiff, being charged with contributory negligence in not using coupling sticks, as required by a printed rule of the company, denied all knowledge of such a rule, it was competent to introduce the rule upon that subject, but not the entire printed rules upon all subjects.

4. In view of his denial, it was competent to prove that plaintiff had frequently seen other employees use the coupling sticks.

5. It was not competent to prove that the rules were "frequently referred to" by the employees generally in the discharge of their various duties.

Appeal from city court of Decatur; W. H. SIMPSON, Judge.

This action was brought by the appellee against the appellant. The facts, as they appear from the bill of exception, are sufficiently set forth in the opinion. Upon the plaintiff denying any knowledge of the rules of the company requiring all couplings to be made with "coupling sticks," the defendant offered to introduce in evidence the printed rules of the company, but, upon objection by the plaintiff, the

court excluded all of the rules, saying that only the rule requiring the couplings to be made with the sticks could be introduced; and the defendant duly excepted. Upon an examination of the plaintiff, the defendant asked him if he had not frequently seen persons use coupling sticks when they were coupling the cars. The plaintiff objected to this question, the court sustained the objection, and the defendant duly excepted. Upon the examination of another witness for the plaintiff, the defendant asked him: "Are not the rules frequently referred to by employees in the discharge of their duties in and about running engines and trains?" The plaintiff objected to this question, the court sustained the objection, and the defendant thereupon excepted.

Among other things, the court charged the jury, in his general charge, as follows: "At the time the plaintiff was injured, in December, 1887, all railroad engineers were required to have a license. If you find from the evidence that the engineer Williams did not have a license at that time, and was running the engine of the defendant without a license, this is a fact you may look to in determining whether defendant was guilty of negligence." To this part of the general charge of the court the defendant duly excepted. At the request of the plaintiff, the court gave the following charge: "(2) It makes no difference, gentlemen of the jury, whether the injury to the plaintiff was caused by a defect in defendant's engine or by the negligence of the engineer. If it occurred from either cause, or from both causes combined, and the injury was not proximately caused by the negligence of the plaintiff, then your verdict should be for the plaintiff." Among the other charges requested by the defendant was the following: "If the jury believe the evidence they must find for the defendant." The court refused to give this charge, and the defendant duly excepted to this refusal, and also to the giving of the charge requested by the plaintiff. There was judgment for the plaintiff, and the defendant now appeals, and assigns the various rulings of the court as error.

Humes, Walker & Sheffey, for appellant.
E. W. Godbey and Wert & Speake, for appellee.

SOMERVILLE, J. The action is one brought by an employee of the defendant railroad company to recover damages for an injury alleged to have resulted from the negligence of the defendant's engineer in operating a defective engine, the injury being received while the plaintiff was engaged in coupling a car to the engine.

1. The accident happened in the company's depot yard, where the locomotive in question was used only as a switch engine, and where the engineer in charge at the time, one Williams, was employed only in this capacity, and not as an engineer on the main line of the road. The statute requires locomotive engineers to be licensed only where they "operate or drive an engine upon the main line or road-bed of any railroad in this state," and not otherwise. Acts 1886-87, p. 100, §§ 1, 2. Will-

iams, therefore, was not required to have a license for the business of running a switch-engine in the depot yard. The court for this reason, if for no other, erred in instructing the jury that the law did require of him a license, and that they would be authorized to consider the want of it as a fact tending to prove negligence on the part of the defendant company. The evidence, moreover, shows that he did obtain a license about two weeks after the accident occurred, preparatory to operating an engine on the main line of the road. The court erred in giving the general charge bearing on this point, and also in refusing to give the third charge requested by the defendant.

2. Where an action is brought by a servant or employee for a personal injury received by him in the service of the master for employer, the relationship of the parties as master and servant is no bar to a recovery, among other specified contingencies, "when the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer." Code 1886, § 2590, subd. 1. But it is expressly declared in the same section of the Code that the master or employer is not liable under the foregoing subdivision, "unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." Code, § 2590, subd. 5. The second charge given by the court at the request of the plaintiff imposed a liability on the defendant if the alleged defect in the engine caused the injury, without regard to the limitation that no such liability shall exist unless the alleged defect arose from the master's negligence, or had not been discovered or remedied by reason of such negligence, or by reason of the negligence of some servant charged with the duty of seeing that the engine was in proper repair. This charge was clearly erroneous.

3. The point in the case upon which most stress seems to be laid is the alleged fact of the plaintiff's contributory negligence. This defense is made out if the plaintiff, by his want of ordinary care, was guilty of any conduct which substantially contributed to the injury received. The negligence attributed to the plaintiff is the reckless manner of his undertaking to couple the car to the engine. This was done while standing on a platform attached to the engine, the plaintiff attempting to handle simultaneously the link and pin in the car, and also the link on the moving engine. Experts testified that this was a dangerous experiment. This he did without the aid of a coupling stick, using only his naked hands for the purpose. The rules of the company provide that "coupling by hand is strictly prohibited; sticks must be used to guide the hand or shackle;" and each employee "is required to provide himself at all times with a stick for that purpose." It was competent to introduce in evidence any rule of the com-

pany applicable to plaintiff's duties at the time he was injured, but not the entire body of the company's printed rules bearing on matters entirely foreign to the issue in dispute, and the court so properly ruled.

4. The plaintiff having denied any knowledge of the foregoing rule requiring the use of the coupling stick, it was competent for the defendant to prove that plaintiff had frequently seen persons use such a stick in prosecuting their duties in making couplings of cars, but he could not prove the mere fact that the rules were "frequently referred to" by the employees generally in the discharge of their various duties. The important point was the knowledge which the plaintiff, not other employees, may have had, or was culpable in not having, as to this particular rule, or, what is the same thing in effect, the ordinary habit of prudent persons in the discharge of their duties under similar circumstances.

5. The court did not err in refusing to give the general affirmative charge requested by the defendant, as there was some slight evidence tending to prove negligence on the part of the defendant's engineer, and to rebut the alleged want of ordinary care on the part of the plaintiff. Its probative force and relative preponderance was a question for the jury.

Reversed and remanded.

MAXWELL V. STATE.

(Supreme Court of Alabama. April 30, 1890.)

JURY IN CAPITAL CASES—MURDER—HARMLESS ERROR—INSANITY.

1. An act of February 28, 1887, established a general jury system for the state. That of February 11, 1889, "To expedite the trial of capital cases in Jefferson county," provided a mode for drawing and impaneling special jurors, and prescribed the number of peremptory challenges. By an act of February 28, 1889, four sections of the general act of 1887 were re-enacted in full, as amended,—among them, section 17, containing a repealing clause "of all laws and parts of laws, general and special, in conflict with this act;" but no change was made in that clause. *Held*, that the Jefferson county act is repealed so far, only, as its provisions conflict with the four sections as amended.

2. Section 18 of the general act, as amended, providing that in capital cases the defendant shall have 21, and the state 14, peremptory challenges, conflicts with and repeals section 8 of the Jefferson county act, allowing 10 and 5, respectively. The other sections of the local act remain in force.

3. The provisions of the Jefferson county act in regard to the drawing and organization of the third jury to complete the *venue* for capital cases dispenses with the presence of the defendant, and, if the statute were silent, it would not be necessary.

4. The discharge for cause of two of the jurors drawn for the special *venue* before the case is called for trial, and in the absence of the defendant, and also of one who had been drawn for the regular panel, is impliedly authorized by the Jefferson county act; and, if not, the discharge would involve no reversible error.

5. A defendant in a capital case cannot complain that at one term a day in the next was fixed for his trial, nor that an order was made on that day that the cause be passed to a later one.

6. On a trial for murder, in which the defendant has offered testimony that, 10 days before the killing, the deceased went to his home, and made an assault on his wife, the admission of evidence that a certain negro "had lived on a

part of the 40 acres constituting the defendant's homestead" is reversible error; the appellate court being unable to "see affirmatively that it did not injure the defendant," though it is "utterly unable to see that it did or could" have done so.

7. The burden is on the accused to establish insanity by a preponderance of the evidence; and a reasonable doubt, raised by all the evidence, will not authorize an acquittal.

8. On a plea of not guilty by reason of insanity, it is not error to refuse to charge that, before the jury can convict, they must be satisfied, beyond a reasonable doubt, that the defendant has not established his plea of insanity by a preponderance of the evidence.

9. On trial of pleas of not guilty, and not guilty by reason of insanity, under Acts Ala. 1888-89, p. 742, providing for committing to an asylum those acquitted on the latter plea of murder, and other high crimes, an instruction tending to authorize a general verdict of not guilty, on a conclusion based on insanity, is misleading, and is properly refused.

Appeal from criminal court, Jefferson county; S. E. GREENE, Judge.

Indictment for murder. Pleas, not guilty, and not guilty by reason of insanity. The defendant offered evidence tending to show that 10 days before the killing, at his home, in a secluded place on the mountain-side, a criminal assault was made on his wife by the deceased.

The defendant requested the following charges, and duly excepted to the refusal of each: "(1) If the jury believe from the evidence that the defendant, at the time when the fatal shots were alleged to have been fired, was so far affected in his mind and memory that he was not able to distinguish right from wrong, and had not knowledge and understanding of the character and consequences of his act, and power of will to abstain from it, then he was not a legally responsible being, and the jury should find him not guilty. (2) In order to sustain the defense of insanity, it is not necessary that the insanity of the accused be established by a preponderance of evidence. If, on the whole evidence, the jury entertain a reasonable doubt as to the sanity of the accused, they must acquit him. (3) While the law presumes every man to be sane, and responsible for his acts, until the contrary appears from the evidence, still, if there is evidence in the case tending to rebut this presumption, sufficient to raise a reasonable doubt upon the issue of sanity, then the burden of proof is on the state to show by the evidence, beyond a reasonable doubt, that the defendant was sane at the time the alleged offense was committed. (4) To warrant a conviction in this case, it is incumbent on the state to establish by evidence, to the satisfaction of the jury, beyond a reasonable doubt, the existence of every element necessary to constitute the crime charged; and if the jury, after a careful and impartial examination of all the evidence in the case bearing on the question of sanity or insanity, entertain any reasonable doubt of the defendant's sanity at the time of the alleged offense, they should give him the benefit of that doubt, and acquit him. (5) Before the jury can convict the defendant in this case, they must be satisfied beyond a reasonable doubt, and to a moral certainty, that he

committed the act, and that he has not established his plea of insanity by a preponderance of the evidence. (6) A probability that the defendant was insane at the time of firing said shots, or was unable to distinguish between right and wrong as to the act he was committing, or had not the will power to control him, then the jury must find him not guilty. (7) A probability of the defendant's innocence is a just ground for a reasonable doubt, and therefore for his acquittal."

W. J. Cahalan and Charles G. Brown, for appellant. W. L. Martin, Atty. Gen., for the State.

MCLELLAN, J. 1. The act of February 23, 1887, "To more effectually secure competent and well-qualified jurors in the several counties in this state," undertook to establish a general jury system throughout the state, and was made to apply to all the counties of the state, with a proviso excepting from its operation certain named counties, among which were Clay and Marengo. Jefferson was not one of the excepted counties. The seventeenth section of the act is in the following language: "Be it further enacted, that section 4732 of the Code of Alabama, and all other laws and parts of laws, general and special, conflicting with the provisions of this act, be, and the same are hereby, repealed; but all laws now in force in relation to jurors, their drawing, selecting, or qualification, not in conflict with this act, are hereby continued in full force and effect. But the provisions of this act shall not apply to the counties of Henry, Mobile, Dallas, Talladega, Clay, Marengo, Cherokee, Etowah, St. Clair, Coffee, Dale, Geneva, Marshall, and Montgomery."

2. The legislature, at its next session, passed an act "To expedite the trial of capital cases in Jefferson county," which was approved February 11, 1889. This act provided a mode for the drawing, summoning, and impaneling special jurors for the trial of capital cases, differing in several respects from the mode prescribed in the general law referred to, prescribed the number of peremptory challenges to be allowed the state and defendant, respectively, and repealed "all laws, general and special, in conflict with" its provisions, and expressly continued in full force and effect all laws, general and special, not in conflict. Acts 1888-89, p. 324. The effect of this statute was, of course, to repeal all the provisions of the act of 1887 which were in conflict with it, so far as Jefferson county was affected thereby.

3. At the same session (1888-89) of the general assembly, it was considered that the act of 1887 was defective, and needed amendment in its 3d, 6th, 13th, and 17th sections; and on February 23, 1889, an act "To amend sections 3, 6, 13, and 17 of an act entitled 'An act to more effectually secure competent and well-qualified jurors in the several counties of this state,'" was passed. The changes made by the amendatory act are the following: Section 3 of the original act required that jurors should be selected from the male residents, etc., "who are householders or freeholders," etc. The amendment eliminates the words

quoted, and allows the selection to be made without reference to householders or freeholders. Section 6 of the original act, among other things, provided that the president of the board of jury commissioners should keep the key to the jury-box; and the amendment requires that the key should be deposited with the county treasurer, and made certain verbal changes to accommodate this substantive amendment, and harmonize the section. Section 13 of the original act, while undertaking to deal generally with the subject of peremptory challenges, failed entirely to provide the number of such challenges which should be allowed in capital cases; and there was no provision on this point in the act. The amendment merely supplies that omission, and prescribes that the defendant in a capital case shall have 21, and the state 14, peremptory challenges. In effecting each of these several amendments, the sections to which they pertain were re-enacted, and published in full, agreeably to constitutional requirements; and this course was pursued, also, in respect to the amendment made to section 17 of the original act, which we have set out in full above. The sole change made in that section, aside from the mere verbal one incident to giving the section of the Code therein referred to the number it bears in the Code of 1886, was effected by omitting the counties of Clay and Marengo from among those excepted from the operation of the act, and thus bringing them within the statute. But in reaching this result the whole of section 17 was re-enacted, including its repeal of all conflicting laws, "general and special."

4. The special act of February 11, 1889, was, as we have seen, in conflict with the act of 1887 in several particulars, and in so far repealed the latter as to Jefferson county. The amendatory act of February 28, 1889, is in conflict with the special act passed at an earlier day of the same session in the one particular as to the number of peremptory challenges to be allowed; the former allowing, as we have seen, 21 to the defendant and 14 to the state, and the latter only allowing the defendant 10 and the state 5. If section 3 of the amendatory act, which, with the exceptions noted, is a reproduction and re-enactment of the repealing section of the original act, is to receive a literal construction and enforcement, its effect must be either to repeal the special act *in toto*, or to repeal it in so far as there is a repugnancy, the one to the other. If the latter result is to follow, only that section of the special act which prescribes the number of peremptory challenges in capital cases will be stricken down, and the various other provisions of the act, as to setting such cases for trial, and the drawing, summoning, and organizing special jurors and juries, etc., will be allowed to stand, provided these provisions are capable of being executed without the repealed section. Assuming for the moment that all other provisions of the special act are susceptible of operation and effect in the absence of that section, which is in conflict with the amendatory general statute, the first inquiry is whether the repealing

clause of the latter act refers to statutes inconsistent with itself only, or to statutes in conflict with the original act of 1887 as amended by it; for, if the latter is the meaning we are to give to the repealing clause, it is very evident that no part of the special act can stand, since all of its provisions are, to a greater or less extent, inconsistent with the act of 1887. We do not, however, understand this to be the rule. The act of 1887, being repealed as to Jefferson county by, and so far as in conflict with, the special act, the amendment of some of its sections did not have the effect to revive it as applicable to that county, except in those parts of it which were so amended and re-enacted. The fact that a repealed statute is referred to in a subsequent one, the reference not being intended as a re-enactment, will not give it vitality; and "even where the later act attempts to amend an earlier one, previously repealed by implication, the copying of parts of the earlier act into the amendment was held not to re-enact it." End. Interp. St. § 372; *Stingle v. Nevel*, 9 Or. 62. Moreover, the constitutional requirement that "no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length," in our opinion, very clearly forbids that any part of the law of 1887 which had been repealed by the act of February 11, so far as Jefferson county is concerned, should be again brought into force in that territory, revived in and extended to that county, without the re-enactment and publication at length of such parts or sections of the original law. *Rogers v. Torbut*, 58 Ala. 523; *Stewart v. County Com'rs*, 82 Ala. 209, 2 South. Rep. 270; *Judson v. City of Bessemer*, 87 Ala. 240, 6 South. Rep. 267. Our conclusion, therefore, is that both the fact and the extent of the conflict between the special act and that of February 28, 1889, is to be determined by a reference to those acts alone, wholly disconnected with the act of 1887, as it was originally or as amended. It seems clear, too, that, giving to the repealing clause of the amendatory act the most sweeping effect demanded by its very letter, it cannot be construed to repeal any, or any part of any, law not in conflict with that act. It provides for the repeal of "all laws and parts of laws" conflicting with its terms. This reference to parts of laws, taken in connection with the further provision that all laws not in conflict shall continue in full force and effect, can mean nothing else than that such parts only of any statute are repealed, and those parts not in conflict shall be unaffected; and this we understand to be the rule whenever the purpose or the effect of repeal is to destroy conflicting enactments, even where no reference is made to "parts of laws." *Abernathy v. State*, 78 Ala. 411. Of course, if the section repealed leaves the statute so emasculated as that it cannot be executed, the whole law fails, and its former field of operation would be covered by the general law. We see no reason, however, why the special law under consideration

may not stand, and be fully executed, as to all of its remaining provisions, without the section providing for the peremptory challenges, which is in conflict with the amendatory act. It is very true that, with the limited number of special jurors provided for in the special act, the allowance of the greater number of peremptory challenges which is provided for in the general law would frequently result in exhausting the venire before a jury is obtained. But this result might, and frequently does, happen under the general law, and, indeed, will happen in every case under the general law where the minimum number of special jurors are ordered, and both the state and defendant exhaust their peremptory challenges. So that this objection is one of degree, rather than of kind, and raises a question of convenience, rather than authority; and when such deficiency occurs, whether under the special or general law, the power of the court is ample, and the same in either case, to summon a sufficient additional number of special jurors for the trial of any case. If, therefore, the special law is affected at all by the repealing clause of the act of February 28, 1889, it is only to the extent of expunging section 8 of the former, and authorising, instead of the number of challenges prescribed by it, the larger number prescribed by section 2 of the later act.

5. No question was made in the present case as to the number of peremptory challenges the parties, or either of them, were entitled to. Hence, having determined that no part of the special law, unless it be section 8, was repealed by the subsequent act at the same session, the exigencies of this case do not require that we should go further, and decide whether that section was repealed. Yet it is, perhaps, better that we should pass upon that question, in view of its importance in the administration of the criminal laws in Jefferson county, and the probability of its recurrence in this court, if not settled now. Its solution would involve no difficulty, of course, if the repeal relied on was one by implication. Such repeals, even where both statutes are general, are regarded with great disfavor in the law, and are not allowed except in cases of irreconcilable conflict. End. Interp. § 210; 3 Brick. Dig. p. 750, §§ 47, 48. And in no case will a repeal of a special act be implied from an inconsistent general law, even though the latter expressly repeal all contravening statutes. Faust v. Huntsville, 83 Ala. 279, 3 South. Rep. 771. This doctrine was thus forcibly stated by BLACK, C. J., in a case which, like the present one, involved a statute affecting a county, and a later, inconsistent enactment applying to the state: "It seems to be well settled that a general statute, without negative words, cannot repeal a previous statute, which is particular, even though the provisions of one be different from the other. * * * It is against reason to suppose that the legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances of one county had made necessary." Brown v. County Com'rs, 21 Pa. St. 37. And the presumption, as between general

laws, as well as the rule where a general and special law conflict, against repeal by implication, are strengthened where, as in this case, both acts are passed at the same session. *McFarland v. Bank*, 4 Ark. 410, 417; *Ottawa v. LaSalle Co.*, 12 Ill. 339. But in the case at bar the repeal insisted on is not one by implication merely. On the contrary, there is an expressed repeal of all laws and parts of laws, general and special, in conflict with the amendatory act. A part of the special act is so in conflict. We are reasonably satisfied that the legislature did not, in fact, intend to repeal the special act, or any part of it; but we reach this conclusion aside from, and even in spite of, any expressions the law-makers have used. It is not reasonable to suppose that they intended the amendatory act, which had abundant field for operation outside of Jefferson county, to repeal a special act which they had just passed for that county. It seems clear, too, that the re-enactment of the repealing clause of the original act was only for the purpose of striking the counties of Clay and Marengo out of the proviso thereto, since that was the only change made in its phraseology; and it might well have been supposed, in view of constitutional requirements, that, to accomplish this purpose, it was necessary to set out the whole section. But however clear we may be as to the actual intent of the legislature, dissociated from the language employed, the fact remains that that language evinces an entirely different intent; and, however well assured we may be that its use was inadvertent, we must be guided by it. The office of construction is to ascertain what the language of an act means, and not what the legislature may have intended. "*Index animi sermo*." The court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time; the meaning of the law being the law itself. *Edrich's Case*, 5 Coke, 118; *Logan v. Courtown*, 13 Beav. 22; *Reiser v. Association*, 39 Pa. St. 137. While there are circumstances under which the meaning of words will be enlarged or restrained, or even entirely disregarded, where the intent of the legislature, as gathered from the whole act, and other acts *in pari materia*, render it necessary, it would require a stronger case than is involved here before we could feel authorized, when the legislature, in terms, repealed all special, or parts of special, laws in conflict, etc., to say that they mean nothing by the very plain language they employed; and this though we might be morally certain, aside from the words, that the particular result was never, in fact, present in their minds. Of such case, we adopt the language of Lord CAMPBELL: "I really cannot doubt," says his lordship, "what the intention of the legislature was; but that intention has not been carried into effect by the language used. It is far better that we should abide by the words of a statute than seek to reform it according to the supposed intention." *Coe v. Lawrance*, 1 El. & Bl. 516. Our conclusion is that the amendatory act repealed section 8 of the special act, which prescribes the number of peremptory chal-

lenges to be allowed in capital cases, and leaves all other provisions of the act of February 11, 1889, in full force. We have considered these questions more exhaustively, perhaps, than was necessary, but feel justified in so doing by their importance in this and many other cases arising in the county of Jefferson, and also because the able arguments on both sides merited a full response on our part.

6. Considering this case under the special act, (section 8 thereof, only, being eliminated,) we find no error in the action of the trial court in overruling defendant's motion in arrest of judgment, or in its rulings on these same points, or some of them, as shown in the bill of exceptions. The contention of appellant that a time was fixed for the trial in his absence is not supported by the record. It affirmatively appears that he was present on September 5, 1889, when an order was made setting the 25th day of the ensuing month for his trial, and that on the day last named, the prisoner again being present, the cause was formally, by an order of court, "passed until Monday, the 2d day of December, 1889." We know of no legal objection to the right and power of a court to determine, so far as it may see proper, the order of business at an ensuing term; and certainly the defendant could not have been put at a disadvantage by reason of the fact that at the September term of the criminal court a day was fixed in the next term for his trial. It would seem, on the contrary, that it was in his interest, and to his benefit, that he should be apprised of the time of his trial so long in advance of the day set, and thus have his opportunities to prepare for the trial enlarged. The day of trial being, as we think, regularly and properly set, the order of October 25th, that the cause be passed to December 2d following, can be reasonably held to mean nothing other than that the trial should be deferred to, and had on, the day last named, and was an order setting that day for the trial. *Martin v. State*, 77 Ala. 1.

7. The special act dispenses with the presence of the defendant both at the drawing and organization of the third jury to complete the *venue* for a capital case. We suppose the objection taken to the action of the court with respect to this matter in defendant's absence proceeds on the assumption that the special law was not of force. Any way, the objection is untenable. Abstractly considered, the defendant has no more right to be present at the drawing and organization of these special jurors than when the regular jurors for the week of his trial are drawn and organized; and his absence in neither case can prejudice him, since, if present, he could interpose no objection to the proceeding. All his constitutional rights with respect to these jurors he is afforded an opportunity to assert when his case comes on for trial. These considerations, in connection with the fact that the special law was of force, and applied to all these proceedings, serve to determine all the grounds of the motion in arrest of judgment against the defendant, except those which bring in question the

court's action in discharging two of the persons drawn for the special *venue* before defendant's cause was called for trial, and also one who had been drawn and summoned for the regular juries of the week. The act, we think, impliedly authorized the discharge of such persons under the circumstances shown; and, if it does not, it appears to be well settled that the discharge involves no reversible error. *Farias v. State*, 85 Ala. 1, 4 South. Rep. 679.

8. The fact that a certain negro "had lived on a part of the forty acres constituting the homestead of the defendant and wife," manifestly, had no bearing whatever on any inquiry disclosed in this record. It was, confessedly, wholly irrelevant. Evidence of the fact was objected to. The objection was overruled, and an exception duly reserved. After this, the same witness, in answer to another question, stated that the homestead tract referred to was mineral land. Thereupon, as we read the bill of exceptions, the defendant moved to exclude both this and the answer as to occupation by the negro; and this motion was overruled "upon the statement of the state's solicitor that he would connect with other evidence which would make it competent." Our opinion is that the evidence as to the land containing minerals was relevant and competent as tending to account for the presence of the deceased at defendant's house for a legitimate purpose; it having been shown that he "was looking after mineral lands" for the Sloss Steel & Iron Company. The motion being directed both against this testimony, which was legal, and that about the residence of the negro, which was illegal, was not well laid; and the defendant could not, under it, have the benefit of his objection and exception made and reserved, separately and independently, to the testimony that a negro had lived on the land. And this objection was not obviated by the solicitor's undertaking to connect it with other evidence in a way to make it relevant. That undertaking, as we have seen, did not apply to this evidence alone, and arose after the defendant had fully taken and perfected his separate exception. It follows that the position assumed in argument, that it was the duty of the defendant, the solicitor having failed to connect this evidence, to call the court's attention to the fact, and again move to exclude it, is not tenable, even conceding this is necessary to put the court in error in respect to evidence admitted on an undertaking of this kind, which we do not decide; and this action of the court, upon which the first exception was based, is to be considered wholly aside from the subsequent statement of the solicitor, involving this and other evidence. So considered, we have the case of the admission, against objection, of palpably irrelevant testimony. It may be—indeed, it is highly probable—that this evidence did not prejudice the defendant. Nay, further, we are utterly unable to see that it did or could have worked him injury. But, on the other hand, we cannot affirmatively see that it did not injure him; and we do not feel that safety and certainty which the rule, even in civil cases, requires to rebut

the presumption of injury from error, that no harm was done, which would warrant us in holding this error to have been without prejudice. 1 Brick. Dig. p. 780, § 106. And while my own opinion is that, in principle, the rule should be the same in both civil and criminal cases, yet it cannot be denied that it is much more strictly adhered to in the sense of requiring greater assurance, if possible, that injury has not resulted in the latter class of cases, if, indeed, our decisions have not established the absolute doctrine that there is no such thing as error without injury in a criminal cause, except where it affirmatively appears that the defendant was benefited by the ruling of which he complains. *Vaughan v. State*, 83 Ala. 55, 3 South. Rep. 530; *Williams v. State*, 83 Ala. 16, 3 South. Rep. 616; *Mitchell v. State*, 60 Ala. 26; *Diggs v. State*, 49 Ala. 314; *Marks v. State*, 87 Ala. 99, 6 South. Rep. 377.

9. It is unnecessary to discuss the charges requested by the defendant in detail. All of them were, in our opinion, properly refused. Some were affirmatively bad in that, under the issue presented by the special plea of not guilty by reason of insanity, they misplace the burden, and misstate the measure, of proof; the burden in that issue being on the defendant, and requiring to its discharge at least a preponderance of evidence in support of the defense of insanity. It would be an anomaly to require the state to prove a fact which the law presumes to exist, and to authorize such fact to be overturned by the injection into the case of a reasonable doubt of its existence. Such is not the law. *Acts 1888-89*, p. 742 et seq.; *Boswell v. State*, 63 Ala. 307; *Ford v. State*, 71 Ala. 385; *Parsons v. State*, 81 Ala. 577, 2 South. Rep. 854; *Gunter v. State*, 83 Ala. 96, 3 South. Rep. 600.

Moreover, all of said charges were misleading, in that they authorized the jury, if they found the issue under the special plea in favor of the defendant, to return a general verdict of not guilty, without more, or at least tended to that result. The form of the verdict, under the act cited above, "in relation to criminal insane persons who are charged by indictment with murder and other high crimes," is a matter of great importance, as upon that form depends the liberty of the defendant. If it be not guilty, simply, the defendant is entitled to immediate enlargement. If not guilty by reason of insanity, he stands acquitted of the crime, it is true; but he is not entitled to his liberty. On the contrary, such verdict is by statute made the basis of a judgment committing him to the insane asylum. The leading purpose of the statute was to separate, as far as possible, the two issues presented by the pleas of not guilty, and not guilty by reason of insanity, and to have the proof directed to these issues, respectively, and the verdict responsive to them separately. In a case like this, where both pleas were interposed, it was essential that the jury should be directed and required to make their verdict speak with distinctness to that one of the issues which they found in favor of the defendant; and any charge

which, while authorizing acquittal of the offense, failed to require this, or tended to authorize the jury to render a general verdict of not guilty, when their conclusion of innocence might have been based on the theory of the defendant's insanity, is misleading, and should not be given.

For the error pointed out above, in the admission of evidence, the judgment is reversed, and the cause remanded.

LYNCH v. STATE.

(*Supreme Court of Alabama. May 5, 1890.*)

LARCENY FROM WAREHOUSE—INDICTMENT.

1. A trunk near the door of a baggage-room on a platform, covered by the same roof, but not inclosed, which is used as a common passage-way by all going about the depot, is not in a warehouse within Code Ala. 1886, § 8789, punishing larceny therefrom.

2. In an indictment for larceny from a warehouse under Code Ala. 1886, § 8789, declaring it grand larceny, the statement of the place of taking not being so made as to show that it was not intended as an affirmative averment, as under a *videlicet*, it is descriptive of the offense charged, and, on failure to prove it, a verdict cannot be taken for grand larceny, though the value stated is such as to raise the stealing to that grade without regard to the place of taking. *STONE, C. J.*, dissenting.

Appeal from city court of Montgomery; THOMAS M. ARRINGTON, Judge.

Indictment under Code Ala. 1886, § 8789, for stealing a trunk from a warehouse. The taking was from a depot platform near the door of the baggage-room, the roof of which extended over it, but it was not inclosed, and it was used as a common passage-way by all going about the depot.

John G. Finlay, for appellant. *W. L. Martin*, Atty. Gen., for the State.

MCCLELLAN, J. A warehouse defined to be "a place adapted to the reception and storage of goods and merchandise." 2 *Rap. & L. Law Dict.* 1344; 2 *Bonv. Law Dict.* 799. A cellar used merely for the deposit of goods intended for removal and sale is a "warehouse" within the statute of 7 & 8 Geo. IV., defining burglary. *Reg. v. Hill*, 2 *Moody & R.* 458. The term "warehouse," as employed in the Kentucky statutes against larceny, means any house, not an office or shop, in which goods, wares, and merchandise are usually deposited for safe-keeping, or for sale, and includes a granary built and used for keeping and preserving farming utensils and the like. *Ray v. Com.*, 12 *Bush*, 397. This court has said that in construing the word "warehouse," as used in the penal statute concerning larceny, from it and other like structures, the legislature must be held to "have had in contemplation, when making the enactment, such warehouses as they and our people are familiar with throughout the state," which would include "a covered structure, used for storing cotton bales, one side and end of which were planked up, and the others left open, so that wagons could drive under to load and unload, which, together with two acres of land connected with it, was inclosed by a plank fence nine feet high, the gates of which were kept locked." *Hagan*

v. State, 52 Ala. 373. To these several definitions we may add, further, that to our minds the term necessarily involves the idea of an inclosure of some sort; some kind of structural barrier to the ingress of the public, designed to afford protection to the goods deposited therein, and to contribute to their safe-keeping. The open, uninclosed, though covered, place disclosed in the facts of this case, to which the public had unobstructed access, and which was "used as a common passage-way to all persons going about the depot," where, indeed, all persons had a right and were expected to go in leaving or approaching railway trains, was not a warehouse within any of these definitions, or within the letter or spirit of the statute under which the indictment was drawn.

The charge of larceny from a warehouse could not be supported by proof of larceny from this place. There was a fatal variance between the allegation and the evidence, and the defendant's motion to exclude the evidence should have been sustained. *Henry v. State*, 30 Ala. 679. The judgment cannot be helped by reference to the fact that the indictment sufficiently presents the charge of grand larceny without the averment as to the warehouse. In that aspect the latter averment becomes a matter of unnecessary particularity in the description of the offense; but not being laid in such a way, as under a *videlicet*, as to show that it is not intended as an affirmative averment, it must be proved as laid, though the indictment would have been good without it. The judgment of the city court is reversed, and the cause remanded.

STONE, C. J., (*dissenting*.) I cannot agree that there is such a variance between the offense charged and that which the testimony tends to prove as to preclude a conviction of larceny on the present indictment. I think the less grave offense, larceny, is necessarily included in that preferred by the jury,—larceny from a warehouse. Code 1886, § 4390; *Henry v. State*, 30 Ala. 389; *Hudson v. State*, 34 Ala. 253; *Allen v. State*, 58 Ala. 98.

WEST et al. v. WEST.

(*Supreme Court of Alabama. May 21, 1890.*)

PARTITION—GUARDIAN—PLEADING.

1. In a bill for partition by the guardian of a lunatic, he must sue, not in his own name describing himself as guardian, but in that of his ward.

2. One of the heirs of an entire tract, of which a part has been assigned to the widow as dower, may compel partition of the residue.

3. A bill for partition filed by the guardian of a lunatic is not repugnant in seeking an account of the rents and profits, and also a sale of his ward's interest.

4. A bill filed by the guardian of a lunatic heir to an entire tract, part of which has been assigned to the widow as dower, praying a partition of the residue and a sale of his ward's undivided interest in the reversion, is multifarious.

Appeal from chancery court, Marshall county; S. K. McSPADEN, Judge.

The facts are sufficiently stated in the opinion. Code Ala. 1886, § 2532, referred to therein, is a section of part 3, tit. 1, entitled

"Proceedings in Civil Cases in Courts of Common Law," while section 3417 comes under title 4, "Proceedings in Chancery." *Lusk & Bell*, for appellants. *Brown & Holliday*, for appellee.

CLOPTON, J. The bill is filed by appellee, as the guardian of William F. Johnson, against whom an inquisition of lunacy was taken in the probate court of Yell county, Ark., and seeks a partition of the lands owned by his ward and the defendants as tenants in common. The first ground of demurrer is that the lunatic is not made a party. The general rule in a court of equity is that all persons having a material interest in the subject-matter of a suit must be made parties, in order that complete justice may be done, and that they may be concluded by the decree. This rule applies to infants and lunatics. The settled practice in England in bringing suits in the chancery court for the benefit of lunatics is to file the bill in the name of the lunatic by his committee, or to join the lunatic and committee as complainants, unless the object of the suit is to avoid an act done by the lunatic during his lunacy, in which case he may be joined or omitted. *Willis*, Eq. Pl. 5; *Coop*, Eq. Pl. 31. The rule is thus stated in *Story*, Eq. Pl. § 65: "In some of the states of America, the courts of equity are intrusted with the like authority [as in England] to appoint committees for idiots and lunatics, and in such case the idiots and lunatics sue by their committees. In other states, idiots and lunatics are by law placed under guardians appointed by other courts, and ordinarily by the courts of probate of the state. In such cases, the idiots and lunatics sue and defend suits by their proper guardians, unless some other is specially appointed for that purpose." In *Gorham v. Gorham*, 3 Barb. Ch. 24, the question of the necessity of making a lunatic a party was fully discussed, and the foregoing rules sustained. After reviewing the elementary writers and authorities, the chancellor observes: "When it is said by these writers that idiots and lunatics must sue by their committees, it is not meant that the suit is to be brought by the committee in his own name, merely describing himself as the committee of the lunatic, as has been erroneously supposed by the court of one of our sister states. But they mean that the suit should be brought in the name of the lunatic, stating that he sues by the committee of his estate, naming them, as in the case of an infant suing by his next friend, or that the suit should be prosecuted in the names of the lunatic and of his committee." The necessity of making the lunatic a party rests on the principle that a decree in favor of his guardian, merely describing himself as such, would not be a decree in favor of the lunatic; and, if the suit proved unsuccessful, would not protect the defendant from subsequent litigation by the lunatic, should he be restored to soundness of mind, and to possession and control of his property. In the present bill, complainant describes himself as guardian of the lunatic, and brings the bill for his ward, naming him. This, as it appears

from the above authorities, is insufficient to make the lunatic a party, so that final decree of partition shall conclude him.

But it is contended that this mode of bringing the suit is authorized by section 2582 of the Code, which provides that, "in all suits in which the ward has an interest, and the recovery inures to his or her benefit, a guardian may sue in his own name for the use of the ward." This statutory provision does not apply to suits in chancery. In *Blackman v. Davis*, 42 Ala. 184, the guardian of minor children filed, in his own name, an application for the removal of an administrator. The petition was demurred to on the ground that the guardian was not authorized to file it in his own name. After stating that the petition did not conform to the requirements of section 2036 of Code 1852, which corresponds to section 2582 of the present Code, the court says: "We think, however, that the proper mode of proceeding for infants in this case is in the name of the infants by the guardian or next friend, by analogy to the rules of chancery practice, and that section 2036 does not apply;" thus recognizing that the practice in chancery is as above stated. That section 2582 does not apply further appears from the fact that specific statutory provision is made as to the manner in which persons of unsound mind may sue in chancery. Section 3417 provides: "Persons of unsound mind may sue by next friend, and guardians may be substituted; and, upon restoration to sanity, the suit may proceed in their own names." In no other respect is the practice in chancery modified or changed by statutes. This ground of demurrer should have been sustained, and the complainant allowed to amend his bill.

There are several causes of demurrer, which may be comprehended in one general assignment, namely, that the lands constitute an entire tract, in a part of which the co-tenants have only an estate in reversion, not subject to partition. The demurrer as to these causes is based on the following facts: The parties derive title to all the land by descent from their immediate ancestor. At the time of his death they constituted an entire tract, and since then a distinct portion has been carved out and assigned to his widow as her dower, she still living. The parties having an estate in reversion in the part of the lands assigned for dower, so that partition thereof cannot be decreed, defendant insists that complainant is not entitled to partition of the remaining lands. The rule invoked is that partition will not be awarded by fragments or parcels, but must be made of the entire estate. The general rule that a suit for partition of a parcel will not be entertained, where the estate in common consists of an entire tract, to which there is a right to immediate partition, has no application when there is a present title and right of possession to a portion, and a reversionary interest in another and distinct part. In such case, though the entire estate may be derived from the same source at the same time, the titles to the respective parts are distinct; and as is said in *Wilkinson v. Stuart*,

74 Ala. 198: "For all legal purposes, and in legal effect, the parties stand in a relation they would occupy if the several titles had been derived by several instruments, to distinct, different tracts or parcels of land. In such case, the rule invoked could not be applied, and it is not now capable of application, constraining unwilling tenants into the continuance of a relation they are anxious to dissolve, and which may be dissolved as to all the lands they hold by present title, attended with a right of present possession."

The bill is not repugnant in seeking to have an account of the rents and profits, and also a sale of complainant's ward's portion. It may be that the court, on proper allegations and proof, would order a sale after partition has been made, rather than subject the guardian to another proceeding, either in the chancery or some other court. Though the demurrer does not specially go to that portion of the bill, which seeks an account of the rents and profits, as counsel have argued the question we will merely state the general rule, which is, a tenant, using and occupying the lands held in common, is not liable to account to his co-tenant on partition for the rents and profits, unless there is an agreement to pay, or his entry and possession are hostile and exclusive. *Newbold v. Smart*, 67 Ala. 326; *Gayle v. Johnston*, 80 Ala. 395; *Wilkinson v. Stuart*, supra.

Though the complainant does not seek partition of that part of the lands in which the parties have an estate in reversion, the bill prays that his ward's undivided interest therein may be sold. This constitutes a joinder of two distinct subject-matters, which have no connection with each other, and in one of which the defendants have no interests, and renders the bill multifarious.

Reversed and remanded.

PREWITT v. ASHFORD.

(*Supreme Court of Alabama. May 21, 1890.*)

EQUITY—DECREE—CONVEYANCE OF LEGAL TITLE—ESCROW.

1. A decree of a court of chancery which establishes that lands have been purchased by a husband with his wife's separate estate, will not divest the husband and his grantees of the legal title to the land, and vest it in the wife, though it in express terms purports to do so, as the statutes of Alabama do not give chancery courts authority to transfer title from one party litigant to another by mere decree, except on a party's failure to comply with directions therein fixing a specified time by which the conveyance shall be made.

2. Where the equitable owner of land executes a quitclaim deed to be held in escrow, and delivered to the grantee on the affirmation by the supreme court of a judgment rendered in his favor in a litigation involving the land, the affirmation of the judgment, and the delivery of the deed to the grantee, will carry with it the legal title acquired by the equitable owner while the litigation was pending in the supreme court.

Appeal from circuit court, Lawrence county; H. C. SPEAKE, Judge.

J. B. Moore and W. P. Chitwood, for appellant. D. D. Shelby, for appellee.

SOMERVILLE, J. The action is one of statutory ejectment. The court, on the trial below, gave the general affirmative charge to find for the defendant; and the verdict of the jury was, accordingly, so rendered. The evidence in behalf of the plaintiff, Prewitt, who is the appellant here, made out a *prima facie* case of title in him, such as would authorize a recovery unless his case was overthrown by the countervailing evidence of the defendant, Mrs. Ashford. It was as follows: (1) A warranty deed from Richard Prewitt to Josephine Prewitt, dated April 27, 1866; (2) a deed from Josephine Prewitt to the plaintiff, W. V. Prewitt, dated February 6, 1883; (3) the fact of uninterrupted possession under these deeds from April, 1866, to March 3, 1888, which was within a few weeks of the time the present suit was brought; (4) a quitclaim deed from Caroline Ashford to Richard Prewitt, the original owner, dated November 23, 1875. This deed was delivered as an escrow to J. B. Moore, to be by him delivered to the grantee in the event of the affirmance by the supreme court of the decree rendered in the case of Liles v. Prewitt, involving litigation concerning the lands in controversy. This event happened October 11, 1881. Richard Prewitt died November 23, 1882, and the deed was delivered to his heirs in the year 1887.

It is not denied that this makes a *prima facie* case for the plaintiff. It is sought, however, to destroy the force of this chain of title by showing that on March 12, 1877, while the escrow deed of Mrs. Ashford was in the hands of Moore, awaiting delivery, and before the affirmance of the judgment in Liles v. Prewitt, in October, 1881, the event on which it was to be delivered, the legal title to the land was transferred from Richard Prewitt and his wife, Josephine Prewitt, to Mrs. Ashford, the defendant, by decree of the chancery court of Lawrence county. To show this, a decree of that court is introduced in evidence, rendered March 12, 1877, and affirmed on appeal to this court in the year 1879, which purports to accomplish this result. On a bill filed by Mrs. Ashford against said Richard Prewitt and wife, and others, claiming an equity in said lands by reason of the alleged fact that her husband, Thomas H. Ashford, had bought and paid for them with money belonging to the complainant's statutory separate estate, this equity was established, and a decree rendered declaring that "the legal and equitable title in and to" said lands "be, and the same are hereby, divested out of the defendants in said cause, and are vested absolutely in said complainant, Mrs. Ashford." It is further contended by the defendant that this title thus acquired by Mrs. Ashford in March, 1877, did not pass to Richard Prewitt or his heirs under the escrow deed in November, 1875, and delivered in 1887. The contention is that this decree was *res adjudicata* as to the title in question, because the escrow deed was a part of a compromise between the parties litigant made *pendente lite*, and that it should have been brought to the attention of the chancery court by a supplementary answer, in ac-

cordance with the general rule declared in May v. Coleman, 84 Ala. 325, 4 South. Rep. 144, as applicable where a pending suit is compromised.

It is manifest, then, in view of this state of facts, that the plaintiff's title must prevail in either of two cases: (1) If the decree of March, 1877, did not in fact operate to divest the legal title out of Richard Prewitt, and *proprio vigore* transfer it to Mrs. Ashford; or (2) if it did so divest and transfer it, and nevertheless the escrow deed from her to Richard Prewitt operated on delivery to relate back so as to vest such title in him, and this title passed, under his warranty deed of April, 1866, *eo instanti*, to Mrs. Prewitt, and thence, by her deed of February, 1883, to the plaintiff. The plaintiff insists on each of these contentions; and we repeat that, if either of them be correct, he was entitled to a verdict on the evidence contained in the record.

As to the first proposition. The chancery decree of March, 1877, did not, in our opinion, operate to vest the legal title of the lands in Mrs. Ashford, although it imports, in express terms, to do so. The reason is that a chancery court, apart from the power conferred by statute, possesses no jurisdictional authority to divest, by mere decree, a title out of one party litigant, and vest it in another. A decree was not itself a legal title, and never operated *proprio vigore* to vest or divest title, according to the original principles of equity jurisprudence. It operated only *in personam*, on the parties, and never *in rem*, on the subject-matter in controversy. This rule is well settled. 1 Pom. Eq. Jur. §§ 135, 170, 428; 3 Pom. Eq. Jur. § 1317. The statute recognizes only two modes in which a decree may divest title out of one party, and vest it in another, in cases of conveyance, release, or acquittance: (1) Where the chancellor decrees that the party shall convey, release, or acquit by a time specified in his decree, and he fails to do so. In this event, "such decree operates in all respects as fully as if the conveyance, release, or acquittance was made." (2) Where such decree has been made, ordering a conveyance, etc., and there is a default in its execution, the chancellor may then decree that the same shall "be executed by the register or a commissioner in the name of the party," and, "when so executed," it is declared to be "as valid in all respects as if executed by the party." Code, 1896, § 3595. The chancellor did not pursue either of these statutory powers in the decree of March 12, 1877, under consideration. Having no jurisdiction to divest or transfer title except under the authority conferred by the statute, and having failed to pursue that authority, it follows that his decree was inoperative for this purpose. Mrs. Ashford never acquired more than an equity under the decree, and that equity can avail nothing as a defense to this suit, which involves only the legal title.

As to the second proposition. Even if we should hold that, contrary to the above view, Mrs. Ashford did acquire the legal title to the land by virtue of the chancellor's decree, we are further of opinion that she

parted with this title by virtue of the delivery of the escrow deed of November 23, 1875, executed to Richard Prewitt, and deposited with J. B. Moore, to be by him delivered to the grantee on the affirmance by this court of the decree in *Liles v. Prewitt*. That contingency did happen, as we have stated, in October, 1881; and the deed was afterwards delivered to the grantee's heirs. The established rule in reference to an escrow of this nature is that when the condition upon which it is to be delivered is performed or happens, if necessary to protect the intervening rights of the grantee, the instrument will be held to relate back, and take effect *nunc pro tunc* from its first delivery as an escrow. *Shirley v. Ayres*, 45 Amer. Dec. 546; *Foster v. Mansfield*, 37 Amer. Dec. 154; *Hatch v. Hatch*, 6 Amer. Dec. 67; *Tied. Real Prop.* § 815. This principle especially applies where either of the parties to the deed dies before the condition is performed, or before final delivery, and the condition is afterwards performed, or the delivery consummated. *Ruggles v. Lawson*, 7 Amer. Dec. 375; *Shep. Touch.* 59; *Foster v. Mansfield*, 37 Amer. Dec. 154. And, moreover, where the grantee dies after the first delivery, and before the final one, the trustee holding it may deliver it to the grantee's heirs; and it will be held, ordinarily, to have taken effect in the ancestor, so as to transmute title through him to the heirs by inheritance, where nothing intervenes to prevent. *Stone v. Duvall*, 77 Ill. 475; *Jones v. Jones*, 16 Amer. Dec. 40, 41, note. The heirs here acquired no title, because it was cut off by the warranty deed of Richard Prewitt to Josephine Prewitt, and passed from the latter by her deed to the plaintiff, although it was a quitclaim. The legal effect of a deed with covenants of warranty is to pass *eo instanti* any titles subsequently acquired by the grantor; and, where there is no intervening equity, it may relate back to the time when the conveyance was executed. *Parker v. Marks*, 82 Ala. 548, 3 South. Rep. 5; *Bone v. Lansden*, 85 Ala. 562, 6 South. Rep. 611; *Chapman v. Abrahams*, 61 Ala. 108. And, while a quitclaim will not estop the maker from afterwards acquiring and holding an adverse interest in the land conveyed, yet such a deed will convey such of the covenants of the former grantor as run with the land; and the grantee in a quitclaim deed will be entitled to such further title or estate as may ensue at any time to the grantee of such former grantor by virtue of such covenants. *Johnson v. Williams*, 14 Pac. Rep. 537.

This effect of the final delivery of the escrow deed was not, in our opinion, interrupted by the decree of March 12, 1877. Nor did that decree preclude Richard Prewitt from claiming the benefit of the title acquired under this deed. This title was not involved in the issue of that or any other suit between the parties or their privies prior to the present one. Its very existence was dependent on an extrinsic event, which might never have happened, and in fact did not happen before the suit in which that decree was rendered was finally concluded, viz., the affirmance of a decree by this court in another case,

which did not occur until October, 1881. The case does not fall within the principle declared in *May v. Coleman*, 84 Ala. 825, 4 South. Rep. 144, which was the compromise of a right existing at the time,—not, like the one here under consideration, a compromise where no right at all might ever accrue; and, if it did, even then in no event except upon a contingency having no connection whatever with the pending suit. The proceedings in the case of *Heflin v. Ashford*, 85 Ala. 125, 3 South. Rep. 760, which appear in this record, clearly involved no issues which affect this case, under the principles above declared. It follows from what we have said that the court erred in the charge given, and in admitting in evidence the proceedings of the chancery suits to which objection was taken by appellant. The plaintiff, on the facts proved, would have been entitled to the general affirmative charge in his favor.

Reversed and remanded.

IN RE GIBSON.

(Supreme Court of Alabama. May 26, 1890.)

HABEAS CORPUS—JURISDICTION.

1. Code Ala. § 4201, gives the county courts jurisdiction of misdemeanors, and its judgment of conviction for a misdemeanor is valid though the court may have conceived that it was acting under an unconstitutional statute, (Act Feb. 20, 1889.)

2. When defendant, in a misdemeanor case, demands a trial by jury, the case must be transferred to the circuit court, under Code Ala. § 4219, and a judgment rendered by the county court is void.

3. Where, on application for a writ of *habeas corpus*, it appears that petitioner is held under a valid judgment, and also under an invalid one, the writ will not be granted.

On application for *habeas corpus*.

Code Ala. § 4201, gives the county courts concurrent jurisdiction with the circuit courts of all misdemeanors committed in their respective counties. Section 4219 provides that if defendant demands a trial by jury he shall give bond for his appearance at the next term of the circuit court.

Shorter & Dent, for petitioner.

MCCLELLAN, J. The petition presented to the judge of the city court of Birmingham disclosed that the applicant, at the October term, 1889, of the county court of Barbour county, sitting at Eufaula, pleaded guilty of the offense of carrying a concealed weapon, charged against him by complaint or information, and not by indictment, and that he was thereupon adjudged guilty, and the sentence passed on him under which he is now held. The county court of Barbour, without reference to the act of February 20, 1889, which was held unconstitutional and void in the case of *Collins v. State*, 88 Ala. 212, ante, 260, had jurisdiction to hear and determine the case made by the complaint and defendant's plea, and to render judgment thereon. This power is vested in that court by the general law (Code, § 4197 et seq.) applicable to Barbour county, and by special enactment its exercise at the time and place shown in the record is au-

thorized Acts 1886-87, p. 765. The court thus having the power to render the judgment which it did render, it is immaterial that the judge should have conceived he was acting under the unconstitutional statute, so long as no step upon which the judgment rests taken in the proceeding depends for its validity on the void enactment. The fact that a person was acting as clerk of the court who was without authority to act could not avoid an otherwise valid judgment; nor could the extra-official certificate of such person that the proceeding was had under the nugatory statute exert any influence on judicial action clearly within the competency of the court.

The other judgment shown by the petition was, and is, void, for the reason that the court's jurisdiction to render it under the facts shown, exists alone by virtue of the void enactment, and hence, in legal contemplation, does not exist at all. When the defendant demanded a jury in the assault and battery case the jurisdiction of the county court at once ceased, and the case should have been transferred to the circuit court, as provided by section 4219 of the Code. But, the petition disclosing that petitioner was held under a valid judgment, and sentence rendered and pronounced on the charge of carrying a concealed weapon, the judge of the city court properly denied the writ prayed for, and a like denial is made here.

SNODGRASS V. CALDWELL *et al.*

(Supreme Court of Alabama. May 21, 1890.)

EVIDENCE—COPY OF BOOK—ACCOUNT—ADMISSIONS—HEARSAY—BURDEN OF PROOF.

1. In an action on an account, a copy of the last page from the book of original entries, containing the footing of the entire account, to the correctness of which the debtor did not object on its exhibition to him, is admissible in evidence as an admission by him, though it is incompetent as an original entry.

2. Where the only issue is as to the payment of an account, testimony that the creditors had executed their note to the debtor after an alleged settlement of the account is properly excluded, on an admission by the debtor's counsel that the note was not in any way connected with the settlement.

3. Where, in reply to the debtor's claim that the account had been partially paid by a delivery of corn to the creditors, one of them testifies that they had paid for the corn by turning over some of their notes to the debtor, testimony by the debtor that the creditors had subsequently collected these notes, "which I can prove," is properly excluded as hearsay, since the natural import of the language is that the debtor had no personal knowledge of the collection.

4. When the debtor, in his testimony, admits the correctness of the account, but says that he has paid it, the burden is on him to prove the payment.

Appeal from circuit court, Jackson county; JOHN B. TALLY, Judge.

Action on a bond by William E. Snodgrass against C. B. Caldwell and others, partners as Caldwell Bros. The defendants pleaded payment and set-off.

The defendants requested the court to give the following charges in writing: "(%) A merchant's books of original entries made by him and his clerks are evi-

dence for him in a court, where the entries are proven by the merchants and clerks who made the particular entries, and that the entries were made correctly at the time the things were sold. On such proof being made, the books are evidence. In this case, the books of original entries, according to the evidence, were burned up; and hence the books here in court, being copies of the books destroyed, are not admissible, except the entries on page 642, [last page;] and they are admitted to the jury as evidence in connection with the testimony that this page of the account thereon was shown to W. E. Snodgrass, and he made no objection to the account against [him] on this page, and hence this part of the book is evidence. (1) The plea of set-off by the defendant is the claim of the defendant, and is called a cross-action. It is as though the plaintiff sued the defendant on his claim, and then the defendant had sued the plaintiff on his claim, and each one is required to reasonably satisfy the jury from the evidence that his claim is correct before they can allow it. (2) Now, then, in regard to the plaintiff's claim, when he offers the note of the defendants, this makes out his claim, unless defendant can satisfy you from the evidence that he has paid the debt, or has some other good defense to it. But in this case the defendants do not deny the note, but claim they have an account to offset against it. (3) Now, then, having offered their account as a set-off, it is on them to prove to your satisfaction that their account is correct; but, if the plaintiff admits that he owed them an account of about \$1,700, then this establishes the correctness of defendants' account for about that sum. Now, the plaintiff says he has paid that account, and tells you how he paid it. If, having admitted the account, he relies on payment, then the burden is on him to reasonably satisfy the jury that he paid it, and this he should do by the greater weight of evidence. That is, his evidence that he has paid the account should be of greater weight than defendants' evidence that he has not paid it. If it is not as great or only equal to the defendants', then he has failed to prove the payment, and in that event the jury should allow the defendants their set-off, and take the claim of one side from the claim of the other, and render their verdict for the balance in favor of the one in whose favor the balance is found. (4) If the plaintiff, on the trial of this cause, admitted that the account of Snodgrass & Caldwell, which is offered in evidence, was correct to the amount of about \$1,700, but claimed that he has paid the account, then the defendants' case is made out as to so much of said account; and they are entitled to have it allowed them, unless the plaintiff has satisfied the jury by the preponderance of the evidence that he has paid the account." The court gave each of these charges, against the objection and exception of the plaintiff. There was judgment for the defendants, and the plaintiff prosecutes this appeal, and assigns the rulings of the court on the evidence, and the giving of the charges requested by the defendants as error.

R. C. Brickell and Hunt & Clopton, for appellant. *J. E. Brown and Watts & Son*, for appellees.

STONE, C. J. The present suit by Snodgrass was on a bond or note under seal, and the defendant did not deny the execution of the bond. The defense was—*First*, payment; and, *second*, set-off. The set-off claimed was an account for a larger sum than the amount of the bond alleged to be due from Snodgrass to the defendants. On the matter of the set-off, the testimony was greatly in conflict. Snodgrass had control of several plantations, and was in the habit of advancing to his laborers or tenants. The proof leaves it in doubt whether the plantations were cultivated by hired labor or by tenants. The advances thus made by him consisted largely in merchandise and supplies, purchased by him from merchants on time. The defendant's testimony tended to show that a considerable sum of the advances he had made were purchased by him from Caldwell Bros. on a credit, and that when they executed their bond to him he owed them about \$1,700 on account, partly past due, and partly running to maturity. Their testimony also tended to show that the bond sued on rested on an independent consideration, having nothing to do with the account for merchandise sold. Many witnesses testified to sales of different items set forth in the account, as having been made within their knowledge, but this species of proof did not extend to each one of the various items which went to make up the total sum claimed. One of the defendants, being examined as a witness, testified that the books of original entries had been burned up, but that those entries had been copied in another book by the book-keeper of the firm, and that the book-keeper was then dead. He testified that all the items of the account were so copied, and that on the last page of the said account many items appeared, together with the sum or footing of the entire account, showing the amount claimed to be due from Snodgrass on the account. This witness testified that he exhibited to Snodgrass the last page or sheet of said account, including the footing, and that said Snodgrass either admitted its correctness, or did not raise any objection to it. Said last sheet or page of the copy account was then put in evidence against the objection of plaintiff, and he excepted. This testimony, if believed, was pertinent and legal only on the theory that Snodgrass' admission of the correctness of the account, or his failure to object to it, was an express or implied admission of its correctness. 1 Greenl. Ev. §197; 1 Brick. Dig. p. 835, § 439. If Caldwell testified truly, the page or sheet of the account testified to have been shown to Snodgrass constituted part and parcel of the latter's admission, expressly made, or implied from silence, and the admission was meaningless without it. It was properly admitted. *Acklen v. Hickman*, 63 Ala. 496; *Mims v. Sturdevant*, 36 Ala. 636; 1 Greenl. Ev. §§ 436, 437.

Plaintiff, Snodgrass, when examined as a witness, admitted that he owed Cald-

well Bros. about \$1,700 by account,—about the amount claimed by them,—but said he had paid it, and he owed them nothing. He said it had been taken into the account and settled when the bond was executed on which this suit was brought. He denied that the sheet or page of the account had ever been shown to him, as testified to by Caldwell. He was asked by his counsel "whether he took any other note or notes of the Caldwell Bros. after the note in suit was executed. Defendant objected to this question. Plaintiff here stated that he [did] not remember that Caldwell Bros.' account was in with the Snodgrass & Caldwell account; and his counsel stated they did not expect to show that the note inquired about was in any way connected with the settlement of Caldwell Bros.' account. Thereupon the court sustained the objection, and the plaintiff then and there excepted." We have quoted literally.

It had been testified during the trial, without conflict, that Snodgrass (not plaintiff) and Caldwell had been partners in merchandise, and that Snodgrass sold his interest to another Caldwell, when the firm of Caldwell Bros. was formed, and continued the business. A large part of the account claimed as set-off had been due to Snodgrass & Caldwell, and, when the sale and change of partnership took place, this claim passed over to, and became the property of, the new firm of Caldwell Bros. It will have been discovered that the real issue in this case was whether or not the plaintiff, Snodgrass, owed the account which was claimed as a set-off. Upon all other questions the litigants were agreed; and they were practically agreed on this, except as to the disputed assertion of its payment. So payment *vel non* of that account was the real and only issue of fact before the jury. *Prima facie*, any testimony that was not "in any way connected with the settlement of the Caldwell Bros.' account" would seem to have been irrelevant. But for this statement we could conceive of hearings the giving of a later note might have on the inquiry of payment of the account. Stated as the question is, we cannot affirm that the circuit court erred in excluding the evidence. But it is not shown the answer would have elicited any information. *Roberts v. State*, 68 Ala. 515; *Tolbert v. State*, 87 Ala. 27, 6 South. Rep. 284.

Some testimony was given tending to show a partial payment of the account claimed as a set-off, by a sale of corn from Snodgrass to Snodgrass & Caldwell, while the account remained their property. In reply to this, there was testimony tending to show that the corn was paid for in notes turned over by Snodgrass & Caldwell to plaintiff. On re-examination in reference to this transaction, the plaintiff stated: "The Caldwells collected these collaterals, which I can prove." This answer, on objection of defendants, was ruled out by the court. There was no error in this. The natural import of the language was, not that the witness had personal knowledge of the collection, but that he could make proof of it. This was mere hearsay, and prop-

erly excluded. If the witness had any personal knowledge on the subject, it should have been called out by further interrogation.

We do not understand charge "1/2" as appellant's counsel does. Its first paragraph or phrase is simply a statement of the rule for admitting books of original entries in evidence. That clause has no direct bearing on this case, for no books of original entry were offered in evidence. In the second clause, commencing with the words, "In this case," the court, as a predicate for the instruction intended to be given, stated what the testimony bearing on the subject tended to prove. "According to the evidence," is the language of the instruction, and there was no conflict in the testimony that the books of original entry had been burned. The court rightly instructed the jury that the book before them, being only a copy, was not, as a book, admissible in evidence. We suppose this was in reference to some contention which had been pressed in the trial. The real point of the instruction was that the jury, "in connection with the evidence," could consider the page of the book, and only that page, which Caldwell testified had been shown to Snodgrass. In this the court committed no error, as we have shown in a former part of this opinion. Charges 1 and 2 are so manifestly correct we will not comment on them.

The objection to charges 3 and 4 is confined to that portion of them which declares the burden of proof of payment of the account relied on as set-off. Plaintiff in his testimony admitted that he had owed an account for about the amount claimed, but said he had paid it. The instruction was that, the plaintiff having admitted the indebtedness, the burden was on him to prove its payment; "and this he should do by the greater weight of evidence; that is, his evidence that he has paid the account should be of greater weight than the defendant's evidence that he has not paid it." It must not be overlooked that this was the case of an admission made by the plaintiff while giving his testimony.

It is certainly the rule that, when admissions are relied on as evidence against the party making them, they cannot be garbled, and only such portions as the offerer chooses put in evidence. But the rule does not require that every part of the admission shall be taken as equally true. The rule is the same as that which relates to confessions, and it is for the trying body to determine the credibility of the different parts. 1 Greenl. Ev. § 201; 3 Brick. Dig: 285, § 547; Binford v. Dement, 72 Ala. 491; Zelnicker v. Brigham, 74 Ala. 598. The rule is different when facts are admitted as a basis of trial.

The general rule is that the burden of proof is on him who asserts, and not on him who denies; and confession and avoidance is not an exception to the rule. To test this, let us suppose the pleadings had been drawn out in full. The plaintiff declares on his bond, made by defendants, and payable to himself. Defendants confess and avoid; that is, they admit the

making of the bond, but aver that plaintiff owes them a larger sum, which they seek to set off. Plaintiff then confesses and avoids, by replying, not that he never owed the account pleaded as set-off, but that he had paid it. This leaves the question of payment of the account the only issue in the cause, and on that issue the burden of proof is on him who asserts payment. Charges 3 and 4 are free from error. Affirmed.

PHINIZY *et al.* v. FOSTER.

(*Supreme Court of Alabama. May 21, 1890.*)

CONSTRUCTION OF WILLS.

A testator directed that, in the event of the death of one son without issue living at his death, then his portion was to be divided equally among the children of another son. *Held*, that only those children who were living at the time of the death of the former son without issue took under the will.

Appeal from chancery court, Lawrence county; THOMAS COBBS, Chancellor.

Ward & Betts, for appellants. *W. P. Chitwood* and *E. H. Foster*, for appellee.

CLOPTON, J. The sixth clause of the will of Samuel Watkins, who died in 1835, reads as follows: "In the event of my son Edgar dying without issue living at his death, I desire his portion, with the accumulations, to be divided equally among the children of Paul J. Watkins and my daughter Elmira; and, in the event of my daughter Elmira dying without issue living at her death, I desire the estate left to her and her children, together with the accumulations, to be equally divided among all my grandchildren and great-grandchildren. But great-grandchildren whose parents are living, and able to take under this will, not included in this bequest." At the time of the testator's death, Paul J. Watkins had five children living, three of whom died prior to the death of Edgar Watkins, who died in 1887 without leaving issue living. The bill, which is filed by appellee, one of the children of Paul J. Watkins who survived Edgar Watkins, brings the foregoing clause of the will for construction, and seeks to have ascertained and determined who are the persons entitled to share in the distribution of his portion of the estate,—whether all the children living at the time of the death of the testator, or only those who were living at the time of Edgar's death.

Admitting the uncertainty of the happening of the event upon which they were to come into possession of the property, appellants contend that the children living at the death of testator are the persons ascertained by the will to take when the contingency happened, and thus became invested, with a present right of a future contingent enjoyment,—a possibility coupled with an interest transmissible by descent,—and which entitled the real and personal representatives of those who died during the continuance of Edgar's life to participate in the distribution when the period of distribution arrived. Two rules are invoked in support of this construction,—the *first*, that a will speaks from the

death of the testator; and the second, that the law favors vested estates.

For most purposes the will is regarded as speaking from the death of the testator, especially in reference to classes of persons subject to fluctuation by increase or diminution in number, which is generally understood to apply to persons answering the description at the time of the testator's death. In a gift to a tenant for life, remainder to his children or to the children of a third person, those living at the death of the testator take vested remainders, subject, it may be, to open and let in any after-born children. It is also an acknowledged rule that the law inclines to regard estates as vested, rather than contingent. *BEST, L. Ch. J.*, states as the established rule for the guidance of the court: "That all estates are to be holden to be vested except estates in the devises of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will." *Duffield v. Duffield*, 1 Dow & C. 311. The rule is generally applied when the intention of the testator is obscure and doubtful. It has no application when the intention to create contingent legacies or devises is clear. In respect to each of the rules the intention of the testator, as shown by the words employed by him, must control.

The pivotal question is whether the estate in remainder, created by the will, vested at the death of the testator, or was it contingent? The distinguishing characteristics are: A remainder is said to be vested when the estate passes out of the grantor at the creation of the particular estate, and vests in the grantee during its continuance, or *eo instanti* that it determines, when a present interest passes to a certain and definite person, to be enjoyed *in futuro*, and is said to be contingent when the estate is limited either to a dubious and uncertain person, or upon the happening of a dubious or uncertain event,—uncertainty of the right of enjoyment, as distinguished from the uncertainty of possession. *Lessee of Poor v. Considine*, 6 Wall. 458. It is an established principle that estates are regarded as contingent when the event upon which they take effect may or may not happen. For instance, when a will gives a legacy to a certain person if he reaches a certain age, it is presumed that the testator meant he should not have it unless he reached that age. According to the express terms of this will, the children of Paul J. Watkins took nothing unless Edgar died without issue living. The condition precedent to the vesting of the estate is so apparent from the terms employed by the testator that it cannot be held to have conferred a present right of future enjoyment without subverting his manifest intention. The time when they can come into possession and enjoyment is not merely a qualifying clause of the time of division, but is attached to the subject of the gift,—is of its essence and substance. *High v. Worley*, 32 Ala. 709; *Marr v. McCullough*, 6 Port. (Ala.) 507. From the nature of the event upon the happening of which the gift arises, the tes-

tator must be presumed to have made no gift unless it happened.

When the payment of a legacy is dependent upon an uncertain future event, which may or may not occur, it lapses if the legatee dies before the happening of the event. There must be some person *in esse* capable of taking when the contingency on which the right depends occurs. On this principle, if a legacy is given to a class of persons dependent on an uncertain event, that class is to be ascertained at the time of its happening, if it ever happens; and the entire interest vests in such persons as at that time fall within the description of persons constituting that class. In 2 *Williams, Ex'rs*, 1382, the author states as one of the positive rules "that if the words 'payable' or 'to be paid' are omitted, and the legacy is given at twenty-one, or if, when, in case or provided the legatee attains twenty-one, or on his attaining that age, or any other future definite period, this confers on him a contingent interest which depends for its vesting, and its transmissibility to his executors or administrators, on his being alive at the period specified." In *Van Zant v. Morris*, 25 Ala. 285, it is said: "Where the enjoyment of the thing devised is, by the testator's expressed intent, not to be immediate, * * * but is postponed to a particular period, or until a particular event shall happen, then those who answer the general description at that period, or when the event happens on which the distribution is to be made, are entitled to take."

In *Travis v. Morrison*, 28 Ala. 494, the testator directed his executors to keep his estate together, and in the event of his wife's marriage, or the marriage of any one of his children, or any one of them arriving at age, to divide his property equally between them, giving each a child's part. One of the children died before either of them arrived at the age of 21 years, or married. The court said: "Our conclusion is that the legacies to be given and assigned by the executor in the event of the marriage or attainment of majority of any of the legatees, are contingent, and that those of the legatees who were alive when some one of them married, or arrived at majority, take in equal parts the entire bequest mentioned in the clauses under consideration."

The gift is to a class, children of Paul J. Watkins. The term "children," there being no necessity to give it a broader signification to prevent the will being inoperative, and it not appearing the testator intended to use it in a more extensive sense, includes only the persons who descended from him in the first degree. When he intended grandchildren or great-grandchildren, he used those terms. *McGuire v. Westmoreland*, 36 Ala. 594. As the gift is to a class, and did not take effect unless Edgar Watkins died without issue living, the rule established by the foregoing authorities, and sustained by the current of authority with scarcely a dissent, that those who fall within the description at the time the bequest took effect, and those only, are entitled to take, applies, and governs the construction of

the clause under consideration. *Insurance Co. v. Webb*, 54 Ala. 688; *Leigh v. Leigh*, 17 Beav. 605; *Satterfield v. Mayes*, 11 Humph. 58; *Lorillard v. Coster*, 5 Paige, 185.

Affirmed.

NEW DECATUR V. BERRY.

(*Supreme Court of Alabama*. May 21, 1890.)

MUNICIPAL CORPORATIONS—POWERS—CONTRACTS.

The town of New Decatur, organized under Code Ala. c. 1, tit. 14, §§ 1486-1516, with the usual and ordinary municipal powers, has no power to establish a quarantine against property and persons, and a contract for services to be rendered in connection therewith is *ultra vires* and void.

Appeal from city court of Decatur; W. H. SIMPSON, Judge.

Plaintiff was employed by defendant, the town of New Decatur, as "chief of the quarantine guard," and brought this action for services rendered in that capacity, recovered judgment, and defendant appeals.

C. A. Castle and Wert & Speake, for appellant. J. M. Buford, for appellee.

MCCLELLAN, J. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: *First*, those granted in express words; *second*, those necessarily or fairly implied in or incident to the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable." 1 Dill. Mun. Corp. § 89; *Smith v. Newbern*, 70 N. C. 14; *Cook Co. v. McCrear*, 93 Ill. 236; *Mayor, etc., v. Wharf Co.*, 63 Ala. 611; *Eufaula v. McNab*, 67 Ala. 590. Applying this statement of the powers of municipal corporations—which is said by high authority to be "the best summary of all the decisions upon that point to be found in all the books"—to the charter of the town of New Decatur as it was organized and existed in 1888, the conclusion must be against the power then exercised by that municipality to declare, establish, and enforce quarantine against the town of Decatur. New Decatur was organized under chapter 1, tit. 14, Code, §§ 1486-1516, and its power to the end in question must be referable to that statute if it exists at all. Confessedly no such power is conferred by express words; confessedly, also, no such power is essential—not simply convenient, but indispensable—to the declared objects and purposes of the corporation. And certainly, though not confessedly in this case, the power to establish quarantine, and prohibit persons and property from coming or being removed into the town from Decatur, cannot be said to be necessarily or fairly implied in or incident to the express grants of powers, which are to pass by-laws to enforce the powers granted; to prevent and remove nuisances; license, etc., shows, amusements, and retailers; to restrain and prohibit gaming, houses of ill fame, disorderly conduct, etc.; to establish watches, and appoint captains thereof; to establish and regulate markets and town prisons, sink and repair public wells, etc., and keep in repair streets, alleys, and

drains; to license and regulate vehicles carrying for hire; to appoint a marshal, clerk, treasurer, and other necessary officer, and provide their compensation; to impose fines, and provide for their collection; to supply vacancies in corporate offices; to purchase and hold property, and dispose of the same; to exercise such other powers as are conferred by law; and to levy and collect annual taxes on property. How the granting of either of the several powers could be made the basis for a necessary or fair implication that the legislature intended also to confer the power to establish a quarantine is not conceivable. How the power to prohibit persons from coming into the town under any circumstances can in any just sense be said to be incident to any one of the powers enumerated we are unable to see. Every power conferred may be fully exercised and effectuated without the exercise of the power here claimed. No power conferred would in the slightest degree be aided by the exercise of the power claimed here. The power claimed is not expressly granted; it is not implied in or incident to any power granted; it is not essential to the declared objects and purposes of the corporations; it does not exist. The employment of the appellee by the corporate authorities, as "chief of the quarantine guard," cannot find justification or authorization under the power "to establish night and day watches and patrols, and to appoint captains thereof." The watches and patrols thus provided for are for the ordinary police of the town, charged with the conservation of peace and good order, and the enforcement of authorized ordinances of the municipal government. None of these duties were to be performed by the alleged quarantine guard, or the appellee as chief of that guard. He was employed, if at all, solely for the purpose of discharging functions with which the municipality had no power to clothe him, and rendering services which were not in furtherance of any municipal object or purpose. The corporate authorities having no power to establish quarantine regulations, they, of course, were without authority to execute and enforce them, and without authority to bind the town to payment for services rendered in the execution and enforcement of the *ultra vires* ordinance or resolution; and the attempt to ratify the action of the intendant, in employing appellee and assuring him that his services would be remunerated, was equally abortive as fixing any liability on the town. 1 Dill. Mun. Corp. §§ 463-465.

The judgment of the city court is reversed, and judgment will be here rendered for the appellant, defendant below.

MCDONALD V. BERRY et al.

(*Supreme Court of Alabama*. May 21, 1890.)

EXEMPTIONS—ESTATE OF WIDOW IN HOMESTEAD—RES JUDICATA.

Where an application by the administrator for an order of sale of the land to pay a debt of decedent's that is not subject to any exemption is denied, and the widow's invalid claim of homestead exemption allowed, and the estate is subsequent-

ly declared insolvent, the creditor cannot subject the land to his debt after the widow's death, as the order allowing the homestead exemption, from which no appeal was taken, is final, and decisive of his rights.

Appeal from probate court, Marshall county; T. A. STREET, Judge.

Code Ala. § 2543, provides that when the estate is insolvent the homestead exempted in favor of the widow and minor children shall vest in them absolutely.

Lusk & Bell, for appellant. *O. D. Street*, for appellee.

STONE, C. J. On September 1, 1865, James Berry executed his bond, or note under seal, payable one day after date to P. Kilfoyle & Sons, for the sum of \$142.51. On November 25, 1873, James Berry died, being a resident of Marshall county, and owning 160 acres of land therein, on which he resided; the land being worth less than \$2,000. He left a widow and children surviving him; some of the latter being under age. Having made a will, the same was probated; and on January 12, 1874, administration of his estate with the will annexed was committed to the general administrator of the county. The bond to Kilfoyle & Sons was properly presented or filed as a claim against the estate, was sued on against the administrator before time had perfected a bar, (Code, 1886, §§, 2614, 2632, 2633, and notes,) and was reduced to judgment in 1877; the amount of the judgment was, \$289.31, besides costs. The estate having been declared insolvent pending the suit, the judgment was ordered to be certified to the probate court for *pro rata* allowance. On December 24, 1875, the widow of James Berry, in her own name and right, made affidavit, and filed it, claiming the whole 160 acres of land left by him as an exempt homestead under the act approved April 23, 1873. Sess. Acts p. 64. No judicial proceeding other than that after stated was had on this claim, and no notice was given of it, so far as we are informed. A proceeding was then pending, at the suit of the administrator, to obtain an order to sell the lands for the payment of debts, on the ground that there was not sufficient personal property to pay them. All the personal property, being less than \$1,000, had been set apart as exempt. On February 28, 1876, said application for an order of sale came up for hearing, when the widow, by her counsel, moved that her homestead exemption be allowed her, and proved that the lands were worth less than \$2,000. The court granted her motion, and dismissed the administrator's petition for an order of sale. On February 14, 1876, the administrator reported the estate insolvent; and on March 15, 1876, it was declared and decreed to be insolvent.

It is not shown that, on the trial mentioned above, Kilfoyle & Sons were represented. The law made no provision that the creditors should have notice. The petition did set forth that there were unpaid debts of the estate,—among them, that to Kilfoyle & Sons,—which were incurred by the decedent before April 23, 1873; but no notice is taken of that fact in the decree of the court dismissing the

petition. If there had been no debt in existence which antedated the enactment of the exemption statute of April 23, 1873, it is not perceived that the probate court erred in allowing the homestead exemption. *Miller v. Marx*, 55 Ala. 322. It having been ascertained by the decree aforesaid that there was no property, personal or real, subject to administration, the administration was brought to a settlement, and closed, leaving the debts unpaid.

The widow of James Berry died in 1883 or 1884; and afterwards, January 16, 1885, John C. Kilfoyle, claiming to be the owner of the said debt to Kilfoyle & Sons, procured the appointment of an administrator *de bonis non* on the estate of said James Berry. In his petition to have an administrator appointed, Kilfoyle represented that he was the largest creditor of Berry's estate, and "that the said James Berry left property in this state and county that yet remains unadministered upon." The probate court of Marshall county thereupon appointed an administrator *de bonis non*, who, 10 days afterwards, filed his petition to obtain an order to sell said lands for the payment of debts. It is not perceived that there is any imperfection in the petition or other proceedings to obtain the order of sale. The probate court refused the order, and dismissed the petition, on the ground, we suppose, that the widow's claim of exemption, and its allowance, had placed the lands beyond the reach of creditors, and beyond the power of the administrator to subject them to the payment of debts. From that decision the present appeal is prosecuted.

The following propositions are settled by our decisions: *First*, when any person dies, leaving a wife or minor child or children, one or both, surviving him, the exemption in favor of such surviving wife or children, as a general rule, are determined by the law in force at the time of the death of the husband and father. *Taylor v. Taylor*, 53 Ala. 135; *Rottenberry v. Pipes*, Id. 447. *Second*, A statute which increases exemptions, either of homestead or personal effects, has no operation against debts contracted before its enactment. *Alabama Conference v. Vaughan*, 54 Ala. 443; *Wilson v. Brown*, 58 Ala. 62; *Nelson v. McCrary*, 60 Ala. 301; *Blum v. Carter*, 63 Ala. 235; *Cochran v. Miller*, 74 Ala. 50; *Keel v. Larkin*, 72 Ala. 493. *Third*, The act approved April 23, 1873, repealed all statutes of exemption theretofore in force. It follows that as to persons dying after that time, and before February 9, 1877, who owed debts contracted before April 23, 1873, there were no exemptions to wife and children secured by statute. The constitution of 1868, however, secured certain exemptions against debts contracted after it went into effect. Debts contracted before the constitution of 1868 became binding were not subject to any exemption claims after the repeal until the re-enactment, February 9, 1877. Sess. Acts, p. 95; Code 1876, § 2844; *Clark v. Spencer*, 75 Ala. 49; *Giddens v. Williamson*, 65 Ala. 439; *Carlisle v. Godwin*, 68 Ala. 137.

As we have shown, the debt to Kilfoyle was contracted in 1865, and Mr. Berry died in November, 1873. There were, therefore, no exemptions against this debt; that is,

the Kilfoyle debt. Such portion of the Henry claim as was contracted before April 23, 1873, is governed by the constitution of 1868; the balance of it, by the act approved April 23, 1873. When Mrs. Berry's homestead exemption was conceded to her, —February 28, 1876—her husband's estate had not been declared insolvent. Her interest at that stage of the administration was a life-estate in her, and an estate during minority in her minor child or children. Soon afterwards—March 15, 1876—the estate was decreed insolvent, and this enlarged the homestead estate into a fee, if her homestead claim was otherwise valid. *Baker v. Keith*, 72 Ala. 121.

We have shown above that Mrs. Berry's claim of homestead exemption was invalid against the Kilfoyle debt. If the true fact had been properly presented on the first application for an order to sell the land, they would have shown the claim of homestead exemption to be unfounded, and no defense to the application; and, if the probate court had ruled the defense sufficient, his decree would have been reversed in this court on appeal. He sustained the defense, and denied the application for an order of sale, and there was no appeal from his ruling. What effect has that decision, acquiesced in as it was, upon the present application? We may premise that there has been no change in the *status* of the estate, material to the present inquiry, since the decree on the first application was pronounced. In proceedings to sell lands of a decedent for the payment of debts, the personal representative represents the creditors, and antagonizes the interests of the heirs. *Steele v. Steele*, 64 Ala. 438, 455, 456; *Wilburn v. McCalley*, 63 Ala. 436; *Calhoun v. Fletcher*, Id. 574; *Corr v. Shackelford*, 68 Ala. 241. We hold that, the *status* of the estate, as affecting the questions raised on each petition, being the same, the ruling made on the first trial, that the homestead claim was valid, is decisive of the right under the second petition, and that the probate court did not err in refusing the order of sale. *Ford v. Ford*, 68 Ala. 141; *McCalley v. Robinson*, 70 Ala. 432.

Affirmed.

SNODGRASS v. AMBESTER.

(*Supreme Court of Alabama*. May 21, 1890.)

ARBITRATION—SUBMISSION.

1. When in a pending suit the case is referred to arbitrators, no statement in writing signed by the parties of the matter in dispute, as required by Code Ala. § 3223, is necessary, as that section only applies to disputes submitted when no suit is pending.

2. When one of the arbitrators agreed on by the parties to a pending suit declines to act, and another is substituted by agreement, a memorandum of the substitution on the submission is not necessary, under section 3225, which requires such memorandum in cases submitted when no suit is pending.

Appeal from circuit court, Jackson county; JOHN B. TALLY, Judge.

Code Ala. § 3221, provides that courts may refer pending causes to arbitrators chosen by the parties or their attorneys. Section 3222 provides that, when no suit is pending, the parties may refer their con-

troversy to arbitrators chosen by themselves, whose award may be entered up as the judgment of the proper court. Section 3223 provides that the parties must concisely state in writing, signed by them, the matter in dispute between them.

R. C. Brickell and Hunt & Clopton, for appellant. *W. L. Martin*, for appellee.

McCLELLAN, J. Technically an order of court directing, by consent of parties, the arbitration of matters involved in a pending suit is not a submission to arbitrators, but a reference of the cause as presented by the pleadings. Upon such reference, there is no office for the written submission entered into by the parties to perform. If the matter in controversy already sufficiently appears from any part of the record,—and it does sufficiently appear from the complaint or statement of the cause of action in every pending suit,—any further statement of it in writing is unnecessary. *Mendenhall v. Smith, Minor*, (Ala.) 380; *Chapman v. Ewing*, 78 Ala. 403.

This is made to appear more fully by a reference to the act of 1819, which provides for the appointment of arbitrators by the parties for the settlement of any suit or controversy, "and (if no suit is pending) the parties shall concisely state in writing the nature of the controversy," etc.; and this distinction as to the necessity for a written submission, stating the matter in dispute, is preserved in our present Code, §§ 3221-3223. The objection to the award in this case, on the ground that the parties did not "concisely state in writing, signed by them, the matter in dispute between them," is therefore untenable; no such statement being required when the arbitration is had on an order of reference in a pending suit.

The only other objection made is predicated on the fact that, one of the arbitrators originally agreed on having declined to act, another was substituted by agreement of parties, and no memorandum of the substitution was made on the submission, as required by section 3225 of the Code. The submission here referred to is that concise statement of the matter in dispute, and the names of the persons selected as arbitrators, provided for by section 3223. There was no such statement in this case, as we have seen, nor was any required. The memorandum, therefore, could not be entered upon it, if that be required in any case where the substitution is made by the parties. Nor do we think it was essential that the agreement to substitute should have been in writing. That would be necessary where the original arbitrators are required to be named in the written statement signed by the parties. But where, as here, the reference is of a pending suit and by an order of the court, no such written statement of the names of the persons first selected is required, or was made in this case. It is sufficient if the persons be orally agreed upon and orally suggested to the court in the first instance; and, upon the failure of one so selected to act, our opinion is that a substantial compliance with the law is shown when the parties agree on the per-

son to be substituted, and their agreement in this behalf, and the name of the person so substituted, are recited and stated in the award, as was done here; and nothing more than substantial compliance with the statute is essential to the validity of the award. Code, § 3232; Chapman v. Ewing, supra.

We find no error in the record, and the judgment must be affirmed.

MONEY v. STATE.

(Supreme Court of Alabama. May 23, 1890.)

LANDLORD AND TENANT — FRAUDULENT REMOVAL OF CROP.

The defendant was indicted under Code Ala. § 3835, for removing certain cotton knowing it to be subject to landlord's lien. There was evidence that it was first moved off the premises to an abandoned house; that the house wherein it was usually stored was burned; and that it was then carried to a certain gin by another party, who did not disclose to the proprietor that it was defendant's cotton. Held that, notwithstanding defendant had a contract with the landlord to remove it to said gin, if it was done with intent to defraud, the offense falls within the meaning of the statute; and it was not error to refuse to withdraw such evidence from the jury.

Appeal from city court of Montgomery.
W. L. Martin, Atty. Gen., for the State.

CLOPTON, J. The indictment is found under section 3835 of the Code, and charges defendant with selling or removing a bale of cotton, with the purpose to hinder, delay, or defraud Oliver Rushton, who had a lawful and valid lien thereto under a written instrument, lien created by law for rent or advances, or other lawful and valid claim, verbal or written, with knowledge of the existence of such claim. By the written contract between defendant and Rushton the cotton was to be put in good order, and delivered to the latter at his store at Raif Branch. There was evidence tending to show that it was understood by the parties that the cotton should be ginned at Smille's gin, which was on the direct route from the premises of defendant to the place of delivery, and to which it was carried. There was also evidence tending to show a fraudulent intent in removing the cotton. The defendant requested the court to instruct the jury that if he was required by the contract to have the cotton ginned and packed, and delivered to Rushton at Raif Branch, and he did no act of removal other than to haul it to the gin, and have it ginned and packed, they must acquit him, although he may have hauled the cotton to the gin with a fraudulent intent.

While the existence of a valid claim or lien, and a sale or removal of the property subject thereto, with knowledge of the existence of the claim or lien, are essential elements of the statutory offense, the intent to hinder, delay, or defraud the claimant or lienor constitutes its guilt. If it was understood by the parties that the cotton should be ginned and packed at a particular gin, and defendant carried it to such gin for no other purpose than to be put in order for delivery to Rushton, there would be no criminality in such act of removal. The criminal intent would be

wanting. But the place to which the cotton was removed is immaterial, if removed with the intent to defraud. Though it may have been understood that the cotton should be ginned and packed at Smille's gin preparatory to being delivered to Rushton, if it was carried to the gin with intent to defraud him by selling it to some other person, or disposing of it in some other way, then the offense was complete.

The first charge requested by the defendant is based on the same state of facts as the second, omitting the fraudulent intent. This charge is objectionable, in that it ignores, and draws from the consideration of the jury, the evidence tending to show that the cotton was first removed to an abandoned house about a mile from the premises of defendant; that his cotton-house was burned; and that after the burning of the house the cotton was carried to the gin by one Kimbrough, who did not inform the proprietor that it was defendant's cotton,—evidence materially bearing upon the question of the intent with which the cotton was removed. The charge, in fact, withdraws entirely from the consideration of the jury the question of intent.

The third charge requested by defendant is abstract, there being no evidence tending to show facts on which to base an honest belief that there was no lien on the cotton.

Affirmed.

MCINERNY v. IRVIN.

(Supreme Court of Alabama. May 23, 1890.)

ADVERSE POSSESSION—UNACKNOWLEDGED DEED.

1. Where plaintiff and defendant claim title under the same grantor, 10 years' adverse possession by plaintiff under an unacknowledged deed, prior to the grant to defendant, will establish a superior title by prescription.

2. A deed, which had been signed 16 years before, but not acknowledged until within a short time prior to the bringing of an action of trespass *quare clausum*, is admissible in evidence, in connection with plaintiff's possession under it, as color of title, to define his boundaries.

3. It is competent, in impeaching the credibility of a witness, to prove her general character bad, without limiting the inquiry to matter of veracity; but it is not permissible to inquire into her virtue and chastity, or to show she is a common prostitute.

Appeal from circuit court, Morgan county; JOHN MOORE, Judge.

This action was brought by the appellee, Brown Irvin, against the appellant, M. McInerny, and sought to recover damages for a trespass committed on the lands alleged to belong to the plaintiff, by breaking down the fence and trampling under foot the vegetables. The plaintiff based his claim to the strip of land in controversy, which was a part of a lot in the town of Decatur, on a deed made to him by one N. T. Tisdale, bearing date July 15, 1871. On the plaintiff offering to introduce this deed in evidence, the defendant objected; but the court overruled his objection, and the defendant thereupon excepted. The evidence of the plaintiff tended to show that he had been in continuous possession of the part of the lot in con-

trovercy ever since the execution of this deed, and had warned the defendant to keep off of the said tract of land. The defendant based his claim to lot 204 on title which he derived indirectly from the said N. T. Tisdale. The defendant purchased the lot numbered 204 from one Nelson, who purchased from one Sutton, and Sutton purchased from the said N. T. Tisdale, December 2, 1881. The contention of the defendant was that, as he bought the lot numbered 204, and as the part of the lot involved in this suit was a part of the said lot 204, he was entitled to the whole of the lot, and therefore had a better title to the tract involved than the plaintiff, and hence could not be guilty of trespass. In substantiation of his claim he introduced one Minnie King, by whom he proved that she lived on the lot 204 in the years 1881, 1882, and 1883, and that the part of the lot now involved was not then inclosed within plaintiff's fence, but the said fence was on the line between the lot of the plaintiff and the said lot 204, and that the part here involved was a part of the lot 204. There was an attempt made to impeach the said Minnie King in the manner shown by the opinion. The rulings of the lower court on the pleadings and evidence are here assigned as error by the defendant below, who prosecutes this appeal.

O. Kyle, for appellant. Wert & Speake, for appellee.

SOMERVILLE, J. The action is one of trespass to realty *quare clausum fregit*, the premises alleged to have been trespassed on being described as certain parts of lots 203 and 204 in the town of Decatur. The defendant interposed the plea of not guilty to the alleged trespass on lot 203, and the special plea of *liberum tenementum* as to lot 204.

1. The effect of the plea of *liberum tenementum* is to assert title to the *locus in quo* in the defendant. It raises the question of title, and evidence of paramount title in either party litigant is admissible precisely to the same extent as it would be under the general issue. An action of trespass of this nature being on the actual possession of the plaintiff, if the defendant proves in himself a superior title the damage done to the premises can be no injury to the possessor, because he has no right. *Wilsons v. Bibb*, 1 Dana, 7; *Dean v. Fall*, 8 Port. (Ala.) 491; 2 Greenl. Ev. § 626. The plaintiff having proved possession, the burden is then cast on the defendant to establish a better title in himself, or else his plea falls.

2. There was clearly no error in admitting in evidence the deed from Tisdale to the plaintiff, bearing date July 15, 1871. It is true that the execution of this paper was not acknowledged until February 9, 1887, about 16 years after it was signed, and something over a month before the present action was commenced. But it was offered in connection with the alleged fact of the plaintiff's actual possession under it for 19 years prior to the date of the trial, and was certainly admissible as color of title to define the extent of such possession, and to characterize its boundaries. *Bohannon v. State*, 73 Ala. 47; *Doe v.*

Anderson, 79 Ala. 209; *Wilsons v. Bibb*, 1 Dana, 7; *Molton v. Henderson*, 62 Ala. 426.

3. Ten years of adverse possession under such a muniment of title, with the exceptions provided for by the statute, which have no application to this case, "arms such holder with all the powers of offense and defense which an unbroken chain of title confers." *Barclay v. Smith*, 66 Ala. 230. Its effect would be to cut off and extinguish any superior legal title which the defendant may have had, if any such he ever acquired, by his chain of title from Tisdale, dating back to the latter's deed to Sutton, under whom the defendant claims; thus converting the actual adverse holder into the true owner, with a perfect title. *Bicknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. Rep. 399; *Crockett v. Lashbrook*, 5 T. B. Mon. 531; 1 Amer. & Eng. Enc. Law, 301-303. And this assertion of title in the plaintiff could be supported under the issue of freehold title, raised by the special plea of *liberum tenementum*, without the necessity of a replication to such plea on the part of the plaintiff.

4. It was competent for the defendant to impeach the credibility of the witness Minnie King by proving that her general character or reputation was bad. It was not necessary to restrict such inquiry to reputation for truth and veracity, although it must be admitted that evidence bearing especially on the latter inquiry would be more satisfactory for the purpose of impeachment, and of course admissible by either party. The practice on this subject was settled in this state as far back as *Ward v. State*, 23 Ala. 53, (decided in the year 1856,) where a majority of this court held that, in impeaching a witness, the inquiry is not limited to his general character for truth, but his bad character generally may be proved as a fact going to his credibility. This ruling was followed in *De Kalb Co. v. Smith*, 47 Ala. 407, and was again reaffirmed in *Holland v. Barnes*, 53 Ala. 83, and *Motes v. Bates*, 80 Ala. 382. The practice in our trial courts has been uniformly established in conformity to these rulings, and its propriety has passed beyond the pale of further discussion.

5. In refusing to permit the witness to be impeached by evidence of her alleged bad character for chastity and virtue, or by showing that she was a common prostitute, the circuit court but followed the settled rule of law announced by this and other courts on the subject. *Holland v. Barnes*, 53 Ala. 83; *Evans v. Smith*, 17 Amer. Dec. 74, note, 77, and cases cited.

The rulings of the circuit court are all, in our opinion, free from error, and the judgment is affirmed.

INMAN v. PROUT *et al.*

(Supreme Court of Alabama. May 22, 1890.)

PARTITION—JURISDICTION—PARTIES.

1. A sale in partition among joint tenants made by the probate court, under Code Ala. 1876, § 3514, is valid as to a judgment creditor of one of the joint tenants whose lien was acquired before the application for partition was filed, for such creditor is not a necessary party to the proceeding for partition.

2. Where, subsequently to the sale for partition thus made, the judgment creditor has his execution levied on the joint tenant's undivided interest in the land, and buys it in, he does not become a tenant in common with all the purchasers of the separate tracts conveyed at the partition sale, but is only tenant in common with each individual purchaser to the extent of his debtor's undivided interest in that tract, and he cannot maintain a bill against all the purchasers in one suit for a second partition.

Appeal from chancery court, Colbert county; THOMAS COBBS, Judge.

Kirk & Almon, for appellant. *J. B. Moore*, for appellees.

CLOPTON, J. The bill filed by appellant seeks the sale of lands for partition between herself and the appellees as tenants in common, and an account of rents and profits. Appellees and Patrick A. Prout originally were joint tenants of the property, having derived it by descent from their deceased father, each owning a one-fifth interest. On March 21, 1885, complainant recovered a judgment in the circuit court against Patrick Prout, upon which a *pluries* execution was issued May 4, 1886, and levied on the same day, on his undivided interest in the lands, execution having been regularly issued and delivered to the sheriff. His interest was sold June 7, 1886, and purchased by complainant, to whom the sheriff executed a deed. After complainant had obtained her judgment, Holden Prout, one of the original joint owners, made application to the judge of probate, March 9, 1886, for a sale of the land for partition between the joint tenants, and obtained an order, April 19, 1886, of sale, under which the lands were sold May 24, 1886, and purchased by different persons. The case made by the bill is that complainant and the defendants, being four of the original joint owners, are tenants in common of all the land sold by the sheriff under her execution. It proceeds on the theory that the proceedings in the probate court, and the decree of sale, are void as to complainant, and that, having acquired the interest of Patrick Prout, she is entitled to partition, as if no such proceedings were had.

Section 3514 of Code of 1876, under which the proceedings were had, confers on the probate court jurisdiction to order a sale of property for distribution among joint tenants. It declares: "Judges of the probate court may decree and order a sale of all property, whether real, personal, or mixed, held by joint owners or tenants in common, when the same cannot be equitably partitioned or divided between such joint owners or tenants in common, notwithstanding they, or any number of them, are infants, or persons of unsound mind." The jurisdiction is invoked and attaches upon the filing of a petition in writing to the judge of probate by a proper party, containing the requisite jurisdictional averments. The transcript, made an exhibit to the bill, and also introduced in evidence, shows that a written application was made to the judge of probate of Colbert county, in which county the property was situate, by one of the joint owners, setting forth the names of all the joint owners, their residences, the interest of

each, the property, and that it cannot be equitably divided without a sale thereof. Upon the filing of this application the jurisdiction of the court attached. *Morgan v. Farned*, 83 Ala. 367, 8 South. Rep. 795. All the parties in interest had notice. The subsequent proceedings were in the exercise of this jurisdiction, and appear to be regular; but, if not, all reasonable intendments will be made to support the decree. The court having jurisdiction of the subject-matter and of the persons, the decree, on a collateral attack, is valid as to all those who were parties to the proceeding, and operates to pass title, though there may be an outstanding interest in a person not made a party, if the petition does not disclose such interest. *Whitlow v. Echols*, 78 Ala. 206; *Cantelou v. Whitley*, 85 Ala. 247, 4 South. Rep. 610. But the contention is that, the complainant being a judgment creditor of one of the joint owners, and having a lien on his individual interest, acquired before the application was made to the probate court, the order of sale, and the sale for partition, are void as to her. The contention goes too far. Lienholders are not necessary parties to a proceeding for partition. If the lien covers the interests of all the joint owners, it is not displaced or affected by the partition; and if it is upon a separate undivided share the statute provides: "When there is a lien on an undivided interest of any of the parties, such lien, if a partition is made, is thenceforth a charge only on the share assigned to such party." Code, § 3508. No provision is made for the ascertainment or adjustment of liens in case of sale. We shall not undertake to decide whether, under the effect and operation of the statutes, the property is discharged, in case of a sale for partition, from a judgment or execution lien on a separate, undivided interest, acquired before the filing of the petition, and the lien transferred to such party's share of the proceeds of sale; for, conceding that the lien is not affected, the utmost result is that the property is sold, and the purchaser takes it subject to the lien. Partition in a proper case is a matter of right, and unwilling co-tenants will not be forced to continue a relation they wish dissolved because the undivided interest of one may be incumbered. Probably in such case the better course would be to resort to a court of equity for a sale for partition, making the lienholders parties; but the existence of such lien does not oust the jurisdiction of the probate court.

Under the decree of sale in the partition proceedings in the probate court the lands were sold, May 24, 1886, by the appointed commissioners, the sale was reported to and confirmed by the court, and the commissioners ordered to make conveyances to the respective purchasers. At the sale John Lasiter purchased lot numbered 86; Holden Prout, lot 17; George Prout, lot 85; and George Prout, John Prout, and Joshua Prout, lot 144. The bill seeks partition of the two lots last named. By the proceedings the title of the original joint owners to the several lots was divested, and vested in the purchasers respectively, so that each purchaser's title and posses-

slon is separate and distinct. Admitting that the complainant became the owner of the interest of Patrick Prout by her purchase at the sale under the execution against him, the sale for partition having been made prior to the execution sale, she did not become tenant in common with the original joint owners as such, but a tenant in common to the extent of the interest purchased by her in each of the lots only, with the purchaser of such lot at the partition sale. The title and possession of each purchaser being separate and distinct, complainant cannot sustain a joint suit against the several purchasers, but must bring a separate suit against each for the partition, or sale for partition, of the lot purchased by him. In *re* Prentiss, 7 Ohio, 416. The parties must be tenants in common of all the lands sought to be divided; and a sale for partition among the original joint owners having been made under a valid decree of a court of concurrent and competent jurisdiction, whereby the joint tenancy was dissolved, complainant cannot maintain a bill against them as such for the purpose of a second sale of the same lands for partition among them and herself as the purchaser of Patrick Prout's interest.

This conclusion relieves the necessity of considering the other questions argued by counsel. Affirmed.

FOOTE V. GODWIN.

(*Supreme Court of Louisiana.* May 19, 1890.
43 La. Ann.)

ASSUMPSIT—EVIDENCE—FRAUD.

1. A claim, the payment of which has remained undemanded more than 10 years, cannot be recovered unless the testimony is direct and uncontradicted.

2. Alleged concealment, deception, and fraud with reference to an amount alleged to have been collected for another must be shown conclusively in order to enable a claimant to recover.

3. Plaintiff's testimony alone with reference to the alleged concealment, deception, and fraud will not be held sufficient to prove them, when previously in another case, before a different tribunal, he has sworn that the amount, if recovered, would be due only to the party, since deceased, from whose succession he now seeks to recover.

(*Syllabus by the Court.*)

C. S. Kellogg and H. H. Walsh, for appellant. *Branch K. Miller*, for appellee.

BREAUX, J. Appeal from the civil district court for the parish of Orleans. The record shows the following facts:

Some time in the year 1862, plaintiff's brother, as agent of David R. Godwin, bought for him, in Texas, a number of beeves, at \$20 per head. In purchasing, herding, and driving them, he, the said brother, was assisted by the plaintiff in this suit. The latter alleges that, while they were in Texas, he also bought 200 head of beeves, and all together they were driven to Louisiana; that Godwin was to sell these beeves in the New Orleans market, and account to plaintiff in proportion to the number of beeves he owned. In south-west Louisiana, 300 of these beeves were sold to the Confederate government, and others were afterwards bought and placed in the drove,—a num-

ber about equal to that sold to the Confederate government. They were pastured in Louisiana about eight months. On the trial of the case before the court *a qua*, a copy of an affidavit of plaintiff was introduced in evidence, in which he deposed that he and his brother purchased for account of David R. Godwin, and with his money, 1,837 head of Texas beeves; that they drove them from Texas to Cypremort, in the parish of St. Mary. While there they were taken by the Federal army in April, May, and June, 1863. He also deposes in this affidavit that they cost, purchase price and expenses, \$60,000.

There was a claim presented by Godwin against the United States government, before the southern claims commission, in 1865, for the value of 1,200 head of Texas beeves taken by the Federal army in Cypremort, the number remaining of the beeves bought for him by his said agent, as before mentioned. The case was heard before this commission, and a trial was had. The affidavit before mentioned was admitted in evidence. In addition, at the time, plaintiff testified as follows before the claims commission at Washington: "Question. Have you any interest in this claim? Answer. I have not. Q. You do not expect to recover anything, if he recovers? A. No, sir; I do not. Q. He pays you for coming on here,—your expenses and time? A. He pays my expenses here. Q. Nothing was said about your being paid in proportion to the amount that was recovered, or anything of that sort? A. No, sir." Upon this and other testimony, the claims commission held that the claimant should recover the sum of \$24,000 which was paid to him by the government on the 28th May, 1877.

Plaintiff in the case at bar, in 1876, wrote several letters to Godwin, in which he applied for loans and relief, but does not state anything about any claim of his, either actual or prospective, growing out of the beef transaction in the name of Godwin. In his testimony before the district court in this case, plaintiff testifies that he knew some years prior that the claim against the government for the value of the 1,200 beeves had been allowed, but that he was informed by the claimant that the amount was not sufficient; that he had applied for an increase. He testifies that Godwin designedly concealed from him that the amount had been paid. Godwin died in January, 1877. About nine months after his death, plaintiff's counsel ascertained that the sum allowed by the government had been paid. This suit was then brought. On the trial before the court *a qua*, the defendant offered in evidence, and it was admitted, a copy of plaintiff's affidavit made in 1875; the affidavit admitted before the claims commission; also a copy of his testimony before that commission, an abstract from which is copied herein. In his testimony, plaintiff denies that his evidence before the claims commission was correctly reported. Nothing is said about the affidavit. Serious objections are presented to plaintiff's claim,—at least two in number.

1. The number of cattle taken by the

government does not correspond with the number bought.

The number bought for Godwin's account in Texas was.....	1,791
The number bought in Louisiana.....	800
	<hr/>
Sold to the Confederates.....	2,091
	<hr/>
Leaving.....	1,791
The Federal army took.....	1,200

The records do not disclose that more than 300 head had been sold before the Federal army took these 1,200. About an equal number was bought in Louisiana. There was therefore a loss incurred of 591 head. Plaintiff alleges that they were joint owners in the proportion of one-sixth to five-sixths. The latter proportion of the ownership incurred considerable loss, while the former remained the same; for plaintiff testifies to a right predicated on 200 heaves placed in the drove by him. Nothing is said by plaintiff as to expense or loss. While there is no necessity for applying the maxim prevailing in mathematics, that a solution which leaves a residuum unaccounted for is no solution at all, it is remarkable that one of the owners of joint property bears all the losses, while the other incurs none.

2. The plaintiff has sworn twice that the property was the property of Godwin, and that he had no interest whatever in the claim. His testimony before the southern claims commission is not at all reconcilable with his ownership at this time, if that ownership be predicated upon a title dating prior to the time the witness testified. The evidence before the court establishes the date as prior. The witness in his own behalf, as plaintiff, testifies as to an acknowledgment made to him personally by Godwin since the case was heard before the claims commission. "He is not to be heard who alleges things contrary to each other." *Edson v. Freret*, 11 La. Ann. 710. "Extrajudicial statements of deceased persons have always been ranked as the weakest evidence, and when reported to have been made to a single witness, in the presence of no one else, generally disregarded." *Succession of Townsend*, 40 La. Ann. 66, 3 South. Rep. 488. The case of *Hobbs v. McLean*, 117 U. S. 580, 6 Sup. Ct. Rep. 878, is cited by the defendant as authority bearing conclusively in support of his position in this case. Each plaintiff had testified in the suit of *Peck* against the United States, in which case the fund was received, that he had no interest in the claim of *Peck*, except that he held one of the notes or memoranda made by *Peck*. *Ferguson v. Arthur*, 117 U. S. 488, 6 Sup. Ct. Rep. 861. It was held that the plaintiffs were not estopped. It was exclusively a question of estoppel *vel non*. The weight to be given to the testimony was not the question. In the case at bar, plaintiff is not estopped. The defendant cannot set up estoppel; for the testimony, as in the case cited, was given in favor of her side of the controversy, which by it has not been misled or injured. It is a question of weight to be given to the testimony.

In determining the weight to be given

to the testimony, that given before the court of claims cannot be ignored, but must be considered in connection with the testimony given when the present case was tried. The testimony of the plaintiff is not such as to satisfy this court that the previous testimony should be disregarded, and that weight should be given to the last only. They are statements under oath. One excludes the effect of the other, and cannot form the basis of a judgment. Only one other witness testifies with reference to Godwin's declaration made since the claim was heard before the court of claims. He knows that he, Godwin, spoke of aiding the plaintiff, but he does not show any intention on the part of Godwin to hold himself bound. There was not the least promise made. The parties, the witness and Godwin, had just become acquainted with each other; and it is not in evidence that this witness ever spoke of the conversation to any one afterwards; not even to the plaintiff. In the absence of acknowledgment proven by satisfactory and sufficient evidence, judgment affirmed.

26 Fla 345
JACKSONVILLE, T. & K. W. RY. CO. v. WELLMAN.

(Supreme Court of Florida. Aug. 4, 1890.)

RAILROAD COMPANIES — KILLING STOCK — EMPLOYE'S REPORT—EVIDENCE.

1. A declaration against a railroad company to recover damages for killing a mule on its road need not be more specific in its allegation as to locality than to state the county in which the killing occurred.

2. The report of an employee of the company as to the killing of an animal, if admissible as evidence on behalf of the company, is not so unless it be shown that it was the duty and business of the employee to make such report, and that it was made contemporaneously with the occurrence. Nor should the oral testimony of the employee be stricken out on the ground that his report is better evidence.

3. The engineer in charge of the engine had testified for the company, and on cross-examination was asked, "What would be the consequence if you should kill stock carelessly and negligently, and should report it to your company?" The question was objected to, on the ground that it was new matter, and was irrelevant and incompetent, but the court overruled the objection. *Held*, that the question was proper, as a means of furnishing the jury a test of the value of his evidence through his relation to the company, and his interest and inclination towards the parties.

4. There is no rigorous rule that would exclude cumulative testimony in rebuttal, but its admission or rejection rests very much in the discretion of the trial judge.

5. The statute of 1887, c. 3740, makes the fact of injuring or killing live-stock by the engine, etc., of a railroad company, when proven to the satisfaction of the jury, *prima facie* evidence of negligence. And where this fact is proved, and the evidence is conflicting in regard to the particular carelessness which it is claimed led to the injury, if the evidence to which the jury gave credence reasonably tends to support their finding, this court will not disturb the verdict.

6. Where the testimony as to the value of an animal killed by a railroad company does not indicate whether the estimate of the value given was based upon the market price, if there is such a price to govern, or upon actual value, and there is nothing to show that an effort was made to ascertain from the witnesses on what basis the valuation was made, this court will not set aside the

verdict on the mere supposition that this basis was not the market value.

(*Syllabus by the Court.*)

Appeal from circuit court, Volusia county; JAMES F. McCLELLAN, Judge.

J. R. Parrott, for appellant. Hamlin & Stewart, for appellee.

MAXWELL, J. In an action of appellee against appellant to recover damages for the negligent killing of a mule, the declaration runs thus: Plaintiff "sues the defendant, the Jacksonville, Tampa & Key West Railway Company, a corporation duly incorporated under the laws of the state of Florida, and as such the defendant, in the month of May, 1887, run and operated a railroad from Jacksonville to Sanford, Fla., and run the same in and through Volusia county. And on or about the 18th day of May, 1887, and in Volusia county, the said defendant, by their servants, agents, and employes, carelessly and negligently run the engine and cars of defendant over one mule, the property of the plaintiff, and crippled and wounded the said mule, of which injuries the said mule soon thereafter died," etc. This declaration was demurred to, on the ground that it does not allege the existence of defendant so as to give the court jurisdiction of the case, and on the further ground that it does not set forth in what part or near what mile-post on defendant's road the accident happened in Volusia county with sufficient exactness to enable defendant to make its defense. The court overruled the demurrer, properly so, we think, but the record contains exception to this. The mere reading of the declaration shows that the first ground has no foundation in fact, and as to the second ground it was not necessary in respect to locality to set forth more than that the accident occurred on defendant's road in Volusia county. We know of no rule of pleading which requires a more particular statement of the place of such an occurrence.

The defendant filed three pleas: (1) Not guilty; (2) contributory negligence; and (3) a fuller equivalent of not guilty. Issues were joined on the pleas and a trial had, in the progress of which arose the further questions presented here for determination. Among these is a question relating to the admission or retention of the evidence of one Giles, a witness for the plaintiff. After he had testified as to what he saw at and about the time the engine of defendant struck the mule, he was asked by defendant's counsel if in his official capacity, being section foreman, he did not, after the accident, make a report to the company in regard to it. He said he did. Thereupon said counsel moved to strike out his testimony, on the ground that there was better evidence in existence, meaning the said report. The court denied the motion. A similar question is connected with the effort of the same counsel to get in evidence a like report of one Gerror, engineer, and a witness for defendant. The court refused to admit it, but permitted the witness to refresh his memory from the report. In both instances the action of the court was proper. It

was not shown, so far as the record discloses, that it was the duty or business of either of these witnesses to make such reports; and if it was, it is not a matter of such common knowledge as to dispense with proof of it. As to Giles, it does not appear when his report was made, whether contemporaneously or not; but, even if there had been satisfactory showing on these points, so as to render the paper admissible, if admissible at all, this furnished no reason for striking out his oral testimony. If admissible in analogy to entries by a third person in the course of business, that does not render his oral testimony inadmissible. On the contrary, the rule is that "if he is living, and competent to testify, it is deemed necessary to produce him." 1 Greenl. Ev. § 115. Then, as to Gerror, besides that it does not appear that it was his duty or business to make such reports, the one he made was dated May 29th, and, as the accident occurred May 18th, we are not prepared to say that it was within the rule which requires contemporaneous entry of the transaction to render it admissible as evidence. So Gerror's report also, if admissible at all, was properly excluded for want of requisite conditions to support it.

On cross-examination of the engineer, Gerror, he was asked, "What would be the consequence if you should kill stock carelessly and negligently, and should report it to your company?" Defendant's counsel objected to the question "on the ground that it was new matter, was not brought out on the direct, and was irrelevant and incompetent;" and he says here that the court erred in overruling his objection. We think not. There is much latitude allowed in a cross-examination, because "by means of it the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, * * * are all fully investigated and ascertained, and submitted to the consideration of the jury, * * * who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony." 1 Greenl. Ev. § 446. The answer of the witness, "I would pay for it and get out," shows that the question related to his situation towards the parties, and to his interest and inclination, and was with a view to test the value of his testimony.

The objection to the testimony in behalf of plaintiff of one Aiken, as being improperly admitted in rebuttal, is not well founded. There had been conflict of testimony between the witnesses of plaintiff and defendant on important matters of fact, and Aiken was called to strengthen the case of plaintiff, his testimony on those matters being in fact strictly in rebuttal of that of defendant's witnesses, though cumulative from a different point of observation of that of plaintiff's witnesses. We do not understand that there is any such rigorous rule as would cut off his testimony under such circumstances, but that its admission or rejection lies very much in the discretion of the trial judge.

The testimony being freed from the ob-

jections of appellant, we are now to consider whether the verdict in favor of plaintiff should be set aside because contrary to the evidence and to law; and in considering the evidence the rule established by statute in 1887 (Acts 1887, p. 113, c. 3740) must be applied. This makes the fact of the injuring or killing of live-stock by a railroad engine, cars, or train, when proven to the satisfaction of the jury, "*prima facie* evidence of negligence on the part of [the] railroad company." That the mule was injured, and died from the injury, and that the injury was inflicted by an engine running at the time on defendant's road in Volusia county, is not disputed. This much proved, the burden was then put upon appellant to show that the injury was not the result of negligence. In regard to that, it appears from the testimony of appellant's witnesses that the brakes of the engine were in good order; that the whistle was blown, and that proper effort was made with the lever to stop the train, but that it was impossible to stop it in the distance between the train and mule when the mule was first seen from the engine, the distance, according to their statement, being not over 20 feet. If there was negligence, therefore, it is to be found in some other facts than the condition of the engine and its management. Appellee claims as a principal fact that there was carelessness in the engineer and others on the engine in not keeping a proper lookout ahead, and to show this has evidence that the road-track over which the train ran for a mile before reaching the mule was straight, and that, though early in the morning, there was sufficient light to enable them to see it a much longer distance than 20 feet. One witness says that it was after sunrise, about 6 o'clock in the morning of the 18th of May, and that before the mule was struck he saw a brakeman on the top of the cars as it was passing some 40 or 50 rods (more than 300 yards) distant from him. Another says it was broad daylight when he saw the train coming down the track, about half a mile off, as it seemed to him, but would not say whether the sun was up or not, and saw the mule on the track some way off before it was struck. Another says he plainly saw the mule at a distance of 100 feet grazing on the grade of the road, 15 or 20 minutes before it was struck, and that when so seen it was between daylight and sunrise. He says further that the morning was foggy. On the other hand it is claimed for defendant that the morning was very foggy; that the accident occurred just at dawn, and that at the time, owing to these conditions and to the fact that one could not see more than 20 or 30 feet ahead with the headlight, on account of the fog, the accident was unavoidable; and the engineer and fireman testify to this effect.

It was incumbent on appellant to satisfy the jury that there was not carelessness in the particular mentioned, and they, in dealing with the conflicting evidence as to the time of day, and as to the sufficiency of light for discovery of the mule sooner than was done, and in time to prevent the

accident, found in favor of the plaintiff; and on this conclusion their verdict sustained the charge of negligence. This court will not disturb a verdict reached under such circumstances, where the evidence to which the jury gave credence reasonably tends to support it, as in this case we think it does.

Another ground of objection to the verdict is that "there was no testimony as to the market value or as to the value of the animal killed; consequently no evidence on which the jury could assess damages." Two witnesses said the mule was worth \$200, but the verdict was for only \$150. It is argued from this that the evidence did not authorize the jury to find the amount they did, and that therefore they discarded the testimony, and acted on their own knowledge, which they had no right to do. But there was other testimony which entered into the question of value. One witness said the mule was probably 11 years old, and another said it was an old gray mule. This may have influenced the jury in their conclusion as to value, and probably did. And as to the question of market value, assuming that mules have such value, there is nothing in the evidence to show whether the estimate of value was upon what the mule was worth in market, or otherwise; and, if appellant considered the market value the true measure of damages, it was for him, by examination of the witnesses, to test whether or not that was the basis upon which the worth of the mule was given. We cannot say, from anything before us, that it was not.

The remaining questions raised by appellant we find to be without substantial merit, and it is unnecessary to discuss them. As to the refusal of the court to give the charges appellant asked for, some of these were calculated, under the state of the evidence, to be misleading, while as to the others there was nothing in the evidence to call for or warrant them.

The judgment will be affirmed.

THRASHER v. STATE.

(*Supreme Court of Florida. June 14, 1890.*)

MURDER—RIGHT TO BAIL—INTENT.

1. Under a constitution making all offenses bailable except "capital offenses, where the proof is evident or the presumption great," bail will be denied a person under indictment for murder where the evidence adduced is such that if a jury had found a verdict of guilty of a capital offense a judge would sustain the conviction, or refuse to grant a new trial. If the evidence is of less efficacy, bail should be granted.

2. The charge given by the circuit court in the case of *Andrews v. State*, as to premeditated design, as such charge appears on page 607, 21 Fla., is not "quoted with approval," or passed on otherwise by this court in that case, in so far as it relates to premeditated design.

(*Syllabus by the Court.*)

Error to circuit court, Alachua county; J. J. FINLEY, Judge.

Taylor & Carter, Robt. W. Davis, and John W. Ashby, for plaintiff in error. *William B. Lamar, Atty. Gen., and J. L. Frazer*, for defendant in error.

RANEY, C. J. The plaintiff in error stands indicted in the circuit court of Alachua county for the murder of Louis Wittkovski, and, having applied to the judge of that circuit to be released on bail, the judge heard the testimony adduced by the prisoner and the state, and, concluding that the case was not bailable, denied the application. To the order refusing bail the prisoner prayed a writ of error to this court, and the circuit judge granted the writ, and in this manner the decision of the judge is before us for review.

The ninth section of the declaration of rights is: "All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great." Const. 1845. A safe rule, commending itself to our judgment, and having the sanction of courts of high character in states in which a similar constitutional provision has prevailed, is to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by jury, on such evidence of guilt as is exhibited on the hearing for bail, and where the evidence is of less efficacy to admit to bail. *Com. v. Keeper of Prison*, 2 Ashm. 227; *State v. Summons*, 19 Ohio, 139; *Street v. State*, 43 Miss. 1; *Ex parte Bryant*, 34 Ala. 270; *Ex parte McAnally*, 53 Ala. 495; *Ex parte Nettles*, 58 Ala. 268; *Church, Hab. Corp.* §§ 402, 403. The decisions of the Texas court of appeals cited in behalf of plaintiff in error were made under a constitutional provision similar to the above, omitting the words "or the presumption great," (Const. Tex. 1876;) yet the same rule is approved in *Ex parte Foster*, 5 Tex. App. 625; *Ex parte Beacon*, 12 Tex. App. 318; *Ex parte Coldiron*, 15 Tex. App. 464.

We have carefully considered the evidence in this case, and, without going into a discussion of it, which in such cases appellate courts refrain from doing, (*Ex parte Foster*, supra,) in view of the possible effect it might have upon the jury trial to follow, we are satisfied that the circuit judge was governed by the rule as above stated, and as it is further explained in the authorities cited, and we find in the record nothing which would justify us in interfering with his action in refusing bail. *Ex parte McAnally*, supra.

We are asked, among other grounds, to admit to bail upon the basis of the charge as to premeditated design given by the circuit judge in the case of *Andrews v. State*, and to be found in 21 Fla. 607, which charge counsel assert to be "quoted with approval" by this court. Even a slight consideration of the opinion will discover that the correctness of the charge as to the question of what constitutes a premeditated design was not before the court, and that it was not passed upon, approvingly or otherwise in that respect. The law as to premeditated design as an element of murder in the first degree, under the statute of 1868, is discussed in other decisions to be found in our Reports; and it is not for us to review at this time an instruction of the circuit court in the *Andrews Case* upon a point not made when it was before this court.

The writ of error was doubtless allowed by the circuit judge in this case upon the theory that the proceedings before him were substantially in the nature of a *habeas corpus*. No objection has been taken by the state to the apparent and serious irregularities. Still it has been not without considerable hesitation that we, on ascertaining them since the submission of the cause, have obtained our own consent to overlook them, and our having done so on this occasion will not be taken as a precedent for future causes. The judgment is affirmed.

STATE *ex rel.* MIRA v. SMITH, Tax Collector.

(*Supreme Court of Florida*. July 21, 1890.)

INTOXICATING LIQUORS—LICENSE—REPEAL OF ACT.

The act of March 3, 1883, (chapter 3406) enacting, in effect, that no person shall be licensed to sell intoxicating liquors, wines, or beer until he has obtained from the county commissioners a permit to sell the same, to be issued by them on his application, signed by a majority of the registered voters of the election district in which the privilege of selling is to be exercised, and duly proven, and published in the manner prescribed, was not repealed by the nineteenth, or local option, article of the constitution of 1885, providing for elections to decide whether the sale of intoxicating liquors, wines, or beer shall be prohibited in a county, and giving to a majority vote cast in an election district in favor of prohibition the effect to prohibit sales in such district, although the majority of the aggregate vote of a county may be against prohibition; nor has subsequent legislation repealed or rendered it inoperative as to any county in which an election may not have been held under the above article of the constitution.

(*Syllabus by the Court.*)

Mandamus.

John E. Hartridge, for plaintiff. William B. Lamar, Atty. Gen., for defendant.

RANEY, C. J. The eleventh section of the general act for the assessment and collection of revenue, approved March 5, 1883, (chapter 3418,) provided that no person should engage in or manage any business, profession, or occupation named therein unless a state license should be procured from the collector of revenue, such license to be issued on the payment of the amount specified in the section, as to any particular profession or occupation; and the same section authorized counties and incorporated cities and towns to impose an additional license tax upon the same business, occupation, or profession, but not to exceed 50 per cent. of the state tax.

The same legislature passed an act (chapter 3416) which was approved on the 3d day of the same month, and is entitled "An act to regulate the sale of liquors, wines, and beer in the state of Florida by the boards of county commissioners of the several counties." Its provisions are that it shall not be lawful for any person or persons to sell any intoxicating liquors, wines, or beer in any election district in any county except upon compliance with the following requirements: Any person wishing to sell the same shall make application to the board of county commissioners of the county in

which the privilege of sale is desired, at a regular meeting of the board, for a license to sell; such application to be signed by a majority of the registered voters in such election district, as shown by the registration list on file in the office of the clerk of the circuit court at the date of the application; and the applicant to make affidavit that each and every name or mark affixed to the petition was the act and deed of the party purporting to have signed the same, which signing must have been in the presence of at least two credible witnesses, and that there was no fraud, bribery, or deception in procuring the signatures or marks. The petition, with the names and marks, has to be published in a prescribed manner for two weeks before the county commissioners meet to "hear" the petition. No collector of revenues shall issue "license" to any person or persons unless "a permit" is presented from the board of county commissioners, and said "license" so issued shall contain a provision that the same may be suspended or revoked by the board of county commissioners for any of the causes hereinafter set forth. Section 3. It forbids (section 4) the sale of any liquors, wines, or beer to any minor, or to any person in a state of intoxication, and authorizes and directs (section 5) the board to suspend a license upon affidavit being made by two or more reliable citizens that the dealer has sold any intoxicating beverage to a minor, or to a person in a state of intoxication, and prescribes (section 6) the practice upon the hearing in such cases. Any person violating the provisions of this act is made amenable to the penalties "now prescribed by law" for selling liquor without a license, and to be tried in the same manner; but there is a proviso to this section to the effect that the act shall not apply to the sale of domestic wines by the person making the same.

In *State v. Brown*, 19 Fla. 563, decided in 1883, the fifth and sixth sections of the act were held to be void and unauthorized by the constitution in so far as they sought to invest the county commissioners with judicial power to hear and determine a complaint against the holder of a license, and to revoke it, as they created a court not authorized by the organic law, but that, in so far as the act required the applicant for a license to produce to the county commissioners an application signed by a majority of the registered voters in the election district where it was desired to make sale, and to otherwise comply with the terms prescribed, it was valid. The two acts were, as to the matter of liquor licenses, held to be *in part materia*, and not incongruous, but capable of being enforced, barring the unconstitutional provisions mentioned.

In 1885, an amendment, approved February 15th, was made of the above general revenue law, but it in no wise affected the liquor provisions of either of the two statutes. Later in the same year, the convention which framed the present constitution assembled, which constitution was ratified by a vote of the people in November, A. D. 1886, and went into operation on the 1st day of January of the following year.

The local option, or nineteenth, article of this instrument is to the effect that the board of county commissioners of each county in the state shall, not oftener than once in every two years, upon the application of one-fourth of the registered voters of the county, call and provide for an election in the county to decide whether the sale of intoxicating liquors, wines, or beer shall be prohibited therein, the question to be determined by a majority vote of those voting at the election so called, which election must be held in the manner provided by law for holding general elections. If at any such election a majority of the votes cast in any election district of a county is against the sale of such liquors, they shall not be sold in such district. Such election shall be held within 60 days from the time of the presentation of the application, unless thereby it would take place "within sixty days of any state or national election," in which case it shall be held "within sixty days after any such state or national election;" and the legislature is directed to "provide necessary laws to carry out and enforce" this article.

The legislature of 1887 passed an act (chapter 3700, approved June 2, 1887) for the "enforcement of the provisions" of this article. Among its provisions are the following: Should a majority of the votes legally cast at any election held as provided in the act be against selling, then no intoxicating liquors, wines, or beer shall be sold in the county until otherwise determined by an election to be held not oftener than once in every two years; but, should the majority of the votes be for selling, then such liquors, wines, or beer may be sold in the county until otherwise decided by an election to be held pursuant to the statute; it being provided, however, that such liquors shall not be sold in any election district in which a majority vote was cast against selling; that, should it be determined at an election that liquors may be sold in the county, then the person or persons wishing to make sales in any precinct voting in favor of such sales shall obtain license on paying such tax or taxes as may be prescribed by law for carrying on the business. Any person selling, or causing to be sold, any liquors in any county voting against the sale of the same therein, is, upon conviction, to be deemed guilty of a misdemeanor, and shall be fined or imprisoned, or both fined and imprisoned, as provided in the act.

This legislature also passed a general revenue act, approved June 13, 1887, which is a revision of the general revenue law of 1885, mentioned at the outset of this opinion, and contains similar provisions to those set out in the first paragraph of this opinion. In this act of 1887 the following language also occurs, in section 9, which section takes the place of section 11 of the act of 1883: "Dealers in spirituous, vinous, or malt liquors shall pay a license tax of four hundred dollars in each county for each place of business, and dealers paying the same, and receiving a license therefor, shall be authorized to sell spirituous, vinous, and malt liquors, or any of such liquors; but neither spirituous, vin-

ous, nor malt liquors shall be sold unless said license tax is first paid, and a license therefor first taken out. Distillers of spirituous liquors shall pay a license tax of three hundred dollars in each county, for each place of business: provided, that no license shall be issued to any person to sell or distill spirituous, vinous, or malt liquors in any county or election district where such sale has been prohibited in pursuance of the constitution and laws of this state." This language, down to the proviso, with a substitution, however, of "three hundred" for "four hundred," is to be found in the general revenue act of 1883, (chapter 3418, supra,) but not the proviso. The last section of this act repeals expressly the general revenue act of 1883, and the amendment thereof, with a proviso, however, that the former of these acts shall remain in full force as to all violations of the penal provisions committed previous to the act of 1887.

It is urged by counsel for relator that the above article of the constitution repeals of itself the act of March 3, 1883. Admitting expressly that no election has ever been held under the article to decide whether intoxicating liquors, wines, or beer shall be sold in the county where the relator seeks a license, he contends that the presence of the article in the constitution does away with the act. In *Butler v. State*, 25 Fla. 347, 6 South. Rep. 67, we held, and, as we are still satisfied, correctly, that, when this local option article is put in operation in any county or election district by a majority vote, it suspends during the period of its operation, or until there shall be another election changing the status, all statutes regulating the sale of such liquors, wines, or beer in the county or district. In that case we held specifically that the general revenue law of 1887, in so far as it authorized the licensing and sale of such liquors, was not repealed by the local option article being in operation in any county or district pursuant to an election held thereunder, but that it was only suspended pending the period of such active enforcement of the constitutional provision in such territory. Nothing was said as to the act of March 3, 1883, because under the facts of the case it was not necessary to mention it.

The purpose of the local option article was to remit to the registered voters of each county the settlement of the issue whether the sale of intoxicating liquors, wines, or beer should be prohibited within the county. It gives to one-fourth of the registered voters of any county the right to require an election to be held once in every two years, to test the sentiment of the voters upon this question. The only issue presented by the constitutional provision is whether or not the sale shall be prohibited. Until an election has been held, and a majority of the electors of a county or of some election district thereof have voted against the sale, the prohibitory provisions of the article and the statute enforcing it are inoperative throughout the county. If the majority of the voters in the county, or in any election district thereof, express themselves, through their ballots, as in favor of prohibition,

the result is that the sale of such liquors, wines, and beer becomes forbidden and illegal until this condition shall be changed by a subsequent election, at which a majority shall vote in favor of permitting their sale, or, in other words, shall vote against prohibition; and there can be no subsequent election within two years from the first one, but, after two years have elapsed from the time of one election, there may, whatever may have been its result, be another if one-fourth of the registered voters of the county shall see fit to apply to the county commissioners for it. Whenever the article is in force or active operation throughout a county, or in an election district, the power of the legislature to license or otherwise regulate the sale of intoxicating liquors, wines, or beer therein is suspended; for, in the nature of things, the power to license or otherwise regulate a subject necessarily implies the existence of the subject. But there is in this article, considered of itself, or in it and the fact that a vote has been taken resulting in a majority against prohibition, nothing that limits the power of the legislature to regulate the sale. An election, considered solely with reference to what is contained in the article of the constitution, does not involve any expression of opinion or direction as to how the sale shall be regulated in case the vote should be against prohibition.

The article is, as to any county or election district in which it is not actually operative through an election resulting in favor of prohibition, not a limitation upon the power of the legislature further than the rules it prescribes for calling and conducting an election upon the issue of prohibition, and the resulting effect given by it to a majority vote in favor of prohibition. It says nothing as to the regulation of the sale of intoxicating liquors, wines, or beer in any county or district where it has not been put in force. In other words, it is not a regulation of the sales of these intoxicants, and was never intended as such, but only as a provision for submitting the issue of prohibition or sale, and declaring the effect of a majority vote in favor of prohibition in a county or election district. As to any locality in which it is not in actual force by virtue of a majority vote, the legislature is as free to prescribe regulations of the sale as it would be if no such article or provision was not to be found in the constitution. Of course the article is no more in force in a county or district where a majority of the electors have voted against prohibition than in one where no election under it has ever been held. Not being a regulation of the sale of the intoxicants where sales are permitted, but merely a regulation of the mode of ascertaining the public sentiment of a county or election district, as represented by a majority of registered voters, as to whether the sale of such intoxicants shall be prohibited, and a declaration of the effect of a majority vote cast in favor of prohibition, it cannot be regarded as superseding, or as intended to supersede, any existing regulation of sales. It does not pretend to regulate sales where the sale of such intoxicants is allowed.

That is not its object; and, not being its object, it can have no effect upon a statute of which such is the object. *U. S. v. Claflin*, 97 U. S. 546. There is no repugnancy in a statutory regulation which says that any person may sell intoxicants in an election district after having obtained a petition signed by a majority of the registered voters, and published the same, and a constitutional provision or statute which says that no person shall sell any such intoxicants at all, if at an election called in the manner provided a majority of the registered voters express themselves against any sale of them. *State v. Palmes*, 23 Fla. 620, 3 South. Rep. 171; *Potter's Dwar. St.* 113, 114, 154, et seq. The purpose of the latter is to prohibit altogether that which would otherwise be permitted, whereas the object of the former is to prescribe the rules under which what is permitted may be done.

The repugnancy necessary to work a repeal by implication is one that is clear and positive, (*State v. Palmes*, supra,) and we are satisfied, after the most careful consideration, that there is no such repugnancy to be found between the act of March 3, 1883, and the constitution. The fact that no sale could be made in any election district when the article of the constitution has not been put in force, if a majority of the registered voters should refuse to sign a petition for any one, and that thereby prohibition may in fact be enforced under the statutory system, does not change the character of this statute as one regulating sales. A failure to comply with any prerequisite, whatever it might be, would lead to the same result. The purpose and effect of this statute as a regulation are, it is true, that no person shall sell unless he shall have, in effect, the certificate of a majority of the registered voters of the district that he is personally fit to be intrusted with the conduct of the business of a liquor dealer, but its purpose and effect are also that any person may sell who shall secure such certificate, and publish the same in the manner prescribed, and pay the tax and fee required by the general revenue law. *State v. County Com'rs*, 22 Fla. 1. It is a part of the statutory regulation of the sale of intoxicating liquor, the other features of the regulation being prescribed by the revenue act, which two acts, it has been held, are to be construed *in parimateria*. *State v. Brown*, 19 Fla. 563, 595. The statutory system contemplates sales by persons who comply with the regulations of the two acts, but the purpose of the constitution is to prohibit sales by any person under any regulations whatsoever. One prescribes the qualifications and conditions for selling; the other prohibits all sales of intoxicating liquors, wines, or beer.

The second section of the act for enforcing the prohibition article of the constitution is as follows: "If such county at such an election votes in favor of the sale of such liquors within such county, then any person or persons in any precinct which at said county election voted in favor of

the sale of such liquors, paying the proper license tax to the proper officer in said county, shall have granted to him proper license for selling such liquors in such precinct." There is of course nothing in this indicating that the legislature regarded the act of March 3, 1883, as having been repealed by the constitution. Nor is there in the former statute, or in the general revenue law of the same year, supra, anything that can be held to repeal the act of March 3, 1883.

The motion to quash is granted.

HAYES v. TODD.

(*Supreme Court of Florida*. April 1, 1890.)

SUFFICIENCY OF SUPSEDEAS BOND—MOTION TO VACATE.

1. Where the evidence adduced by a defendant in error on a motion to vacate a *supersedeas* raises serious doubts as to the sufficiency of the sureties, and no evidence is offered by plaintiff in error to meet the representations made by such proof, the *supersedeas* will be vacated.

2. An application by plaintiff in error for an allowance of time, within which to file a new *supersedeas* bond in case the one assailed shall be held insufficient, is not ground for continuing the pending *supersedeas*, or delaying the entry of the order vacating it. The movants for a vacation of the *supersedeas* should have their order, if entitled to it, and the plaintiff in error may present a new bond, and apply for another *supersedeas* order.

(*Syllabus by the Court*.)

Error from circuit court, Polk county; G. A. HANSON, Judge.

On motion to vacate the *supersedeas* bond.

Wall & Knight, for plaintiff in error.
Thomas McDermott, for defendant in error.

RANEY, C. J. The affidavits presented in support of this motion raise serious doubts in our minds as to the sufficiency of the sureties, and, though these doubts are not such as might not have been overcome by an effort to meet the representations of the affidavits, had such an effort been made, still, under the circumstances, we think the motion should be granted.

Counsel for plaintiff in error have signified a desire that we give them time to file an additional *supersedeas* bond. Upon this point our conclusion is that the proper practice is for them to become actors in presenting a new bond, and applying for a *supersedeas* order, and that the present movants are entitled to the order setting aside the *supersedeas* heretofore granted. *McMichael v. Eckman*, ante, 865, (decided at the present term.)

Counsel for defendant in error has asked that the *supersedeas* order be vacated on the ground also that a justice of this court cannot approve a *supersedeas* bond on a writ of error. The notice to the plaintiff in error did not specify this as a ground of the motion, and it is not necessary, even if it is proper, to decide the point. The practice as to the approval of such bonds has long been to the contrary of this position, but we do not care to dispose of it finally now.

Motion granted.

WILLIAMS v. HUTCHINSON. CAMPBELL et al. v. SAME. BOLEY et al. v. SAME. SOUTHERN SPRING BED CO. v. SAME.

(Supreme Court of Florida. June 30, 1890.)

ATTACHMENT—APPEALABLE ORDER—SERVICE OF CITATION.

1. An order dissolving an ancillary attachment is a final judgment at law, from which an appeal lies.

2. An order dissolving an ancillary attachment is a final judgment, although it does not expressly dismiss the attachment proceedings. *Lyman v. Alexander*, 9 Fla. 489, disapproved.

3. A suggestion or statement in the brief of counsel that an order appearing in the appeal transcript was taken from the motion docket is not evidence that the order was not duly recorded in the minutes of the term of the court at which it appears from the transcript that the motion was heard and determined, such transcript being certified by the clerk as containing a correct transcript of the "record of the judgment."

4. An order duly entered upon the record of a term of the circuit court, and omitting the title of the cause, and the signature of the judge, in the following language: "It appearing that notice was given of this motion, and the same being argued, it is ordered that the motion be granted; to which ruling counsel for plaintiff excepted, and the plaintiff is allowed thirty days to file bill of exceptions and perfect appeal,"—is a final judgment or an expression of final judicial action as distinguished from a direction for a mere formal entry by the clerk.

5. A citation to an appellee, issued by a clerk of a circuit court, is the process of the supreme court, and must be served by the sheriff of the latter court in person or by deputy, and service made by any other sheriff simply by virtue of his office, and not as deputy of the sheriff of the supreme court, is not legal; section 11 of the act of February 10, 1833, (section 4, p. 937, McClel. Dig.,) having been repealed by the act of August 1, 1868, (section 3, p. 937, McClel. Dig.)

6. Where process of the supreme court is returned as served by the sheriff of a county, who is, however, not the sheriff of that court, and a motion is made to amend the return so as to show that it was served by the sheriff of the supreme court through him as deputy, and the only proof of such deputation is that the latter sheriff delivered to a predecessor of the sheriff claimed to be such deputy a paper constituting such predecessor and his successors in office his deputy to execute all process of the supreme court in the county of which he was sheriff, and a certificate of the sheriff of the supreme court stating, in effect, his conclusion from the execution and delivery of the appointment to the predecessor that the sheriff making the service was and is his deputy, the motion should be denied, as the proof does not show the person making the service received or accepted the paper, or other appointment of himself as deputy.

7. Where there has been no legal service of a citation 25 days before the term of the supreme court, to the first day of which it was made returnable, nor was the writ placed in the hands of an officer authorized to serve it, a new citation, returnable to a day in term, will not be granted by that court, but the appeal will be dismissed.

(*Syllabus by the Court.*)

Appeal from circuit court, Alachua county; J. J. FINLEY, Judge.

Taylor & Carter and *W. W. Hampton*, for appellants. *S. Y. Finley*, for appellee.

RANEY, C. J. The attachment proceeding in each of the above cases is ancillary to the personal action of *assumpsit* instituted contemporaneously. Circuit court rule 80. The appeals are from orders dissolving the attachments.

In *Jeffreys v. Coleman*, 20 Fla. 536, it

was held that when an ancillary attachment is issued, upon which property is seized, an order of the court dissolving the attachment is a final judgment, from which an appeal lies, as it is a final determination of the attachment or ancillary proceeding. *Kennedy v. Mitchell*, 4 Fla. 457.

The first ground of the motion to dismiss is that the record does not show that a final judgment has been rendered by the circuit court. The transcript of the record before us shows an order dissolving an attachment, which order is signed by the judge; and from the certificate of the clerk to the transcript we must infer that this order was duly recorded in the minutes of the special term of the court, at which it seems the several motions were heard and determined. The suggestion in the brief of counsel for appellee that the order "was taken from the motion docket" is, in view of this certificate of the clerk to the effect that it is a correct transcript of the "record of the judgment," no evidence that the order was not put by the clerk upon the record of the court as its judgment dissolving the attachment.

The order, omitting the signature of the judge, is as follows: "It appearing that notice was given of this motion, and the same being argued, it is ordered that the motion be granted; to which ruling counsel for plaintiff excepted, and the plaintiff is allowed thirty days to file bill of exceptions and perfect appeal." This order, appearing upon the record of a term of the circuit court at which it was made, which record must be assumed to have been duly approved by the judge, is, we think, a sufficient, though inartificial, expression of final judicial action dissolving the attachment, and should be taken as such, and not as a mere direction for a more formal entry by the clerk on the minutes or record of the term; and this, even though the latter might have been the intention of the judge when he wrote and signed the order. Nor do we now see that the same order made by a judge acting at chambers in vacation would not be a sufficient expression of a final judicial determination to dissolve an attachment, and operate to do so. There is nothing in these conclusions inconsistent with the decision in *Sedgwick v. Dawkins*, 17 Fla. 811.

It seems to have been decided in *Lyman v. Alexander*, 9 Fla. 489, that an order professing merely to dissolve an attachment does not, though made before plea, constitute a final judgment, from which an appeal lies, but that to do so it must also expressly dismiss the suit. This idea is based upon the language of the statute, which is: "When any suit shall be commenced by attachment, and the same, on motion, be dissolved before plea to the action, then, in every such case, the suit shall abate, and be dismissed from the court." Section 27, p. 116, McClel. Dig. The reasoning of the court is that, until the formal order of dismissal of the suit is entered, the order of dissolution is interlocutory, and not final.

When the attachment is not ancillary to a common-law personal action, or in oth-

er words where the suit is commenced by attachment alone, there is no personal action until the defendant pleads; and hence, up to that point, the attachment proceedings constitute the only suit or action in existence, or that can be dismissed. Though it be true that a technical order of dismissal will, as a matter of form, more fully meet the words of the statute, still we are altogether unable to see that its substantial requirements of what is necessary to finally abate and dismiss the action are not as perfectly met by the order of dissolution. When the attachment is dissolved, nothing is left of the action, and we think that an order made before plea simply dissolving an attachment is as much a final judgment as one purporting to not only "dissolve" the attachment, but also to "dismiss" the suit. When the dissolution takes place before plea, the attachment proceedings, and nothing else, are, in the absence of a common-law personal action, the entire suit or action. *Mitchell v. Watson*, 9 Fla. 162. Where the attachment is ancillary to a personal action, the effect of a dissolution of the attachment in abating the attachment proceedings is the same as if there was no personal action, and the fact that such dissolution, whenever made, has no effect to abate the personal action, is immaterial in so far as the abatement of the attachment proceedings is concerned. Where the attachment is ancillary, its dissolution at any time abates it, and the plaintiff relies upon the principal action for a personal recovery upon his claim or demand.

Another ground of the motion is that there has been no legal service of the citation. The statute (section 6, p. 841, McClel. Dig.) provides that 25 days' notice of the appeal before the term to which it is returnable shall be given to the appellee, and the rule of court (circuit court rule 101) adopts a citation as the form of notice. The citations here were issued by the clerk of the circuit court of Alachua county, and appear, by the returns indorsed upon them, to have been served by the sheriff of that county as such sheriff. They are writs of the supreme court, and should have been served by its sheriff in person, or through a deputy, and due return of the service should have been made in the name of such sheriff in the usual form. Under the act of August 1, 1868, (section 3, p. 937, McClel. Dig.), the sheriff of Leon county is the sheriff of this court, as the courts sit in this county, and in no other. The statute repealed the eleventh section of the act of February 10, 1832, (section 4, *Id.*) It has not been made to appear that the sheriff of Alachua county has ever been appointed a deputy of the sheriff of this court. It is true that the latter sheriff did, in the year 1885, deliver to the sheriff of Alachua county then in office a paper constituting him "and his successors in office" his deputy to execute all process of this court in that county, (as with commendable desire to facilitate the service of all process he did in other counties;) but it has not been made to appear that this paper or other appointment has ever been received by, or that its existence

has ever come to the knowledge of, the present sheriff, to say nothing of the fact that as the record stands the service appears to have been made in no other capacity than that of sheriff of Alachua county. Had this paper appointment mentioned been delivered to the present sheriff by his predecessor, as must have been the intention of the sheriff of this court, we cannot see that the service would not be legal, or that the return could not be amended; but upon the facts as they are the service was illegal, and there is no basis for an amendment of the return. It is true the sheriff of this court certifies that the sheriff of Alachua county is now, and has ever since qualifying as sheriff been, recognized by him as his deputy; but we do not think this is sufficient to show that the sheriff of Alachua has received or accepted the above, or other, appointment as deputy; the certificate, considering the connection in which it is made, being one of a conclusion founded upon the execution and delivery of the above appointment in the year 1885. These views are fully supported by the following cases: *Tischler v. Wall*, 20 Fla. 924; *Knight v. Weiskopf*, 21 Fla. 157; *Trust, etc., Co. v. Buddington*, 23 Fla. 514, 2 South. Rep. 885; *Mussina v. Cavazos*, 6 Wall. 355.

There having been no legal service of these writs, it is claimed by appellee that the appeals should be dismissed, while on the other hand the appellants ask for new writs to be issued out of this court, returnable to a day in term, or other proper day upon the appeals. In *Tischler v. Wall*, the citation was improperly tested, and served by a private person; and in *Knight v. Weiskopf*, the *scire facias ad auilendum errores* was similarly defective, and served by the sheriff of Duval county, and the appeal and writ of error were dismissed. In *Driggs v. Higgins*, 19 Fla. 103, 25 days did not intervene between the day of issue of the writ of error and the first day of the term, and the *scire facias* was not served 25 days previous to such first day, and the writ was dismissed.

In *Knight v. Weiskopf*, and *Trust, etc., Co. v. Buddington*, the decisions of the supreme court of the United States as to the necessity for citation and service of the same before the term to which an appeal or writ of error is returnable are reviewed. *Dayton v. Lash*, 94 U. S. 112, instituted a change as to the necessity for service prior to the commencement of the term, and permits a new citation to issue during the term of the supreme court to which the appeal is returnable, and to be served during that term. The fact that the writs in *Tischler v. Wall* and *Knight v. Weiskopf* were defective in matters of form of an amendable nature does not, in our opinion, preclude the application of the rule adopted there to a case in which, as in the one before us, there are no such defects, which rule is that, where no legal service at all has been made of the writ before the term to which the appeal is returnable, the appeal fails, and should be dismissed. This is the rule as it was originally understood in the supreme court of the United

ed States, (*Bacon v. Hart*, 1 Black, 38, and others cases cited in *Knight v. Welskopf*.) and we deem it more consistent with the provisions of our statute and the practice of this court, and particularly so as to a case in which the writ has not even been placed in the hands of the proper officer for service; and on this ground the appeals will be dismissed.

It will be ordered accordingly.

JENSEN V. WALTHER.

(*Supreme Court of Florida. June 30, 1890.*)

Appeal from circuit court, Walton county; JAMES F. McCLELLAN, Judge.

William B. Lamar, for appellant. Benjamin S. Liddon, for appellee.

RANEY, C. J. The facts in this case as to service of the citation are similar to those in *Williams v. Hutchinson*, ante, 853, (decided at this term.) The motion of appellees to dismiss the appeal must be granted, and that of appellant to amend the return of service be denied. It will be ordered accordingly.

POST *et al.* v. ROACH *et al.*

(*Supreme Court of Florida. June 11, 1890.*)

CREDITOR'S BILL.—FRAUDULENT CONVEYANCE.

1. Where a creditor's bill does not seek to set aside his debtor's assignment for the benefit of creditors, and no fraud in making the assignment is shown, it is error to decree that the property assigned shall be held subject to a judgment and execution on the creditor's claim obtained after the commencement of the creditor's suit.

2. A creditor must have prosecuted his claim to judgment to constitute a lien on real property, and to judgment and execution to constitute a lien on personal property, before he can, in a court of equity, question the disposition of the debtor's property, even though disposed of by a fraudulent assignment; and the pending of an action at law between the parties, which may result in a judgment and execution for the creditor, does not modify this doctrine.

(*Syllabus by the Court.*)

Appeal from circuit court, Putnam county; J. J. FINLEY, Judge.

Calhoun, Davis & Gillis, for appellants.

MAXWELL, J. This is a suit of Roach & Co. against E. C. Post and J. R. Hunter, as partners under the style of Post & Hunter, and H. L. Green, as assignee of Post. The bill alleges that on March 19, 1885, Post wrote complainants a letter asking credit for a bill of furniture, and promised complainants, if they would ship him the goods, he would send them a joint note of himself and wife as soon as he could know the amount, and would send check to pay freight; that in this communication he made statements and representations as to the amount of property he owned, and that his letter is signed, "E. C. Post, of Post & Hunter;" that complainants, relying upon the statements made in this letter, did, on June 20, 1885, ship to defendants (Post & Hunter) a bill of goods amounting to nearly \$1,000, and that they advanced freight charges and insurance premiums; that after they had shipped the goods, and defendants Post & Hunter had received them, and knew the amount, they would not, and have not, delivered to complainants said joint note of Post

and wife to secure the same; that afterwards Post made an assignment to Green, nominally for the benefit of his (Post's) creditors; that Post repudiated the existence of any such firm as Post & Hunter; that complainants were informed, and believe, that no such firm ever did in fact exist, but its existence was only pretended, to deceive; that complainants are informed, and believe, that several thousand dollars' worth of property had been purchased from other parties under the same pretext; that Post, after having used Hunter as a "cat's-paw" assigned the goods bought by Post & Hunter for the benefit of Post's creditors; that in December, 1885, complainants commenced their action against defendants for the amount due them, and simultaneously sued out a writ of garnishment against Green as assignee of Post, and defendants and garnishee appeared in said suit, that soon afterwards Green, as assignee, gave notice that he would sell the goods at auction; that complainants have good reason to believe that Green, the assignee, in his answer as garnishee, will deny that he has any goods or effects of Post & Hunter, and that he would convert the stock into ready money before the day for answer, and there would be nothing left for the judgment to reach; and that the funds of Post & Hunter would go to pay the debts of Post, and he would claim a homestead and exemption.

The bill then charges confederation between Post, Hunter, and Green to cheat complainants out of their moneys. It further alleges that defendants pretended that no such firm as Post & Hunter ever existed, but that it was understood between them that if the said Hunter could raise so much money he was to be a partner, but that he never raised the money, and was therefore never a partner, and that there were never any articles of co-partnership entered into between them; that the said defendant Hunter never received any of the income of said firm; that Post kept the business himself, and had all the stock in charge, and, having assigned, conveyed the right and property to the assignee, Green; that the said assignee wished to hurry the sale of the assets for the benefit of Post's creditors; and that the building in which the business was conducted belonged to the wife of Post, and the said Post had no real estate to pass to the assignee,—all of which pretenses are contrary to equity and good conscience. The bill concludes with prayer for an injunction restraining and enjoining defendants from selling or disposing of the goods, or in any wise meddling with the furniture, for the appointment of a master to take the property assigned in custody, and for an account before the master, and that the master shall sell the property, pay complainants, and then pay all other claims that shall be proven against Post & Hunter.

An injunction was granted on the bill, an answer afterwards put in, on which issue was joined, and on the testimony taken a hearing had, and a final decree given, in which it is recited that, it appearing to the court that the property mentioned

in the bill as having been assigned to Green was at the time the property of Post & Hunter, and that at the time of the purchase of the goods said Post and Hunter were partners, and that as such partners they purchased the goods, and that a judgment has been obtained by complainants against Post & Hunter, upon which execution has been issued, and that the goods assigned are subject to said judgment and execution, and should be applied to the satisfaction of the same, and also that the real estate belonging to Post & Hunter at the time of said assignment is subject to said judgment and execution, therefore it is decreed that the property, real and personal, included in the assignment, be, and the same is declared and decreed to be, subject to the execution aforesaid. This is substantially the whole of the decree.

We do not deem it necessary to set out the details of the answer, which, for the most part, admits the allegations of the bill, with explanations of default on the part of Post, not, in our view, material in a legal sense. But the answer denies fraud. Nor is it necessary to recite the evidence further than by incidental references to the same in the succeeding epitome of facts, with a view to sustain our conclusion that the bill itself is fatally defective in making a case for the relief sought. We gather from the record that the case is this: Roach & Co. sold goods to Post, representing himself as buying for Post & Hunter. Post offered to give certain security, which he failed to do. Though there was no real partnership between Post & Hunter, as between themselves, the fact that Hunter knew of the ordering of the goods in the firm name, and gave no dissent, bound him as a partner so far as Roach & Co. were concerned. But Roach & Co. were informed by letter from Post, June 26, 1885, before the goods were received, and several months before this suit was instituted, that Hunter had withdrawn from the partnership; the fact being that the arrangement between Post & Hunter was that the latter should become a partner on contributing a certain sum of money to the business, which he did not do, and that he did not share in the profits of the business. Post, having conducted the business in his own name from June 26, 1885, found himself in failing circumstances on November 7, 1885, and on that day made an assignment to Green for the benefit of his creditors. After the assignment, and before the bill in this case was filed, Roach & Co. had commenced an action against Post & Hunter for the price of the goods, and that action was still pending; but before the present suit was determined there was a judgment in favor of Roach & Co. for the amount claimed, and an execution issued, which was returned, "Nothing to be found."

Conceding that Roach & Co. were deceived in the promises made by Post as to the security he would give them, they only stood in the relation of ordinary creditors, whether of Post or of Post & Hunter. If fraud was practiced upon them in obtaining the credits, that might have been a ground for following up the goods

they sold and reclaiming them. But this is not what they undertake, and, even if it were, the length of time they suffered to elapse before any complaint of the fraud, knowing of Post's default, and that he was claiming to do the business in his individual name, was an indication that the fraud charged was an after-thought. Then, if Roach & Co. were only general creditors, awaiting the payment of their claim like other creditors, was the assignment in fraud of their rights such as entitled them to have it set aside? They do not, indeed, ask to have it set aside, and that is a serious defect in their bill. But if this had been their aim, there is nothing in the bill nor anything in the evidence to show fraud. On its face the assignment is that of an ordinary debtor, giving preference to some creditors over others. It was made by one who was known to Roach & Co., for several months previous, to be in charge of the business, and to have possession and control of the goods in his own name, and there is not a single circumstance shown to indicate that the assignment he made was not in good faith. As to Roach & Co., so far as appears, the only complaint they can make against the assignment is that they were not among the preferred creditors. They had no lien on the goods, and were not in a position to complain that Post's assignment, after undisputed exclusive possession and control of the business for months, was not an assignment by Post & Hunter. Of course no one questions the right of a debtor to make an assignment preferring some creditors over others, so long as there is nothing fraudulent in the transaction.

But, even if there had been fraud in the assignment, Roach & Co., on the showing they make, could not invoke equity to enforce their claim. The law is that a creditor must have prosecuted his claim at law to judgment to constitute a lien on real property, and to judgment and execution to constitute a lien on personal property, before he can question the disposition of the debtor's property. *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Rhodes v. Cousins*, 6 Rand. (Va.) 188; 2 High. Inj. § 1403. And it does not avail to modify this doctrine that an action at law is pending which may result in a judgment and execution in favor of the creditor. *Phelps v. Foster*, 18 Ill. 309.

The decree will be reversed, and the bill dismissed.

JACOBY v. SHOMAKER et al.

(Supreme Court of Florida. July 5, 1890.)

SUPERSEDEAS — INTOXICATING LIQUORS — ILLEGAL SALES.

Where the damage which may result from a *superseadeas* to a decree is of such character that it can be compensated in money, a *superseadeas* will be granted, if the appeal does not, upon an inspection of the record, appear to be frivolous, or, in other words, if the points of error suggested by the record are not such as require no argument to show their untenableness; but where, from the nature of the case, the damage which may result from superseding an injunction is of such character that it cannot be compensated in money or otherwise, as in the case of the sale of intoxicating

liquors in a community, a *supersedeas* will not be granted unless the error of the decree appealed from is palpable. An injunction bond will indemnify the party enjoined from selling, but a *supersedeas* bond is no indemnity to the other parties or the community against all the damage which may result to them from sales pending the *supersedeas*.

(*Syllabus by the Court.*)

Appeal from circuit court, Jackson county; W. D. BARNES, Judge.

On motion for a *supersedeas* to the temporary injunction appealed from.

Benjamin S. Liddon, for appellant.
Francis B. Carter, for appellees.

RANEY, C. J. The record shows that under the act of March 3, 1883, (chapter 3416 of the Laws,) the county commissioners of Jackson county granted to the appellant a permit to sell intoxicating liquors, wines, or beer in a specified election district in that county, he having presented to them a petition under the act purported to be signed by a majority of the registered voters of the district, and that he has obtained a license under the general revenue law as a liquor dealer, and is about to commence selling pursuant thereto. The bill filed by appellees assails the action of the county commissioners in granting the permit, and consequently the license granted thereon, as illegal. The judge of the first circuit granted a temporary injunction, and from this order Jacoby has appealed, and applied to this court for a *supersedeas* to the injunction.

The statute authorizing appeals from interlocutory orders in chancery provides that such appeals shall not operate as a *supersedeas* unless the judge of the circuit court or a justice of the supreme court shall, on an inspection of the record, think fit to order and direct a stay of proceedings; but that no appeal shall operate as a *supersedeas* except upon the conditions now prescribed by law in cases of appeals from final judgments and decrees. Section 2, p. 167, McClell. Dig.

In *Williams v. Hilton*, 25 Fla. —, 6 South. Rep. 452, where a motion was made to vacate a *supersedeas* which had been granted by a justice of this court, it was held that on such an application the judge or justice is not required to satisfy his mind on litigated questions, but to see from an inspection of the record that there is an appeal, and that it is not frivolous, and that the state of the case as to its future course is such as to render a *supersedeas* proper.

Counsel for appellant, relying on *Williams v. Hilton*, urges that his appeal is not frivolous. Two of the questions found upon an inspection of the record to be presented by it are the right of the complainant to invoke the aid of a court of chancery in the premises, and whether or not the above act of March 3, 1883, has been repealed by the local option, or nineteenth, article of the constitution of 1885. Counsel for appellees contends that no *supersedeas* should be granted unless the judge or court acting in the matter is satisfied that the court below has erred; that a very clear case of wrong or injustice

should appear from the record to justify the suspension of an injunction; and that to hold otherwise would be to overthrow the presumption that the judgment appealed from is correct.

The rule laid down in *Williams v. Hilton*, a case involving the injunction of a sale of land under a decree of foreclosure, is correct for all cases of its nature, or where the damage to result from the *supersedeas* is of a character that can be compensated in money; and were the case before us one of this character we should not hesitate, in view of the above questions presented by it, to grant a *supersedeas* upon proper security being given for the indemnity of the appellees against any loss or damage to result from the *supersedeas*, for it cannot be said that the points of error suggested are frivolous, or, in other words, are such as not to require argument to show their untenableness. It is not contemplated that the judge or court, when acting on an application for a *supersedeas*, should go fully into the merits of the case. This would be giving to such applications the place of a final hearing.

The case before us is one whose character distinguishes it from the class of cases to which the rule laid down in *Williams v. Hilton* is applicable. The complainant's suit is from its nature virtually in behalf of the public or the people of the district in question, and to prevent a wrong and injury to the public of a character that, if the bill is advisedly brought, cannot be compensated, in money or otherwise. It cannot be said that there can be compensation for the damage which may result to a community from the establishment and continuance of a retail liquor business pending the *supersedeas* of an injunction against it. On the other hand, however, if the injunction be found on final decision here to have been erroneously granted, the damage which may inure to the appellant from the injunction is clearly one of a pecuniary character, and a bond with surety, which has been given here, is the proper and usual indemnity in such cases. The damage which the appellees and the rest of the public may sustain being one of the character indicated above, our opinion is that a *supersedeas* should not be granted unless the error of the decree is palpable. If it was, we would not hesitate to grant the *supersedeas*; but, the character of the case being such as it is, and the questions presented requiring investigation for their decision, the *supersedeas* must be denied, and it will be so ordered.

ORDER *et al.* v. STATE.

(*Supreme Court of Florida. July 28, 1890.*)

GAMBLING—EVIDENCE.

The defendants were playing a game of cards called "poker," for "corn," upon a bench in a room adjoining a school-house. One of the parties had his hat under the bench with some "corn" and two dollars in silver in it. No betting was seen or heard by any witness, and a witness for the state stated that he thought the game was being played for "fun," and the defendants stated upon oath that the game was being played for amusement, and that nothing whatever was bet

on it. *Held*, that the evidence was not sufficient to show that the parties were gambling.

(*Syllabus by the Court.*)

Error to circuit court, Suwannee county; J. F. WHITE, Judge.

B. B. Blackwell, for plaintiff in error. William B. Lamar, Atty. Gen., for defendant in error.

MITCHELL, J. The plaintiffs in error were convicted for gambling on the 12th day of February, 1890, and they were each sentenced to imprisonment in the county jail for the term of three months, and each to pay one-third of the costs of the case, and the case is brought here upon writ of error to the circuit court of Suwannee county.

There are several questions raised by the errors assigned, but it is only necessary to consider one of the questions so raised, and that is as to whether or not the verdict of guilty is sustained by the evidence.

William Wells, a witness for the state, testified that on the 15th day of September, 1889, he went into the back room of Thurman's school-house, in O'Brien, Suwannee county, Fla., and that he there saw the defendants playing cards, and that he saw "corn" on the bench on which defendants were playing; that they were passing the corn from one to the other, and that he saw under the bench where Sapp was sitting, a hat containing some corn and two dollars in silver money; that there were two doors to the room, and that the side door was closed and the partition door was open, and that he remained in the room where they were playing about five minutes. Upon cross-examination witness stated that he did not see defendants betting with each other, nor gambling; that he did not see or hear any betting or gambling. This was the whole of the evidence for the state.

One Bynum, for defense, testified that he saw the defendants playing cards at the time and place mentioned above; that he went in the house with defendants when they first entered it, but left, and returned in about 10 minutes, when he found defendants playing; that they seemed to be playing for amusement only, and that he did not see or hear them betting, or in any other way gambling with each other, and that he did not see any money in the house. The defendants Oder and Sapp, in their statements to the jury, admitted that they and Barrow, the other defendant, were playing cards at O'Brien, September 15, 1889, but say that the game was played for amusement only, and that they did not bet with each other, or in any other way gamble.

The defendants were indicted under the last clause of section 1, c. 3764, Act June 7, 1887, entitled "An act to suppress gambling houses and gambling," which is as follows: "Or if any person or persons shall play or engage in any game at cards, *keno*, *roulette*, *faro*, or other game of chance, at any place, by any device whatsoever, for money or other thing of value. * * * " The first clause of this section of the statute applies to parties keeping houses, booths, etc., for the purpose of gambling. The fourth section of the act provides "that if

any of the implements, devices, or apparatus commonly used in games of chance, usually played in gambling houses or by gamblers, are found in any house, room, booth, shelter, or other place, it shall be *prima facie* evidence that the said house, room, or place where the same are found is kept for the purpose of gambling;" but it does not apply to that clause of the section under which the defendants were convicted, and consequently the "corn" used by the defendants could not be taken as *prima facie* evidence that they were gambling, because the statute does not make even the implements, etc., usually used for gambling by gamblers *prima facie* evidence of gambling in any place not kept for gambling purposes. In this case the evidence does not show that the house in which the game of cards was played was kept for the purpose of gambling. But suppose it did, and suppose that "corn" is an implement, device, or anything else usually used in gambling, that does not alter the case, because the court cannot judicially take notice that "corn" is an implement or device used by gamblers. To make such implements, etc., *prima facie* evidence, it is incumbent upon the state to prove that they are instruments usually used by gamblers in gambling.

And now, barring the suspicious circumstance of the hat under the bench with the corn and the money in it, where is the evidence in the case to convict any one of the defendants? It was the duty of the state to prove the guilt of the defendants beyond a reasonable doubt in order to warrant a conviction.

The fact that the defendants were using corn in the game, and that there was a hat under the bench with corn and two dollars in it, does not show a case of gambling beyond a reasonable doubt, even if the defendants had introduced no evidence. The only witness for the state testified that he neither saw nor heard any betting or gambling by the defendants.

Under the conclusion we have come to, we do not intend to impute to the jury any improper motive in arriving at their verdict. There is nothing in the case showing such improper motive. All that we say is that the evidence in the case is not sufficient to sustain the verdict, and for this reason the judgment is reversed, and the cause is remanded, with directions for further proceedings not inconsistent with this opinion.

WHITE V. STATE.

(*Supreme Court of Florida. June 21, 1890.*)

JURY LIST—INSTRUCTIONS—MISCONDUCT OF JUDGE
—BILL OF EXCEPTIONS.

1. The statute (McClell. Dig. 631) requires the county commissioners to select from the registered voters of the county a list of 800 persons properly qualified to serve as jurors, which list, certified and signed by the chairman of the board, shall be forthwith delivered to the clerk, and by him recorded in the minutes of the county commissioners, but does not require such list to be recorded in the minutes of the circuit court.

2. The defendant requested the judge to give a certain charge, which was given, but the judge failed to sign and seal the charge, and to declare

the charge given. *Held* not to be error, as the defendant had the benefit of the charge, and as there was no exception at the time to the failure of the judge to sign and seal the charge, or to pronounce the charge given.

3. When it is alleged in a motion for new trial that the judge used improper language to or in the presence of the jury, the language imputed to the judge will not be considered by the appellate court, if not incorporated in the bill of exceptions.

(*Syllabus by the Court.*)

Error to circuit court, Leon county; D. S. WALKER, Judge.

Geo. W. Walker and John S. Beard, for plaintiff in error. William B. Lamar, Atty. Gen., for defendant in error.

MITCHELL, J. The plaintiff in error was convicted at an adjourned term of the circuit court, January, 1890, for murdering his wife, Martha Ann White, by striking her on the head with a piece of iron gas-pipe. The defendant moved for a new trial, which motion was overruled, and he was sentenced to death, and the case comes here upon writ of error to the circuit court of Leon county from the order of the trial judge overruling said motion.

There are only two errors assigned, the first being that the court erred in sustaining the demurrer of the state to defendant's plea in abatement; second, the court erred in overruling each and every ground alleged as error by defendant's attorneys in motion for new trial.

The defendant in his plea sets up that the indictment found against him "ought not to be further prosecuted, because he says that the list of three hundred persons selected by the board of county commissioners to serve as jurors for said year (naming the year) in said county, certified to by the chairman of said board, was not recorded in the minutes of the circuit court for said county, as required by law."

The plea was demurred to, and the demurrer sustained, and it is contended that this was error. But the contention is not tenable. The statute (Act March 11, 1879, McClel. Dig. 621) provides that "the board of county commissioners, at a meeting to be held the first week in January of each year, or as soon thereafter as practicable, shall select from the list of registered voters in their respective counties and make out a list of 300 persons properly qualified to serve as jurors, who shall be such persons only as they know or have good reason to believe are of approved character, sound judgment, and intelligence; which list, certified and signed by the chairman of the board, shall be forthwith delivered to the clerk, and by him recorded in the minutes."

The statute requires the list to be recorded in the minutes of the county commissioners, but does not require it to be recorded in the minutes of the circuit court, as contended. The presumption is that the list was properly recorded by the clerk in the minutes of the county commissioners, for, if it was not, that question would probably have been raised.

The grounds of the motion for new trial are: (1) "That the written instructions requested by the defense to be given to the

jury were given to the jury without being signed or sealed by the judge, as required by law, and the same was also defective for the reason that the judge did not declare in writing his ruling thereon, as presented, and pronounced the same to the jury as given or refused."

The defendant, as shown by his motion, had the benefit of the charge requested by him, and, as there was no exception at the time to the failure of the judge to sign and seal the charge, or to pronounce the charge given or refused, the refusal to grant a new trial on said first ground was not erroneous. *Gibson v. State*, 26 Fla. —, ante, 376; *Express Co. v. Van Meter*, 17 Fla. 788; *Potsdamer v. State*, Id. 895; *Baker v. Chatfield*, 23 Fla. 540, 2 South. Rep. 822.

(2) "That upon attorney for defense asking Starlin Hill, witness for the state, if he knew anything of the character of the deceased, the ruling of the judge was in the following language: 'I will not allow a man who has killed his wife to bring the character of his wife in question;' which remark was calculated to prejudice the minds of the jury, to the injury of the accused." Now, such language, if used by the judge, would be erroneous, as it would be, as contended by counsel for the accused, calculated to prejudice the jury against the accused. Such language, if used by the judge, assumed that it was proved that the accused had killed his wife. But the record before us fails to show that the trial judge used the language imputed to him. It is true that the accused incorporated this language in his motion for new trial, but this was not sufficient. It proved nothing. The overruling of the motion negated the use of such language. But if the judge did use such language it was the duty of the accused, if he desired to avail himself of the same, to incorporate the language in a bill of exceptions, so that it might be reviewed by the appellate court. *McNealy v. State*, 17 Fla. 198. There is other language imputed to the trial judge, but what we have said above applies to such other language also.

We have given the whole case careful consideration, so far as we could, with very imperfect record before us, and after doing so find no cause for reversal, and therefore the judgment of the court below is affirmed.

TUBERSON V. STATE.

(*Supreme Court of Florida. July 21, 1890.*)

AUTREFOIS ACQUIT—TESTIMONY OF ACCOMPLICE—JURY—INFORMATION.

1. The defendant pleaded *autrefois acquit*, which was demurred to *ore tenus*, and the demurrer sustained. *Held*, that there was no error in sustaining the demurrer, as it was not made to appear that the offense for which the defendant had been tried and acquitted was one and the same offense as that for which he was convicted.

2. The testimony of an accomplice uncorroborated is sufficient to convict upon.

3. When a jury after thorough deliberation upon any case shall return into court without having agreed upon a verdict, the court may explain to them again the law applicable to the case, and may send them out again for further deliberation; but, if they shall return the second time without

having agreed on a verdict, they should not be sent out again without their consent unless they shall ask from the court some further explanation of the law, but the mere entry upon the motion docket that the court sent the jury out the third time without their consent is no evidence of the fact that the jury were so sent out.

4. When the information sets out the offense with sufficient certainty to notify the defendant fully of the nature of the same, the information will not be quashed as being vague and uncertain, nor will the affidavit to the information be held insufficient when it complies with the oath prescribed by the statute.

(*Syllabus by the Court.*)

Error to criminal court of record, Duval county; LOTON M. JONES, Judge.

Pope & Michelson, for plaintiff in error. *William B. Lamar*, Atty. Gen., for the State.

MITCHELL, J. The plaintiff in error was tried for gambling in the county criminal court of record of Duval county, on the 2d day of July, 1889, and was convicted and sentenced to the penitentiary for three months; and the case comes before this court upon writ of error to said court from the order of the court, overruling motion for new trial and arrest of judgment.

The errors assigned are—*First*, the court erred in sustaining demurrer *ore tenus* to defendant's plea of *autrefois acquit*.

This plea, in substance, is that the defendant, at the same term of the court at which he was tried and convicted upon a charge of gambling, was also tried and acquitted upon a charge of keeping a gambling house, and the contention is that the gambling by the defendant and keeping a gambling house were one and the same offense. This position is not tenable. The two offenses, keeping a gambling house and gambling, are distinct offenses. A man guilty of keeping a gambling house may not be guilty of gambling, and a man may be guilty of gambling at any place without having any connection with a gambling house; and, in the case at bar, it may be that the defendant never kept a gambling house, and yet was guilty of gambling. The evidence in the case is excluded from our consideration by the defendant's failure to incorporate it in a bill of exceptions, and, in the absence of the evidence, the presumption is that the evidence sustains the finding of the jury, for, if the verdict was not supported by the evidence, there would probably be a bill of exceptions before this court to show that fact. We find nothing in the record to sustain the contention that the offense for which the defendant was tried and acquitted and the offense for which he was convicted were one and the same transaction, and for this reason can see no error in the court below sustaining the demurrer to the defendant's said plea.

The *second* error assigned is: The court erred in refusing to give the fourth charge as requested by defendant. This was the charge refused:

"The testimony of an accomplice uncorroborated is not sufficient to convict." There was no error in refusing this charge. *Bacon v. State*, 22 Fla. 51. But even if the

uncorroborated evidence of an accomplice were not sufficient to convict upon, there is absolutely nothing in the record which shows that any accomplice testified in the case.

Third assignment: The court erred in refusing to discharge the defendant as prayed on account of sending out the jury three times without their consent, when no further explanation of the law was asked for by them. Under the statute (McClell. Dig. p. 448, § 23) it is provided that: "When a jury, after due and thorough deliberation upon any cause, shall return into court without having agreed on a verdict, the court may explain to them anew the law applicable to the case, and may send them out again for further deliberation; but, if they shall return a second time without having agreed on a verdict, they shall not be sent out again without their own consent unless they shall ask from the court some further explanation of the law." In the case at bar, where is there any evidence that the jury, after their thorough deliberation, returned into court a first, second, third, or any other number of times, and were sent out again, without their consent or with it? There is no such evidence in the record, and there was no error in the court refusing to discharge the defendant as requested by him.

It is true that the defendant entered a motion asking to be discharged upon the ground before stated, but this motion was overruled, and the presumption is, in the absence of all evidence to show what the proceedings in the court below were as to said alleged error, that said proceedings were regular and legal. In *Borroughs v. State*, 17 Fla. 648, it was held that "all objections, rulings by the court, and exceptions should appear in the body of the bill of exceptions in their proper and appropriate place, and will not be considered if upon separate pieces of paper filed subsequent to the verdict, or in cases of motions for new trial, or in arrest of judgment after final judgment." This decision is decisive as to the question under consideration in this case. See, also, *McNealy v. State*, Id. 198.

Fourth assignment: The court erred in overruling motion for new trial. The grounds of this motion are: (1) The verdict is contrary to the evidence and weight of the evidence. (2) The verdict is contrary to law. (3) The verdict is contrary to the charge of the court on the affidavit on file. We see no cause for reversal on any of these grounds.

The grounds of the motion in arrest of judgment are: (1) Because the information is vague, uncertain, and defective. (2) Because the affidavit to the information is defective and illegal. (3) Because the law upon which the information is based is unconstitutional and void.

We see no cause for reversal upon any of the grounds of the motion to arrest the judgment. The information was sufficiently definite to put the defendant upon full notice of the offense with which he was charged. The information was not so vague, indistinct, and indefinite as to mislead the defendant and to embarrass

him in the preparation of his defense, or to expose him after conviction or acquittal to danger of another prosecution for the same offense; and consequently there was no error in the court refusing to arrest the judgment upon the alleged insufficiency of the information. *Green v. State*, Id. 689. The affidavit to the information conforms to the affidavit prescribed by the statute, and is therefore sufficient.

The last ground of this motion is not insisted upon, and it may be treated as abandoned.

From all that we can learn from the record the defendant had a fair and impartial trial, and the judgment of the court below is affirmed.

RANSOM V. STATE.

(*Supreme Court of Florida*. July 28, 1890.)

GAMBLING ROOM—EVIDENCE—INSTRUCTIONS.

1. The defendant and four other persons were playing a game of "poker" in a room with cards and chips, the chips being of different colors, and varied in value, some of the chips being worth 10 cents. The defendant took a percentage off the game, and resided in the room. *Held*, that the evidence was sufficient to sustain the verdict of guilty of keeping a gambling room.

2. The court charged the jury that, if they believed from the evidence that the offense was committed in two years before the filing of the information they should convict. Two years had not elapsed from the date on which the act under which the defendant was convicted took effect and the filing of the information, but the offense was committed between the date on which the act took effect and the filing of the information. *Held*, that the charge was erroneous, but without prejudice to the defendant.

3. The affidavit of the solicitor to the information conformed to the affidavit prescribed by the statute, and was sufficient.

(*Syllabus by the Court*.)

Error to criminal court of record, Duval county; *LOTON M. JONES*, Judge.

John E. Hartridge, for plaintiff in error.
William B. Lamar, Atty. Gen., for the State.

MITCHELL, J. The plaintiff in error was tried and convicted in the county criminal court of record, of Duval county, upon information, for keeping a gambling house. Motions were entered for new trial and to arrest the judgment, which motions were overruled, and the prisoner sentenced to imprisonment in the county jail for three months, and the cause is brought here upon writ of error, and the following errors are assigned: (1) That the conviction in this case was contrary to the evidence. (2) The verdict was contrary to the charge of the court as given in the third, fourth, and seventh charges. (3) The court erred in charging the jury that they could convict if they found that the defendant had committed the offense at any time within two years from the date of the filing of the information. (4) The information was not sworn to, as required by the constitution of the state of Florida.

As to the first assignment: The evidence, in substance, is as follows: That on the 24th day of June, 1889, the defendant and others were in a room in the third story of a building known as the "Abell

Block," situated on Bay street, in the city of Jacksonville, playing a game of draw poker; that Smith, a witness for the state, asked permission "to come in the game," but did not have money enough to go in with, but that he gave his money to another person, who was playing; that the defendant was sitting at the table, and took out a percentage of the game, which witness supposed was for the house; the game was being played for chips; that the "game of poker is a very uncertain game." There is usually one person who takes the per cent. for the house. Either the keeper does this, or some one else does so for him. On cross-examination this witness, Smith, testified that when he gave his money to be played in the game he was to participate in whatever was won by the party to whom he gave it, and to share the loss by him, and that he gave the man 90 cents.

Fred Dennis testified for the state that he had been in a certain room in the third story of the Abell block, and that he had seen a game of poker played there for chips; that he could not swear positively that he saw the chips bought. He saw the defendant in the room once or twice. Saw him playing in the game. There were five engaged in the game. Saw defendant playing once. He was doing nothing more than other players. Did not see any one take a per cent. off the game. This was the time Smith was present. They played with cards, the ordinary playing cards used in games, and with chips. On cross-examination this witness testified that the night he saw the playing going on, and played there, Smith, who has testified in this case, was present. It is customary in games of poker to take out something for the expenses of the game, such as drinks and cigars, and room; sometimes for "jack-pots," and sometimes for trips.

B. L. Gladden, a witness for the state, testified that he had been in a room on the third floor of the Abell block. At that time a game of draw poker was being played. Saw defendant present. He was participating in the game, and playing with the others. Did not see any per cent. taken off. The game was played with the ordinary playing cards, and with chips. The chips were various in colors, and varied in value. Could not now give the exact value of each, though he knew the value of one set of chips was 10 cents. A table that looked like a dining table, a carpet, and an ice-box and chairs, were in the room. The table was an ordinary one, and may have had a cloth on it, but did not have any hole in the center for putting chips in. At the time he saw the game played, Smith was present. It was in June of this year, (1889.)

Napoleon Broward, a witness for the state, testified as follows: "I am the sheriff of Duval county. I know the defendant. After the defendant was arrested and brought to the justice's court he said to me, while we were awaiting the commencement of the examination, 'I do not keep a gambling house, or gambling room. I live in the room.'"

This is the substance of the evidence in the case, and not a word of it is contra-

dicted by the accused, and, in our opinion, it is sufficient to sustain the finding of the jury, provided the defendant was at the time the keeper of the room in which said game of cards was being played. The defendant was present, and he was the only person shown to have taken out a percentage of the amount for which the game was being played; and, when this fact is coupled with the fact, testified to by Broward, that the defendant said he lived in the room, his (the defendant's) connection with the room is sufficient, we think, to show that he kept it for the purposes for which it was used,—gambling,—and hence that it was a gambling room.

Second assignment. We have examined the charge of the court, and are of opinion that the verdict conforms to the charge.

Third assignment. We think that the court erred in charging that the jury should convict if they found that the defendant had committed the offense at any time within two years from the date of the filing of the information, but it was error without prejudice to the accused.

The defendant was convicted under the act of June 7, 1887, entitled "An act to suppress gambling houses and gambling," and the evidence in this case shows that the offense of which the defendant was convicted occurred on the 24th day of June, 1889, the time between the date on which the act took effect and the day on which the defendant was convicted being less than two years; but the evidence also shows that the offense was committed after the act took effect, and before the filing of the information. This being the case, the defendant was legally convicted, notwithstanding the erroneous charge of the court, and he had no legal cause of complaint.

Fourth assignment. The affidavit to the information conforms to that prescribed by the statute, and is sufficient. *Tuberson v. State*, ante, 858, (decided at the present term.)

The judgment is affirmed.

ROBERTS v. STATE.

(*Supreme Court of Florida.* July 28, 1890.)

INDICTMENT—WORDS OF STATUTE—INTOXICATING LIQUORS—LICENSE.

1. When the words used in an indictment are equivalent to the words of the statute, and the indictment is sufficient to put the defendant upon full notice of the offense with which he is charged, the judgment will not be arrested upon the ground that the indictment was so vague and indefinite that the defendant was embarrassed and misled in his defense.

2. A person who wishes to sell spirituous, vinous, or malt liquors in a county where no election has been held, to determine whether or not such liquors shall be sold, must present his petition, signed by a majority of the registered voters of the election district in which he desires to sell, to the board of county commissioners, obtain a permit to sell, and present the permit, the amount of money required by law for the license, and the license fee to the collector of revenue for the county; and if the collector of revenue then refuse to grant the license, the applicant has his remedy against the officer to compel him to grant the license. But a sale without the license is a violation of the law, and one who sells without the license cannot shield himself upon the ground that

he had presented the money for the license, or that he did not intend to violate the law.

(*Syllabus by the Court.*)

Error to circuit court, Columbia county; JOHN F. WHITE, Judge.

B. B. Blackwell, for plaintiff in error. *William B. Lamar*, Atty. Gen., for defendant in error.

MITCHELL, J. The plaintiff in error was tried and convicted upon a charge of engaging in and managing the business of a dealer in spirituous, vinous, and malt liquors without a license on the 8th day of March, 1890. Defendant moved in arrest of judgment, and for new trial, which motions were overruled, and defendant sentenced to pay a fine of \$600, and costs of the case, and the case now comes before this court upon writ of error.

There are but two assignments of error in the case: (1) The court erred in overruling motion in arrest of judgment. (2) The court erred in refusing to grant a new trial.

The grounds of the motion to arrest the judgment are: (1) Because said indictment does not charge a crime under the laws of the state of Florida; (2) because said indictment is so vague, indefinite, and uncertain that the defendant was embarrassed and misled in his defense; (3) because the indictment fails to allege the facts and circumstances of the offense charged, and only states a conclusion of law.

As to the first ground: The defendant was convicted under chapter 3681, Laws Fla., (Act of June 13, 1887,) the ninth section of which act provides that "dealers in spirituous, vinous, and malt liquors shall pay a license tax of four hundred dollars (\$400) in each county for each place of business, * * * but neither spirituous, vinous, nor malt liquors shall be permitted to be sold unless said license tax is first paid, and a license therefor first taken out. * * * And the tenth section of the act provides that "any person or persons that shall carry on or conduct any business or profession for which a license is required, without first obtaining such license, shall, except in such cases as are otherwise provided for in this act, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than double the amount required for such license." The charge in the case at bar is that the defendant "did, on," etc., "then and there engage in and manage the business of a dealer in spirituous, vinous, and malt liquors without first paying a license tax to the state of Florida, and without first having taken out a license therefor, and for which business a license is required by the law. * * * The language used in the indictment is not identical with the words of the statute, but the words used in the indictment are equivalent to those used in the statute. "To engage in," means "to embark; to take a part; to employ one's self; to devote attention and effort; to enlist." *Webst. Dict.* "To manage," is defined by Webster to be "to have under control and direction; to conduct; to guide; to administer; to treat; to handle." These definitions of the words used

in the indictment substantially mean the same thing as the words "carry on" and "conduct" used in the statute; and for this reason we think the indictment sufficiently sets forth the offense with which the defendant was charged, without charging a sale. *Jordan v. State*, 22 Fla. 528; *Dansey v. State*, 23 Fla. 316, 2 South. Rep. 692. The defendant was put on full notice of the offense. Evidence was introduced to sustain the charge without exception, and we can see no ground for arresting the judgment upon the alleged insufficiency of the indictment. The better pleading, however, is to charge statutory offenses in the precise language of the statute.

What we have said in regard to the first ground of the motion in arrest of judgment applies to the remaining grounds of the motion; all the grounds of the motion raising objections as to the sufficiency of the indictment.

The first ground of the motion for new trial is that the verdict was contrary to the evidence. This objection cannot be sustained, because the evidence shows repeated sales of liquors by the defendant, and in fact fully sustains the verdict.

The second ground of the motion is that the court erred in the charge to the jury, viz: "In the county of Columbia, to obtain license to sell spirituous liquors in the tenth election district in the county, it was the duty of the defendant to have presented his petition, signed by a majority of the registered voters of the tenth election district of Columbia county, to the county commissioners, and to have obtained a permit to do so, and then, having obtained said permit, to have presented the same to the officer authorized by law to issue the license, and to have tendered him the amount of money required by law for the license." Now it is argued that, in case the local option law of 1883 is not in force in Columbia county, in selling liquors without the license required by law no crime is committed, because the intent to do the forbidden act must go beyond the mere act itself. It must be criminal; that is, willful. We do not agree with counsel in this proposition. The evidence shows that sales of liquor were made by the defendant without a license authorizing him to make such sales, and in doing so he violated the law, and hence was amenable to its penalties. Ignorance of law is no excuse for the commission of an offense against the law. Counsel for the defendant argues this case as if there had been an election held in the county of Columbia to determine whether or not liquors should be sold in that county; but if such election was held, there is nothing in the record to show that fact. As to whether or not such election was held in Columbia county can have no weight in the decision of this case; for that the defendant carried on the business of a dealer in spirituous, vinous, and malt liquors without authority of law is not disputed. But it is argued that the defendant tendered the money and demanded a permit to sell liquors, etc., and that the officer whose duty it was to grant the permit refused to grant it, and for this reason

the defendant, in selling without a license, was not legally liable for such selling. But this is not correct, because it makes no difference whether the defendant offered to pay the money or not, as his authority for selling could only be shown by the proper license. If the defendant was entitled to the permit and license, he could have compelled the proper officer to grant them. This he did not do, but proceeded to sell without authority, and hence laid himself liable to the penalties of the law.

The judgment is affirmed.

JACKSON V. STATE.

(*Supreme Court of Florida. July 23, 1890.*)

INDICTMENT—WORDS OF STATUTE.

An indictment for a statutory offense may charge the offense in the words of the statute; but when the words used in the indictment are equivalent to the words used in the statute the judgment will not be arrested upon the ground, alleged in the motion to arrest the judgment, that the indictment does not charge an offense under the laws of the state.

(*Syllabus by the Court.*)

Error to circuit court, Madison county; *J. F. WHITE*, Judge.

B. B. Blackwell, for plaintiff in error.
William B. Lamar, Atty. Gen., for defendant in error.

MITCHELL, J. The plaintiff in error and others were jointly indicted for gambling, and upon being arraigned Jackson pleaded guilty, and was sentenced to confinement in the county jail for the term of three months.

Motion to arrest the judgment was made—*First*, because the indictment does not charge an offense under the laws of the state of Florida; *second*, because the indictment does not charge the facts and circumstances of the offense named in the said indictment, and defined by the statute upon which it is based. This motion was overruled, and the case comes before this court upon writ of error to the circuit court of Madison county. The refusal of the circuit judge to arrest the judgment is assigned as error.

The indictment, omitting the formal parts, charges that the defendant and others (naming them) "on the 12th day of April, A. D. 1890, at and in the county, circuit, and state aforesaid, with force and arms, in the woods near the town of Ellaville, said county and state, unlawfully then and there played and engaged in a game of cards for money, which said game of cards was then and there a game of chance. * * *

This indictment is under section 1. c. 3764, Act June 7, 1887, which is as follows: "If any person, by himself or herself, servant, clerk, agent, or in any other manner, shall have, keep, exercise, or maintain a gaming table or room, or gaming implements or apparatus, or house, booth, tent, shelter, or other place for the purpose of gaming or gambling, or in any place of which he or she may, directly or indirectly, have charge, control, or management, either exclusively or with others, shall procure, suffer, or permit any person or persons to play for money or other valuable thing or things at any

game whatsoever, whether heretofore prohibited or not, or if any person or persons shall play or engage in any game of cards, keno, roulette, faro, or other game of chance, at any place, by any device whatever, for money or other thing of value, he, she, or they so offending shall, on conviction, be imprisoned in the county jail not less than three months nor more than one year, or be imprisoned in the state prison not more than three years, at the discretion of the court."

The indictment is not in the precise language of the statute, and we will remark that in all statutory offenses it is the safer course to follow the language of the statute closely, but the language used in the charging part of the indictment is equivalent to and covers substantially the language of the statute fully, and is for this reason a substantial compliance with the rule which requires statutory offenses to be charged in the very language of the statute. 1 Bish. Crim. Proc. § 612; Humphreys v. State, 17 Fla. 381; Tilly v. State, 21 Fla. 242.

Under the indictment the defendant was fully advised as to the offense with which he was charged, and pleaded guilty thereto, and it is now too late for him to take advantage of any mere formal defect in the indictment.

The judgment is affirmed.

CLIFTON V. STATE.

(Supreme Court of Florida. July 28, 1890.)

BURGLARY—INDICTMENT—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

1. The indictment charged the defendant with breaking and entering a building (store) in the night-time, with intent to commit a felony, to-wit, larceny, and the court charged the jury, if they found that the defendant broke and entered the building as charged in the indictment, they should convict. *Held*, that the charge referred to the indictment in its entirety, the time of the breaking and entering being included, and was therefore not erroneous in not charging more specifically that the breaking and entering must be in the night-time.

2. There were \$600 worth of goods in the store at the time, and upon going to the store sometime during the night the owner found that some one was inside, whereupon he hallooed, and the defendant and another person jumped out of a window which had been broken open, and upon entering the store the owner found various articles of merchandise packed in sacks. *Held*, that the evidence was sufficient to warrant the jury in coming to the conclusion that the defendant broke and entered the building with the intent to steal goods of the value of more than \$20.

3. The charge of the court and charges given upon request of the state and the accused should be considered together, and if, as a whole, the charge is correct, the verdict will not be set aside upon the ground of alleged error in the charge.

(Syllabus by the Court.)

Error to circuit court, Volusia county;
JOHN D. BROOME, Judge.

Foster & Gunby, for plaintiff in error.
William B. Lamar, Atty. Gen., for defendant in error.

MITCHELL, J. Daniel Clifton, Jr., plaintiff in error, was tried and convicted upon an indictment charging him with breaking and entering a building in the night-time, with intent to commit a felony, on the 1st

day of May, 1889. The defendant moved for new trial. The motion was overruled, and the case is brought here upon writ of error.

No assignment of errors has been filed, but counsel for plaintiff in error contend that the trial judge in his charge did not give the law of the case, and that he erred in giving certain charges, and in refusing to give others requested by plaintiff in error, and in overruling the motion for new trial. We have carefully considered the charges given and those refused, and, considering all the charges together, in our judgment they correctly state the law of the case. The court charged the jury that "if they believed from the evidence that Daniel Clifton, Jr., broke and entered the building, as charged in the indictment, with intent to commit a felony, to-wit, larceny of the property of W. R. Revels of the value of more than twenty dollars, it is not necessary to prove that the defendant took any property, the intent being the gist of the larceny." This part of the charge, it is contended, is defective in not charging that, to make out the offense, the breaking and entering must occur in the night-time. We do not think that this proposition is tenable, because the indictment charged the breaking and entering in the night-time, and the court charged, if the jury found that the defendant broke and entered the building as charged in the indictment, they should convict. The charge referred to the indictment in its entirety, including, of course, the time of the breaking and entering, and consequently the charge was not in this respect defective, as contended. Nor did the court err in charging that it was not necessary to prove the taking and carrying away the property of Revels. It was for the jury, under the evidence, to draw their conclusions as to whether or not the defendant intended to steal the goods of Revels. The evidence upon this point, we think, was sufficient to warrant the conviction.

On the night the store was broken into the owner went to the store some time after night, and saw some one light a match inside, and discovered that a window, which he had closed about night, had been broken open, whereupon he hallooed, and the defendant and another man jumped out of the window, and ran off; and upon entering the store two or more sacks with goods of different kinds belonging to Revels were found in them, which in our judgment clearly evidenced the intention of the parties who entered the store to steal the goods found therein, and that the jury were safe in coming to the conclusion that it was the intention to steal goods to the value of more than \$20. Under the evidence, there were \$600 worth of goods in the store at the time, and it may be that the jury believed the thieves intended to steal the whole of them. But then it is contended that the jury had some doubt in their minds as to the guilt of the defendant, as they recommended him to the mercy of the court. There may be some force in this contention, but if so we fail to comprehend it. Juries frequently render verdicts that it would be difficult

for them to give a sufficient reason for finding, but, as they are charged that if they have a reasonable doubt as to the guilt of the accused it is their duty to acquit, it is but seldom that a jury recommend to mercy upon the ground that they have a doubt as to guilt. Recommendations to mercy by juries is oftener through sympathy for the accused and his family than from all other causes, and when they recommend a man to the mercy of the court it is no evidence that they have any doubt as to his guilt.

The charges asked by the defendant were, in substance, but a repetition of those given by the court, and there was no error in refusing to give them.

The several grounds of the motion for new trial we have considered in their order as argued by defendant's counsel, and therefore we will not consider them again.

The charges of the court, including those given at the request of the state attorney and the one given upon defendant's request, being construed together, were fair to the accused. The accused being convicted, and there being nothing whatever to induce the belief that the jury were influenced by any improper motive, and there being evidence to sustain their finding, we can see no cause for reversal. The judgment is affirmed.

PALMER V. PALMER.

(*Supreme Court of Florida. May 26, 1890.*)

DIVORCE — CRUELTY — ILL TREATMENT WITHOUT VIOLENCE.

1. Divorce on the ground of extreme cruelty will be denied where there is no actual bodily violence, unless the treatment or abuse or neglect or bad conduct complained of be such as damages health, or renders cohabitation intolerable and unsafe, or unless there are threats of mistreatment of such flagrant kind as to cause reasonable and abiding apprehension of bodily violence, so as to render it impracticable to discharge marital duties.

2. Nor will divorce on the ground of habitual indulgence of a violent and ungovernable temper be granted unless that temper has been displayed towards complainant, and habitually, and with the effect of rendering life an oppressive and intolerable burden, and making it impracticable to discharge marital duties under such burden. Occasional outbursts of passion, petulance, readiness to anger, frequent and unreasonable complaints, though made in a loud-voiced, boisterous manner, if these are only calculated to render the relations between the parties unpleasant and disagreeable, or simply unhappy, do not furnish sufficient cause for divorce.

(*Syllabus by the Court.*)

Appeal from circuit court, Hillsborough county; G. A. HANSON, Judge.

H. C. Macfarlane and D. F. Hammond, for appellant. *Barron Phillips and Sparkman & Sparkman*, for appellee.

MAXWELL, J. This is a suit for divorce, the wife being the complainant. Her grounds of complaint are extreme cruelty, and the habitual indulgence of violent and ungovernable temper towards her on the part of the husband. The original bill having been deficient in specifying the acts on which these charges were predicated, an amended bill was filed, to which there was a demurrer, afterwards waived, as it was succeeded by an answer without any

disposal of the demurrer, so far as shown by the record. Issue was made, proofs taken, and on the final hearing a decree was rendered for the complainant, and from that the husband brings this appeal.

In support of its general charges the amended bill alleges that the defendant failed to provide complainant sufficient food and clothing, so that she and her children frequently suffered for the common necessities of life. That during her first and second pregnancy he would force her to perform manual labor far beyond the strength of even a woman in good health, and when she would fail to perform the labor demanded he would fly into violent passion and abuse her, using the most indecent, harsh, and profane language. That at one time, not more than 15 minutes before her confinement, he compelled her to run after his mule, which he had negligently allowed to escape, and, becoming very angry, cursed and abused her because she could not catch or round up the mule, although she did all she could, and from her exertions and the abuse she was seized with labor pains, and soon after was delivered of a child, suffering intensely at the time, and for several days thereafter, and this nearly resulted in the death of both herself and child, which was caused by this unkindness and cruel treatment, he scarcely ever speaking a kind word to her during the suffering. That while they lived together he would often, for nothing, or the most trivial causes, fly into paroxysms of uncontrollable passion towards her, and would curse and abuse her, telling her he wished she was dead, and that he and the children would be better off if she were dead. Sometimes he would become angry with his team when plowing or driving, and would come home and vent his anger upon her. That, beginning almost immediately after their marriage, and down to their separation, he was constantly quarreling at her and abusing her. Once she returned in the night from a neighbor's house, where she had been attending a musical entertainment, and found that he had locked her out, and it was with great difficulty that she effected an entrance, and he became angry with her because she had entered, and refused during the succeeding week to furnish her with food for herself and children, causing them great suffering. That about four months ago he became violently angry with her for allowing her mother to visit her, and threatened to kick her out of the house if she did not keep her mother away, and his treatment of her father's family had been such that she has been entirely deprived of their pleasant social intercourse. That she is, both by nature, and by sickness and long suffering brought on by his unkindness and ill-treatment, of a highly nervous and excitable temperament, and he, well knowing this, has often, with intention of worrying, annoying, and injuring her both bodily and mentally, said unkind and cruel things to her, which had the intended effect. At one time, because she would not make a deed to him of the place on which they lived, the title to which was in her, he became very angry, and told her that,

but for the fact that the title was in her name, he would kick her from it. She refused to make the deed then, but some time afterwards discovered that, in making a deed to one Randall at defendant's request, he had, without her knowledge, fraudulently inserted therein the numbers of the land of their home place, and that through several conveyances the same had been deeded to him. Whereupon, "unable longer to endure," etc., she separated from him.

There are other charges in the bill, with a view to having the custody of the children awarded to the complainant, but these need not be set out, as this becomes unnecessary, under our view of the merits of the case upon the evidence.

The answers of defendant to the original and amended bills give a categorical denial of every material allegation therein, adding explanation as to some of the charges, and vindication of conduct in some matters not deemed material by us; but it is unnecessary to recite details, since all through the case the complainant and defendant are in direct antagonism in their allegations and testimony, and thus apparently neutralize each other, leaving us to determine between them by rules of evidence, and by other testimony, as these may dictate.

In the attempt to sustain by evidence the charges of extreme cruelty and of the habitual indulgence of violent and ungovernable temper, the facts are so intermingled as to leave it uncertain, for the most part, to which of those grounds of divorce respectively they are intended to be applied. Many facts being common to each ground, we will apply them indiscriminately, distinguishing others as occasion may require.

The case is one in which there is no allegation of actual violence to the person of complainant, nor any testimony that in the slightest degree points to violence. It must therefore be governed, in respect to cruelty, by the rules of law which relate to divorce for injury inflicted through the mental and emotional nature. In this state it has been held that such injury, when, in effect on health and happiness, it is no less damaging than the effect of blows on the body sufficient to amount to legal cruelty, is good cause for divorce. *Donald v. Donald*, 21 Fla. 571. But the treatment or abuse or neglect or conduct, whatever it may be, short of bodily violence, that will authorize divorce must be of a character to damage health, or to render cohabitation intolerable and unsafe. The *Donald Case* goes no further than this; and its doctrine on the subject is approved in *Williams v. Williams*, 23 Fla. 324, 2 South. Rep. 768. But it may be said further that, in the absence of bodily violence, if threatening or the abuse or mistreatment is of a flagrant kind, to cause reasonable apprehension of such violence, so as to render it impracticable to discharge marital duties because of this apprehension, relief should be granted. Under the authorities cited in the *Williams Case*, this rule is held to apply in the instance of a single act of violence, and we think it no less applicable, even if there

has been no act of violence, where the conduct complained of has given equally strong and reasonable ground for abiding apprehension.

Giving the wife in the case at bar the benefit of this rule, and also of the rule which takes into consideration the effect on her health of the mistreatment charged against the husband, there having been no actual violence, we do not find in the evidence satisfactory proof to sustain the complaint for divorce on the ground of extreme cruelty. Apart from her own testimony on material points, which is directly contradicted by the testimony of the husband, there is little to support the charges of the bill. There is enough if general assertions by witnesses of extreme cruelty could be of any avail, but when they come to specify the acts which constitute the cruelty the evidence is altogether insufficient. For instance, as to neglect in supplying food and clothing for the wife and children, which is the most serious ground of complaint, much of the evidence for complainant consists of statements made by her to neighbors. Fanny Robles says: "She came to our house once, saying she was hungry, and wanted some fresh meat; that she had none at home; that she hadn't anything to eat. She only came this once for something to eat." But she says also: "I have been there [house of the parties] when he had plenty, and still I have been there at other times when he had scarcely anything at all in his house to eat. One time he had only a barrel of flour in his house. If he had anything else there, it was certainly not in his cupboard, store-room, or kitchen. * * * I have known this to occur often." Then she tells how the children would run to the cupboard for something to eat when they were brought to her house. As to clothing, this witness says: "I can't tell very well" how Mr. Palmer provided for his family. "On one occasion I spent the night with Mrs. Palmer, and she had neither a nightgown for herself or to offer her company." But further on she says: "Mrs. Palmer always appeared to be comfortably clad, and to have enough, but not as much as the other ladies." All another witness says is "that, according to their circumstances, Mrs. Palmer did not have plenty of clothing, or what they ought to have had." The mother of complainant says her daughter sometimes came to her house for something to eat, and has told her she did not have enough to eat at home; but says also, "I don't know that I can say that I ever visited her house when she was out of provisions;" adding: "I went there very seldom, and my stays were very short. Don't know whether there were provisions or not."

This testimony for complainant on the charge under consideration, which is all the record shows of any consequence, except that of complainant herself, wholly fails to prove that she or her children at any time suffered for the want of food or clothes. Indeed, one of the circumstances stated by one or more of the witnesses, and relied on to show that they did,—the running of the children to the cupboard of neighbors when the mother took them

visiting,—produces on the mind of the writer a contrary impression. The little fellows must have learned from their experience at home where to find something to eat, and that experience led them to expect the same elsewhere. The manners of such conduct were more involved than hunger. But the other testimony is scarcely of more force. And a matter to be noted as significant is that the only witnesses of complainant who had boarded in the house at different times had nothing to say about deficiency of food or clothing.

On the other hand, a number of witnesses for defendant, whose opportunities for observation as near neighbors, visitors, and some of them boarders, were good, testify that the family was well provided with provisions and clothing. Some of this testimony, to the effect that the witnesses, though near neighbors of the parties, and being with them from time to time, never heard or saw anything to justify the complaints of the wife, being of a negative character, is of little weight; but that of those who boarded in the house for months, one of them a boarder for four or five months just preceding the separation, is positive to the effect that there was no deficiency of supplies. And, as to clothing of wife and children, a list of what was in the house when complainant left her husband, taken by two neighboring ladies at his request soon after she left, shows ample supply for the family, and they say it was sufficient, and that there was also sufficient comfortable furniture in the house. We do not give the evidence of the several witnesses in detail, but its substance is as we have stated it, and its preponderance over that in behalf of complainant is very manifest in the record.

There is no evidence but her own as to the husband's forcing complainant to do manual labor far beyond her strength, and his violent passion and abuse when she would fail to perform the labor demanded; or as to compulsion to run after a mule not more than 15 minutes before her confinement, and his cursing and abuse because she could not catch or round up the mule, and the consequent injurious effects upon her; or as to her being locked out one night when she returned from a musical entertainment, and his anger on the occasion, and refusal during the succeeding week to furnish food for herself and children; and her evidence on these complaints is denied by defendant.

In regard to the complaint against the husband respecting his conduct towards the father, mother, and family of complainant, there is nothing shown that could seriously affect the life of complainant. There was some interruption of intercourse between them, because the father and mother seem to have found it disagreeable to visit the house of complainant often, and there was unpleasantness because defendant objected to what he considered too much sponging of the family on him. There is really some evidence to show an active and kindly interest of defendant in members of complainant's family, but the complaint to the contrary is

so unwarranted, so far as appears from the evidence, that we deem it unnecessary to discuss the matter further. Dislikes that so frequently occur under similar circumstances, if they lead to nothing worse than intemperate language, do not furnish sufficient occasion to break the marriage tie.

Another complaint much relied on is the alleged fraudulent conduct of the husband in procuring the title of the home lands, which he had deeded to the wife, to be transferred back to himself. This transaction could not have been consummated except by the joining of the wife therein, but she charges that the numbers of the lands of the home place were fraudulently inserted by defendant in the deed she signed, and without her knowledge. The defendant denies this, asserting that he practiced no deceit, and that she knew she was deeding the whole property. In their testimony they are in direct conflict as to what occurred between them then, touching her knowledge of the contents of the deed, and there is no testimony but hers to support her charge. So far as she implicates the brother-in-law of her husband, Charles Gay, in the alleged scheme to deprive her of her lands, he admits that he had a conversation with the husband about the effect upon his credit of having the title to the lands in the name of his wife, but denies that he ever "advised him to get the title out of his wife's hands, or anything of the kind," and says that when he received the trust-deed under which he conveyed the lands to the husband it was a surprise to him. We do not find the proof in regard to this land transaction sufficient to make it the basis for a divorce, and we are not prepared to say that, even if the alleged fraud were satisfactorily proven, it is such cruelty as, under the law, would authorize so grave a remedy as divorce.

We come now to the evidence that may be applied alike to both the grounds on which the divorce is sought,—extreme cruelty and the habitual indulgence of violent and ungovernable temper. We have seen that, where there has been no real violence, the acts or conduct which will authorize divorce on the first of these grounds must be such as affect health, or such as give reasonable apprehension of violence not yet committed. The evidence entirely fails, in our judgment, to show that complainant has suffered in health from any treatment of her husband, or that her health has been at all affected, except in such way as results from child-bearing, and this is not shown to have extended beyond the ordinary course of nature. She had three children within less than six years, and is not shown to have been in a worse state for bearing the third than for bearing the first, though in the mean time she had the burden of nursing in addition to the labor and household duties devolving on her as the wife of an ordinary workman. If she had toothache, backache during her pregnancy and at other times, nervous depressions that sometimes send a wife and mother to the lounge, these are not such unusual conditions in early married life as to drive one

to the conclusion that there must have been other than natural causes to produce them; and such conclusion will not be adopted in the absence of stronger evidence than appears in this case that the ailments were caused by maltreatment. The evidence also fails to show that there was any reasonable ground on which the wife could entertain apprehension of bodily violence. For a man of such violent temper as she and some of her witnesses impute to the husband, it is remarkable that not a single instance of actual violence on his part against her or any other human being is produced, while on the other hand it is stated, and not denied, that he was never known to strike or engage in bodily conflict with any one. Nothing in his past conduct, therefore, could justify any fear of violence from him. So, neither as to health nor as to reasonable apprehension of future violence, do we find proof sufficient to authorize divorce on the ground of cruelty.

As to the "habitual indulgence of violent and ungovernable temper," it must be temper displayed towards the complainant. *Johnson v. Johnson*, 23 Fla. 413, 2 South. Rep. 834. Further than this, there is no decision in this state, or elsewhere, so far as we can discover, which defines the meaning or scope of this language of the statute, and the difficulty of giving any satisfactory general definition beyond that inherent in the words themselves is apparent; so that the circumstances and facts of each case must be the guide by which to determine whether a party is obnoxious to the charge. And it is not enough that these should merely show the temper as one exhibited in a general way, as one characteristic of the party, nor enough that when exhibited towards a complainant it is only calculated to render the relations between the parties unpleasant and disagreeable, or even unhappy. This state of feeling may be produced by but occasional outbursts of the temper described, or by indulgence of a lesser degree of passion, by constant petulance, readiness to anger, a spirit prompting to frequent and unreasonable complaints, and other like causes inimical to domestic happiness. But these do not make a case for divorce under this statute; and, to make a case on the temper described, that temper must have been indulged against the complainant habitually, and with the effect of rendering life an oppressive and intolerable burden, and making it impracticable to discharge the duties of the marriage state under such burden.

Looking to the evidence in support of the charge in the present case, we find that of the complainant offset by that of the defendant in all material matters. While she says in general terms that his temper towards her was violent and ungovernable, the instances she gives to show this, either as to language or conduct, are for the most part insufficient to show more than crossness or sulkiness or anger. Her own expressions in regard to those instances are not stronger than "cross," "unkind," "harsh," "angry," "cruel;" and altogether this sort of dis-

play of his temper, so far as gathered from her evidence, occurred in domestic disputes, or family complaints, that took the usual course of such disputes and complaints, and in which at times he may have been offensive and too censorious, but not to the extent of displaying a violent and ungovernable temper. But the defendant, admitting that he was sometimes in bad temper with his wife, and spoke to her angrily, says that he was ordinarily kind and indulgent to her; and his evidence amounts to a denial or reasonable explanation of all the specific charges appearing in the testimony of his wife that are of any serious consequence.

Of other witnesses called for complainant, Fanny Robles seems to have been most relied on to support the charge. She seems to have been a specially intimate friend of complainant, and was often at her house. The most she says, instancing different occasions, is that defendant acted "rude and ungentlemanly;" "his manner was very insulting;" "spoke to his wife as though she was a brute;" called her a "liar," and "a good for nothing, lazy lout;" "noticed his ill treatment of his wife," etc.,—there being in her testimony nothing stronger to show violent and ungovernable temper of defendant towards his wife. F. M. Robles, another witness for complainant, being asked if he knew the character of defendant in the community in which he lives "for being a man of ungovernable temper," replied: "I think he has a very high temper, and exhibits it very often, but whether it is governable or ungovernable I cannot say;" and he says afterwards: "I have known Mr. Palmer on several occasions to exhibit his temper, acting very badly towards his team, towards his children, and towards his wife, and in speaking about his neighbors;" and then gives instances of "unkind" actions that are simply trivial. The Chamberlains, husband and wife, witnesses for complainant, give little testimony on the subject, except as to the high passion defendant was in the day his wife left him, which is not at all pertinent, and a confession of defendant to Mr. Chamberlain at that time, that when he got mad "I rave and storm around, and then it is all over; but when my wife gets mad she never says anything. If she would say something, would quarrel with me and be over with it, it would be better." S. J. Lyon, a witness for complainant, and a near neighbor, who has known the parties for eight years, says: "I never heard anything of Mr. Palmer's being a high-tempered man before this case commenced. * * * I have never regarded him as being a man of ungovernable temper." A. Thompson says: "The defendant was habitually quarrelsome, domineering, and abusive in his language. He was generally so in his neighborhood. He was cruel to animals," etc.; but he says nothing of defendant's conduct towards his wife. Mr. and Mrs. Jagger, father and mother of complainant, say, the first, that he "doesn't know much about what temper Mr. Palmer exhibited at his house, for I was not there. I have seen him exhibit his temper with his team and parties outside." The latter,

when asked as to her knowledge of defendant's unkindness to his wife, said: "When I would be there he was always finding fault with her; she could never do anything right; and in such a way that he was very unkind and cruel." White, who lived two months with the parties, says: "Defendant's treatment towards his wife * * * was unkind. * * * He frequently appeared to be mad, and cursed and abused his wife, and threatened to kick her off the place."

There is nothing in the evidence of greater force against defendant than what we have quoted. Considering the case, then, upon the evidence for complainant alone, it shows the defendant to be a man of irascible disposition, of querulous habit, and prone to use harsh and improper language; but it does not show the higher temper which the statute contemplates, and, so far as it has any tendency in that direction, it fails to show the habitual indulgence of it towards his wife which is a necessary ingredient of the complaint.

But on the part of defendant there are several witnesses, some of them near neighbors, and others inmates of the household for weeks and months, who testify to the kindly conduct of defendant towards his wife, so far as their observations extended, and to the absence of any such exhibitions of temper as are charged against him while in their presence. This is somewhat negative evidence, but it is hardly conceivable that if the defendant had the outrageous temper ascribed to him he would not sometimes have displayed it before some one or more of the 11 witnesses who testify in his favor on this subject, and who had such opportunities to observe his conduct. The immense volume of testimony has forbidden any attempt to give much of it, in even the briefest condensation, and hence we limit ourselves mainly to the conclusions we have drawn from it after the most careful study of the whole of it. Of the evidence for defendant as to temper, we copy only that of one witness, who worked and boarded with him five or six months immediately preceding the separation. He says: "All I saw of Mr. Palmer's conduct towards his wife while I was there was nice and kind. Never knew there was any difficulty between them. Mr. Palmer acted towards his children just as a nice father could, and they did so towards him. When Mr. Palmer would come in with his wagon at any time of day both of the children would run out with their hands up to meet their father, and he would take them up into the wagon very kindly, and set one of them on his knee, and the other beside him, and drive to the barn, where he would take them down, very kindly and gently. When Mr. Palmer was at home he would bring in wood and water, make fires, and start to cooking the breakfast. I have seen him wash and dress his children, and sometimes put them to bed. When I was boarding there, I had always plenty to eat, and everything else had; of different things, too. During the whole time I was there I never heard Mr. Palmer use an unkind word towards his wife or children."

We omit comment on a great deal of evidence in regard to quarrels of defendant with his neighbors, as it has no pertinency; but, even if it had, there is nothing in it that shows more than occurs in ordinary disputes between neighbors. We think much of what is said against defendant arises from his habit of loud and vehement talking, several witnesses testifying that this is his habit in ordinary conversation.

Reviewing the whole case upon the law and evidence, as we understand both, it appears to us that neither the charge of extreme cruelty nor that of the habitual indulgence of violent and ungovernable temper is sustained by the proofs. As to the former, we think there can be no doubt of the failure of proof; and as to the latter, if complainant's evidence does not fail, as we think it does, to sustain her case, certainly the record shows a preponderance of evidence largely in favor of defendant. And when it is seen that these charges are made against a man who, notwithstanding all his loud and boisterous talking, and his petulant and angry complainings, never committed an act of violence upon any one, who is a sober, industrious, hard-working laborer, who strove to place his wife on a plane with cultivated society, expending his hard-earned means in providing a home in which comfortable furniture and a piano for her were evidences of his family pride and devotion, whose children showed their eagerness to run to him when he returned home from his work, thus evincing that they found in him a kindness of nature inconsistent with the character this suit seeks to stamp upon him, who, when his character for veracity is attacked, produced abundant evidence to put the attack to shame, and who has shown a conciliatory spirit in this controversy in marked contrast to that of complainant,—when all this is seen, we cannot but think that such a man should not be condemned except upon better and stronger evidence than has been produced against him in this case.

The decree is reversed, and the bill will be dismissed.

ON PETITION FOR REHEARING.

MAXWELL, J. We have considered the four grounds on which a rehearing is asked, and find nothing in them to justify the petition. So far as the decision of the case involved a question of fact, a cursory reading of the opinion will show full consideration of the question, and will show, too, that questions of law were necessarily involved in any proper decision of the case. As to the relative weight of the testimony of appellant and appellee, we did not fail to consider that the reputation of appellant for truth and veracity was attacked, but in our judgment the attack was not sustained; and it is also a mistake to suppose that we did not consider the character of the witnesses, as much so as could be done from the record, or that the court did not give proper weight to the findings of fact by the chancellor who tried the cause below. Every phase of the case suggested by the petition for rehear-

ing was most carefully and laboriously considered.

A rehearing is denied.

WALKER, J., of the second circuit, sat in place of MITCHELL, J., who was disqualified.

WILLIAMS v. LA PENOTIERE.

(Supreme Court of Florida. Aug. 14, 1890.)

WRIT OF ERROR—DISMISSAL—DAMAGES—APPEARANCE.

1. The fact that the plaintiff in error has not paid the damages adjudged against him as for a frivolous appeal on account of his omission to file the appeal transcript in due time in the appellate court is not ground for dismissing a writ of error subsequently taken to the judgment from which the appeal was taken.

2. Objection to part of the record as having been filed in the appellate court subsequent to the issuance of the writ of error on a transcript previously filed on appeal is not a ground for dismissing the writ of error.

3. An application to the appellate court by counsel for defendant in error for an order granting leave to withdraw the transcript with a view to testing its correctness is an appearance in that court, and cures any defect there may have been in the service of the *scire facias ad audiendum errores*.

(Syllabus by the Court.)

Error to circuit court, Hillsborough county; G. A. HANSON, Judge.

Phillips & Carter, for plaintiff in error. C. W. Stevens, for defendant in error.

RANEY, C. J. That the plaintiff in error has not paid the damages allowed as for a frivolous appeal by the judgment of this court rendered at the June term, 1889, dismissing the appeal on account of appellant's omission to file the transcript of the record here within the time required by law, (25 Fla. —, 6 South. Rep. 167,) is no ground for dismissing this writ of error. The appellee then, who is now defendant in error, has a sufficient remedy for collecting the amount allowed him as damages.

Objections to any part of the record as having been filed here since the writ of error was granted on the appeal transcript then on file here, are not grounds for dismissing the writ of error.

The alleged defect in the service of the *scire facias ad audiendum errores* has, if it existed, been cured by the motion made in this court in February last by the attorney who presents the present motion, he acting then as now for the defendant in error, and asking an order that the transcript be sent to him with a view to his ascertaining the necessity of suggesting a diminution of the record, and to complete the same, to the granting of which motion the counsel of record for plaintiff in error assented. This motion constituted an appearance in this court by the defendant in error to the proceedings in error.

The motion should be denied, and the costs of it taxed against defendant in error, and it will be so ordered.

KURTZ v. STATE.

(Supreme Court of Florida. July 28, 1890.)

CRIMINAL LAW—INSTRUCTIONS—PRESUMPTIONS.

1. A party charged with crime is entitled to an acquittal unless proved guilty beyond a reason-

able doubt. But when a judge fails to charge that the evidence must establish guilt beyond a reasonable doubt, and the evidence is not incorporated in the bill of exceptions, and the record discloses neither a request for the instruction, nor that the omission to charge was called to the judge's attention, the judgment will not be reversed on a writ of error.

3. The defendant was convicted for having violated a statute which had not at the time of the filing of the information been in force two years, and the jury were charged that if they believed from the evidence that the offense was committed within two years before the filing of the information they should convict. This was error; but, as the evidence established that the offense was committed after the act under which the defendant was convicted took effect, and before the filing of the information, the error was without prejudice. The evidence not being incorporated in the bill of exceptions, the presumption is that it showed that the offense was committed after the date on which the act took effect, and before the filing of the information.

(Syllabus by the Court.)

Error to criminal court of record, Duval county; LOTON M. JONES, Judge.

Call & Adams, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

MITCHELL, J. The plaintiff in error was convicted in the criminal court of record of Duval county on the 25th day of June, 1889, for keeping a room for the purpose of gambling, and was sentenced to be confined in the state-prison for the period of three months, and the cause comes here upon writ of error to said criminal court of record.

Several errors are assigned, the first of which is that the court erred in charging the jury "that if the jury are satisfied from the evidence that the defendant, at any time within two years prior to the date of filing the information herein, had committed the offense named in the information, then they should convict."

To this charge there are two objections insisted upon by counsel for plaintiff in error: (1) That the court withdrew from the consideration of the jury the consideration of a reasonable doubt as to the guilt of the prisoner; and (2) that there was error in the charge, in that two years had not elapsed from the date upon which the statute under which the prisoner was tried and convicted took effect prior to the filing of the information.

Now, at the outset we are confronted with the fact that the plaintiff in error, for reasons best known to himself, has not had incorporated in the bill of exceptions the evidence adduced in the court below, which leaves the case to be decided solely upon the charge found in the record, without any opportunity of comparing it with and applying the evidence thereto upon which the prisoner was convicted. That a party accused of crime is entitled to acquittal unless he is proven guilty beyond a reasonable doubt is too well established to admit of argument.

Was the accused in the case at bar proved guilty beyond a reasonable doubt? The presumption is that he was, and, under the circumstances of the case, this presumption is strengthened by the fact that the evidence upon which the prisoner was convicted has not been presented by him

for inspection by this court. If there was anything in the evidence that tended to raise a single doubt as to the guilt of the accused, the able counsel by whom he is represented would most probably have had the evidence here to show that fact.

The absence of the evidence is significant of its character. Under this state of the case, and as the bill of exceptions shows that the charge of the court incorporated therein was not the only charge given, it may be that the court correctly charged the law upon the subject of a reasonable doubt. But suppose there was no charge upon this subject, it cannot be assigned as error, because the record does not disclose that the accused requested any charge in regard thereto, or that the attention of the court was called to the omission to so charge. *Cato v. State*, 9 Fla. 163; *Reed v. State*, 16 Fla. 564; *Carter v. Bennett*, 4 Fla. 283.

The case of *Blige v. State*, 20 Fla. 742, is cited as supporting the contention that the court erred in not charging the jury upon the subject of a reasonable doubt. But in that case the point requested to be charged upon was the gist of the offense, and the court refused to give the charge, (which charge was correct,) and the refusal to give the charge was held to be error; and if the court had refused to charge upon the question of a reasonable doubt in the case at bar the judgment would have to be reversed; but, as before stated, such refusal is not shown by the record.

What we have said as to the first objection to the charge applies to the second. The evidence must have shown that the offense was committed within the time in which the defendant could be lawfully convicted. It is not insisted that the defendant did not commit the offense within the time in which he could have been legally convicted,—that is, between the time the act took effect and the filing of the information,—but that he might, under the charge of the court, have been illegally convicted. This may be true, but the question is, did the evidence show that the offense was committed at a time that made the conviction illegal? Certainly not; because, if such was the case, we assume that the evidence would now be here to show that fact. It is contended that the county solicitor could have had the evidence here, but then the county solicitor is not seeking a reversal of the judgment, but relies upon the presumptions in favor of the correctness of the proceedings in the court below. The affirmative is upon the party seeking a reversal, and it was his duty to have the evidence here for the purpose of showing the error complained of.

The third assignment of error is "that the information herein is not sworn to as required by law."

Article 5, § 28, Const. 1885, provides: "All offenses triable in said [criminal] court shall be prosecuted upon information under oath." Chapter 3731, § 13, Laws 1887, prescribes the following oath to be made by the county solicitor to informations filed by him, to-wit: "Personally appeared before me —, county solicitor, who, being first duly sworn, says that the

allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged." The affidavit of the county solicitor to the information in the case under consideration is strictly in conformity with that prescribed by the statute, and in our opinion it is in conformity with the requirements of article 5 of the constitution. Certainly the framers of the constitution never intended that the county solicitor should swear to such informations upon his own knowledge. Under this article of the constitution the legislature has prescribed the practice in the county criminal courts of record, and, among other things, the form of the oath to be taken by the county solicitors, which form has been followed in this case, and we can see no force in the contention that said oath is not in conformity with the constitution and the statute.

It is also assigned as error that the court below erred in not arresting the judgment and granting a new trial. All the grounds of the motion in arrest of judgment that have been raised by the assignment of errors and insisted upon have been already considered, and it is not important to consider them again. There are "additional" errors assigned, but they only raise the same questions that were raised by the original or general assignment.

The judgment is affirmed.

FULLER et al. v. CABON.

(Supreme Court of Florida. July 7, 1890.)

TEMPORARY INJUNCTION—BILL AND AFFIDAVIT—DISSOLUTION.

1. Ordinarily, where the equities of the bill are denied by answer, a preliminary injunction will be refused, or if granted on bill will be dissolved; but the rule is not inflexible, there being an exception in cases of irreparable mischief, and the granting or continuing of injunctions always resting in the sound discretion of the court, to be governed by the nature of the case. And the rule is modified in this state by the statute which authorizes either party to introduce evidence in support or denial of the bill or answer before the injunction shall be dissolved.

2. An affidavit of the complainant which only affirms in general terms the truth of the statements of the bill, and some of it denying the negative statements of the answer, while other portions deny statements not responsive to the bill, is not sufficient evidence under the statute to overcome the denials in an answer of the allegations which constitute the equities of the bill.

3. Where the bill shows no irreparable mischief through the insolvency of the responsible party, and the answer denies the equities of the bill, and the evidence, under the statute, does not overcome the answer, a summary injunction should not be granted.

4. The power of this court, where on the granting of an injunction no bond was required, and no affidavit made of inability to give bond, to remand the case with directions to dissolve the injunction unless the complainant give bond, instead of remanding it unqualifiedly for a dissolution of the injunction, will not be exercised where it appears, irrespective of the absence of a bond, that the injunction should not have been granted.

(Syllabus by the Court.)

Appeal from circuit court, Franklin county; D. S. WALKER, Judge.

John W. Malone, for appellants. *Lidon & Carter*, for appellee.

MAXWELL, J. In this case, which is a suit of appellee against appellants, an injunction was granted upon bill, answer, and affidavit of complainant. The defendants appealed, and assign in this court that the court below erred in granting the injunction, because—*First*, the answers of defendants fully deny all the circumstances upon which the equity in the bill was founded; *second*, no injunction bond was required of complainant.

The material allegations of the bill are, in substance, that one of the defendants, Mary A. Fuller, was indebted to complainant, Cason, for professional services, as attorney, in procuring the establishment of a nuncupative will of Sarah C. Humphreys, by the terms of which said M. A. Fuller became the sole legatee of certain property, including six or eight hundred head of cattle, and in other litigation concerning the estate of said Humphreys, which led finally to the removal of the administrator of said estate and the appointment of another; that, said M. A. Fuller failing or refusing to pay, complainant, on the 16th of December, 1887, obtained a judgment against her in the circuit court of Franklin county for \$365; that the clerk refused the demand of complainant for the issue of execution on the judgment 10 days after the adjournment of the court, and did not issue it till January 20, 1888; that the defendant Patton was acting as the agent of M. A. Fuller in the establishment of the will, and in defending complainant's action for fees, and was fully cognizant of the matters above charged, but, notwithstanding this, on the 5th of January, 1888, pretended to purchase from said Fuller her entire stock of cattle for the pretended consideration of \$3,000; that complainant is informed and believes that there was no adequate, full, and valuable consideration for the transfer; that it was made by said Fuller, and accepted by Patton with full knowledge thereof, for the purpose of delaying, defrauding, and hindering complainant in the collection of his said judgment, and that Patton was fully cognizant of this; that the pretended consideration for the sale, as shown by the bill of sale, was that said Patton was to pay the debts of the said Humphreys, and the balance to be paid to said Fuller, making, in the aggregate, \$3,000, and complainant avers that said debts were small, and there was administration on the estate, and complainant is informed and believes that said Patton has not paid said debts, and that the bill of sale was not intended to take effect till this was done; that, on the same day of the pretended sale, Patton, in consideration that said Fuller would credit him \$1,000 on the pretended amount he was to pay, executed a bill of sale to defendant F. Fuller, son of said M. A. Fuller, for one-third of the cattle, and complainant charges that this was not a *bona fide* purchase by said Fuller, and that the transaction was intended by the three parties to hinder, delay, and defraud

complainant in the collection of his judgment.

The bill further alleges that afterwards, execution having been issued on complainant's judgment, and become a lien upon said property so pretended to have been purchased by Patton, viz., March 31, 1888, said Patton executed to defendant W. H. Neel a mortgage on all his interest in the cattle, but complainant charges that said Neel had at that time full knowledge of the foregoing facts, and was not a purchaser without notice; and that said Neel recently pretends that he has purchased the interest of F. Fuller in the cattle, but if he did so purchase he had knowledge that the title of said Fuller was fraudulent and void.

And it then alleges that Patton and Neel, under some private arrangement between them and the other defendants, are killing and selling the cattle in market for beef; that they have already slaughtered 100 head, and, as complainant is informed and believes, are selling about 20 per month, and he has reasonable ground to fear that if said defendants are not restrained from killing and disposing of said cattle there will not be sufficient to pay his demand; that said M. A. Fuller has no other property subject to execution sufficient to satisfy complainant's judgment; and he claims that, as attorney, he has a lien on said cattle independent of the lien of his execution and judgment.

The defendants M. A. Fuller and F. Fuller, answering jointly, admit the sales as alleged in the bill, but deny that they were made without valuable and sufficient consideration, or for a pretended consideration, and say they were made in good faith, and not intended to defraud complainant by hindering and delaying the collection of his demand, and say that the debts of Humphreys were large, and nearly consumed the whole estate. They deny that the cattle are being slaughtered and sold as alleged in the bill, and deny that there will not be sufficient to pay complainant's demand out of said cattle, and say there is ample to pay his debt, if any, due him. The answer of Patton is to the same effect in regard to the sufficiency of the consideration of the sales, and the good faith and absence of fraud therein, and says, as to the consideration of the sale by M. A. Fuller to him, it was ample, and that he has paid debts of the Humphreys estate to the amount of about \$1,900, and, as to his sale to F. Fuller, that the consideration was ample, and that the \$1,000 paid by the latter was through an order of M. A. Fuller to F. Fuller, on him, (Patton,) for that amount of his indebtedness to her.

Neel, in his answer, denies that at the time of Patton's mortgage of cattle to him, and of the sale by F. Fuller to him, he had any knowledge or notice of any lien of complainant on said cattle, and says that on the execution of the mortgage he paid \$500 to Patton, and gave him four promissory notes for \$250 each, payable at 30, 60, 90, and 120 days, and that he has paid these as they arrived at maturity, except the 90-day note, which

he will be compelled to pay also. He denies any bad faith in the transaction.

The main equity of the bill rests on the charge of fraud in the sale of the cattle by M. A. Fuller to Patton. There is nothing in the claim of complainant that he has a lien on the cattle for his fees due for services rendered in establishing the nuncupative will of Humpreys, under which M. A. Fuller became legatee. When that was done, the property of the estate vested in the administrator of Humpreys, and M. A. Fuller, though legatee, had no such direct right in it as would enable a lien to attach. Nor did the judgment give complainant a lien, the law of this state being that a judgment is a lien on realty, but not on personality. And, as to any lien given by the execution, that could not attach till January 20, 1888, 15 days after the date of the sale to Patton. So complainant has no equity for an injunction except on the ground of fraud in the sale. The allegations of the bill in regard to this are denied by the answers of the parties concerned in the sale, and, ordinarily, where the equities of the bill are denied, a preliminary injunction will be refused, just as such injunction will be dissolved, ordinarily, when granted upon the bill, if on the coming in of the answer the equities of the bill are denied. But there are exceptions to this; and these, as stated by Judge STORY in *Poor v. Carleton*, 3 Sumn. 74, "for the most part, are fairly resolvable into the principle of irreparable mischief." Or, as expressed by this court in *Allen v. Hawley*, 6 Fla. 142, "the general rule * * * is to dissolve the injunction when the answer fully denies all the circumstances upon which the equity of the bill is founded. * * * But there is no inflexible rule to this effect, for the granting or continuing of injunctions must always rest in the sound discretion of the court, to be governed by the nature of the case." The rule is modified in this state, as explained in *Sullivan v. Moreno*, 19 Fla. 200, by the legislation which provides that, when "the defendant in his answer shall have denied the statements of the bill or of the accompanying affidavit, either party thereto shall have the right to introduce evidence in support or denial of the bill and accompanying affidavit or answer before the injunction * * * shall be dissolved." And in the present case it is contended for complainant that the rule upon which a summary injunction will be refused, where the answer denies the statements of the bill, does not apply, because the complainant, in support of his motion for injunction, offered, by way of evidence, his affidavit, which sustains the allegations of the bill. That affidavit is objected to because sworn to before an officer of another state not authorized to administer the oath, but the objection should have been made in the court below, and comes too late here. As to the statements of the bill, it is but a general affirmation of their truth, and some of it denies the negative statements of the answers, while much of it denies matter not responsive to the bill. It does not seem to us to add any strength to the case for

a summary injunction, and is not sufficient to overcome the denials of the answers, if we apply the rule that, "where the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill shall be taken as true, unless they are disproved by evidence of greater weight than the testimony of a single witness." *Carr v. Thomas*, 18 Fla. 736. And, we may add, especially so when the witness is the complainant in the bill.

Further than this, conceding that the facts alleged in the bill are sufficient to entitle the complainant to the relief he asks, if sustained by evidence on a final hearing, we are not satisfied they are sufficient to authorize a summary injunction in the absence of allegations that show irreparable mischief as likely to result from delay. We suppose complainant had such allegations in mind when he stated that M. A. Fuller had no other property out of which his execution against her could be satisfied, and that the cattle were being killed and sold in such numbers that if this is not prohibited enough would not be left to bring the amount of his claim. But his bill shows that Fuller has nothing to do with the cattle now, and its charge is that defendants Patton and Neel are the parties disposing of them, and that they are treated as the cattle of Neel. Neel, therefore, is the real party against whom the injunction will operate, and who will be responsible for the cattle if complainant is successful in his suit. But it is not alleged in the bill that Neel is insolvent, and that a decree against him would be fruitless in case the cattle should not be forthcoming. This should appear, to authorize a summary injunction.

This view, and that we have taken in regard to insufficiency of evidence to overcome the denials of the answers, are important in connection with the second ground of error, viz., the granting of the injunction without bond. There is no affidavit of inability to give bond, as required by the statute, (McCl. Dig. p. 158, § 19,) and it is not contended for complainant that a bond is not necessary; but, on the authority of *Scarlett v. Hicks*, 13 Fla. 314, supported by *Gamble v. Campbell*, 6 Fla. 347, it is suggested that, instead of reversing the case and remanding it for a dissolution of the injunction, it is in the power of this court to remand the case, with directions to dissolve the injunction unless the complainant give bond in compliance with the statute. If we admit the power and the views heretofore expressed, leading to the conclusion that, as the case stands, a summary injunction should not have been granted, are correct, it follows that the case is one in which the power should not be exercised. And that is just what occurred in *Gamble v. Campbell*. Though in that case the court held that an injunction should not be dissolved because of a deficient bond, it refused to put the power of correction in motion, because of want of equity in the bill; the difference between that case and this being that, while here the equity of the bill is conceded, the answers meet it in such way, and the defect of the bill as to allegation

of irreparable mischief such, that, in our opinion, a summary injunction should not have been granted.

The decree is reversed, and the case will be remanded, with direction that the injunction be dissolved.

STATE *ex rel.* MITCHELL v. BLOXHAM,
Comptroller.

(Supreme Court of Florida. Aug. 4, 1890.)

CONSTITUTIONAL LAW—OFFICES AND OFFICERS—
SALARY.

1. Where a constitution, as revised, provides that an officer holding under the former constitution shall assume an office of another name created by the new, and having all the duties of the other office, and also additional duties, the effect of the new instrument is that the old office shall cease upon the new instrument becoming operative; and this, although some of such additional duties may under the terms of the new instrument be performable for a limited time by another officer.

2. It is provided by the present constitution (section 8 of the schedule) that the commissioner of lands and immigration in office under the former constitution at the time the present one became operative should assume the office of commissioner of agriculture, and that (section 29, art. 4) the salary of the commissioner of agriculture shall be \$1,500. *Held*, that the commissioner of lands and immigration under the former constitution became the commissioner of agriculture upon the new organic law becoming operative, and that his salary from the 1st day of January, 1887, was \$1,500 a year.

3. Where the constitution prescribes the salary of an officer, and the legislature enacts a law appropriating an amount large enough to permit his being paid more, the statute is not legal authority for paying more than the salary prescribed by the constitution.

WALKER, J., dissenting.

(Syllabus by the Court.)

Mandamus.

D. S. Walker, Jr., for plaintiff. William B. Lamar, Atty. Gen., for defendant.

RANEY, C. J. The relator was, at the ratification of the present constitution in 1886, commissioner of lands and immigration under the constitution of 1868, as amended in 1871, and claims that he continued to be such officer until the first Tuesday after the first Monday in January, 1889, and that he was entitled to be paid a salary at the rate of \$2,000 per annum. The defendant's contention is that the relator ceased to be commissioner of lands and immigration, and became commissioner of agriculture, under the new constitution, upon its ratification in November, 1886, or its becoming operative in January, 1887, and that \$1,500 per annum was his salary from the latter date.

The present constitution was framed in 1885, ratified by the people at the election held in November, 1886, and, under a provision of the ordinance directing its submission to a popular vote, went into effect on the 1st day of January, 1887.

The twentieth section of the executive article is: "The governor shall be assisted by administrative officers as follows: A secretary of state, attorney general, comptroller, treasurer, superintendent of public instruction, and commissioner of agriculture, who shall be elected at the same time as the governor, and shall hold their of-

fices for the same term: provided that the first election of such officers shall be at the time of voting for governor, A. D. 1888."

The twenty-sixth section of the same article is as follows: "The commissioner of agriculture shall perform such duties in relation to agriculture as may be prescribed by law; shall have supervision of all matters pertaining to the public lands under regulations prescribed by law; and shall keep the bureau of immigration. He shall also have supervision of the state-prison, and shall perform such other duties as may be prescribed by law."

The first section of the schedule, or eighteenth article of the constitution, reads thus: "The constitution adopted A. D. 1868, with amendments thereto, is declared to be superseded by this constitution. But all rights, actions, claims, and contracts, both as respects individuals and bodies corporate, shall continue to be as valid as if this constitution had not been adopted. And all fines, taxes, penalties, and forfeitures due and owing to the state of Florida under the constitution of 1868 shall inure to the use of the state under this constitution."

The third section of this article is: "All persons holding any office or appointment at the ratification of this constitution shall continue in the exercise of the duties thereof according to their respective commissions or appointments, or until their successors are duly qualified, unless by this constitution otherwise provided."

The fourth section is: "Nothing contained in this constitution shall operate to vacate the office of lieutenant governor until the expiration of his present term."

The eighth section is: "Upon the ratification of this constitution the commissioner of lands and immigration shall assume the office of commissioner of agriculture, and his duties as such shall be prescribed by the first legislature assembled under this constitution."

The constitution of 1885 is a revision of that of 1868, (State v. George, 23 Fla. 525, 3 South. Rep. 81,) and both as a revision, and by virtue of the first section of the schedule, supra, the former organic law was entirely done away with by the latter, upon its going into effect January 1, 1887, except such parts of the old as were expressly retained by the new.

We held in State v. Commissioners, 23 Fla. 483, 3 South. Rep. 193, that the office of lieutenant governor under the former instrument would have expired upon the election of a president of the senate in 1887, under the sixth section of the legislative article of the new organic law, had it not been for the fourth section of the schedule, supra, but that the effect of this section was to continue the office of lieutenant governor, with its functions, as it was constituted by the former constitution, (section 14, art. 5, as amended in 1875,) until the expiration of the term for which the incumbent holding at the ratification of the new instrument was elected; and that that part of section 6 of the new constitution providing that the senate at the convening of each regular session should choose a permanent president did not go into effect until the session of 1889, as the

functions of the office of lieutenant governor continued by the fourth section of the schedule included the presidency of the senate, and it must have been the purpose of the framers of the constitution and of the people in adopting it that the provisions of the new instrument as to a president of the senate should stand inoperative until the meeting of the legislature of 1889. The legislature of 1887 did not elect a permanent president, but was presided over by the lieutenant governor.

The eighth section of the schedule, in providing that the commissioner of lands and immigration should, upon the ratification of the new constitution, assume the duties of commissioner of agriculture, affords an instance in which that instrument did not intend that a person holding office should continue after the new instrument became operative in the exercise of the duties of the same office, according to his commission, until his successor was duly qualified. The person holding the office of commissioner of lands and immigration was to assume the office of commissioner of agriculture. The purpose of the third section was to continue the occupants of office in office, where the office itself was continued. It was not to continue an office which other parts of the constitution showed a clear intent to abolish upon the ratification or the taking effect of that instrument. The office which the person holding the office of commissioner of lands and immigration was to assume, under section eight, was that of commissioner of agriculture under the new instrument. The duties of this office, as shown above, (section 28 of the executive article,) were such duties in relation to agriculture as might be prescribed by law, —supervision of all matters pertaining to the public lands under regulations prescribed by law, to keep the bureau of immigration, and have supervision of the state-prison, and such other duties as might be prescribed by law. An amendment of 1871 to the constitution of 1868 consolidated the office of surveyor general and that of commissioner of immigration under the name of commissioner of lands and immigration. The duties of the former office, as prescribed by that constitution, were the supervision of all matters pertaining to the public lands, and of the other office to organize a bureau of immigration for the purpose of furnishing information, and for the encouragement of immigration. The office of commissioner of immigration was, under the original instrument as it stood prior to the amendment, to expire at the end of 15 years from the ratification of the instrument, with power, however, in the legislature to continue it by law.

It is clear that the person holding the office of commissioner of lands and immigration was to assume, under the new constitution, an office whose duties included all those which had devolved upon him as such commissioner, and also other duties of another character. The provision of section 8 of the schedule embodied in the language "and his duties as such shall be prescribed by the first legislature assembled under this constitution" is not

a limitation upon the functions which he was to assume, but it was a direction to the legislature to do at its first session whatever was necessary to be done by it under the twenty-sixth section of the executive article, whose provisions are given above. His duties, not with reference to agriculture, but as commissioner of agriculture, or as to any and all matters within the provisions of the twenty-sixth section just mentioned, in so far as legislation might be necessary, were to be prescribed at that session. The only purpose these particular words of the eighth section of the schedule subserve is, in view of what is said in the section of the executive article, a direction to the legislature as to the time of its action, or for prompt action. Everything else is implied by provisions of the executive section as to duties that may be "prescribed by law."

To say that it was intended by the constitution that the person holding the office of commissioner of lands and immigration should continue to hold such office involves the conclusion of a purpose that he should hold two distinct offices, of which one included all the duties of the other. When a person assumes an office, the office is necessarily an existing thing. It does not simply say that he shall perform the duties or certain duties of the office, but he is to assume the office, and this means he is to take the office and become that officer with all its duties, whatever they might be, and not that he is to perform its duties under the name or authority of another or former office. Again, it will be observed that the duties to be prescribed at such first session of the legislature are not those as commissioner of lands and immigration, but as commissioner of agriculture.

Not only is it thus clear that the person holding the office of commissioner of lands and immigration at the ratification of the present constitution was not to continue in the exercise of the duties of such office, but was to assume a new office upon which were devolved the same and additional duties, but it is also clear from other parts of the constitution that the office of commissioner of lands and immigration, as a distinct administrative office, was to expire with the old instrument. The twentieth section of the executive article mentioned at the outset of this opinion takes the place of the seventeenth section of the fifth or executive article, and the first section of the seventh or administrative article of the former constitution. The offices named by the latter section were, giving effect to the consolidation referred to above, as made by the amendment of 1871, those mentioned in the twentieth section of the executive article of the new constitution,—an adjutant general, and the commissioner of lands and immigration. There is not to be found anywhere in the new constitution, except in the eighth section of the schedule, any mention of the office of commissioner of lands and immigration. Its omission from the twentieth section and elsewhere, taken in connection with the provision that the person occupying it should on the ratification of the constitution assume a new office, such new of-

office, including the same and other duties, is inconsistent with the idea of even a temporary continuance of the old office after the new instrument should become operative. The omission of the adjutant general from the twentieth section mentioned above is not characterized by a similar omission from other parts of the new instrument. The sixteenth section of the executive article provides for the appointment by the governor of all commissioned militia officers, including an adjutant general for the state, whose "duties and compensation" were to be prescribed by law, with a proviso, however, "that this constitution shall work no vacancy in the office of adjutant general as now constituted, until the expiration of the present term." If this proviso was intended to preserve the office of adjutant general as formerly constituted, until the expiration of the term existing at the ratification of the new instrument, then the idea of its framers must have been that, in the absence of such proviso, the office of adjutant general as it was then constituted would have become extinct upon the 1st day of January, 1887, and it would after that have been the duty of the governor to appoint an adjutant general for the state under the new constitution. But for this proviso the section to which it is annexed would, considering the omission of the office of adjutant general from the twentieth section of the executive article, have placed that officer among those excepted from the general provision of the third section of the schedule, because it is plain that but for this proviso the meaning of the constitution would be that the office of adjutant general as it was constituted should not continue to exist even temporarily.

It is the ordinary purpose of a schedule to make temporary provision for government until the new organic law can be put in full operation, and this was the purpose of the third article of the schedule before us; yet it is plain from the last five words of it that it was not its purpose that all persons holding office at the ratification of the new instrument should continue in the exercise of the duties thereof, according to their respective commissions or appointments, and until their successors should be appointed. The words "unless by this constitution otherwise provided" would not have been added had it not been a fact that there were exceptions to the general rule established by the section, and it is plain that these exceptions were to be found in the constitution, and it seems plain that the commissioner of lands and immigration was such an exception.

The twenty-ninth section of the executive article provides that the salary of the commissioner of agriculture shall be \$1,500. The meaning of this is that the person holding the office of commissioner of agriculture at any time should be paid at the rate of \$1,500 per annum, and it was as applicable to the person who assumed that office in January, 1887, on the constitution becoming operative, as to any one subsequently elected to it. That the duties of the office would be less before the legislature should act, or before the term

of the then adjutant general should expire, affected neither the requirement of the constitution that the office should be assumed by the person specified in section 8 of the schedule, nor the amount of his pay. A provision in a constitution for the pay of an officer must be intended for the occupant of the office of the same name, and which the constitution expressly provides shall be assumed or occupied at a period which cannot be postponed beyond the time the instrument first became operative.

Two reasons are urged why the eighth section of the schedule may not mean that the commissioner of lands and immigration should assume the office of commissioner of agriculture. The first is that supervision of the state-prison is given to him by the twenty-sixth section of the executive article, while this function really remains in the adjutant general by virtue of the provision of the sixteenth section of the same article; that this constitution shall work no vacancy in the office of adjutant general as now constituted until the expiration of the present term. The second reason is that until the legislature could or might act the commissioner of agriculture could have no "duties in relation to agriculture." Admitting both of these assumptions to be correct, there is in them nothing that conflicts with the requirement of the specified section of the schedule that the office of commissioner of agriculture should be assumed. He was to take the office, whatever its duties were. If the effect of the proviso mentioned was to retain in the office of adjutant general until the expiration of the term referred to the duty of supervising the state-prison, and consequently preclude the exercise of this function by the commissioner of agriculture, all that can be said of this is that it rendered inoperative the provision for the exercise of such duties by the commissioner of agriculture until the expiration of the pending term of the adjutant general, as the power of the senate to elect a permanent president was superseded by the constitution for the pending term of the office of lieutenant governor, whose function it was to preside over that body.

That no duties "in relation to agriculture" could be prescribed by law for the office until the legislature should meet must be assumed to have been as well known to the framers of the constitution and the people who ratified it as anything else was. Yet knowing it, the former framed, and the latter ratified, the provision that the commissioner of lands and immigration should assume the office of commissioner of agriculture, whose only duties, according to the argument, were the "supervision of all matters pertaining to the public lands, and keeping the bureau of immigration."

When the constitution says, as it does in the seventeenth section of the executive article, that the governor and the administrative officers of the executive department shall constitute a board of commissioners of state institutions, which board shall have supervision of all matters connected with such institutions, in such

manner as may be prescribed by law, it means, and also meant upon going into effect, by "administrative officers of the executive department," the officers named in the twentieth section of the same article, *spura*. Among these was the commissioner of agriculture, which officer the former commissioner of lands and immigration was to become by assuming that "office," whatever its duties might be; and the commissioner of agriculture was one of the officers meant by the tenth section of the sixteenth article when it said the "administrative officers of the executive department shall keep their offices at the seat of government."

It is true that the legislature of 1887 appropriated for that year, and for the year 1888, enough moneys for salaries for the "administrative department" to permit the payment to relator of a salary of \$2,000 per annum, if he is entitled to it. But not only is it not true that the act making the appropriation does not recognize or speak of the officer as commissioner of lands and immigration, but on the other hand it is true that another statute, the railroad commission act, passed at the same session, does mention and recognize the "commissioner of agriculture" as an officer of the state by making him one of the board of revisers under that act. We fail to find in the legislation of that year any recognition of the commissioner of lands and immigration as an existing office. Considering the appropriation act and the railroad commission statute together, the only conclusion to be drawn is that the legislature regarded the commissioner of agriculture as the existing officer, and that it was to him the \$2,000 should be paid, if from so general an appropriation it can be said a legislative construction of his being entitled to this amount can be inferred. Such a construction by the legislature is in direct antagonism to the express language of the constitution, that the salary of the commissioner of agriculture shall be \$1,500.

The judgment of the court will be that the respondent go without day, and recover his costs, to be taxed by the clerk. *Tucker v. Justices, 1 Jones, (N. C.) 451; High, Extr. Rem. § 526; State v. County Com'rs, 22 Fla. 364, 370.*

WALKER, J., dissenting.

HON. DAVID S. WALKER, judge of the second judicial circuit, sat in the place of MITCHELL, J., disqualified.

ANDREU *et al.* v. WATKINS.

(*Supreme Court of Florida. Aug. 4, 1890.*)

DESCRIPTION IN DEED—MONUMENTS AND DISTANCES—REFERENCE TO OTHER DEEDS AND MAPS.

1. When there is no ambiguity in the description of land in a deed of conveyance, parol testimony is inadmissible to vary or qualify the description.

2. When a deed conveys to W. "a strip of land, being the east end or portion of a certain lot deeded" to the grantor "by Abbott, by deed" of a specified date, and recorded in a designated book, stating the page, "the west half having been sold to D. B.; the piece now intended to be conveyed by this deed measures as follows: Beginning at

the south-east corner of said lot, which is now the dividing line between this lot and the lot of" the grantee, "thence northerly forty-seven feet to the north-east corner of said lot," thence west, and thence south, and thence "eastwardly along Mulberry street to the place of beginning," giving the length of the lines, the meaning of the deed to W. is that the true east line of the "lot" conveyed to her grantor is the east line of the "strip" intended to be conveyed to W., and parol evidence is inadmissible to show that a fence (not mentioned in the deed) west of such line, which fence had under a mistake been recognized by the grantor and W. as the true line for a period less than that required by the statute to bar a recovery by the grantor of her land lying east of the fence, was intended by the deed as the eastern boundary of the strip conveyed.

3. Where a deed states that the land conveyed is bounded on the west by a specified street, according to a map referred to, the meaning of the deed is that wherever the eastern line of the street as it was laid out, or actually surveyed, is there also is the western boundary of the land conveyed.

4. In description of lands, monuments control distances where there is an inconsistency between the two as given in a deed of conveyance.

5. What the boundaries of land as actually given by a deed are, is a matter of law to be ascertained from the meaning of the deed; where they are, is a question of fact, and to show this, or apply the description to its subject-matter, parol testimony is admissible.

6. A deed which fails to describe a part of the land intended to be conveyed does not convey the land thus omitted, and no recovery of the part so omitted from the description can be had under the deed.

7. Where one deed refers to another or to a map or plan of a survey for a description, the deed, map, or plan referred to becomes as much a part of the instrument making the reference as if actually copied into it.

(*Syllabus by the Court.*)

Appeal from circuit court, St. Johns county; JAMES M. BAKER, Judge.

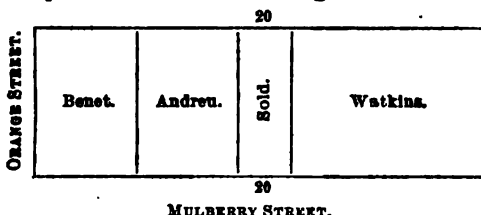
Appellee recovered judgment in an action of ejectment brought against appellants (husband and wife) for a piece of land in the city of St. Augustine, and described in the declaration as follows: "A strip of land being the east end or portion of a certain lot conveyed by Lizzie Andreu and Michael Andreu, her husband, to Mildred Watkins, by deed dated April 5, 1884, recorded in Book CC, on page 435, etc., of the public records of St. Johns county, commencing at the south west corner of the said lot on the north side of Mulberry street, being 20 feet west of the place where the old line of fence stood, which, up to the time of the said conveyance, marked the dividing line between the land of said Mildred Watkins and said Lizzie Andreu; thence northerly 47 feet; thence east 5 feet; thence southerly parallel to the first line 47 feet to Mulberry street; thence west along Mulberry street to the place of beginning; and containing 235 square feet. The plea was the general issue."

To maintain her action the plaintiff introduced in evidence the following instruments:

A deed from Lucy B. Abbott, dated May 17, 1883, conveying to plaintiff all that certain lot of land in the city of St. Augustine described as follows: Beginning at the intersection of Mulberry and Water streets, from the point northerly along said Water street 153 feet; thence south 47 feet to Mulberry street; thence east-

wardly along north side of Mulberry street 158 feet to beginning corner; and is bounded on north side by land of said Lucy B. Abbott; south by Mulberry street; east by Water street; and west by lot of Andreu, and is in that part of the city of St. Augustine known as the "North City," and conveyed to said Lucy B. Abbott by I. W. Starke on the 28th day of August, 1872, and recorded in Book I, p. 505; "also reference to map on file in county clerk's office of the Mary Ann Davis tract, to which reference may be had."

A deed dated April 5, 1884, from Mrs. Andreu and her husband, conveying to the plaintiff "a strip of land being the east end or portion of a certain lot deeded to party of first part by Lucy B. Abbott, by deed dated June 23, A. D. 1882, recorded in Book AAA, p. 123, the west half having been sold to Dora Benet. The piece now intended to be conveyed by this deed measures as follows: Beginning at the south-east corner of said lot which is now the dividing line between this lot and the lot of Mildred Watkins; thence northerly 47 feet to the north-east corner of said lot; thence west 20 feet; thence south, and parallel with the east side, 47 feet to Mulberry street; thence eastwardly along Mulberry street 20 feet to the place of beginning; the front and rear being 20 feet each, and the east and west sides 47 feet deep." Then follows a diagram thus:



Miss Watkins, the plaintiff, testified: That the dividing line between herself and the Andreus was, at the time of their conveyance to her, marked by a fence. Andreu's lot was inclosed by a fence on the east. That this fence was understood between them as dividing their lots. That she had not received possession of the 20 feet conveyed to her by the Andreus. That they had given her only 15 feet and one inch. That the fence was moved after their conveyance to her. That Andreu said he had only given witness this quantity. That the fence is now on the same line where Andreu moved it, 15 feet and 1 inch from where it stood, so far as witness knows. It was moved several months after she bought. That they agreed to let the fence remain for a while, as she had a crop on the land. She could not swear that any one measured the distance between where the fence now stands and the line where it used to stand. It was 158 feet from the line of Water street to where the line of Andreu's fence stood. That Andreu was, at the time of the deed from Miss Abbott to witness, in possession of his lot, and his fence was there, the fence that was understood to make the east line of this lot.

On cross-examination she testified that she had put up a fence on the east side of

her lot on the line of Water street, but had never fenced it on Mulberry street.

James L. Colee, a witness in behalf of plaintiff, testified that some six weeks ago he measured the Watkins lot, and the adjacent lots as they stand, and made a plat "showing the lots as they now stand, and as they stood several years ago." The red lines show the lots as they stood at the time Miss Watkins and Mr. Benet bought. The black lines as they now are, are shown by the fences. The present fence stands 15 feet and 6 inches from where the old fence stood. The present fence is now 173 feet and 6 inches from Water street. In making my survey I began at the south-east corner of Miss Watkins' lot. The plat was introduced, but is not necessary to an understanding of the case.

On cross-examination he said that he being his survey at the south-west corner of Water and Mulberry streets, and measured along Mulberry street 158 feet, and drove a stake; did not measure from Orange street; that he accepted, as the east line of Miss Watkins' lot, her fence built on the line of Water street; that he "went" according to her deed; cannot say when she bought; that he did not have any data as to where the fence then stood; took Mrs. Benet's statement and that of Mrs. Andreu as to where the old fence stood.

Upon redirect examination he said that Mrs. Andreu could not show him where the old fence stood. They said their fence on Orange street was moved back five feet, and that it was done to straighten the street, and that they intended to have the same amount of land they bought from Miss Abbott. Could not say if Andreu said the fence was moved in from Orange street before or after the sale by him to Miss Watkins.

The testimony in behalf of the defendant is as follows:

A deed from Miss Lucy B. Abbott, dated June 23, 1882, recorded in Book AAA, p. 123, of St. Johns county records, and conveying to Mrs. Andreu "all that certain piece or parcel of land in the North city lying and being in the city of St. Augustine. * * * described as follows: Bounded on the north by lands of the party of the first part, on the south by Mulberry street, on the west by Orange street, and on the east by lands of the party of the first part; and measuring on the north and south sides 150 feet, and on the east and west ends 47 feet, as by reference to the map of the North city of the Mary Ann Davis tract filed in the office of the clerk of the circuit court of St. Johns county, Fla., May 14, 1877, and is part of the same land that was conveyed to party of first part by John W. Starke, by deed dated August 28, 1872, recorded in Book T, p. 505." The map mentioned in this deed was also introduced in evidence.

Miss Lucy B. Abbott testified that she was grantor in the deeds to Miss Watkins and Mrs. Andreu; that she had owned the property since 1873; Van Ness and witness owned the whole Mary Ann Davis tract; that upon a survey made of that part of the tract covered by the property in con-

trovery a few years since she was present, and the old stake set on the line of Water street was found; that Miss Watkins' fence on the east end of her lot is on the line of Water street as platted, and as found by said survey; that the distance by the original survey of the tract from Water street to Orange street is 300 feet; that at the time Andreu built his fence witness could not get a surveyor to locate the lines of his lot, and he built his fence five feet into Orange street.

William Mickler deposed that he knew the location of the streets in North city, and the location of the land in litigation; that he had lately made a survey and measurements of the blocks lying between Water and Orange streets, and found the distance between these streets, measured along Mulberry street, to be 302 feet; that Orange and Water streets are each 30 feet wide at Mulberry street, and Mrs. Watkins' fence on Water street is on a line with the other fences on that street; that he did not measure the lots, but only the blocks; that the fence of the Benet lot on Orange street is on a line with the other fences on that side of the street. If the fence on west end of Benet's lot was moved five feet to the west, it would reduce the width of Orange street to 25 feet.

The other facts are stated in the opinion.

Rude & Dewhurst, for appellants. *Fleming & Daniel*, for appellee.

RANEY, C. J., (after stating the facts as above.) It is certain that the land intended to be conveyed by Miss Abbott to Mrs. Andreu by the deed of June 23, 1882, was bounded on the west by Orange street; or, in other words, that the eastern line of Orange street, as that street was actually located by the survey which the map of the North city of St. Augustine, filed in the office of the clerk of the circuit court of St. Johns county on the 14th day of May, 1877, was intended to represent, was made the western boundary, and the land conveyed was that extending east from Orange street 150 feet, and north from Mulberry street 47 feet, the land north and east being at the time of the conveyance the property of the grantor. The meaning and effect of this deed was that wherever the eastern line of Orange street, as it was laid out, was, there also was the western boundary of the land conveyed; and wherever the northern line of Mulberry street was, there was the southern boundary of the grant; and that the eastern boundary line was 150 feet east of the former street, and the northern line 47 feet north of the latter street. These are the boundaries which, as a matter of law, are given by the deed. *Abbott v. Abbott*, 51 Me. 575, 581. To apply this description, or identify the line described, or, in other words, locate the boundaries, it is necessary to find the described lines of the two streets, as they were actually laid out, and measure the distances given in the deed. Where the boundaries of land described in any deed really are, is always a question of fact; and parol testimony is admissible to show where they are, or apply the description to its subject-matter. *Abbott v. Abbott*, supra; *Reamer v. New-*

mith, 34 Cal. 624; *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. Rep. 147.

The deed from Miss Abbott to Miss Watkins, the plaintiff, was executed about 11 months after the above conveyance, and makes the intersection of Mulberry and Water streets on the north side of the former street the south-east and initial point of the description of the ground, and the former street the southern boundary, the latter street for the distance of 47 feet the eastern boundary, and a line parallel with and 47 feet north of Mulberry street the northern boundary, and one parallel with Water street the western boundary. It is true that it gives the distance along Mulberry street, and the length of the northern parallel line, as 158 feet; but it also says that the land granted is bounded on the west by the "lot of Andreu," (*Flagg v. Thurston*, 13 Pick. 145,) and it makes reference to the same map to which the deed to Andreu refers.

The proof is that only one map answering the designation of the two deeds is on file in the clerk's office in St. John's county; and it should be remarked of the map that the block of land out of which the above conveyances were made is not subdivided into lots, but is, according to the map, one solid piece, measuring 300 feet east and west, by 340 feet north and south, and bounded east, south, and west by the streets mentioned above, and north by Locust street.

These are the conveyances from the common grantor, existing at the time of execution of the deed of April 5, 1884, from Mrs. Andreu and her husband to Miss Watkins, upon which deed the latter relies for a recovery of the land sued for. The question, of which a correct answer, when made, will afford a solution of this controversy, is, what land does this deed convey? By its terms it conveys "a strip of land being the east end or portion of a certain lot deeded to party of the first part by Lucy B. Abbott, by deed dated June 23, A. D. 1882," (stating, as supra, the book and page in and upon which it is recorded, and showing it to be the deed to Mrs. Andreu,) "the west half having been sold to Dora Benet. The piece now intended to be conveyed by this deed measures as follows: Beginning at the south-east corner of said lot, which is now the dividing line between this lot and the lot of Mildred Watkins; thence northerly 47 feet to the north-east corner of said lot; thence west 20 feet; thence south and parallel with the east side 47 feet to Mulberry street; thence eastwardly along Mulberry street 20 feet to the place of beginning."

There is no ambiguity in this description. Its purpose is to convey the east end of the lot conveyed by Miss Abbott to Mrs. Andreu, and it makes the south-east and north-east corners of the land so conveyed the north and south-east corners of the piece intended to be conveyed by this deed to Miss Watkins. The eastern boundary of the lot conveyed to Mrs. Andreu is made the eastern boundary of the piece intended to be conveyed by her and her husband to Miss Watkins, and no other piece of land than one whose eastern boundary is located 150 feet east of the eastern line

of Orange street will answer the calls of this deed. No other eastern boundary will effectuate a conveyance of the eastern end of the lot. This deed, in giving the measurement as "beginning at the south-east corner" of the lot conveyed to Mrs. Andreu, and stating that such corner "is now the dividing line between" such lot and the lot of Miss Watkins, and following with the words "thence northerly 47 feet to the north-east corner of said lot," means that the south-east corner on Mulberry street, 150 feet east of Orange street, was the commencement of the dividing line between the Andreu and the Watkins lot, and that the line run northerly to the north-east corner was the dividing line, and that this line should be the eastern boundary of the piece of land conveyed. The intention of the parties, as shown by this deed, was that it should convey the east-end piece of the lot, the same to measure 47 feet north and south, by 20 feet east and west, and be bounded on the south by Mulberry street, and having its south-east corner 150 feet east of Orange street; and to locate the boundaries of the land it is necessary to find the eastern boundary of Orange street as it had been located by the survey represented by said map, and from these locate the initial point of description 150 feet east, on the north side of Mulberry street, and trace the boundaries according to the directions and distances given in the deed.

There can be no doubt from the testimony in this case that the eastern boundary of Orange street was, at the time Miss Abbott conveyed to Andreu, and when Andreu built the fences, at least five feet east of where he put the western fence; and the only conclusion that can be drawn, particularly in view of Miss Abbott's testimony, is that he located it where he did through a mistake as to where the eastern line of the street was, and this mistake naturally resulted in and accounts for his putting the eastern fence five feet west of where, by the calls of his deed, it should have been. Admitting as a matter of fact that both of the Andreus and Miss Watkins, when the deed from the former to the latter was made, understood the eastern fence to be on the eastern line of the lot conveyed to Mrs. Andreu to Miss Abbott, this misunderstanding cannot change the meaning and effect of the deed to Miss Watkins, which deed shows that it was the intent to convey the eastern 20 feet off the land actually conveyed to Mrs. Andreu by the deed of June 23, 1882. Whether or not the western fence had been moved in before the conveyance to Miss Watkins is not so certain. According to this deed, Mrs. Andreu owned at least five feet east of her fence, and the record of her deed was constructive notice to Miss Watkins, even if Miss Watkins' deed from the common grantor did not put her on notice by its reference to Mrs. Andreu's lot, and Mrs. Andreu could have recovered against Miss Watkins, even assuming the latter's possession to have been adverse, as the period of the statutory bar had not run.

There can be no doubt but that Miss Watkins' fence is on the line of Water street as it was laid out by the original

survey. Miss Abbott testifies to the finding of the old stake at the south-east corner, and the evidence is otherwise entirely satisfactory on the point. It is true that Mickler's measurement of the distance from Water street to Orange street, as the fences now stand, was 302 feet, and Collee's survey makes it 303 feet, whereas the above plan of the original survey states it to be only 300 feet. These discrepancies can be of no benefit to the plaintiff, nor any harm to the defendant, in their controversy as it appears now, for it is not pretended that Mrs. Andreu claims further east than 130 feet from the fence, or east line of Orange street; or, in other words, that she denies Miss Watkins' right to the east 20 feet of the 150 feet of land conveyed to her by the original deed from Miss Abbott. Assuming that the east line of Orange and the west line of Water street were, as actually laid out on the ground by the surveyor, more than 800 feet apart, the mistake as to their distance from each other would not affect their actual location as boundaries. *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. Rep. 147. The description of the street in the deed from Miss Abbott to Mrs. Andreu would nevertheless mean its east line as it was actually run out. Whether or not, in the absence of any other proof than that as to finding the old stake on Water street, the eastern line of Orange street would not be assumed to be 300 feet west of that stake, is immaterial to this case.

The contention of Miss Watkins that the fence, which was 5 feet west of the true line, or only 145 feet east of Orange street, is the eastern boundary of the land conveyed, is not supported by the deed. It is not mentioned in the deed as the eastern boundary. If it had been made the eastern boundary by proper words, then of course the 5 feet east of it would not have passed by the deed; but as it was not, the fact that either or both of the parties to the deed may have understood it to be will not include it in the grant. A deed which fails to describe any part of the land intended to be conveyed does not convey the part omitted from the description.

The parol evidence as to where the fence stood was inadmissible to prove that any other than the east true line of the lot conveyed to Mrs. Andreu was the east line to the piece conveyed by her and her husband to Miss Watkins; and no other land passed by the latter deed than a piece having the same eastern boundary, and extending west 20 feet, and otherwise answering the calls of the deed, and hence the land sued for is not included in that deed, and cannot be recovered under it. *Cornell v. Jackson*, 9 Metc. 150; *Northrop v. Sumner*, 27 Barb. 196; *Tymason v. Bates*, 14 Wend. 671; *Crosby v. Parker*, 4 Mass. 110; *Armstrong v. Du Bois*, 90 N. Y. 95; *Cornell v. Todd*, 2 Denio, 130; *Clark v. Baird*, 9 N. Y. 183, 199 et seq.; *Drew v. Swift*, 46 N. Y. 204; *Linscott v. Fernald*, 5 Greenl. 496; *Bell v. Morse*, 6 N. H. 205; *Van Wyck v. Wright*, 18 Wend. 157; *Clark v. Wetley*, 18 Wend. 320; *Sedg. & W. Tr. Title Land*, § 798a.

There is in the authorities presented in behalf of the appellee nothing in conflict

with the views given, or authorities we have cited. The cases relied upon to sustain the introduction of parol evidence to show that the fence was the dividing line referred to by the deed are such as present a latent ambiguity in the description, as in *Abbott v. Abbott*, supra, and *Hedge v. Sims*, 29 Ind. 574, or where stakes or other monuments were held to control distances, as in *Turnbull v. Schroeder*, supra; or where, as in *Reamer v. Nesmith*, supra, *Waterman v. Johnson*, 13 Pick. 261, and *Claremont v. Carlton*, 2 N. H. 369, parol testimony was admitted to explain particular expressions which did not of themselves convey a definite meaning.

Where one deed refers to another, or to a map or plan of a survey, for a description, the deed, map, or plan referred to becomes as much a part of the instrument making the reference as if actually copied into it. *Chaffin v. Chaffin*, 4 Gray, 280; *Allen v. Bates*, 6 Pick. 460; *Foss v. Crisp*, 20 Pick. 121; *Vanoe v. Fore*, 24 Cal. 436; 3 Washb. Real Prop. (4th Ed.) 427, 428, 450; *Gould, Waters*, § 194.

As the plaintiff has not been in possession of the land sued for for the period and under the circumstances necessary to create in her a statutory title by adverse possession, nor in fact in possession of it at any time in so far as this record discloses, and as such land is not covered by her deed from Mrs. Andreu, and parol testimony is not admissible for the purpose for which it is attempted to be used, a new trial should be granted.

It is unnecessary to discuss the several assignments of error further than they are involved in what has been said above. The judgment is reversed, and the case remanded for a new trial.

YATES V. STATE.

(*Supreme Court of Florida. July 23, 1890.*)

MURDER—MALICE AND PREMEDITATION—DISCRETION OF TRIAL JUDGE—CONDUCT OF JURORS.

1. In a trial for murder in the first degree, proof of malice and premeditation need not be express or positive, but may be deduced from all the facts attending the killing; and if the jury can reasonably and satisfactorily infer from all the evidence the premeditation or intention to kill, and all the other ingredients which are necessary to constitute murder in the first degree, it is sufficient.

2. Upon a motion for new trial, on the ground that one of the jurors was sleeping during the trial, the evidence as to the fact being conflicting, the appellate court will not interfere with the discretion of the trial court in overruling the motion.

3. On motion for new trial two witnesses stated that one of the jurors had stated before the trial that if he could get on the jury he would break the accused's neck, but the evidence being conflicting, and the witnesses who testified as to the alleged statement of the juror being related to the accused by marriage, and one of them being an enemy to the juror, the trial judge did not transcend his discretion in overruling the motion.

(*Syllabus by the Court.*)

Error to circuit court, Osceola county; JOHN D. BROOME, Judge.

Mershon & Rogers, for plaintiff in error.

William B. Lamar, Atty. Gen., for the State.

MITCHELL, J. At the fall term, 1889, of Osceola circuit court, the plaintiff in error, James Yates, Jr., was tried, convicted, and sentenced to death for the murder of one M. H. Mitchell, and the case comes here upon writ of error.

There is but one error assigned: "That the court erred in denying the motion of the defendant for a new trial on the grounds set forth in said motion."

The grounds of the motion for new trial are:

"(1) Because the jury found contrary to law, and against the law.

"(2) Because the jury found contrary to the evidence, and against the evidence, and against the weight of evidence.

"(3) Because the jury found against the law and the evidence.

"(4) Because the jury found upon the statement of state attorney, J. D. Beggs, as to what the testimony was, and not from their own recollection as to what the witnesses swore, to-wit: While W. L. Palmer, Esq., assistant state attorney, was addressing the jury, one of the jurors, to-wit, Newton Lackey, asked him what the testimony was as to whether or not Yates wrote a letter at the store, and the said W. L. Palmer gave his understanding, to-wit, that there was no evidence as to his having written.

"(5) Because while J. D. Beggs, Esq., state attorney, was addressing the jury that two of the jurors asked him what the evidence was as to certain points of the case, and that the said district attorney, J. D. Beggs, proceeded to tell them what it was, to which conduct defendant's counsel then and there excepted.

"(6) Because while Jack Woods was testifying in the case one of the jurors, to-wit, B. F. Cobb, was sleeping, and could therefore not have heard the testimony, as will appear by the affidavits of G. A. Worley and Burrill Yates hereunto attached.

"(7) Because he was not tried by a fair and impartial jury of his peers, for that one G. W. Tindall, one of the jurors, on Monday, the 14th day of October, 1889, and after he had been summoned as a juror, said to David Allman that he was summoned as a juror in the Yates Case, and that if he could get on the case he would break his neck. And that on the same day, and at a different time and place, he, the said G. W. Tindall, told S. E. Lightsey that he was summoned here in the Yates Case, and that if he could get on it he would break his neck, as will appear by affidavits hereunto attached."

The first ground of the motion was not well taken. The verdict of the jury was in due form, and conformed to law in every respect.

There was no exception to the charge of the court, and the charge is not complained of here.

Second ground. The following is substantially the evidence in the case as shown by the record:

J. L. Hines testified for the state: "I know James Yates, Jr., and knew M. H. Mitchell. Was at Mitchell's store at Tur-

key Hammock, September 20th, in the afternoon. John Johnson, Dan Sanders, James Johnson, James Yates, and myself were present. Yates is present in court, and witness points him out. I was at the store that night; store in Osceola county, Fla. That afternoon we all went down to meet the boat. Yates and others went on the boat. Mitchell, myself, and one of the Gilbert boys were in the house when the boys came in from the boat. When they came in Mitchell began cursing Lewis Johns, and Yates got up on a corn-sack, and the rest stood around. This was about 3 or 4 o'clock. We remained at the store until the rest got ready to leave, about a half hour by sun. I didn't leave then. Yates came back after I went, to get supper with me. While I was eating supper he said he had to go back and do some writing. I told him he could do it there, and that I had to go back and put the baby to bed, and he said he would go down there with me. We went back to the store about dusk. We went in and I lit a lamp. As I struck the light to light the lamp, Mitchell, who was lying on the bed, got up. When he got up he asked what time it was, and then asked us to come in and take a drink, and we went in and Mitchell and Yates took a drink. Then we went back in the dining-room, sat down, and commenced talking. Mitchell, his little child, Yates, and myself, all that were present at the time, were talking about things generally. About that time Allen and Woods came up. They went to cook their supper on Mitchell's stove. About this time Yates and I started to go home, and Yates asked me to come back, and said we ought to go back and help Mitchell take care of his things, that he was too drunk, and they might take all he had. I told him I didn't think they could take his things, that I thought he was able to take care of himself. We went back, and Mitchell got to talking about his baby, how he intended to raise her, etc. Yates said there was such a book, and asked Mitchell if he had read it, and he said 'No.' Yates got a dictionary, and looked up a word, and they decided that it was all right. Mitchell claimed that they did not find the word, and they went back in the dining-room. I then said to Yates, 'I am getting sleepy, and think I will go home and go to bed;' and we started again, and got out of the door when Yates asked me again if I thought we had better leave, and I said I thought he (Mitchell) could take care of himself; and about that time Mitchell came to the door, called me, and told me to come back, and I told him I thought I had better go to bed, but he continued to call me, and Yates then said: 'You have no use for me.' Mitchell then told him he 'didn't.' Yates told him then he had a due-bill against him for \$2, and Mitchell said he could settle it, and Yates turned round to hand it to him, and Mitchell turned and went back, and called me to see that it was done right. I then went back, and Mitchell got his books and laid them on the counter, and turned to where he had Yates charged with an account, and asked me to run it up for him, which I did, and

saw due Yates a dollar on the books, and Yates told him that it was satisfactory, and asked Mitchell if that was satisfactory to him. Mitchell hunted awhile but didn't give an answer, but, as Yates told him before that he owed a dollar, he claimed that he didn't owe him but 60 or 65 cents. Mitchell said: 'If Hines says I owe him a dollar it is satisfactory.' I told him I didn't know what he owed Yates, but the book showed he owed him a dollar. The account was settled satisfactorily, and they went back in the dining-room. It was then supper time. Newton Allen got supper ready, and they were eating. I and Mitchell were talking about his baby, what he intended to do with her, etc. He said he would send her to a convent, and I told him I thought it was the best place to send her to, and he said he thought a good deal of me, and Yates spoke then, and said: 'You intend to raise the girl up for him.' Mitchell said, 'We are not talking about that,' and I spoke and said we didn't mean anything of that kind, and Yates said he didn't mean any harm, and that he would not have said it if it meant any harm, and made an apology for it. Then he began talking to Mitchell about it being a wonder that people didn't steal everything he had while he was drunk. Mitchell told him that they would not steal it all unless they brought wagons. Yates said they could bring wagons. Mitchell said if they did he could start again, and that they had taken his things once. Yates told him that if it were not for his friends the people would steal what he had, and Mitchell told him again that he could start again. Yates said he didn't see how he could, as his friends had to come there and take care of his things. Mitchell replied that he had dogs, and Yates asked him if he thought more of his dogs than of his friends. Mitchell said he did. Yates told him he didn't like for him to pass any of his insinuations, and asked him if he thought that his dogs were better than he was. Mitchell, replying, said he did. Then Yates slapped him. Mitchell picked up a butcher-knife off the table, and started towards Yates, and Yates drew his pistol. Yates said something when he drew the pistol that I did not understand, and, when Mitchell started towards Yates, he (Yates) backed in front of the door in there, and I said to Mitchell as he started to pass him, 'If you are going to cut up that way I will leave,' and I started out, and went out. I said nothing to Yates when he slapped Mitchell. When Mitchell picked up the knife I said to them they could not do that. Just as Yates slapped Mitchell I said to him that I would not pay any attention to Mitchell, and not start any fuss, that he had better go, and I went on out. After I went out I heard Mitchell say to him 'to meet him half-way.' On my way up to Bass' I heard the report of a pistol. It was not long after I left the store before I heard the report of a pistol. I had got off, I suppose, about 50 or 75 yards. I went on to where I was stopping. Went back to the store next morning. Saw Yates that night after I left the store. He came to where I was stopping

about a half hour afterwards. I was sleeping in Bass' store, and Yates came there. He called me, and I went out to him. When I went out he asked me where his horse was. I told him he was in the pasture, and I asked Yates what he had done. He said he had shot his pistol off, and after Woods came up Yates came to me, and I told him that Woods said that Mitchell was shot, and I asked him if he did it. He told me that when Mitchell had his pistol drawn on him he knocked his hand back, and his pistol fired. Heard only oneshot. Went back to the store next morning. Did not go back that night. I went to the store early next morning, by the time I could see. Yates, Allen, and Padgett were with me. Went in the store. The lamp was still burning that we left there that night, and we found Mitchell there dead. He was lying stretched out by the tin of oil, his head against the door, his hands in this position, [indicating,] and the pistol in his right hand, with the forefinger on the trigger. Think his elbows were resting on the floor. I went for Williams, a justice of the peace. Saw the body examined. Saw a wound on it, on the left breast, below the nipple. The body was lying by the oil, between the front door and the center of the store. When I left the store that night Yates was standing up, and Mitchell had started towards the door of the store, and I went out. From where we found the body to where I last saw Yates in the house was just in the next room, about 5 or 6 feet. I think it was about 3 feet from the door where he was standing. He was standing in the dining-room, and Mitchell's body was in the other room of the store. I am familiar with the premises there. When Mitchell started at Yates with the knife, Yates stepped back. After passing Yates, Mitchell went into the store. I left Yates in one room, and Mitchell was found in the store, in the next room. The partition was about 2 or 3 feet wide, and his feet were about 5 feet, I guess, may be more, from where I left Yates, to where I found Mitchell the next morning. It was an open door there. Don't know whether Yates could have shot Mitchell from where I last saw him to where I found Mitchell the next morning or not without passing through the partition door. They were opposite the door when I left. When I left I went out of the dining-room door. When going out I passed by Yates. Yates was as near the door that I went out of as I was, and he was standing up. It was Mitchell's house. He was lying there. Yates slept with me the night of the killing. He went off. Said he was going to Pine Castle, and then coming here, [Klissimnee.]

On cross-examination the witness testified that "there was a conversation between Yates and Mitchell. While they were talking Yates pulled out his pistol, and laid it on the counter, and Mitchell asked him what he was going to do with it. Yates offered to swap pistols with Mitchell, but Mitchell said he wanted to sell his, and Yates said he would like to sell his. Mitchell was pretty drunk when he came off the boat, and went to sleep about 3 or 4 o'clock. He was cursing and

'rearing,' and got after Lewis Johns with his pistol until we got him to stop. Yates was speaking kindly to Mitchell when talking to him about there being danger of his losing his property. Don't know exactly how far I had got from the store before I heard the shot. It might have been more or less than fifty yards. I was traveling in an ordinary walk. When Mitchell was going to the store I thought he was stepping pretty peart. He seemed to be mad. Don't know whether he was excited or not. I left Woods in the store at the time. He was at the table. There was nothing to have prevented Yates shooting Mitchell as he walked off." Thinks Mitchell's pistol a 38, a self-cocker.

On redirect examination the witness testified: "Yates could have gone out of the house before I heard the pistol shot. He could have gone out as I did."

J. Woods testified for the state that he knew Yates and Mitchell. Mitchell lived at Turkey Hammock. "I was at Mitchell's on the 20th of September last. Was there a little after dark. Yates was there. Saw Yates, Hines, and Mitchell there, also a little girl." Witness also related the conversation between Mitchell and Hines about Mitchell's little girl. During the conversation Yates said to Mitchell, "you don't want me about you," and witness thinks Mitchell said he didn't. Witness also related the commencement of the difficulty, but does not say that he saw Yates slap Mitchell. Continuing, witness testified: "Mitchell walked on in the store. He walked on around the partition, and directly came back to the door with a pistol in his hand. I got up from the table, and walked out of the house. Hines and Allen had already gone out. When Mitchell started towards Yates, Yates drew his pistol. He just stepped back, and let Mitchell pass on by going into his store. That was when he came back with the pistol in his hand. Don't remember to have heard Yates say anything to Mitchell, only to cut if he wanted to. Yates then had his pistol in his hand. When Mitchell came back with his pistol in his hand I heard him tell Yates to meet him half-way; that he was going to do so. That was before I went out of the house. When I went out I left Yates standing in front of the door near the corner, about a foot from the bed,—the door leading into the store. I had just got out of the door when I heard the pistol fired,—don't think more than ten feet from the door. I heard a noise like something fall, as the pistol fired. In a very short time after the pistol fired Yates walked out of the house. He went off, in the direction of Bass' store. He said nothing to me. At the time the little girl was sitting in a chair at the table, screaming, and I went in, and brought her out of the house. Shortly afterwards I carried the child to Bass.' I saw Yates when I went to Bass'. He asked if I had seen anything of Mitchell, and I told him I had not. When I saw Yates at Bass' he said that Mitchell had his pistol presented in his face and was going to shoot him, and that he caught his arm and shoved it off.

and the pistol fired off. Don't remember whether he said it was Mitchell's or his own pistol that was fired. Yates said nothing to me about the shooting of Mitchell the next morning. I think he said something to me about friendship. I told him if he did it, for I asked him if he did it, but he never told me whether he did it or not. I said to him then, 'Jim, you know what you have done,' and he said it looked like he had to do it, or be killed himself, that Mitchell had his pistol presented in his face ready to shoot; and he then asked me if I saw him do it, and I told him I didn't." This conversation was after Mitchell was found dead. Witness then testified as to the position of Mitchell's body, just about as Hines did.

On cross-examination the witness testified that Yates' manner towards Mitchell when advising him about leaving his store open seemed to be kind. "When I left the store Mitchell was advancing towards Yates. At this time Yates had moved up a little towards the door where Mitchell was. In going out Yates would have to pass in front of the door, in going out of the door I went out of. That was the only door without going through the store. The next morning Yates said he was going to Pine Castle, and then would come back, and give up."

On redirect examination the witness testified: "I don't know how long Mitchell was out of my sight when he went out of the kitchen, or bedroom, to the store. Not very long. I don't know whether he was gone long enough for Yates to have gone out. It looks to me like, if he had time, he could have gone out."

On recross-examination the witness testified: "I don't know how long after he went in the store door before he came back. Don't know where Mitchell kept his pistol. He would have had time to walk ten steps and back. He went and came back as quick as he could, it looked to me. He returned, saying to Yates: 'Meet me half-way. I am ready for you.'"

Newton Allen testified for the state: "I knew Mitchell;" and points out Yates. "Knew of the difficulty in which Mitchell was killed. Saw Hines, Mitchell, and a baby in the store. I cooked supper on Mitchell's stove inside the door in Mitchell's bedroom." Witness testified as to the transactions and conversations which preceded the difficulty, substantially as Hines did, and then said, "Yates asked Mitchell, and said, 'If you had no friends you would lose all you had,' and, when he repeated the words again, Yates got up and started towards him, and Mitchell told him he had dogs he thought more of than his friends, and Yates slapped his jaws. In that time he turns back and gets his butcher-knife, and started towards Yates, and Yates backed back to the corner, and let him pass by. If Yates had anything in his hand, I did not see it. When Mitchell went out I left. I was the first to get out. Yates walked out directly after the pistol fired, and I heard a lumbering in the house. Yates walked about ten feet from me, and I heard him cock his pistol."

Woods, being recalled by the state, tes-

tified: "When I left Mitchell's store that night I didn't see any one in there but Yates and the little girl. These were the only persons I saw in there just as I stepped out, and I had only got about ten feet from the door when the shot was fired. I saw a little place of blood on Mitchell's body that looked like something went into his breast. It looked like it might have been a bullet wound. Did not examine it closely."

G. W. Rowland testified for the state: "I know the defendant. Remember when Mitchell was said to have been killed. I saw Yates afterwards at my house. Yates came to my house about the last of September, and was talking to my wife, his aunt, and I heard him say: 'Aunt Sarah, I have bad news to tell you.' I inquired what it was, and he said he had killed a man down the river, that it was Mitchell he had killed, and that he had to kill him in self-defense."

On cross-examination the witness testified: "Yates did not tell me the circumstances, only he said Mitchell was right in the act of shooting him, and that he had to kill him in self-defense. He spoke of surrendering himself as soon as he attended to some business."

Lewis Johns testified for the state: "I was on the jury that held the inquest on Mitchell's body. I was present when the pistol was taken from Mitchell's hand, and it was loaded, every barrel. Saw the wound on the body. It looked like a ball went into his body. I never examined a wound before, a shot-hole, that way. It was a small hole right in there, [indicating the place.] There was a sign of powder on the shirt. There was no physician present."

On cross-examination the witness testified: "None of us inserted anything in the wound to see how deep it was. The wound did not go through the body, but into it. It bled but little."

John M. Lee testified for the state that, according to the official maps, Mitchell's store is in this (Osceola) county.

The following is Yates' statement to the jury: "I was a friend to the old man, and he insulted me several times, and I taken it. He started towards me with his knife, and I gave back, and he threw down his knife, and went in and got his pistol, and I started out of the door. He came to the door with the pistol in his hand, and threw it up, and stuck it in my face, and I hated to do what I did, but I had to do it to save myself. Well, I was a friend to him, and hated to do it. That is all I have to say."

It is not claimed by counsel for the accused that he did not commence the unfortunate difficulty which culminated in the death of Mitchell, but it is insisted that, notwithstanding Yates was the aggressor, the deceased used more force than was necessary to repel the assault made upon him by Yates. In other words, that, when Yates slapped Mitchell, he (Mitchell) armed himself with a pistol, renewed the difficulty, assaulted Yates with the pistol, and put him in imminent danger of losing his life, or imminent danger of great bodily harm, at the hands of Mitchell; and if

the position thus contended for was borne out by the evidence, and the accused had discontinued the difficulty already commenced, and honestly shown an intention to avoid further trouble with the deceased, and at this time Mitchell had assaulted him under such circumstances as to induce the accused to honestly believe that he was in imminent danger of losing his life, or was in imminent danger of great bodily harm, the homicide, at most, would have been manslaughter; but, unfortunately for the accused, the evidence does not sustain the assumption that the accused had at the time abandoned the difficulty. On the contrary, the accused evinced a willingness to renew the conflict at any time. After Mitchell was slapped by the accused, and upon his taking up the knife and starting towards Yates, Yates drew his pistol, and said to him, "Cut if you want to," thus showing a readiness and willingness to renew the difficulty. When Mitchell threw down the knife, and went from the dining-room into the store, the witnesses, except Woods, left the dining-room, but what did the accused do? Did he, after provoking the difficulty with Mitchell, a drunken man, show a disposition to avoid further trouble by leaving Mitchell's house (with perfect safety) as others had done? No, but he remained; and after the last witness had left the dining-room he shot Mitchell down in the presence of his little child, and the evidence shows that at the time he fired the fatal shot he was so close to Mitchell that his clothes were powder burned. As to the position of the parties at the time the shot was fired there is no evidence, save the statement of the accused. He says that on returning from the store Mitchell had a pistol in his hand, (this is corroborated by Woods' evidence,) which he thrust in the face of the accused, and that the accused then shot in self-defense. The evidence does not, we think, show a case of self-defense. The necessity that will justify the slaying of another in self-defense is such that the party should not have wrongfully occasioned the necessity; for a man should not in any case justify the killing of another by a pretense of necessity unless he was without fault in bringing that necessity upon himself. *Vaiden v. Com.*, 12 Grat. 717; *Haynes v. State*, 17 Ga. 465; 1 Bish. Crim. Law, § 844; *State v. Neeley*, 20 Iowa, 108; *Adams v. People*, 47 Ill. 376; *State v. Starr*, 38 Mo. 270.

The only evidence in the case that tends to show that Mitchell, on his return to the dining-room from the store with the pistol in his hand, made an effort to assault the accused, is the defendant's own statement. This statement the jury evidently did not believe, and, under all the circumstances, we are not prepared to say they were not warranted in not believing it.

There is a very significant fact shown in the evidence of Woods, who certainly was not a willing witness for the state. He says that on the morning after Mitchell was killed he had a conversation with Yates, and that in the conversation Yates asked him if he would be his friend, and then asked the witness if he had seen him shoot Mitchell. This was after Yates

had made different and conflicting statements as to the shooting, and then to ask the witness if he saw it casts great suspicion upon the statement of the accused as to how the shooting occurred.

Under our statute, to establish murder in the first degree it devolves upon the state to prove all the elements required to constitute murder in this degree. This proof, however, need not be express or positive. It may be adduced from all the facts attending the killing, and if the jury can reasonably and satisfactorily infer from all the evidence the existence of the intention to kill, that the killing was unlawful, malicious, and from a premeditated design to effect the death of the person killed, it will be sufficient. *State v. Underwood*, 57 Mo. 49. The jury in this case, under the evidence and the law given them by the court, convicted the prisoner of murder in the first degree.

And after giving to the whole evidence that careful consideration demanded by the gravity of the issue involved, and after examining and scrutinizing every fact and circumstance disclosed by the evidence, our opinion is that the finding of the jury is sustained by the evidence, and, consequently, that the court below committed no error in overruling the motion to set aside the verdict of the jury as being against the evidence.

The fourth and fifth grounds of the motion may be considered together. During the trial, two of the jurors asked the state attorney in the presence of the court what was the evidence upon certain points, and the state attorney requested the stenographer to turn to the evidence and see what the evidence was, but to this the defendant objected, and the court sustained the objection. There can certainly be nothing in these grounds of the motion.

The sixth ground of the motion was not well taken. After the trial closed the defense introduced certain affidavits for the purpose of showing that Cobb, one of the jurors, was sleeping while one Jack Woods was testifying in the case. The state filed counter-affidavits, and among others that of the juror, in which he stated that he was not sleeping as charged, and that he heard the whole of the evidence. The witnesses for the defendant stated upon belief that the juror was sleeping, which is fully met and overthrown by the juror's statement that he was not at any time sleeping. But if the juror was sleeping, and that fact was at the time known to the accused or his counsel, it should have been brought to the attention of the court, but, failing to do so, the objection, if it could be called one, was waived. *Baxter v. People*, 3 Gillman, 368; *Cogswell v. State*, 49 Ga. 104.

Seventh ground of the motion. Upon the motion for new trial the defense introduced the affidavits of C. E. Lightsey and David Allman for the purpose of showing that the accused was not tried by a fair and impartial jury, in that the juror Tindall had stated to each of the affiants that if he could get on the jury he would break Yates' neck. Counter-affidavit of Tindall was filed by the state, in which he states most positively that he had made no such

statement either to Lightsey or Allman. The accused states that he did not know of the statements alleged to have been made by Tindall until after the trial of the cause, and, if it was clear that Tindall made the remarks imputed to him, it would be ground for setting aside the verdict.

When affidavits are taken as in this case, and the evidence is conflicting, the verdict will not be set aside unless manifest injury has been done the accused, which is not shown in the case at bar. *Romaine v. State*, 7 Ind. 63; *Com. v. Knapp*, 10 Pick. 477. Such questions as this must necessarily be left largely to the discretion of the trial judge, who may know the witnesses and be able to judge of their credibility. As to the discretion of the trial court in such cases, see *People v. Taing*, 53 Cal. 602; *People v. Vasquez*, 49 Cal. 560; *People v. Cotta*, Id. 168.

The evidence in the case at bar shows that both Lightsey and Allman were distantly related by marriage to the accused; that Allman was a personal enemy to the juror; and it also shows that Lightsey was present when the trial was in progress; and it is remarkably strange that, if it were true that they had heard the juror Tindall make the remarks which the witness swore he did make, neither of them said anything about it until the trial was over. That the trial judge believed the statement of Tindall, and did not believe those of Lightsey and Allman, cannot be doubted, and, under the circumstances as shown by the evidence, we will not say that the judge's conclusion in the matter was not correct. In the case of *Irvin v. State*, 19 Fla. 872, motion was made for new trial, and the affidavits of three witnesses were introduced to show that one of the jurors had stated before going on the jury that if he was on the jury he would hang the accused. Counter affidavit of the juror was filed in which he denied the statement imputed to him, and the court held that, "aside from these considerations, Coburn, [the juror,] by his affidavit, sets the question at rest. He has no recollection of having used the expressions as charged in these several affidavits presented by the defendant on the motion. He says he had not informed himself of the circumstances of the killing, and that when he was sworn as a juror he had no existing or formed opinion as to the guilt or innocence of the accused, and was absolutely without any previously formed opinion. * * * This may be said with reference to the juror Tindall. He had shown himself fully competent as a juror, and, under the decision in *Irvin's Case*, the court below committed no error in refusing to grant a new trial upon the ground of the alleged incompetency of Tindall. To allow parties after the close of an important case to come in and file *ex parte* affidavits, and thus set at naught the finding of a jury, would be equivalent to doing away with jury trials. In this case the trial judge fully examined into all the facts connected with the alleged incompetency of Tindall, and after doing so, in the exercise of a sound discretion, refused to set aside the verdict.

Upon a careful consideration of the whole case we see no cause for reversal, and therefore the judgment of the court below is affirmed.

CITY OF JACKSONVILLE *et al.* v. LEDWITH.
(Supreme Court of Florida. Aug. 14, 1890.)

MUNICIPAL CORPORATIONS—CHARTER—ORDINANCES
—MARKETS — POLICE POWER — TAXATION — LICENSE.

1. A market, within the meaning of that provision of the Jacksonville municipality act, (chapter 3775, St. 1887,) authorizing the mayor and city council to establish and regulate markets, is a place to which the public may resort for selling and buying certain articles; and where the articles are exposed for sale in stalls or space provided for such purpose, and for the use of which stalls or space toll may be charged; and for whose government reasonable regulations, having in view the preservation of peace and good order and the health of the community, may be prescribed.

2. In the United States, the authority to establish and regulate markets falls within the police power of the states, and the right to exercise such authority may be conferred by a state upon municipal corporations; and it is competent for these corporations, if the authority delegated is sufficient, to prohibit the sale of such articles as are within the exercise of the police power, and usually sold at markets elsewhere than at a duly-established market.

3. The question whether or not a grant to a municipal corporation of power to establish and regulate markets implies authority to prohibit the sale of articles falling within the power, and vendible at a market elsewhere than at a duly-established market, not decided, but referred to, and authorities cited.

4. A grant to a municipal corporation of power to regulate by ordinance the vending of meat, poultry, fish, fruits, and vegetables, gives authority to prescribe by ordinance the times and places of their sale, and to prohibit the sale of them elsewhere. The restrictions as to such times and places must however be reasonable, with reference to the welfare of the community, and not be in general restraint of trade. Under this grant sales may be restricted, under the same limitations, to markets duly established under a grant of power to establish and regulate markets.

5. The authority of a municipal government to establish and regulate markets implies power to purchase or provide a site, erect necessary buildings and stalls, and when they are provided, either by a lease, purchase, or other lawful mode, to adopt reasonable regulations for the government of the market, and the business transacted there.

6. Where a municipal corporation constructs or rents a building, its principal object being to provide a market-house, an appropriation of a portion of the building for another purpose, as the holding of municipal courts, does not render the erection or renting of the building illegal.

7. If reasonable facilities for selling at markets are given, regulations, restricting to markets the sale of articles falling within the police power, or the sale of which the health or welfare of the community requires to be regulated, do not constitute a prohibition or illegal restraint of trade or a monopoly.

8. The courts are the final judges as to what are proper subjects of the police power, and the law-making power cannot arbitrarily make that a subject of its exercise which, from its nature, is not one.

9. Where the language of a statute authorizing an exercise of the police power is so broad as to include things which are not as well as those which are subjects of the power, the exercise of the power will be confined to things which are legally the subjects of that power.

10. Where the statute establishing a municipi-

pal government provides that its legislative power shall be exercised by a city council, and that no bill shall become a law until it shall be signed by the mayor, unless he shall fail to return it with his objections to the council within a prescribed time, or unless it, on being so returned, shall be passed by two-thirds of the whole number of the council, and also provides that the mayor and council shall have power to establish and regulate markets by ordinance, and to regulate the vending of meats and other specified articles in like manner, a market cannot be established, nor can it or the vending of such articles be regulated otherwise than by municipal law enacted in the manner above indicated; and an ordinance attempting to authorize the city council or a board of health, or both, to exercise either of the above powers independently, and in disregard of the above provision for the co-ordinate action of the mayor, conveys no authority in the premises. The authority cannot be delegated.

11. The word "privileges," as used in the act establishing the municipality of Jacksonville, where power is given to levy and collect taxes for the purpose of revenue upon "all property and privileges taxable by law for state purposes," and to license, tax, and regulate auctioneers, retailers of liquors, and other named avocations, "and all other privileges taxable by the state," does not mean such things as are technically privileges, and can never be enjoyed or exercised except under authority of law, but means other occupations of the same kind as those designated. A market being a franchise or technical privilege is not taxable by the city of Jacksonville for revenue purposes.

12. The municipality of Jacksonville is not given the power which the state has of selecting the subjects of occupational taxes for raising revenue, but is limited to the occupations named in its charter act, or the revenue laws of the state.

13. The first section of article 12, c. 8775, of the Statutes, as amended by the eleventh section of the act of May 31, 1889, does not in its provision, "privileges may be licensed and taxed by city ordinances," designate subjects of taxation. The purpose of the section is to regulate the manner of assessing and levying taxes on real and personal property, and taxing avocations elsewhere subjected to municipal taxation.

14. Wherever the power to authorize or license a person to establish a market exists in a municipal corporation, a fee for the permit or license may be charged by the municipality as a police regulation although the power to exact a tax for revenue may not exist. A sufficient fee may be charged under the police power to cover, not only the necessary expense of issuing the license, but also that of the additional labor of officers, and other expenses imposed upon the public by the business, but no more.

15. A license to a person to sell meats or other things named in the grant to the municipality of Jacksonville of power to regulate the vending of meats, etc., is not the grant of a right to maintain a market within the meaning of the legislative grant of authority to establish and regulate markets.

16. The grant of authority to regulate the sale of meats, etc., by ordinance, is one of police power. Under it the hours, the places, and rules for conducting the business may be prescribed, and the establishment of fixed places of sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations, and, as in the case of markets affording reasonable facilities for all who may desire to engage in vending such articles, the sales may be confined to particular places; yet all this must be done by impartial and general regulations affording the same rights to all alike upon the same conditions.

17. The grant of authority to regulate the vending of meats, etc., does not give power to tax for purposes of revenue the occupation of vending any of the named articles, but it, in connection with the grant of power to regulate inspection, justifies the imposition of such fees and charges as will cover the expense of both inspect-

ing the articles offered for sale and of the police supervision of the business necessary to prevent its becoming harmful to the community.

18. The power to establish markets cannot be used to create a monopoly of the right to sell.

19. The police power cannot be parted with or impaired by contract.

20. The power of a municipal government to establish markets implies the authority to change their location as the convenience of the community may dictate.

21. Where an ordinance amending a section of a former ordinance provides that such section "shall read as follows," stating the provisions, the section as amended becomes for all future purposes the entire section, and anything which was in the original section, but is omitted from it as amended, is repealed.

22. Where an ordinance is passed establishing a public market, and providing that no person shall sell or offer for sale at any other place within the city limits unless he shall be expressly authorized so to do by the city council, and another ordinance, providing for the establishment of so-called "private markets" at which the same articles may be sold, is passed on the same day, but approved by the mayor on a day subsequent to his approval of the other one, the two ordinances are to be considered as one ordinance for the purpose of ascertaining the intention of the municipal law-makers.

23. Where parts of an ordinance, or of two ordinances which are *in pari materia*, are so connected together or dependent upon each other that it cannot be presumed the municipal law-making power would have ordained the one without the other, and one or some more of the parts are void because in conflict with provisions of the charter act, all the parts so connected or dependent will be held invalid; e. g., where a public market ordinance provided that no person should sell certain articles elsewhere than at the public market, "unless such person should be allowed to do so by the city council," meaning by these quoted words unless he should be authorized to do so under the provisions of a private market ordinance, which latter ordinance was void on account of its conflict with the charter act, the prohibitory clause of the public market ordinance falls with the private market ordinance.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; JAMES M. BAKER, Judge.

J. M. Barry and Fletcher & Wurts, for appellants. Cooper & Cooper, for appellee.

RANEY, C. J. The act of May 31, 1887, c. 8775, establishing the municipality of Jacksonville, provides, in section 4 of article 3, that the mayor and city council "shall have power by ordinance * * * to make regulations to secure the general health of the inhabitants, and to prevent and remove nuisances; * * * to provide for and regulate the inspection of beef, pork, flour, meal, and other provisions, oils, whisky, and other spirits in barrels, hogheads, and other vessels; to regulate the inspection of milk, butter, lard, and other provisions; to regulate the vending of meat, poultry, fish, fruits, and vegetables; to restrain and punish the forestalling and regrating of provisions, and to establish and regulate markets; * * * and to pass all ordinances necessary for the health, convenience, and safety of the citizens; and to carry out the full intent and meaning of this act; and to accomplish the object of this incorporation."

The substance of the market ordinances of Jacksonville, as they stood on Septem-

ber 10, 1889, the time the bill in this case was filed, is, omitting the penal provisions as to a violation of the same, as follows: The public market ordinance makes every day except Sunday a public market day, and constitutes the market buildings on water lot 24, at the foot of Market street, and "not elsewhere," the public market; and ordains that stalls, tables, or space in this market shall be rented to butchers or others desiring to hire the same by the month, or such longer period as may be desirable, upon such terms, and for such sum, as the board of public works shall determine. It also provides that no person shall sell any fresh beef, fresh pork, or mutton, or establish or maintain any market, stall, or shop for the keeping or sale of fresh beef, pork, or mutton, at any place within the corporate limits except at the public market, unless such person or persons shall be expressly authorized to do so by the city council: provided, however, that producers bringing vegetables, poultry, eggs, or other country produce to the city for sale shall be permitted to sell the same free of tax anywhere within the city.

The private market ordinance provides that private markets may be established, regulated, and abolished at the discretion of the city council, but no private market for the sale of fresh meats or fish shall be maintained within the city except with the permission of the city council granted by resolution, and not more than one stall shall be permitted or licensed within the same building. Private markets must be constructed and maintained in accordance with specifications, rules, and regulations approved by the city board of health governing the same, and prescribing the size and character of stalls, and no permit for the establishment or maintenance of any private market shall be granted except upon a petition indorsed by the city board of health. No person can maintain or do business in a private market except upon paying to the city treasurer for a license the sum of five dollars per month for each and every stall used, and no person shall do the business contemplated by this ordinance except upon stalls licensed, as heretofore provided.

A "market," says Blackstone, is a franchise or liberty derived from the crown by grant, or by prescription, which supposes a grant, (2 Comm. 37;) the establishment of public marts or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging, being in England, within the king's prerogative as to domestic commerce, (1 Comm. 274,) such prerogative consisting in the discretionary power of acting for the public good where the positive laws are silent; and, if it be abused by him to the public detriment, such prerogative is exerted in an unconstitutional manner, (Id. 252.) In Jacob's Law Dictionary, as well as that of Tomlin, a "market" is defined to be the liberty, by grant or prescription, whereby a town is enabled to set up and open shops, etc., at a certain place therein, for buying and selling, and better provision of such victuals as the subject wanteth; it being less than a fair, and usually kept

once or twice a week. Bouvier's definition is: "A public place and appointed time for buying and selling; a public place appointed by public authority where all sorts of things necessary for the subsistence or for the convenience of life are sold." In *Ketchum v. City of Buffalo*, 21 Barb. 296, it is said, citing Crabb's Law of Real Property, that a market is the privilege within a town to have a market, and the franchise may be granted to natural persons, or bodies politic. The grantee of the franchise has the right to have the market, but the public have also an interest in the market, and the grantee of the franchise is bound to provide suitable accommodations for those who attend the market. Judge Dillon, in his work on Municipal Corporations, (note 4 to section 380,) quotes the definition given by Judge Breese, which is: "A designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale." See, also, *Cincinnati v. Buckingham*, 10 Ohio, 257; *McLin v. City of Newbern*, 70 N. C. 12; *City of Burlington v. Dankwardt*, 73 Iowa, 170, 34 N. W. Rep. 801. The public character of markets is further illustrated by *Prince v. Lewis*, 5 Barn. & C. 363, where the grantee of the market, for the buying and selling of vegetables, fruits, flowers, roots, and herbs, had for his own profit permitted part of the space to be used for other purposes than those specified in the grant, and the residue of the space became insufficient for public accommodation, and there was not, on ordinary occasions, space within the market for carts and wagons resorting thither with vegetables, etc.; and it was held that the owner of the market could not maintain an action against an individual for selling vegetables in the neighborhood of the market, and thereby depriving him of toll, even at a time when there was room in the market, without showing that on the day when the sale took place he gave notice to the seller that there was room within the market. Again, in *Mosley v. Walker*, 7 Barn. & C. 55, it is said by BAYLEY, J.: "I take it to be implied in the terms in which a market is granted that the grantee, if he confine it to particular parts within a town, shall fix it at such parts as will from time to time yield to the public reasonable accommodations; and that if the space once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it; or, if not, to get land from other people, in order that the market, which was originally granted for the benefit of the people, as well as for the benefit of the grantee, may be effectually held, and that the public may have the benefit which was originally intended they should derive from it."

In the case of *Mayor of Penryn v. Best*, 3 Exch. Div. 292, decided in 1878, the court said: "The mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held." This was decided in the case of *Mayor of Macclesfield v. Chapman*, 12 Mees. & W. 18. It is pointed out in the

judgment that an old case (the Prior of Dunstable's Case, 11 H. 6, f. 19a, and cited in City of London's Case, 8 Coke, 127a.) had been erroneously supposed to decide the contrary. It may also be considered as decided by the case of Earl of Egremont v. Saul, 6 Adol. & E. 924. We feel bound by these authorities, although *dicta* may no doubt be found to the contrary. See Mosley v. Chadwick, in note to Mosley v. Walker, 7 Barn. & C. 47. The second conclusion by which we are bound is that such a right as is contended for may be acquired by immemorial enjoyment or prescription. Mosley v. Walker, 7 Barn. & C. 47; Mayor of Macclesfield v. Pedley, 4 Barn. & Adol. 307. In the court of appeal this view of the law was affirmed, though the judgment of the lower court was reversed on the ground that the right to prevent butchers from selling at their private shops on market days within the limits of the franchise was shown by the evidence to exist by prescription. 3 Exch. Div. 292, 297, et seq.

In our own country the authority to establish and regulate markets falls within the police power of the states, and the right to exercise such authority may be conferred by a state upon municipal corporations; and it is competent for these corporations, where the delegation of power is sufficient, to prohibit the sale of marketable articles outside of the regularly established markets. Dill. Mun. Corp. §§ 141, 380; City of Bowling Green v. Carson, 10 Bush, 64; First Municipality v. Cutting, 4 La. Ann. 335; Ex parte Byrd, 84 Ala. 17, 4 South. Rep. 397.

The question whether or not the grant of the power to "establish and regulate markets" implies, when standing alone, authority to prohibit, elsewhere than at duly-established markets, the sale of articles falling within the exercise of the police power, need not be decided in this case, although it would seem that authorities of great respectability sustain the affirmance of it, and some of them holding that such is the current of authority. Bush v. Seabury, 8 Johns. 327; Village of Buffalo v. Webster, 10 Wend. 100; Cronin v. People, 82 N. Y. 318; Ex parte Canto, 21 Tex. App. 61, 57 Amer. Rep. 609; Ex parte Byrd, 84 Ala. 17, 4 South. Rep. 397; Morano v. Mayor, 2 La. 217; City of Bowling Green v. Carson, 10 Bush, 64; Winnsboro v. Smart, 11 Rich. Law, 551; Dill. Mun. Corp. § 380; Ash v. People, 11 Mich. 347; St. Louis v. Weber, 44 Mo. 547. There are, however, authorities to the contrary. Bethune v. Hughes, 28 Ga. 560; Caldwell v. Alton, 33 Ill. 416. See, also, City of Bloomington v. Wahl, 46 Ill. 489; City of St. Paul v. Laidler, 2 Minn. 190, (Gil. 159.) In addition to the grant of authority to "establish and regulate markets" the legislature has, as appears in the first paragraph of this opinion, expressly authorized the mayor and council to "regulate the vending of meat, poultry, fish, fruit, and vegetables," and under this grant we are satisfied that they may by ordinance prescribe the times and places for the sale of the articles it covers; and such restrictions as to times and places being reasonable with reference to the welfare

of the community, and not being in general restraint of trade, they may likewise prohibit the sale of such articles elsewhere. That the sale of them may, under this grant, be restricted to markets duly established under the other, where the regulations do not constitute an illegal restraint or a prohibition of the trade, we do not doubt. Tied. Lim. § 104; City of St. Paul v. Traeger, 25 Minn. 248-255, and authorities cited *supra*.

Authority to establish and regulate markets implies, beyond question, the power to purchase or provide the site, and erect necessary buildings and stalls, and, when provided by lease, purchase, or other lawful mode, to adopt reasonable and usual rules and regulations in regard to the market and the business transacted there, and having in view the preservation of peace and good order, and the health of the community. Dill. Mun. Corp. § 382; Ketchum v. Buffalo, 14 N. Y. 356; Smith v. Newbern, 70 N. C. 14; Gale v. Kalamazoo, 23 Mich. 344; Spaulding v. Lowell, 23 Pick. 71; and Caldwell v. Alton, *supra*. If the real and principal object is the building of a market-house, the appropriation of a portion of the building to other purposes, as for the holding of courts, does not render the erection of the building illegal. Spaulding v. Lowell, 23 Pick. 71. And the same rule will hold good where, as in the case before us, the premises are leased. Gale v. Kalamazoo, 23 Mich. 344. An express grant of police power as to regulating the vending of meat, poultry, fish, fruits, and vegetables, as has been given to the city of Jacksonville, supplements the other with a restrictive authority as to the time and place at which any article within its meaning and purpose shall be sold. There is nothing in the act which excludes markets as the places to which the vending shall be restricted.

Where reasonable facilities for sale at markets are given, such a regulation is not a prohibition of trade, nor the creation of a monopoly, the subject-matter of the regulation being, as in the case of fresh meat and fresh fish, one which the health or welfare of the community requires should be regulated. It is argued by counsel for appellee that the language of the act includes the power to regulate the vending of all kinds of cured meats as well as of fresh meat, and if the power is given to prohibit the latter it is also as to the former, and hence it was not intended to give this power as to either. We do not admit that there is "prohibition" of the sale of fresh meats in the fact that an ordinance restricts their sale to market-houses; still it is a sufficient answer to the argument made to say that if the language of the statute is broad enough to cover any kind of meat, the vending of which cannot reasonably be dangerous to the health or welfare of the people, such language will be confined, when considered as authorizing the exercise of the police power, to the proper subjects of that power. It is well settled that the courts are the final judges as to what are proper subjects of its exercise, and the legislature cannot arbitrarily make that a subject which

from its nature is not so. In *re Jacobs*, 98 N. Y. 98; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273. It would be unreasonable to hold that the use of language so broad, when considered in the abstract, as to cover things not the subject of the police power, shows a legislative intent not to authorize the exercise of the power as to proper subjects of it. Moreover, the provisions of the same section as to preventing nuisances, and regulating or licensing or prohibiting and suppressing theatrical and other exhibitions, and prohibiting and suppressing gambling-houses and other things, certainly do not limit the meaning and effect of a grant of the power to regulate the vending of meat, or to establish and regulate markets.

The general law for the incorporation of cities and towns, as amended in 1877, (section 22, p. 250, McClell. Dig.) enacts expressly that the city or town council shall have power to establish market-houses, and to require each and every person who may have for sale any fresh meats or fresh fish to bring the same into the market, and offer the same for sale only in the market; and, in view of the absence of such an express provision from the charter act under consideration, it is contended that a legislative intention to withhold from the municipality of Jacksonville the authority to restrict such sales to market-places is manifested. No particular formula of words or expression is essential to convey a power. The only question is, does the language used in any special or general act clearly confer the power? As stated above, our opinion is that both upon principle and authority the grant is unquestionably sufficient to do so in this case.

It is necessary to a judgment upon the validity of the above ordinances to inquire how the power to establish markets, or to regulate the same, or the vending of meats, or other articles mentioned, can be exercised. The statute says the mayor and city council shall "have power by ordinance" to do so. Section 4, art. 3, c. 8775, p. 164, Acts 1887. The first section of the same article enacted that "the legislative power of said incorporation shall be exercised by a city council," and this provision is retained in the section, as amended by an act approved May 16, 1889, (chapter 3952, Acts 1889.) The second section of the article of the act of 1887 provides that no bill shall become a law "until it shall have been signed by the mayor, except that it may be passed without his signature as herein provided. No ordinance, or portion of an ordinance, vetoed by the mayor shall go into effect unless the same be passed by two-thirds of the whole number of members of the city council. If the mayor fail to return any ordinance at or before the next regular meeting after its passage, he shall be deemed to have approved the same, and it shall become a law without further action." Page 164, Acts 1887. The second section of the same article of this act (page 162) is to the effect that the mayor shall carefully examine all bills passed, and should any not meet his approbation he shall re-

turn the same to the next regular meeting of the council with his objections in writing, and he may veto objectionable features, and "approve" the residue of the bill. From these provisions it is plain that a market cannot be established; nor can regulations thereof, or of the vending, of meats, poultry, fish, fruits, or vegetables be made except by a municipal law duly passed by the council, and afterwards submitted to the mayor and sanctioned by his approval, attested by his signature; or which he has failed to return to the next regular meeting of the council after its passage; or which, having been returned to the council with his objections, has been passed over his veto by two-thirds of the whole number of the council.

It is to be observed that by the public market ordinance, as given above, no person can sell any fresh beef, fresh pork or mutton, or establish any market, stall, or shop, for keeping or selling the same or either of them, within the corporate limits of the city, except at the public market, unless such person shall be expressly authorized to do so by the city council. This provision appears in the ordinance as it was when adopted in January, 1889, and was not changed by the amendment made by the council, and approved by the mayor July 30th of the same year. The private market ordinance passed by the council July 30th, but not approved by the mayor till August 5th, provided in its first section that private markets might be established, regulated, and abolished at the discretion of the city council, but that no private market for the sale of fresh meats, fish, or vegetables should be maintained *except by and with the permission of the mayor and city council granted by ordinance*; but an ordinance was passed and approved the 30th day of August providing that this section should read as follows: "Private markets may be established, regulated, and abolished at the discretion of the city council, but no private market for the sale of fresh meats or fish shall be maintained within the limits of the city of Jacksonville except with the permission of the city council granted by resolution." The provision that not more than one stall should be licensed or permitted in the same building was added by the amendment passed September 6th, and approved the next day. The fifth section of the private market ordinance, approved August 5th, repeals an ordinance of June 6, 1888, regulating and governing private markets, but it is not shown, nor is it material to know, what its provisions were. We may, however, remark that it does appear there was in the contract made between appellee and the city in 1876, as to the public market established at the foot of Ocean street, on water lot No. 10, and continued, with renewals and modifications immaterial to mention, down to May 1, 1889, an express stipulation that all other markets then existing in the city should be abolished, and that be the sole and exclusive market, excepting such markets as might be legally existing under contract with the city.

We do not think it can be doubted that the purpose of the amendment of August

30th was to make the right to keep a private market for the sale of fresh meats, etc., dependent simply upon the permission of the council expressed by resolution, instead of the permission of the law-making power duly expressed according to the form prescribed by the charter act for making municipal law; and considering the ordinance as thus amended, and also as it stood after the subsequent amendment approved September 7th, its meaning was that the city council as a separate body might establish, regulate, and abolish, at its discretion, private markets without its action being subjected to the co-ordinate action of the mayor, or having gone through the course required by the statute to make it municipal law. It is too plain to admit of discussion that this cannot be done. In *re Frazee*, 63 Mich. 396, 30 N. W. Rep. 72; *Dill. Mun. Corp.* §§ 96, 357, 716, 779; *Cooley, Const. Lim.* 249. Not that legislative action in the form of a resolution, and which has been passed by the council, submitted to the mayor, and received his approval, or not been returned by him, or, having been duly returned by him, has received the two-thirds vote, may not be an ordinance, (*Dill. Mun. Corp.* §§ 307, 769, and notes; *Robinson v. Mayor of Franklin*, 34 Amer. Dec. note, p. 633;) but for the reason that markets cannot be established, nor can regulations for them, or for the vending of meat and other articles specified in the provision of the statute, be made by the council as an independent part of the city government, or in any other manner than by proper ordinance duly enacted as the statute has provided. *Horn v. People*, 26 Mich. 221, and *Ruggles v. Collier*, 43 Mo. 353, and other authorities cited with it *infra*.

The amendatory section of August 30th took the place of and entirely superseded the first section as it was in the original ordinance of August 5th; and the consequence resulting from the omission of the italicised words, and the insertion of those proposing to delegate to the council the power to establish and regulate markets, is that there was from the approval of the amendment no valid provision for the establishment or regulation of private markets. *Advisory Opinion*, 15 Fla. 735; *Barnett v. Jacksonville*, 19 Fla. 664; *State v. Commissioners*, 23 Fla. 483, 3 South. Rep. 193; *Saunders v. Provisional Municipality*, 24 Fla. 226, 4 South. Rep. 801. That which was in the old section, but was left out of the new, ceased to exist as a part of the municipal law because it was actually and, we must hold, intentionally omitted, and the invalidity of the substituted subject-matter in the new section proposing to give to the council a power which it cannot legally exercise does not change the fact that the italicised provisions of the original section are no longer a part of the municipal law. The omitted matter is no longer in existence as a part of the section, or to be construed by the courts.

Another part of this private market ordinance to be noticed is its second section, which provides "that such market must be constructed and maintained in accordance with specifications, rules, and regulations approved by the city board of health

governing the same, and prescribing the size and character of stalls; and no permit for the establishment or maintenance of any market shall be granted except upon a petition indorsed by the city board of health."

It appears that on the 6th day of August, or the day after the approval of the private market ordinance, the board of health formulated and prescribed rules for the government of private markets. They prescribe, *inter alia*, that such a market shall have a water-tight floor of yellow pine-heart plank, or Portland cement, or of both, as in the judgment of the board may be deemed necessary, at least one inch in thickness, on a solid foundation; the grade of the floor; connections with the sewers and with the water-works; that the construction of all markets shall be subject to the supervision and approval of the city engineer and health officer, and the market to the daily inspection of an officer of the health department; the size of the stalls, (not less than three feet wide, and six feet long,) and that they shall be covered with a marble slab, white oil-cloth, or other "acceptable" substance, and furnished with "suitable" meat block, and with galvanized iron hooks; the hour at which the markets shall be closed, and the removal of meats afterwards; the washing of the stalls, floors, etc., and the use of disinfectants that may be prescribed by the board; and how meat shall be moved from one market to another, or transferred through the streets. The fifth of these rules is that persons owning and operating private markets, and wishing to continue the same, and those desiring to establish and maintain them, must immediately present to the health officer, or to the chairman of the board for the action of the board, a petition to the city council; that it shall state the location, number of stalls, full specifications of the construction, size, and other details of the proposed market or building, together with an assurance that the applicant will, in case his application is approved by the board, and granted by the city council, promptly comply with ordinances of the city, and the rules of the board, adopted, or that may be adopted, in relation to the payment of license, and the fulfillment of sanitary requirements and restrictions in the construction and operation of private markets.

These rules appear from an indorsement of the recorder to have been submitted to and adopted by the city council in regular session on the day they were formulated by the board.

They are intended to control the establishment of and to regulate markets. The establishment and regulation of markets must be effected by ordinance enacted or ordained in the manner prescribed by the statute. It cannot be done either by a board of health, acting in the language of the brief of appellants' counsel, "in the capacity of a committee from the council," nor by the council itself, nor by both. The board of health in prescribing these rules has done no more than the second section of the ordinance contemplated, and the

attempted exercise of this authority by the board was as much unauthorized as the effort of the ordinance to delegate the power was illegal. A public duty which the legislature has confided to the deliberative judgment or discretion of the law-making power of a municipality cannot be delegated by the latter to the judgment or discretion of one constituent element of that power, nor to the judgment or discretion of others. To permit it to be done would be to defeat the will of the legislature as to whose judgment or discretion should direct the subject-matter of the duty confided. *Ruggles v. Collier*, 48 Mo. 359; *St. Louis v. Clemens*, Id. 395; *Sheehan v. Gleeson*, 46 Mo. 100; *Matthews v. Alexandria*, 68 Mo. 115; *White v. Mayor*, 2 Swan, 364; *Day v. Green*, 4 Cush. 433; *State v. Bell*, 34 Ohio St. 194; *Lord v. Oconto*, 47 Wis. 386, 2 N.W. Rep. 785; *Birdsall v. Clark*, 73 N.Y. 73; *Hitchcock v. Galveston*, 96 U.S. 344; *Indianapolis v. Coke Co.*, 66 Ind. 396.

The special market ordinance is alleged to be void because it also prescribes illegal prerequisites, and one of the prerequisites objected to is the license and the charge of five dollars per month for each and every stall.

Section 4 of article 3 of the charter act, (chapter 3775,) authorizes the mayor and council "to levy and collect taxes upon all property and privileges taxable by law for state purposes; * * * to license, tax, and regulate auctioneers, taverns, peddlers, and retailers of liquors, and all other privileges taxable by the state; to license, tax, and regulate hackney carriages, carts, omnibuses, wagons, and drays, and to regulate and license the sale of fire-arms; * * * and to regulate, tax, license, or suppress the keeping and going at large of all animals within the city." The eleventh section of the act of May 31, 1889, (chapter 3968,) an act supplementary to chapter 3775, amends section 1 of article 12 of the parent act, retaining, however, the provision "privileges may be licensed and taxed by the city ordinances," and also enacting that the council may provide for licensing the keeping of dogs.

At the session of the legislature of 1887, at which the charter act (chapter 3775) was passed, a general revenue law (chapter 3681) was enacted, it having received the approval of the governor June 13, 1887, or 13 days after the charter act was approved. This act imposes what was styled "license taxes" on different occupations and professions, and provides that no person shall engage in or manage the business, profession, or occupation mentioned therein unless a state license shall be procured in the manner prescribed; and enacts that counties, incorporated cities, and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper, but that they shall not impose any such tax on any business, profession, or occupation not mentioned therein, nor shall the tax imposed by them exceed 50 per cent. of the state tax. The same limitation upon counties, cities, and towns is to be found in former general revenue laws, as it also is in the amendatory revenue law of May 28, 1889, c. 3847. The rev-

enue law of 1887 (chapter 3681) imposes a license tax on auctioneers, "taverns," (or what may be deemed the same thing, keepers of hotels and boarding-houses,) peddlers, and retailers in spirituous, vinous, or malt liquors, but not on hackney coaches, carts, omnibuses, wagons or drays, and all of this is true of the act of 1889; and in each of these general revenue statutes there is to be found a proviso that the license-tax provision as to peddlers with boat or horse and cart, or carriage, shall not extend to boats and carts engaged in the sale of vegetables and plantation products, fish, and oysters. The question, assuming the five-dollar fee to be a tax for revenue, is, does the special act authorize the imposition of such a license or occupational tax upon the franchise or business of a market? Counsel for appellants suggests that the right to maintain a market being a franchise, it is a privilege, and is therefore taxable. Admitting, as we do, that the right to keep a market and charge toll is a franchise, and consequently a privilege, within the meaning of *Stevens v. State*, 2 Ark. 291; *Washington v. State*, 13 Ark. 752,—still this admission is not conclusive in favor of the right of the city under the above provisions of its charter act to impose a revenue tax upon such markets or persons keeping them, for the meaning of the word "privileges" in the charter act is unmistakable from the connection in which it is used. When the act gives power to levy and collect taxes upon all property and privileges taxable by law for state purposes, and to license, tax, and regulate auctioneers, taverns, peddlers, and retailers of liquors, and all other privileges taxable by the state, it is clear that the legislature did not use the word "privilege" to designate such things as are technically privileges, and cannot ever be enjoyed or exercised in England except through the prerogative of the crown, or under act of parliament, or in this country by authority of law, but to denote other occupations and business of the same kind as those mentioned, and that are taxable by law for state purposes. In a word, we think the meaning of the legislature, as shown by the language last referred to, was simply that whatever occupations were subjected to taxation by the state laws might be taxed by the city of Jacksonville under an ordinance or ordinances duly passed, and none other; and this view is strengthened by the fact of the subsequent provisions of the municipal law as to hackney carriages, carts, omnibuses, wagons, and drays which were not subjected to "license taxes" by the act of 1887, or that of 1889, and hence the necessity for the special mention of them in the charter act. Moreover, this provision as to hackney carriages, etc., would not have been inserted had it been the intention of the legislature to delegate to the mayor and council by the preceding provision the same power which the state has of selecting the subject of occupational or license taxes, (section 5, art. 9, Const.,) instead of limiting it to the subjects named in the charter act, and the revenue laws of the state. Markets are then not subject as occupations

to taxation for revenue under the charter act.

There was nothing in the provision of section 1 of article 12 of the act of 1887 as to "privileges," nor is there anything in the amendment of it made in 1889 that qualifies the above conclusion. That section, as it appears in the act of 1889, c. 8953, reads, omitting the provision as to licensing dogs, as follows: "All property which is subject to state taxes shall be assessed and licensed for taxation alphabetically for the entire city without reference to wards. The assessment shall be made by the comptroller and his assistants, and the valuation of real and personal property shall be subject to be increased or diminished by the counsel, under regulations to be made by ordinance. Privileges may be licensed and taxed by city ordinances. * * * All the duties now devolved upon the recorder in reference to the levy and assessment of taxes shall devolve upon and be performed by the comptroller." It is evident that the purpose of the section is not to designate the subject of taxation, but to regulate the manner of assessing and levying taxes on real and personal property, and of licensing and taxing the avocations declared elsewhere to be taxable, and designated here as those by the word "privileges." It prescribes the manner and mode of exercising the taxing power against the previously defined subjects of taxation.

Appellants do not admit, however, that the charge of five dollars is a tax levied for the purpose of raising revenue, but contend that it is a fee properly chargeable as incident to the power of police regulation, and as such is authorized. According to this private market ordinance no person can "maintain or do business in a private market" except upon paying to the city treasurer for a license the sum of five dollars per month for each stall; and no person can do business in any such stall or private market that is not so licensed. We have seen that by this ordinance not more than one stall can be licensed in the same building. Prior to an amendment of it approved September 7, 1889, there was no such limitation upon the number of stalls in one building. Assuming that, under the power granted to the mayor and council, they may by ordinance authorize the establishment of public markets by private individuals, the same being controlled and regulated by the mayor and council by ordinance, according to the principles of the decisions in *Davenport v. Kelly*, 7 Iowa, 102, (notwithstanding *Le Claire v. Davenport*, 13 Iowa, 210; *Dill. Mun. Corp.* § 385, and note 4; *Gale v. Kalamazoo*, 23 Mich. 344; *Indianapolis v. Coke Co.*, 66 Ind. 396; *Slaughter-House Cases*, 16 Wall. 86; *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652; *Villavaso v. Barthet*, 39 La. Ann. 247, 1 South. Rep. 599,—our opinion is that the power to do so includes, as a market is a franchise, the power to license. A permit to establish a market is, from the nature of a market, a license. It is a permit to do something which could not be done before without such permit, and hence is the grant of a license. Besides this, as we

have stated in the earlier part of this opinion, the power to establish markets is within the police power, and all this being true, we are unable to conclude that the power to charge, as a police regulation, a fee for the permit or license to establish and maintain a market, as distinguished from a permit or license for selling meats or vegetables therein, does not exist. It seems to us that it necessarily does. The fee, however, is not a tax for revenue, but a charge under the police power, and its amount is to be controlled by the principles governing in such cases. What amount of fee or charge can be exacted is a question upon which the authorities are in conflict. By some it is held that no more than the expense of issuing the license can be charged. Judge Cooley's view is that the right to license an employment, no power being given to also tax it for revenue, gives the corporation authority to impose such a charge for the license as will cover, not only the necessary expenses of issuing it, but also the additional labor of officers and other expenses imposed by the business, but nothing beyond this limit; and this seems to us to be the better rule. *Cooley, Const. Lim.* 244, 245, and note 1; *Cooley, Tax'n*, 408-410; *Van Hook v. Selma*, 70 Ala. 362; *Ex parte Gregory*, 20 Tex. App. 210; *Coke Co. v. State*, 18 Ohio St. 237.

A permit or license to a person to sell meats, or fish, or other things, is not the grant of a right to maintain a market, within the meaning of the legislative grant to the municipality of Jacksonville of the power to establish and regulate markets. The establishment and regulation of a market means the right to establish and furnish certain places where the public may resort for selling and buying provisions or articles of immediate necessity, and where the owners of the articles may expose them for sale, and to regulate these places and the business done there; and includes also the right to make charges for the use of stalls and space used by those resorting there with their products to sell the same. Markets are public conveniences, and not a mere license or permit to a person to sell his marketable property. Though the grant of authority to regulate the vending of meat, poultry, fish, fruits, and vegetables will permit the legislative power of the city to ordain general regulations, applicable to all alike, as to when and where those articles may be sold, it is not one conferring the franchise of establishing a market, but it is a power to regulate the sales of articles which, but for it, could be sold anywhere, and at all times. The power to establish markets cannot be used to create a monopoly of the right to sell. It is not intended for any such purpose. The right to sell at markets must be secured to all alike on the same conditions. The grant as to vending meats, etc., is one of police power, and it is to be exercised upon considerations referable to the public health or welfare of the community, and not arbitrarily, nor to create a monopoly in one or several persons, nor to prohibit the trades to which it applies. Though under it the hours of the day, the places, and the mode

or manner of and rules for conducting the business may be designated and prescribed, and the establishment of fixed places of sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations, and, as in the case of markets affording reasonably ample facilities for all who may desire to engage in vending such articles, the sales may be confined to specific places, yet all this must be done on principles of impartial and general regulation, affording the same rights to all alike upon the same conditions, and not in the exercise of a partial and discretionary or arbitrary will of the law-making power, or of any part of it. *Tied. Lim.* 273, 274, 278; *First Municipality v. Blinco*, 8 La. Ann. 688; *Kennedy v. Phelps*, 10 La. Ann. 227; *City of New Orleans v. Stafford*, 27 La. Ann. 417; *Villavaso v. Barthet*, 39 La. Ann. 247, 1 South. Rep. 599; *Belcher v. Farrar*, 8 Allen, 325; *Cooley, Const. Lim.* marg. p. 201; *Horn v. People*, 26 Mich. 221; *Mayor v. Radecke*, 49 Md. 217; *In re Frazer*, 63 Mich. 396, 30 N. W. Rep. 72; *Minturn v. Larue*, 23 How. 485; *Logan v. Pyne*, 43 Iowa, 524; *St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. Rep. 571; *Clark v. Le Cren*, 9 Barn. & C. 52; *Chamberlain v. Compton*, 7 Dowl. & Ryl. 597. It does not authorize the imposition of taxes for revenue purposes upon the occupation of vending, but it does, in connection with the grant as to inspection made in the same section, justify such fees and charges as may be required to cover the expense of inspecting the articles offered for sale, and of the police supervision of the business necessary to prevent its becoming harmful to the community. Though the right to engage in the business at the times and places and under the same conditions applicable to all cannot be denied to any, the business may be so regulated as the public welfare may demand, and the courts will not interfere with the enforcement of a regulation except where it shall be manifest that the protection of the public is not its purpose. *Austin v. Muncey*, 16 Pick. 126; *Dill. Mun. Corp.* note 2 to section 141; *Cooley, Const. Lim.* marg. p. 203. The police power is one whose existence is essential to the protection and welfare of the public, and, while it should be used unhesitatingly and efficiently for the ends it was intended to subserve, it should not be used for other purposes, nor further than is necessary to fully effect the legitimate end in any particular case falling within its proper exercise.

It is plain from the record before us that the right claimed by Ledwith, the appellee, is that of maintaining a building where stalls and space are provided for butchers or others desiring to sell, for the use of which stalls and space he makes charges. For some years prior to May, A. D. 1889, his premises at the foot of Ocean street had been the designated public market, controlled and regulated by the city under an ordinance and a contract between the city and himself, which contract expired on the 1st day of that month. The expiration of this contract excludes from the case all question as to the effect which, if existing, it might have had on

the right and power of the city authorities to change by ordinance the location of the public market, or, barring any other defects that may exist in the public market ordinance of July 30, 1889, to establish the public market at the foot of Market street and abolish that at the foot of Ocean street. As against the appellee, or any one else whose premises or buildings had been the legally established public market, there can be no doubt of the right of the city authorities to remove the market to a different place, or to abolish an existing one and establish a new market. Neither the appellee nor any other person, nor any corporate body other than the municipality of Jacksonville, acting through its law-making authority, has been given power by the legislature to establish markets within the territory of that city. In Florida the legislature alone can confer such power. The power to establish a market includes the power to change the location of it from place to place as the convenience and necessities of the community may dictate. *Dill. Mun. Corp.* § 382; *Cooley, Const. Lim.* 744, note 2; *Wartman v. City of Philadelphia*, 33 Pa. St. 202; *Gall v. Cincinnati*, 18 Ohio St. 563; *Cougot v. New Orleans*, 16 La. Ann. 21; *City of New Orleans v. Stafford*, 27 La. Ann. 417; *Rex v. Cotterill*, 1 Barn. & Ald. 67; *Curwen v. Salkeld*, 8 East, 538; *Gale v. Kalamazoo*, 23 Mich. 344; *Villavaso v. Barthet*, 39 La. Ann. 247, 1 South. Rep. 599; *Butchers' Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652; *Presbyterian Church v. City of New York*, 5 Cow. 538. These authorities show how groundless the vested-right theory of complainant, based on the injury to the value of his property through decrease of rental, is, and how firmly set is the rule that the police power cannot be parted with, or impaired, by contract or barter.

The second section of the public market ordinance shows by the words "unless such person or persons shall be expressly authorized so to do by the city council," particularly when they are considered in connection with the private market ordinance, that it was not the intention of that ordinance to prohibit the sale of fresh meats, etc., elsewhere than in the so-called "public market." On the same day (July 30, 1889) that the first section of this ordinance was so amended as to establish the public market at the foot of Market street, the so-called "Private Market Ordinance" was passed, although the latter did not receive the sanction of the mayor till the 5th day of August; and it is this private market ordinance that was intended by the law-making power of Jacksonville to furnish the rule under which the express authority suggested by the second section of the public market ordinance might be obtained for selling or offering for sale fresh beef, fresh pork, or mutton elsewhere than at the public market, or establishing or maintaining a market, stall, or shop for the sale of the same. The two ordinances are to be considered together, or as one, in seeking for the intention of the municipal law-maker as to markets, and the vending of the meats mentioned in them. Considering them together, we find

that the manifest intention to permit and regulate sales elsewhere than in the *locus* of the public market, as well as that to permit other markets, has not been effectually ordained; or, in other words, the ordinance governing such sales and markets is void because it purports to remit their establishment, maintenance, regulation, and abolition to the sole discretion of a body (the city council) that cannot exercise the power, and also to delegate to a committee (the city board of health) authority which the state legislature has committed to the law-making power of the municipality. It is thus apparent that the city of Jacksonville, as represented in the expression of her legislative agency speaking for her, intended, not only that there should be a public market at the foot of Market street, but that there might be other places established at which sales could be made, yet that sales could not be, except at the public market or a so-called "private market;" and, to make this intention effectual, she has ordained that a person who violates the provision of the public-market ordinance as to selling at other places than the public market or a private market should be subject to fine or imprisonment. It happens, however, that the private market ordinance is void, and the question arises as to what effect this fact has upon the validity of the above prohibitory provision of the public market ordinance. In our opinion it invalidates it, because it never was the intention of the law-making power of Jacksonville that sales should be confined to the public market; and to enforce it with the effect of prohibiting sales elsewhere, in the absence of valid regulations of such sales, would be to do what was never intended. Whether or not an ordinance restricting sales to one place in a city of the territorial extent and of the population of Jacksonville would be held to be valid if assailed as unreasonable it is unnecessary to decide, as such cannot be said to have been the purpose in this case.

The rule as to statutes is, that part of an act may be unconstitutional without invalidating the whole of it. If all the provisions are connected in subject-matter depending upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other, the whole act will be declared void. On the other hand, where some parts are not connected with or dependent upon others, as where a statute attempts to accomplish two or more independent objects, it may be void in part, and valid as to the residue. If its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portions. If the valid and the void parts "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be

carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley, Const. Lim. marg. pp. 177-179; *State v. Deal*, 24 Fla. 293.¹ The same principles apply to city ordinances. Dill. Mun. Corp. § 421, and notes. A valid charter act is the constitution of a municipality as much as the work of a regularly chosen convention, ratified by the vote of the people, is the organic law of the state. It is evident that the purpose of the public and private market ordinances considered together is twofold. Outside of its prohibitory provisions, the object of the former was to provide a public market where persons could resort to sell and buy as indicated above. The object of the prohibitory clause was to regulate the sale of certain articles, and it cannot be denied that it and the private market ordinances are conditions, considerations, and compensations for each other. Surely the specified provision of the former, with the clause last quoted above, would not have been ordained without enacting the private market ordinance unless it should be assumed that it was deemed necessary to have the latter ordinance to make the quoted clause effectual; and that it was not so assumed we are concluded by the fact of the enactment of the private market ordinance.

This prohibitory clause of the so-called "Public Market Ordinance" and the private market ordinance are as connected with, conditional upon, and compensatory to each other as if they were in the same ordinance or section of an ordinance, and the invalidity of the latter ordinance is fatal to the specified provision of the former. To hold the contrary would be to enforce what was never intended by any branch of the law-making power of Jacksonville in passing or approving either of these by-laws.

It is evident that there is no valid regulation prohibiting sales elsewhere than at the public market, and for this reason there is no legal impediment to the sales in the appellee's building, and he should, in the absence of legal restriction of sales to other places, not be interfered with in the alleged use of the premises.

It may be well for us to remark that it is not to be inferred from anything said in this opinion that the municipal authorities may not avail themselves of all sources of knowledge and experience in framing rules and regulations, nor is the power of the city to use all usual or proper agencies for the enforcement of the same when duly ordained to be doubted.

We have gone as far into the questions affecting the vendors of meat doing business in Ledwith's building as is necessary to a decision of the case. Ledwith is not such a vendor, and it is not proper that we should say more than we have said upon any question not affecting his rights.

The decree is affirmed.

¹ 4 South Rep. 899.

LALANDE v. HIS CREDITORS.

(*Supreme Court of Louisiana.* May 23, 1890.
42 La. Ann.)

FACTORS—PLEDGE—BILL OF LADING—NEGOTIABILITY.

1. Though a factor may sell, and bind his principal, he cannot pledge the goods as a security for his own debt, even though there have been bills of lading issued to him therefor. The principal may in such case recover the goods of the pawnee, and the pawnee's ignorance that the factor held the goods in the character of factor is no excuse.

2. The doctrine that a factor cannot pledge is sustained so strictly that it is admitted he cannot do it by an indorsement and delivery of the bill of lading any more than by delivery of the goods he sells.

3. Notwithstanding, by statute, bills of lading may be made negotiable in form, they do not become possessed of all the incidents of negotiability that are attributes of bills and notes.

4. The function of a bill of lading is different from that of ordinary commercial paper. It is not a representative of money used for the transmission of money or for the payment of debts. It is merely a contract for the performance of a certain duty, a representative of goods and personal property to be delivered.

5. Non-negotiable bills of lading are merely assignable as are other choses in action.

6. A carrier and his customer do not stand on the same plane or footing of equality, and in many cases the latter has no alternative as to the kind of bill he will receive, and cannot be estopped by its contents.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; ELLIS, Judge.

White & Saunders and *H. L. Garland, Jr.*, for appellant. *D. B. H. Chaffé*, for appellee.

WATKINS, J. This is a controversy arising over the proceeds of 50 bales of cotton which J. Y. Webb shipped by rail from Minden, Louisiana, to J. B. Lalande of New Orleans, and therefor issued bills of lading to the consignee, and which he pledged to the Whitney National Bank for a loan of \$2,100. Webb claims the ownership of the cotton, and avers that it was consigned to Lalande, as his factor, for sale, and that he was without right or authority to pledge it as he did. The bank claims that it made the loan to Lalande, on the faith of the bill of lading which Webb issued to Lalande as consignee. The contention of the bank is: (1) That the bills were unqualified by any restriction, and that the cotton covered by them was owned by Lalande, and that it acted on the faith of his ownership in making the loan; that, at the time of said loan, Lalande was a merchant in good standing and of high credit, and it acted in good faith, and without any knowledge or suspicion of any rights or equities in favor of Webb. (2) That, under said bills of lading, the pledge was valid and binding, under the express provisions of sections 2482 and 2485 of the Revised Statutes. (3) That Webb, having taken such bills of lading, and thus consigned the cotton to Lalande, placed a written title in his hands and enabled him to hold himself out to the world as owner, and to deal with it as such, and he is thereby estopped from setting up any rights of his own as opposed to its rights of pledge. On these

issues the case went to trial, and there was judgment in favor of plaintiff in rule, and the bank has appealed.

A fair summary of the facts of the case is as follows, viz.: On the 26th of January, 1890, the Minden Railroad issued to J. Y. Webb two receipts of the following form, viz:

"Minden, La., January 20, 1890. Received from J. Y. Webb, Sr., thirty-eight bales of compressed cotton, in good order. Consigned to J. B. Lalande, New Orleans. Through rate \$1.90 per bale. Dept. Delivery."

BALES.	MARES.	NUMBERS.
28	V. V. V.	1-28

Charges, \$27.04.

Received January 29, 1890.

28 total.

"To be transported over the Minden Railroad to Minden Junction. Liability to the Minden Railroad and Compress Company to close when the cotton is delivered to the Vicksburg, Shreveport, and Pacific Railroad. ROBERT T. BOYLE, Agent."

There is another bill of like tenor for 22 bales. Lalande assigned both bills of lading to the bank, on the 24th of January, 1890, as a pledge for a personal loan, on his own indorsement. Three days subsequently he failed in business, and took the benefit of the insolvent law. Subsequently, on the arrival of the cotton in New Orleans, Webb sequestered it in the hands of the railroad company, and the provisional syndic was ordered to surrender it; but, upon being met with a claim of the bank, as pledgee, an agreement was entered into whereby the cotton should be sold, and the contest carried on over the proceeds. The cotton is the property of Webb, who shipped by rail to Lalande, consignee, as his cotton factor and commission merchant, in the customary and usual course of their dealings for many years. Lalande had been engaged in that business for many years in the city of New Orleans, where the Whitney Bank was also engaged in business. At the date of these transactions Webb was not indebted to Lalande. On the contrary, the latter's book showed a credit balance in the former's favor of just 58 cents. When the bank made the loan to Lalande, he was well and favorably known to the officers of the bank "as a merchant in good standing and of high credit." When he requested a loan on the bills of lading, no question was asked him touching his solvency or his ownership of the cotton covered by him. The president of the bank, in the course of his statement of the transaction, said he had known Lalande for six years, during which time he had a large business; and in respect to his credit with the bank, he said, "No man stood better." In the course of his interrogation as a witness, the following transpired, viz.: "Question. From what fact did you assume that Lalande was the owner of the cotton? Answer. Well, the bills of lading. This cotton was consigned to J. B. Lalande, under the bills of lading, indorsed, J. B. Lalande. Without asking any questions, I supposed that this was cotton which belonged to Mr. Lalande, consigned to him

for payment, before the cotton was delivered, and that the proceeds would be put to the payment of the notes. Q. Then it was the bills of lading which made you believe the cotton was Lalande's? A. Yes, sir. Q. Did you make any inquiries to find out if Mr. Lalande was the owner of the cotton? A. No, sir. I considered the fact of his coming there, that the thing was all right. Q. If you know a man by sight, and nothing at all about his standing and solvency, would you have loaned him the money [on such bills?]? A. No, sir." Then we have the following points established, viz.: (1) That Webb was, at date of shipment of the cotton, the owner, and made shipment to Lalande, as his commission merchant and cotton factor in the city of New Orleans, where both Lalande and the bank resided and were engaged in business. (2) That Lalande's business as a merchant was well known to the officers of the bank, and he was personally well and favorably known to them "as a merchant of good standing and of high credit." (3) That the bills of lading were executed in the form of receipts, by the agent of the carrier, in favor of Webb, as the shipper alone, and not to order or bearer, and therein Lalande was named as consignee. The bills were not signed or indorsed by Webb; and in order to effect his pledge to the bank, Lalande, for himself, indorsed same in bank. (4) At the time of the shipment of the cotton and the reception of the bills of lading by Lalande he was not the creditor of Webb for a cent; and he was not at the time he executed the pledge to the bank. (5) When Lalande requested a loan of the bank, and these bills of lading, unindorsed by Webb, were tendered as surety, the officers of the bank accepted them without question, on their own supposition that the cotton that was covered by them belonged to Lalande.

It is perfectly manifest that, on this showing, Lalande had no right or authority to make a pledge of his customer's bills of lading, as security for his personal debt. The law provides that "when a merchant or factor or other person has advanced money, property, or supplies on cotton, etc., and the same has been consigned to him by ship, steam-boat, vessels, railroad, or other carrier, the said agricultural products shall be pledged to the consignee thereof from the time the bill of lading thereof shall be put in the mail, or put into the possession of the carrier for transportation to the consignee, and the right of pledge shall be perfect, with the right of sale of said property, which shall be fully vested in said consignee, with a right to appropriate the proceeds to the payment of the amount due him for such advances as may have been made thereon." Section 2, Art 66, 1874. This statute states the exact relations which subsist in this state between any shipper and the merchant or factor to whom he has consigned any agricultural products by a carrier, and for which the latter has executed a bill of lading. It confers upon the latter solely and exclusively the right of sale. Under the Civil Code, a debtor may

give in pledge whatever belongs to him, (Rev. Civil Code, art. 3142,) but he cannot pledge for his own debt the property of another without the express or tacit consent of the owner; and, if the consent be tacit, it must be inferred from the circumstances so strong as to leave no doubt of the owner's intention; as if he was present at the making of the contract, or if "he himself delivered to the creditor the thing pawned." Id. art. 3146. Chancellor Kent, in his comprehensive treatment of this question, says of the relations of principal and factor: "Though a factor may sell, and bind his principal, he cannot pledge the goods as a security for his own debt, even though there be the formality of the bill of parcels and a receipt. The principal may recover the goods of the pawner, and his ignorance that the factor held the goods in the character of factor is no excuse. The doctrine that a factor cannot pledge is sustained so strictly that it is admitted he cannot do it by indorsement and delivery of the bill of lading any more than by the delivery of the goods themselves. To pledge the goods of the principal is beyond the scope of the factor's power; and every attempt to do it, under the color of a sale, is tortious and void." 2 Kent, Comm. 626. In confirmation of this principle this court has frequently held that the factor cannot pledge property consigned to him. In *Hadwin v. Fisk*, 1 La. Ann. 74, our predecessor said: "On the question of law, the doctrine is well settled that the factor cannot pledge for his own debts property consigned to him, nor can he give it in payment of his own debts." The same was announced in *Boniot v. Fuentes*, 10 La. Ann. 70. In *Young v. Scot*, 25 La. Ann. 313, the court said: "This court has frequently decided that the factor cannot pledge or give in payment of his own debts property intrusted to him for sale." *Avery v. Garney*, 17 La. 166; *Hadwin v. Fisk*, 1 La. Ann. 74; *Miller v. Schneider*, 19 La. Ann. 300. In *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. Rep. 460 the supreme court expressed its approval of this doctrine thus: "By the common law, a factor or agent for sale has no power to pledge, whether the owner has intrusted him with the possession of the goods themselves, or with the symbols of them, as by consigning them to him by a bill of lading, in which he is consignee or indorser;" quoting Kent with approval. But it is contended, in this case, that the bills of lading were indorsed, and therefore the bank was authorized to accept them in pledge, as it would have accepted other commercial paper. But it is necessary that we should take into consideration the character and incidents of a bill of lading, and ascertain to what extent they are negotiable, and in what manner they may become so. Kent defines a bill of lading to be "a receipt for the conveyance of the cargo of a carrier; and though it is signed by the master, he does it as the agent of the owner, and it is a contract binding upon them. By the bill of lading the master engages, as a common carrier, to carry and deliver the goods to the consignee, or his order. It is the document and title of the goods, and as such, if it be to order or

assignees, is transferable in market. The indorsement and delivery of it transfers the property in the goods from the date of delivery." 3 Kent, Comm. 207. Therefore the bills of lading issued by the railroad company to Webb, as the shipper, primarily evidences his title. They are in the name of Webb alone, and not of the loaner, on order. The goods were not deliverable to Lalande, on order, or assigns, but to him individually. The provisions of the act of 1868 on this subject are that "Any bill of lading given by any forwarder, boat, railroad, transportation or transfer company may be transferred by indorsement therein, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour, or other produce or commodity therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person or persons," etc. Section 6, act 150, 1868. But as Lalande alone was named as the consignee in the bills of lading, and the goods were not thereunder deliverable to his order, or to his assigns, his indorsement operated as an assignment of them only to the bank. But in any event, an indorsement of a bill of lading has not a like effect as the indorsement of bills and notes. In the case of *Shaw v. Railroad Co.*, 101 U. S. 557, the supreme court considered the effect of an indorsement of a bill of lading which was made under a similar act to that of 1868, and they said: "It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery all the consequences of an indorsement and delivery of bills and notes before maturity ensue, or are intended to result, from such negotiation. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for the transmission of money, or for the payment of debts, or purchase. It does not pass from hand to hand, as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it, a representation of the goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they are stolen. Why, then, should the sale of the symbol or mere representative of the goods have such effect?" This the court held not to be the case, and said further: "No statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law, which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation, by others than the owner, even when it is out of his possession. This protection would be largely with-

drawn if the misappropriations of its symbol or representation could avail to defeat the ownership, even when the person who claims under the misappropriation had reason to believe that the person from whom he took the property had no right to it." Then the fact that the bills of lading in question were not negotiable in form, and the cotton was not deliverable to the order of Lalande, and that therefore the bills of lading were not transferable in market when Lalande received them, and the fact that even if he had indorsed them they would have only possessed restricted negotiability, and if lost or stolen could have been recovered from a *bona fide* holder for value, when added to the fact that the bank acquired them from a merchant and factor, without question, and who was without authority to pledge them for his own debt, entitle the owner of the property to recover. Lalande being a commission merchant and cotton factor, and well known to the bank as such for a series of years anterior to the time of these transactions, it is chargeable with notice of the relations existing between the parties, or it was reasonably put upon its guard against damages by the possession of such knowledge, and, under the circumstances, should have instituted proper inquiries of Lalande. Surely the bank cannot plead ignorance of the law prohibiting a factor to pledge his customer's property for his own debt, and at the same time protect itself by pleading its own supposition of Lalande's ownership from what appeared on the face of bills of lading which are non-negotiable, in terms. By the course of its own dealing it assumed the risk of Lalande's title, and the validity of the pledge.

This case, in our opinion, occupies the precise attitude of *Stern Bros. v. Bank*, 34 La. Ann. 1120. In that case it is stated that the plaintiffs owned the coupons; that Bader & Co. had no authority to pledge them to the bank; that they had so pledged them for their personal account after their maturity. The court holds "the authorities are quite unanimous, and entirely convincing, that the purchaser or pledgee of negotiable instruments after maturity whose rights are derived from one who is not the owner, and who is not authorized to sell or pledge, acquires no title or right thereto or thereupon as against the true owner." Bills and promissory notes overdue are still negotiable, quite as much so as they were before they became due, but the effect of their transfer after maturity is different from the effect of such transfer before maturity. In the latter case the purchaser or pledgee in good faith would acquire free of equities between the original parties, but in the former case he would not. So it is in respect to the transfer of non-negotiable bills of lading. The transfer passes only such title as the transferer had, subject to the equities existing between him and the consignor or shipper.

This is not a case for the application of the equitable estoppel pleaded by the bank against the claims of the owner. As far as the record shows, the shipper had no agency whatever in the matter, and evidently accepted just such a bill as the

carrier tendered him. As was very justly observed by the supreme court in *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 441, 9 Sup. Ct. Rep. 469, the carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higggle, or stand out, and seek redress from the courts. He prefers rather to accept any bill of lading, or to sign any paper that the carrier presents, and in most cases he has no alternative but to do this or abandon his business. The plaintiff seemed to have had no choice or volition in the matter, and the doctrine of equitable estoppel does not apply to such a case. Judgment affirmed.

LOUISIANA & N. O. ICE CO. v. PARKER, Tax Collector.

(*Supreme Court of Louisiana.* April 7, 1890.
42 La. Ann.)

CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION.

The amendment to article 207 of the constitution, the adoption of which was promulgated 12th May, 1888, did not operate to exempt from taxation for the year 1888. The property so assessed owed the tax from the completion of the assessment rolls on the 31st March, 1888.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; VOORHIES, Judge.

Wynne Rogers, for appellant. *James C. Moise, James B. Guthrie, and J. P. Hornor & Son*, for appellee.

MCENERY, J. The plaintiff company enjoined the seizure of its ice factory, situated in the city of New Orleans, by the state tax collector for taxes due in the year 1888, on the ground that the amendment to article 207 of the constitution exempted said property from taxation, and was in force when the tax was levied. There was judgment for the plaintiff, and the defendant tax collector has appealed. The property under seizure was assessed for taxation in the year 1888, under the provisions of Act 98 of 1886, and the assessment rolls were completed on the 31st of March, 1888, and were filed with the tax collector on August 26th following. The tax-rolls should have been filed with the proper official of the city of New Orleans by the 1st day of May, and with the auditor of the state by the 1st day of July. Section 3, Act 98 of 1886. Act 109 of the Acts of 1882 compels the city of New Orleans to levy a tax for each year between the 1st day of May and the 30th day of June.

The question at issue is, was the property of the plaintiff company liable to taxation before the adoption of the constitutional amendment exempting it from taxation? The property could have been assessed only under Act 98 of 1886, as it was the revenue law in force when the assessment was made. This act required the assessment to be completed by the 31st of March of each year, and directs copies of the rolls for the city of New Orleans to be returned to the proper city official by the 1st of May, and to the auditor of the state by the 1st day of July, so that the city of

New Orleans can proceed to collect the municipal taxes in pursuance of the directions contained in Act 109 of 1882. For the parishes other than Orleans, the rolls, by Act 98, are directed to be returned to the recorder of mortgages, sheriffs, and the auditor as soon as possible, but before the 1st day of each year. The law does not declare at what precise time the tax is due, but makes it collectible from the date of the filing of the rolls. The date of the collection depends upon the energy and ability of the assessor to furnish copies of the rolls, and this dates from any day between closing and completion of the assessment to the last day provided for the filing of the same. The tax is due, that is, the property assessed owes the tax, from the completion of the assessment on the 31st of March of each year, as provided for by the Act 98 of 1886. The last day of the filing of the rolls with the city of New Orleans and the auditor of public accounts was fixed respectively the 1st day of May and the 1st day of July. The rolls ought to have been filed in accordance with the provisions of the act, "as soon as possible," and the delay of the assessors in performing their duty cannot have the effect of relieving the property from the burden of taxation which the law had imposed. When the rolls of the city of New Orleans are filed with the auditor, this of course authorizes the state tax collector to proceed to the collection of state taxes, or they are charged to him in the auditor's office. Had the rolls been filed in accordance with law, he would have been authorized to collect the tax after the 1st day of July. He could have collected the tax had they been filed on any day before this date after the completion of the rolls on the 31st of March. The tax is apportioned and extended on the rolls by the assessor, and the rolls when completed and delivered constitute the authority for the state tax collector to collect the tax. As he could have done this at any time after the 31st of March had the assessor filed the rolls with the auditor, it is evident that the property was liable for the tax after the rolls had been completed, although its collection was postponed until they were filed with the auditor and charged to the collector. The promulgation of the adoption of the amendment was issued on the 12th of May, 1888, after the property had become liable to taxation by its amendment and the completion of the assessment rolls. The delay in delivering the rolls cannot defeat the tax or change the status of the property as it was fixed on the rolls at the completion of the assessment. The amendment to article 207 of the constitution did not operate retroactively and exempt the property for the tax which rested on it prior to its exemption. *State v. City of New Orleans*, 40 La. Ann. 697, 4 South. Rep. 891. It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and annulled, and it is now ordered that there be judgment in favor of defendant dismissing plaintiff's demand and dissolving the injunction issued herein, with costs and 10 per cent. special damages as attorney's fees.

FENNER, J. Had not the revenue act of July 12, 1888, been passed by the legislature, no one would contend that the constitutional amendment promulgated on May 12, 1888, would have operated to exempt plaintiff's property from the tax of 1888, which had then been regularly levied under the act of 1886, duly assessed, and was then collectible. To hold otherwise would be to give a retroactive operation to the amendment, which we have heretofore distinctly denied. *State v. City of New Orleans*, 40 La. Ann. 697, 4 South. Rep. 891. The claim of exemption from taxation for that year urged by plaintiff is therefore based, not on the constitutional amendment, but on the subsequent legislative act. Nothing is better settled than that the legislature is powerless, directly or indirectly, to grant exemptions from taxation. This view is conclusive against the plaintiff's pretensions.

Rehearing refused.

PALAUD v. ILLINOIS CENT. R. CO.

(*Supreme Court of Louisiana*. Feb. 10, 1890.
43 La. Ann.)

RES ADJUDICATA—FACTS DECIDED BY SUPREME COURT—APPEAL—BOND—INTEREST.

1. The supreme court is bound to take cognizance of its own decisions, and of facts which were proved in such decisions.

2. Hence, in a suit for damages resulting from an accident, a fact proved in the case, and bearing on a subsequent case growing out of the same cause, will be noticed in the latter case, in which the testimony is reticent on the point.

3. Under such circumstances the second case will be remanded for testimony on the point, in furtherance of substantial justice.

ON MOTION TO DISMISS.

1. Interest accrued on a demand when judgment is rendered forms part of the judgment, and must be secured as such in a bond for a suspensive appeal.

2. But interest which dates only from the rendition of the judgment is not to be calculated in fixing the amount of a suspensive appeal-bond.

3. Nor is it necessary to include costs of suit in making up the amount of such a bond.

4. Costs and future interest are considered as secured by the half in excess for which the judgment was given.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; F. D. KING, Judge.

Hirault Farrar, for appellants. *Buck, Dinkelspiel & Hart*, for appellee.

POCHÉ, J. The railroad company appeals from a judgment of \$5,000 in favor of plaintiff as damages for the sufferings and the death of her husband by the falling on him of certain sheds owned by the defendant company. The death of Palaud resulted from the same accident which caused that of John H. Tucker, the circumstances of which are recited in our opinion in the case of *Tucker v. Same Defendant*, ante, 124, (recently decided,) which are the same here, with this difference: that Tucker was killed while walking by the sheds on the sidewalk, while Palaud met with his death while he was under the sheds on defendant's premises.

Under our understanding of the issues involved in the present case, it becomes

important to ascertain and to judicially determine the circumstances under which Palaud, the deceased, entered the premises and found himself under the sheds of the defendant at the time that the accident occurred. Now, in *Tucker's Case*, it was in proof that, some time previous to the fall of the sheds, Palaud had been employed by the company's agent to keep trespassers off the premises,—a circumstance which would have, in our opinion, a very material bearing on the issue herein involved. And, strange to say, the record in this case contains no testimony whatever on this point. We deem it our duty to take cognizance of facts proved in a case submitted to our review, which have a direct bearing on another case also under submission before us, for adjudication. *Hubbs v. Kaufman*, 40 La. Ann. 320, 4 South. Rep. 58; *Meyer v. Parker*, 41 La. Ann. 440, 6 South. Rep. 679. But that cognizance in the present case is not of itself sufficient to shape our decree. Hence we feel constrained to remand the case for proof on this important point. It is therefore ordered that the judgment herein rendered be annulled, avoided, and reversed. It is now ordered that the case be remanded to the district court for the purpose of taking evidence on the point herein stated, and of determining whether or not the deceased, Herman Palaud, was employed as keeper of the defendant's sheds at the time that the accident which caused his death happened: all costs to abide the final determination of the cause.

FENNER, J., absent.

MOTION TO DISMISS.

POCHÉ, J. The proceeding thus qualified, which we are about to review, is properly an appeal by plaintiff, in whose favor the judgment on the merits was rendered below, from a decree which denied her motion to set aside the appeal taken by the defendant corporation, and is predicated on the following grounds: (1) That the surety on the appeal-bond was not good or sufficient for the amount for which he had bound himself; (2) that the amount of the bond furnished was insufficient to sustain a suspensive appeal. The relief prayed for was in the alternative, either the absolute dismissal of the appeal or to decree it devolution only. After hearing evidence and argument of counsel, the district judge discharged the rule taken by plaintiff, and her present appeal is from that judgment. In this court she coupled her appeal to a motion to hence dismiss defendant's appeal from the judgment on the merits; but the only question legally before us is the appeal from the judgment on plaintiff's rule in the lower court for the dismissal of the appeal taken by defendant.

1. The judgment on the merits below was in favor of plaintiff in the sum of \$5,000, with legal interest from the date of its rendition, and for costs of suit. The record shows to our satisfaction, as it did to the district judge, that the surety on the appeal-bond is good for the amount in which he proposed to bind himself. He owes no debts, except taxes exigible at

the end of the current year; and he owns the property assessed at \$7,500, and appraised by a competent expert at \$8,000, as its present market value. Hence we consider him a competent surety on a bond of \$7,500.

2. But plaintiff's second point is that the bond itself is not of an amount sufficient to sustain a suspensive appeal, and the contention is that it does not cover interest and costs of suit. The requirement of the Code as to a suspensive appeal from a moneyed judgment is that the appeal-bond be "for a sum exceeding one-half of the amount for which the judgment was given." Code Prac. art. 375. No mention is made in terms either of interest or costs, and hence it would not be a violent presumption to conclude that the law-maker did not intend either to figure as elements in making up the amount of the bond. The law-maker doubtless considered that both were protected in the half required in excess of the amount for which the judgment was given; and, if the matter was *res nova*, that conclusion would strongly commend itself to such a judicial construction. But it has been held in several cases that, in making up a suspensive appeal-bond, interest which had accrued on the demand or claim previous to and up to the date of the judgment should be included as part of the judgment. *Ross v. Pargoud*, 2 La. 85; *Brown v. Brown*, 9 La. Ann. 310; *Jorda v. Judge*, 29 La. Ann. 776. Hence that rule can be considered as settled, and we have no desire to disturb it. But it has no application to the bond now under discussion, because the judgment appealed from covers no pre-existing interest, and contemplates none but future accruing interest, to date only from the rendition of the judgment. It stands to reason that interests which had no existence previous to the judgment, from which alone they are to spring and to derive their being, can have no effect to swell the amount of the judgment at the very moment that the decree is rendered. Hence it follows that in this case the interests to accrue in the future formed no integral or computable part of the judgment at the date of its rendition. As they had yet no actual being, they could produce no present effect.

As to the costs, our conclusion is that they are not to be included in the amount of the appeal-bond. The direct question came up but once in our judicial history, and it was settled in harmony with the views herein expressed. It was in the case of *Brown v. Brown*, 9 La. Ann. 310, in which the court said that a different interpretation had up to that time never prevailed or even been contended for. It was there said: "A bond being required exceeding by one-half the judgment, including interest accrued to the date of its rendition, the appellee is well secured, under that interpretation, for the costs and all future interests." Indeed no other interpretation affords a legal reason for the reaction of a bond exceeding by one-half the amount of the judgment appealed from. We therefore conclude with the district judge that the amount of the bond

furnished in this case is sufficient to sustain a suspensive appeal. It is therefore ordered that the judgment of the district court overruling plaintiff's motion to dismiss the appeal taken by defendant in this case be affirmed at her costs in both courts.

RAYMOND v. VILLIERE, Recorder, et al.
(Supreme Court of Louisiana. March 5, 1890.
43 La. Ann.)

MANDAMUS—REGISTER OF DEEDS—CANCELLATION OF INSCRIPTIONS.

1. *Mandamus* does not lie to the recorder of conveyances to compel him to cancel inscriptions showing titles to real estate in certain parties, unless it is shown conclusively by final and executory judgment that the same have been decreed to be erased, contradictorily with the parties concerned, and that it is his ministerial duty to expunge them from the archives of his office, the less so when the recorder discloses no interest.

2. Parties in whose favor inscriptions exist on the conveyance books of the parish, cannot be forced to appear as defendants to litigate their rights of ownership or the like in proceedings against the recorder for the cancellation of the same. They are entitled to regular process and trial.

3. Exceptions to the form of the proceeding and to want of cause of action, interposed by the parties interested, are well founded and must be sustained, in such a case.

4. Ingrafting ordinary suits in which titles to real estate are involved, in such a proceeding, is not permissible.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; N. H. RIGHTOR, Judge.

Jos. Maille and Gus A. Breaux, for appellant. F. Michinard and T. M. Gill, for appellees.

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the recorder of conveyances for the parish of Orleans to cancel from his books several inscriptions purporting to show ownership of certain real estate in this city in various persons, made co-defendants. The relator was met by an exception to the form of proceeding, to a want of cause of action, and eventually a denial of right. From an adverse judgment, this appeal lies.

In order to succeed the relator ought to have established (1) that, having a valid cause, he had presented his claim for cancellation to the recorder of conveyances; (2) that it was the ministerial duty of that officer to have made the erasures, which he arbitrarily declined. The grounds relied on by the relator are, substantially, that he was once the owner of a certain lot, and building thereon, which long ago he has transferred to the city of New Orleans, which presently owns the same; that since said transfer certain parties have, under judgments rendered against him, seized it, and become the adjudicatees; that one of them, or his representatives, is in possession of it, and enjoys the revenues yielded by it; that the judicial sales made to said parties are radical nullities, because no writ of any kind could have been lawfully levied on said property as his while it stood publicly recorded in the name of the city, etc. It is manifest that, from his own statement, the plaintiff has

no interest, and discloses no cause of action, as he has ceased to be the owner, and is vested with no mandate to champion the rights of the city, which, if they be trodden upon, will have the privilege of revendication. Conceding, however, that he has some interest, it is evident that his action is palpably one, in disguise, to annul titles standing in the name of others to real estate, and upon which the court necessarily would have to pass, for the inscriptions could not be canceled unless the titles were previously pronounced. The present proceeding is nothing but a rule against a public officer to compel him to perform an alleged ministerial function. Although it be true that, for the purpose of giving a clear title to a purchaser of property at a judicial sale, a motion to show cause is permissible against the parties in whose favor mortgage inscriptions exist, the rule, which is not inflexible, does not apply to parties in whose favor inscriptions appear on the conveyance books.

In relation to the summary proceeding for the cancellation of mortgage inscriptions, it has been well said that the object is to compel the auditor claiming an apparent charge to vindicate his right, but not to oblige him to litigate it in the action in which he is called to answer, if he have a right to proceed in another form or before another forum. *Bank v. Delery*, 2 La. Ann. 650, and other cases. The reason is manifest that, while the court may order the erasure, it does not necessarily have to pass on the claim of a mortgage right of the party, for usually it relegates both to the proceeds, the validity of the same to be subsequently determined; while in cases of cancellation of inscriptions from the conveyance books no such reference can take place, as the court, previous to ordering the erasure, have to pronounce the titles invalid. It would be monstrous to coerce the parties to appear on mere notice in a controversy which in form is summary, and in substance has all the emblems of a real action, to litigate their titles in that hasty way. The proper practice would be to proceed against the parties regularly, and, if desirable, to connect the recorder of conveyances with the proceeding.

Ingrafting ordinary suits, in which titles to real estate are involved, on a summary proceeding against an officer to require the execution of a ministerial duty, is not allowable. In such cases the defendant, who would be entitled to a trial by jury, could be debarred of it. We are authorized to take judicial notice of our own decisions. *Palaud v. Railroad Co.*, 42 La. Ann. —, ante, 899. Under that assumption, we cannot ignore, and know that it appears, by proceedings brought in this court by Raymond, upon which we have rendered an opinion and decree, that he has taken steps in the lower court to eject the Billgery heirs from this same property. *State v. Judge*, 41 La. Ann. 951, 6 South. Rep. 721. The present proceeding against the recorder of conveyances appears to be a subterfuge to accomplish indirectly, if possible, that which could only be done, and has been undertaken, di-

rectly. Had the plaintiff already obtained final and executory judgments contradictorily with such parties, recognizing his pretensions and decreeing the cancellation of the inscriptions here in question, and had he presented the same to the recorder of conveyances, with a demand for erasure, and had the latter refused, without good cause, to erase the inscriptions, the plaintiff would have had the right to complain, and would have obtained redress; but he has not established any such grievances, and, in the absence of such showing, or the like, he cannot obtain the relief which he seeks. Surely the recorder is not at fault, and the objections set up by the parties really in interest were properly sustained. Judgment affirmed.

ELYTON LAND CO. v. MAYOR, ETC., OF BIRMINGHAM.

(*Supreme Court of Alabama. May 23, 1890.*)

CONSTITUTIONAL LAW—TAXATION—MUNICIPAL CORPORATIONS.

The charter of the city of Birmingham, § 20, subd. 25, provides that "if there is any property in the city on the 1st day of January of the then current year, which was not in the city on the 1st day of January of the preceding year, * * * and consequently not assessed for state taxation during the preceding year, then it shall be lawful for the clerk of the board, and it shall be his duty, to assess such property * * * at a fair valuation, * * * which shall be added to the valuation as assessed for state taxes for the preceding year," and the municipal taxes assessed on the resulting valuation. The provision is likewise extended to improvements erected in the preceding year, and enhancing the value of the property. *Held*, that this section is in violation of Const. Ala. art. 11, § 7, which provides that "no city * * * shall levy or collect a larger rate of taxation in any one year on the property thereof than one-half of 1 per cent. of the value of such property as assessed for state taxation during the preceding year."

Appeal from city court of Birmingham; H. A. SHARPE, Judge.

This action was brought by the appellant, a private corporation, against the municipal authorities of the city of Birmingham, to recover taxes which plaintiff had paid under protest, as levied by defendant for and during the year 1887, and was commenced on the 15th October, 1888. Defects of forms in the pleadings were waived by the parties, and the case was submitted to the decision of the court, without the intervention of a jury, on an agreed statement of facts. The court rendered judgment for the defendant, and this judgment is here assigned as error.

A. T. London, for appellant. *Cabaniss & Weakley*, for appellee.

CLOPTON, J. Section 20, subd. 25, of the charter of the city of Birmingham, after conferring power on the mayor and aldermen to assess, levy, and collect taxes on all property in the city for each year, not exceeding one-half of 1 per cent. on the value thereof, and providing that the assessments are to be made by the clerk of the city from the state and county assessment books as assessed for state taxes the preceding year, further provides: "That if there was any property in the city on the 1st day of Jan-

uary of the then current year which was not in the city on the 1st day of January of the preceding year, or if there were improvements on the 1st day of January of the then current year erected on property materially enhancing the value of such property, which said improvements had not been erected on the 1st day of January of the preceding year, and consequently not assessed for state taxation during the preceding year, then it shall be lawful for the clerk of the board, and it shall be his duty, to assess such property or improvements at a fair valuation, which said valuation shall be added to the valuation as assessed for state taxes for the preceding year, and the taxes so assessed shall be collected as the other assessments are collected." Acts 1882-83, p. 301. Under the authority conferred by this section, the mayor and aldermen caused to be assessed for taxation for the year 1887 personal property of the Elyton Land Company, which was not within the city on the 1st day of January, 1886, but was within the city on the 1st day of January, 1887, and had not been assessed for state taxation during the preceding year. The company paid the taxes under protest, and bring the action to recover the amount.

The record raises the question whether the provision of the charter conferring such authority infringes section 7 of article 11 of the constitution, which declares: "No city, town, or other municipal corporation, other than provided for in this article, shall levy or collect a larger rate of taxation in any one year on the property thereof than one-half of one per centum of the value of such property as assessed for state taxation during the preceding year." The provision otherwise relates to the power to levy an additional rate for the payment of debts existing at the time of the ratification of the constitution. In the absence of constitutional restrictions, the general assembly could confer on municipal corporations the power of taxation for municipal purposes as to rate, assessment, and subjects which it possesses for state purposes. The inhibition against the power of municipal corporations to levy a greater rate of taxation than prescribed in the constitution operates a limitation on the power of the legislature to delegate authority for that purpose. In interpreting limitations upon legislative power in state constitutions, the nature and objects of the particular limitations should be kept in view, and the causes in which they originated considered in the light of history and former constitutions, and such force and operation given to the language employed consistent with its legitimate meaning as may fairly remedy existing and apprehend evils, and accomplish the desired ends. The framers of the constitution were cognizant that no governmental power is more liable to abuse than the taxing power, and also of its oppressive use and perversion by municipal authorities without regard to the interests of the citizen. They sought to prevent this abuse by restricting the exercise of the power within moderate and protective limits. It is contended that the constitutional inhibition is against a higher

rate of taxation, and was not intended to restrict the power of the municipality to assess taxes on property only which had been assessed for state taxation. This construction ignores the relation which the rate sustains to the valuation, and their inseparable connection. As all taxes levied on property in this state are required to be assessed in exact proportion to its value, an assessment or appraisal is an essential preliminary to the apportionment. Without an assessment made in the mode required by law, and by the proper officers, the tax is without support. This is the principle underlying the limitation upon the taxing power of municipal corporations. Experience having shown the insufficiency of a limitation upon the mere rate, which could be easily avoided by increasing the value, preserving at the same time the nominal rate, and that a mandate to the general assembly "to restrict their power of taxation, assessment, and contracting of debt" did not promote the ends proposed, it became apparent that the interests and protection of the citizen called for a restraint better guarded and more imperatively protective. The plan devised was to limit the rate to a specified per cent. of the value as assessed for state taxation.

The controlling principle is the adoption for cities, towns, and other municipal corporations of the assessment of value made by the officers of the state, as the basis of the per cent. to be levied, and the measure of the tax-payer's liability, thereby preventing different assessments, varying as to values, for the state and for the political subdivisions, mere agencies for the administration of local government, and furnishing a rule by which whether the limited per cent. had been exceeded could be ascertained by a mere arithmetical calculation. As we have said, a constitution, the revision of a former constitution, should be interpreted in the light of its predecessor. The corresponding provision in the constitution of 1868 is found in section 36 of article 4, which declared: "The general assembly shall not have power to authorize any municipal corporation * * * to levy a tax on real and personal property to a greater extent than two per centum of the assessed value of such property." The revisers, not being satisfied with the provision, the supposed defect in which consisted in the unrestrained power of the legislature to provide for assessments for municipal officers, materially altered it. Not only was the per cent. largely reduced, but also in lieu of the words, "the assessed value of such property," the phrase, "the value of such property as assessed for state taxation during the preceding year," was inserted. When the clause thus altered is considered in connection with the omission from the present constitution of the mandate of the general assembly as to the restriction of the power of assessment, the purpose to provide the state assessment as the basis of the percentage, and to prohibit special assessments for municipal taxation, confining municipalities to the exercise of the legislative function of levying taxes, becomes apparent. The effect is to

prescribe for municipal corporations the same rule which governs the levy of county taxes, except that the latter are assessed on the state assessment for the current tax year, and the former on the assessment for the preceding year. *Perry Co. v. Railroad Co.*, 58 Ala. 546. The reason for this difference may have been that, municipal taxes being generally levied before the completion of the state assessment for the current year, the assessment for the preceding year furnished the only certain and ascertained data for adjusting the levy; but, whatever be the reason, the expression "one-half of one centum of the value of such property as assessed for state taxation during the preceding year" excludes the inference that the percentum may be of the value as assessed for municipal taxes by municipal officers, or as assessed by any other mode of assessment. *Expressio unius est exclusio alterius*. A constitutional inhibition that no city, town, or other municipal corporation shall levy a larger rate of taxation on property than a specified per cent. of a designated value is the prohibition of a levy upon a different value. Under the constitution, a city has no authority to levy a tax upon the value of property during the current tax year. In *City of Birmingham v. Klein*, ante, 886, (present term,) speaking of this limitation, it is said *arguendo*: "Not only is the levy by any city to be made 'on the property thereof,' i. e., the whole taxable property thereof, but it must be made on 'such property as assessed, for state taxation during the preceding year.'" Though rules of statutory construction may be of limited application in the construction of constitutional provisions, in the absence of precedents in respect to similar constitutional provisions the construction placed upon statutes somewhat analogous may shed light upon the question. Under a statute of Virginia conferring on the supervisors authority to fix the amount of the county levies, and to order the levy "on all property assessed with state taxes in the county," it was held that the county authorities could not levy a tax on any property, though in the county, which had not been assessed with state taxes. *Railroad Co. v. Washington Co.*, 30 Grat. 471. Under the charter of Ft. Wayne, Ind., which provided that the assessment for local improvements should not in any year exceed 10 per cent. of the value of the property as valued and assessed on the tax duplicate for state, county, and municipal purposes, it was held that, there being no mode for determining the rate of assessment to which property that could not be valued and assessed on the tax duplicate was liable, such assessment could not be made. *First Pres. Church v. Ft. Wayne*, 36 Ind. 338.

It is argued that this construction exempts all property which may have escaped state taxation during the preceding year, and all property which may come into existence after the completion of the state assessment. As to property which may escape state assessment, the municipal officers, on its discovery, have but to report the same to the assessor or col-

lector, whose duty it then becomes to assess it; and as to property subsequently coming into existence, if it exists on the 1st day of January of the current year, its value will be assessed for state taxation during such year, and the municipality can levy a tax on such property in the succeeding year, the only sequence being to postpone the levy of the tax for one year. The power conferred on the municipal authorities by the charter of the city of Birmingham, where the value of real estate as assessed for state taxation during the preceding year, has been materially enhanced on the 1st day of January of the current year by improvements erected thereon which had not been erected on the 1st day of January of the preceding year, to assess such improvements at a fair valuation, and add such valuation to the value as assessed for state taxation, authorizes the municipal authorities to levy on such real estate a greater rate than one-half of 1 per cent. of the value as assessed for state taxation during the preceding year, and violates the letter of the constitution. Keeping in mind that an assessment is essential to support a tax upon valuation, and that none is provided or authorized other than the state assessment, and giving force and effect to each word and phrase, it follows that municipal corporations are inhibited by the constitution to levy a tax on any property which had not been assessed for state taxation during the preceding year. Of course this decision only applies to taxes assessed on property as such according to value, not to other subjects of taxation, such as privileges and occupations.

We have carefully considered the question raised, because of its importance, and that it is brought for the first time before the court, and have arrived at the conclusion announced with some reluctance. But with the policy or expediency of the constitutional provision we have no judicial concern. Our duty is to interpret it as ordained by the people. We are forced to hold that the proviso to section 20, subd. 25, of the charter of the city, above quoted, is unconstitutional. Judgment reversed, and judgment here rendered in favor of plaintiff for \$4,838.18. Reversed and rendered.

ALEXANDER et al. v. JONES.

(Supreme Court of Alabama. May 23, 1890.)

PARTNERSHIP—FIRM DEBTS—ACTION AGAINST PARTNER.

Under Code Ala. § 2005, providing that any one of the partners may be sued for the obligation of all, a partnership may sue an individual for a debt created by a former partnership composed of defendant and a member of plaintiff firm.

Appeal from circuit court, Colbert county; H. C. SPEAKE, Judge.

This suit was instituted by the suing out of an attachment from the circuit court of Colbert county against the defendant, Paul C. Jones, who was then a non-resident of the state of Alabama. The suit was brought by the appellants, Alexander Bros., a partnership composed of Sidney J. Alexander, J. M. Alexander, and Percy Alexander, and sought to recover

from the defendant, Paul C. Jones, a debt created by a partnership known as Alexander & Jones, and composed of Sidney J. Alexander and the defendant, Paul C. Jones. Sidney J. Alexander was a member of both firms at the time the debt sued on was created. The defendant was sued on his individual liability, and his individual property attached, and no claim whatever was asserted against the partnership or the partnership property of Alexander & Jones. Upon motion of the defendant the suit was dismissed by the court on the ground that a common-law court had no jurisdiction of a suit like the present, and from this judgment of the court plaintiffs appealed.

Kirk & Almon, for appellants.

McCLELLAN, J. The question presented by the record was under consideration at the last term in another branch of this case, but a decision of it was then pretermitted as not being necessary to a determination of that appeal. Mr. Justice CLOPTON, delivering the opinion in that branch of the case, in speaking of the right of a partnership, one member of which was also a member of another firm which was indebted to the plaintiff partnership, to maintain an action against the other members of the debtor firm, had this to say: "At common law one partnership can maintain no action against another, when one of the partners is a member of both firms. The reason is that the common partner must necessarily be the plaintiff and defendant, and that a judgment cannot be rendered in favor of himself and against himself. But by statute any one of the associates, or his legal representative, may be sued for the obligation of all. Code, § 2605." 6 South. Rep. 382. This statute has been construed to give a creditor the right to sue any one of the partners for a debt contracted by the firm, whether due by account or otherwise; and that the effect of the suit so commenced is to change, for the purposes of such suit, the obligation of the partners from joint to joint and several. The creditor may declare on the debt as the individual liability of the partner sued. *Duramus v. Harrison*, 26 Ala. 326; *Hall v. Cook*, 69 Ala. 87. Under a statute of Mississippi, declaring the notes of partners joint and several, it was held that a member of a partnership may be co-plaintiff with the other partners in a suit on a promissory note against the members of another firm, of which he is also a partner, provided he is not joined as defendant, and that the others cannot set up his liability as a defense. *Morris v. Hillery*, 7 How. (Miss.) 61. In *Lacy v. Le Bruce*, 6 Ala. 904, it was held that the death of a common partner removed the impediment to a suit at law to recover a demand due by one firm to the other, and that the survivor of the one may sue the survivor of the other. The reason of the rule at common law having ceased by operation of the statute, it would seem that the rule also should cease. Another reason for the common law rule—one that lies back of the reason stated, and is the basis of the latter—is that as between such partnerships no con-

tract could have any legal existence; as to so hold would be to give validity to an agreement of the common partner made with himself. Story, Partn. § 234; Pars. Partn. 238. It is manifest that this reason also is obviated by our statute, since, by its influence, the contract is not only jointly that of the common partner and his associates, but is separately and severally the compact of each one of the associates, to all intents and purposes, as if only one of the partners, and that one not a member of the other firm, had entered into it; and it is valid, even at law, as to him, whatever in strictly legal contemplation may be its infirmity as an obligation of his co-partner. Whether the rule be referable to one or the other or both of these reasons, it is a pure technicality, as is demonstrated by the fact that such contracts have always been upheld and enforced in equity. Its existence, even in those cases where the reasons stated apply, has been deplored by eminent jurists, who approve, as a better doctrine of abstract law, that which obtains in every system of jurisprudence, except that of common-law countries, and which accords to partnerships something of an entity, like that of corporations, separate and apart from the individuals who compose them, in such sort that contracts and actions between them are in no wise affected by the fact of a common membership. Following the lead of *Lacy v. Le Bruce*, supra, and carrying the doctrine of that case to its legitimate consequences, and confining the operation of the rule to those cases in which the only possible reasons for it exist, we hold that under our statute it does not obtain where the suit, as here, is against a member or members of the debtor partnership, who are not members of the plaintiff firm. 1 Lindl. Partn. *267, note 3; 2 Lindl. Partn. *569, note 102. The judgment of the circuit court dismissing the suit is therefore reversed, and the cause remanded.

DOLLINS et al. v. POLLOCK et al.

(Supreme Court of Alabama. May 28, 1890.)

ATTACHMENT—AGAINST PARTNERSHIP—NON-RESIDENTS—LEEN.

1. Where defendants in attachment are described in the affidavit and in the writ as "O. & J. P., partners under the style of P. Broe," the attachment may be levied either on partnership effects or on the individual property of the members, the obligations of partners under the laws of Alabama being joint and several.

2. Code Ala. § 2696, providing for notice by publication of attachment against the property of a non-resident, applies as well to attachments based on a fraudulent disposition of his property by the debtor as to those based on the fact that he has left the state.

3. Where an attachment has been sued out against the defendants in an action, and plaintiffs suffer a voluntary nonsuit in such action, which, however, is set aside on their motion at the same term, the lien of that attachment is left as it was before the nonsuit was granted.

4. The affidavit for attachment is not admissible in evidence on the trial of the claims of third persons who allege that they had purchased the property levied on before the levy.

Appeal from circuit court, Mavengo county; W. E. CLARKE, Judge.

This was a statutory claim suit, in which the appellants interposed a claim to property levied on under an attachment issued ancillary to a suit brought by the appellees against Price Bros. Upon the evidence, the claimants requested the court to give the following written charges to the jury: (1) "The court charges the jury in this case that the inquiry should be directed to the *bona fides* of the debt, and the sufficiency of the consideration, and the reservation of a benefit to the debtor. If the transaction is not assailable on some one of these grounds, fraud otherwise has no room for operation." (2) "The court charges the jury in this case that whether there exists the ordinary badges of fraud, whether the debtor intended to hinder or defraud his other creditors, whether Adams and Dollins were swift in the race of diligence for the purpose of defaulting other creditors who were pressing their demands, or whether such is the necessary consequence, are not material inquiries." (3) "The court charges the jury that the burden of proof that no benefit was reserved to Price Bros. is on the plaintiffs." (4) "The court charges the jury in this case that the intention of Price Bros. in making this sale to Adams and Dollins is not to be considered in determining the legality of this transaction." The court refused to give each of these charges, and the claimants reserved an exception to each such refusal. There was judgment for the plaintiffs in the claim suit, and the claimants bring this appeal, and assign the various rulings of the court below as error.

Geo. W. Taylor, for appellants. Taylor & Johnston and Geo. Lyon, for appellees.

STONE, C. J. Pollock & Co. sued out an attachment against Price Bros., which was levied on a stock of merchandise. Dollins and Mrs. Adams, as partners, claiming to be purchasers from Price Bros., interposed a claim to the merchandise, executed a claim bond, and inaugurated what is known in our jurisprudence as a "trial of the right of property," a statutory proceeding which answers the purpose of an action of trespass against the sheriff, when it is complained that, under process against one, he has levied on the personal goods of another. The issue of merit in such trial is formed by an allegation on the part of the plaintiff in the process that the goods levied on are subject to it, and a denial by the claimant of the truth of that allegation. Such suit can be resorted to only when there is another suit, or final process in progress, and in the absence of such suit or process for the enforcement of a judgment recovered there can be no rightful resort to this statutory remedy. The statutes define its boundaries. 3 Brick. Dig. 776. In such trial the claimant is not concerned in the rightfulness of the levy. His right to litigate is confined to his right to the property, and to his legal right as contrasted with any equitable claim he may assert. *Id.* But if the process under which the condemnation is sought is void, he can take advantage of its invalidity. Of mere irregulari-

ties, or reversible errors, he cannot complain. *Id.* p. 777, § 25. At the threshold of the trial the claimants contended that the attachment was void, and should be dissolved. The first ground on which they rest this contention is that the suit, as they claim, is not against the partnership, but against the individuals composing it; and that consequently only the individual property of the defendants could be attached. This argument is presented in two aspects, the first of which is that the suit as originally framed was against O. R. Price and J. S. Price as individuals and not as a partnership. In suing out the process, alike in the affidavit and in the attachment, the defendants are described as "O. R. & J. S. Price, partners under the style of 'Price Bros.'" A judgment and execution following this description of the defendants would be a judgment and execution against the partnership, and against each individual member named in the process. Under such process the sheriff would be authorized to seize both partnership effects, and the individual property of the several members composing the firm. *Leinkauf v. Munter*, 76 Ala. 194; *Pearce v. Shorter*, 50 Ala. 318. It is difficult to conceive how else process could be framed so as to authorize, in one suit and under one process, the seizure of the property of the partnership, and of the individual members composing it. In opposition to the principle stated above, the appellant relies on certain rulings of this court. Some of the expressions found in some of those cases may, as general propositions, be misleading; but, interpreted in the light of the facts in the particular cases, they are not opposed to what we have said. It should be promised that our statute makes the obligations of partners joint and several, and permits the creditor to sue them, jointly or severally, at his option. Code 1886, § 2605; *Haralson v. Campbell*, 63 Ala. 278; *Hall v. Cook*, 69 Ala. 87; *Same v. Green*, *Id.* 368; *Alexander v. King*, 87 Ala. 642, 6 South. Rep. 382; *Alexander v. Jones*, ante, 903. In the case of *Haralson v. Campbell*, 63 Ala. 278, although the suit was against two persons, describing them as partners, the execution was against the two describing them as individuals, and not stating they were partners. The form of the judgment is not shown in the report. There was a motion to quash the execution "because it directed the money to be made out of the individual effects of the defendants, and not out of the partnership property." The circuit court overruled the motion to quash, and this court affirmed the judgment, saying: "In this case the individuals are named and sued as such. The individual property of each partner is liable to seizure in satisfaction of this judgment." We did not decide that the partnership effects were not also liable, nor could we have so decided if the judgment and execution, like the complaint, had described the defendants as "partners under the name and style of W. J. Haralson & Co." That question was not before us. In the cases of *Hall v. Cook*, 69 Ala. 87, and *Same v. Green*, *Id.* 368, the defendants were sued as individuals, not describing them as part-

ners Those cases shed no light on the present one. In *Saw-Mill Co. v. Smith*, 78 Ala. 108, three persons were named and sued as partners, and only two were served with process. The circuit court rendered judgment against the three. This court corrected the judgment, and affirmed it against the two who had been served. What effect that form of judgment would have in the matter of its collection was neither considered nor presented. None of the cases relied on support the view of appellant.

The second aspect of the question we are considering arises on the following state of facts: The attachment, as we have shown, was sued out against "O. R. & J. S. Price, partners under the style of 'Price Bros.'" The particular statutory ground of the attachment was that "the said Price Brothers have fraudulently disposed of their property." The attachment was sued out January 4, 1889. Our statute (Code 1886, § 2937) requires that when an attachment is levied, and defendant is a resident of the county, he must be notified of the levy by written notice either served on him or left at his residence. Written notice was served on J. S. Price. Other provisions are made for notice if the defendant resides out of the county, but in the state. The conveyance which the attachment in this case attacks as fraudulent was signed Saturday night, December 29, 1888, and was delivered to the purchasers Monday morning, December 31st. On Sunday morning, December 30th, O. R. Price left his place of residence, in Marengo county, with the avowed purpose of going to Florida, and he has never returned. This was before the attachment was sued out, and of course no actual notice of its levy was or could be served on him. As to him there was publication made under the section of the Code to be presently considered, before the return-term of the attachment. Section 2936 of the Code reads as follows: "When an attachment is sued out against a non-resident of the state, the writ shall be returned to the clerk of the court as soon as levied upon the property of the defendant, and thereupon the clerk shall cause a notice of the attachment and levy on the defendant's property to be advertised once a week for three successive weeks, in some newspaper, a copy of which must be sent by mail to the defendant, if his residence is known, or can be ascertained; and if such publication is perfected twenty days before the next term of the court, the case shall stand for trial at that term; otherwise at the succeeding term, or any term after the perfection of such publication, twenty days prior thereto." The appellant contends that this section of the Code refers, and only refers, to cases in which non-residence is made the ground for suing out the attachment, and that it is not applicable to attachments based on any of the other statutory grounds. Code 1886, § 2930. Reasoning from this postulate, he contends that O. R. Price is not made a party to the original suit against Price Bros.; that the suit is practically discontinued as to him, and remains only a suit against J. S. Price individually; that under an attach-

ment against J. S. Price individually only his individual property can be levied on or held under such attachment; that the partnership property is released from the levy, and that the attachment has thereby become void as to the partnership property involved in this suit. We differ entirely with counsel, and hold that section 2936 of the Code, both in letter and spirit, applies to all cases of non-residence of the defendant, no matter which statutory ground is made the basis of the attachment.

Before beginning the trial of this case, the original suit of Pollock & Co. v. Price Bros. was entered upon, the jury organized, and the case partially put before them. At that stage of the trial the plaintiff took a voluntary nonsuit and withdrew the case from the jury. Immediately afterwards, on motion of plaintiffs, the court reinstated the case on the docket, and it was then continued. The appellants contend that this was so far an end of the suit against Price Bros. as to destroy the lien of the attachment levy, and that the same thereby became null and void. It cannot be gainsaid that a successful issue of the main suit, the one in which the attachment issues, is necessary to the final establishment of the lien. A failure of that suit by a judgment for the defendant is a discharge of the lien created by the levy. Until judgment recovered, the lien is provisional. 1 Brick. Dig. p. 162, §§ 108, 113; *Clay v. Bell*, 4 Mass. 99; *Suydam v. Huggefords*, 23 Pick. 465; note to *Bank v. Bacheider*, 39 Amer. Dec. 609. In *Brown v. Harris*, 2 G. Greene, 505, an attachment returnable to a justice of the peace had been levied. On the day set for the trial the plaintiff failed to appear, and was nonsuited. There was a statute in that state (Iowa) allowing such nonsuit to be set aside on showing, if moved for within six days. Motion was made within the six days, the nonsuit set aside, and judgment rendered for the plaintiff. The question was whether setting aside the nonsuit restored the lien, and the court ruled it did not. In *Harrow v. Lyon*, 3 G. Greene, 157, the case of *Brown v. Harris* was followed, the same judge delivering the opinion. These decisions were rendered in 1850-51. In the case of *Danforth v. Carter*, 4 Iowa, 230, decided in 1856, the same court shook the authority of these cases. In the case of *O'Connor v. Blake*, 29 Cal. 312, the justice before whom the attachment was pending nonsuited the plaintiff. Subsequently he set aside the nonsuit, and, the parties being present, he tried the case, and gave judgment for the plaintiff. The court held that the justice had no authority to set the nonsuit aside, and that his unauthorized act in doing so did not revive the lien which had been lost by the nonsuit. This decision was rested, it will be seen, on the absence of authority in the justice to set the nonsuit aside. This court, as well as the courts of many other states, holds that a failure of the attachment suit and consequent judgment for the defendant are *prima facie* a discharge of the lien; yet if on appeal the judgment is reversed, the lien continues. *Danforth v. Carter*, 4 Iowa, 230; *Hackett*

v. Pickering, 5 N. H. 19; Caperton v. McCorkle, 5 Grat. 177. It is said that the judgments of a court during the term at which they are rendered are in the breast of the judge. They are manifestly so far under his control as that he can modify them or set them aside; and his last record utterance in any given case is the judgment in that case, in whole or in part, unless it is void on its face. Of course, in a proper case, it can be reviewed, and may be reversed, after which it ceases to be the judgment; but until reversed it determines the *status* of the case, and of the parties to it. We cannot assent either to the reasoning or conclusions of the court in *Brown v. Harris*, 2 G. Greene, *supra*. We hold that the nonsuit taken in the case of *Pollock & Co. v. Price Bros.*, set aside as it was before the term of the court at which it was taken, left the lien of the attachment levy as it existed before the nonsuit. There was no error in overruling the motion to dissolve the attachment, or in refusing to declare the levy void.

The circuit court erred in allowing the affidavit for attachment to be given in evidence by the plaintiffs. It was an *ex parte* statement, and we know of no rule of evidence for letting it in. *Tallaferrero v. Lane*, 23 Ala. 369. At the request of the plaintiffs, the court charged the jury that if they believed the evidence they must find the property levied on subject to the levy of the attachment. The question before the jury was whether or not there was fraud in the alleged sale to Dollins and Mrs. Adams. The rules for giving or refusing the charge requested have been so often declared that it would almost seem unnecessary to repeat them. 3 Brick. Dig. 109. The general charge, like a demurrer to evidence, is an admission against the party invoking it of the truth of every fact which the adversary's testimony tends to prove, and of every reasonable inference that can be drawn from such testimony, conceding it to be true.

Taking the record for our guide, we suppose the alleged indebtedness of Price Bros. to their sister, Mrs. Adams, claimed to have been \$3,000, was the subject of the severest contest of fact which the trial developed. The general charge ignored that contest; ignored all the circumstances relating to it brought out on the trial; ignored the relationship of the parties; and conceded that the Price Bros. did owe her the \$3,000. There was no denial of the indebtedness to Richardson secured by mortgage which the purchasers assumed to pay, and the testimony proved that the contract price, \$6,000, was about a fair estimate of the value of the real and personal property purchased. This narrowed the elements of fraud implied in the general charge to two items; the alleged indebtedness of \$600 from Price Bros. to Dollins, and the fact that in making up the purchase price the notes of the purchasers, aggregating \$1,280, were accepted and computed. As to the alleged indebtedness to Dollins, if the testimony be true, it was a debt liable to be reduced in certain contingencies. *Liddell v. Chidester*, 84 Ala. 508, 4 South. Rep. 426, and citations. The notes given to make up the amount of

the purchase were not delivered to Price Bros., if the testimony be believed. They were placed in the hands of another to be used in the payment of other debts of Price Bros. *Rankin v. Vandiver*, 78 Ala. 562. These two facts do not necessarily, and *per se*, stamp the transaction as fraudulent, as matter of law. Like the other facts in the case, they were for consideration by the jury, under proper instructions. The court erred in giving the general charge.

In the defense relied on in this case, the claimants set up that they purchased the goods in payment of debts due from Price Bros. to them severally. Whether those debts existed, as claimed, was a very important inquiry. Upon that inquiry, and upon all other inquiries of fact, we disclaim all intention of intimating any opinion. These are questions for the jury, under proper instructions. We have so often declared the rules which should govern in such trials as this that we will not repeat them. We cite several of our decisions which bear on the questions raised. *Hubbard v. Allen*, 59 Ala. 283; *Hamilton v. Blackwell*, 60 Ala. 545; *Harrell v. Mitchell*, 61 Ala. 270; *Thames v. Rembert*, 63 Ala. 561; *Donegan v. Davis*, 66 Ala. 362; *Lipscomb v. McClellan*, 72 Ala. 151; *Crawford v. Kirkesey*, 85 Ala. 293; *Lehman v. Kelly*, 68 Ala. 192; *Seaman v. Nolen*, Id. 463; *Rankin v. Vandiver*, 78 Ala. 562; *Levy v. Williams*, 79 Ala. 171; *Hodges v. Coleman*, 76 Ala. 103; *Meyer v. Sulzbacher*, Id. 120; *Leinkauff v. Frenkle*, 80 Ala. 136; *Tryon v. Flournoy*, Id. 321; *Bray v. Comer*, 82 Ala. 183, 1 South. Rep. 77; *Apfel v. Crane*, 83 Ala. 312, 3 South. Rep. 863; *Carter v. Coleman*, 84 Ala. 256, 4 South. Rep. 151; *Bank v. Elborn*, 84 Ala. 529, 4 South. Rep. 886; *Roswald v. Hobbie*, 85 Ala. 73, 4 South. Rep. 177; *Stix v. Keith*, 85 Ala. 465, 5 South. Rep. 184; *McDowell v. Steele*, 87 Ala. 493, 6 South. Rep. 288.

The first charge asked by claimants should have been given. Charges Nos. 2 and 4 were misleading. Charge No. 3 has the word "no" improperly in it, probably by mistake or miscopy. With that word omitted it should be given. Reversed and remanded.

KELLAR *et al.* v. TAYLOR.

(*Supreme Court of Alabama.* May 27, 1890.)

FRAUDULENT CONVEYANCE—REJECTION OF EVIDENCE.

1. Where merchants in failing circumstances sell their store and goods at a fair price, for a new consideration, the purchaser to make certain payments presently, but the bulk in the future, it is for creditors claiming that the sale is in fraud of their claims to show that the purchaser had actual or constructive notice of his vendors' financial condition.

2. Where it is doubtful whether witness was attempting to repeat what was said to him, or was merely giving the conclusion he had drawn from what was said to him, the exclusion of the testimony is not error.

Appeal from circuit court, Shelby county; LEROY F. BOX, Judge.

This action was brought by the appellee, W. H. Taylor, and sought to recover damages for an alleged trespass committed by the appellants, Arthur H. Kellar and D. R. Dunlap, a United States marshal

and deputy. The facts as shown in the bill of exceptions are substantially as follows: On January 30, 1886, a mercantile firm, doing business under the firm name of McCary & Barr, sold out their stock of goods, store-house, and lands to the plaintiff, W. H. Taylor. The said McCary & Barr offered to sell out to said Taylor for \$3,000, but he refused to buy at this price, and offered them \$2,750, which they finally accepted, and thereupon, some time between the hours of 8 and 10 o'clock, the night of January 30, 1886, they fixed up the papers, etc., and the store, goods, etc., were turned over to the plaintiff, Taylor. By the agreement Taylor was to pay \$500 in cash, and the balance in two payments. This he did by delivering to one Mrs. Elliott, to whom McCary & Barr were indebted, a pair of mules valued at \$275, and giving her a due-bill for the remaining \$225, which he paid a few days thereafter. The deferred payments were arranged by the said Taylor giving his notes to the said Mrs. Elliott and the Elliott heirs, to whom the said firm of McCary & Barr were also indebted for certain amounts, and then in giving his notes for the balance to McCary & Barr. After these arrangements were perfected, the store, goods, etc., were turned over to the said W. H. Taylor, who employed the said Barr as his clerk, and with him continued to do business at the same place until February 10, 1886. At the time of this sale McCary & Barr were indebted to other creditors, from whom they had bought goods, but Taylor denied having any knowledge, either actual or constructive, of any other indebtedness than that to Mrs. Elliott and the Elliott heirs. At this time the defendant Arthur H. Kellar was United States marshal for the northern district of Alabama, and the defendant D. R. Dunlap was his duly authorized and empowered deputy. On February 9, 1886, two attachments were issued from the United States circuit court for the northern district of Alabama, at the suit of two creditors of the firm of McCary & Barr, and delivered to the said defendant A. H. Kellar. These writs of attachments were delivered by said Kellar to his deputy, the defendant Dunlap, and by him were levied on the stock of goods of the plaintiff, Taylor, recently purchased from said McCary & Barr, and were seized and taken into possession by said Dunlap. Before these attachments were levied, each of the plaintiffs in attachment gave bonds of indemnity with Joseph F. Johnston and W. J. Cameron, respectively, as sureties on the said indemnity bonds, and said Johnson and Cameron are made parties defendant to this suit. The ground on which these attachments were issued was that McCary & Barr and said Taylor had been guilty of fraud in making the said conveyance of the store, goods, etc., and in the trial of the present suit this was the defense sought to be established by the defendants. Upon the evidence as adduced the plaintiff requested the court to give the following, among other charges: *First*. "If the jury believe from the evidence that Taylor, on or about the 30th of January, 1886, bought of McCary & Barr the store-

house and lot and the stock of goods in controversy, and paid them therefor a pair of mules and a due-bill for \$225, which he paid a few days thereafter, and that he executed to them and to others his notes, aggregating \$2,250; and if they further believe that the amount so paid and the notes so given were the reasonable value of such store-house and lot and goods, and that afterwards defendant Dunlap, as deputy marshal, seized and took possession of such store-house and stock of goods under the writs of attachment given in evidence; and if they further believe that defendant Kellar was the United States marshal under whom Dunlap was acting in making such seizure, then said defendants are liable to plaintiff for the value of the stock of goods so seized, and the value of the use of the store-house while they had it in possession, unless the defendants have satisfied the jury by the evidence (1) that at the time the purchase was made and closed McCary & Barr were insolvent or in embarrassed circumstances; and (2) that Taylor at that time had actual or constructive notice that McCary & Barr were insolvent or in embarrassed circumstances. The burden of proving each of these facts is upon defendants, and plaintiff is entitled to a verdict unless defendants have proven each of them." *Third*. "Before the jury can find that Taylor was guilty of fraud in the purchase from McCary & Barr, defendants must show facts and circumstances which not only cast a suspicion on the transaction, but they must show a state of facts which are not fairly and reasonably reconcilable with fair dealing and honesty of purpose; and, until this is done, the jury cannot find that plaintiff was guilty of any fraud." The court gave each of these charges, as well as others requested by the plaintiff, and the defendants reserved an exception to each of the charges so given. There was verdict and judgment for the plaintiff, as to the defendants Kellar and Dunlap, and in favor of the defendants John, Ston and Cameron. The defendants Kellar and Dunlap now prosecute this appeal and assign the various rulings of the court as error.

Pettus & Pettus and Knox & Bowie, for appellants. *Tompkins & Troy*, for appellee.

STONE, C. J. The witness Buford, in testifying for defendants, was asked as to a conversation he had had with Taylor. He prefaced his answer by a statement of what he said McCary had said to him. McCary was one of the members of the firm of McCary & Barr, for whose debts the goods were attached and sold. McCary & Barr had sold their establishment, including store-house and goods, to Taylor, the plaintiff in this suit. The witness testified that McCary, in a conversation with the witness, had said that he asked Taylor if his creditors could attach the notes given by the latter in the purchase of the goods, and that Taylor had told him they could. He added: "He told me after having that conversation with Taylor he went immediately to Columbiana, [the county-seat,] and made an assign-

ment of the balance of his effects." The witness, testifying further, said: "I afterwards asked Taylor about it, and he corroborated the McCary statement in full. He had told McCary that his creditors could attach these notes." That part of the answer which is embraced in the last quotation marks was objected to by plaintiff, the objection sustained, the testimony excluded, and defendants excepted.

It is left somewhat in doubt what precise meaning the witness intended to convey by the words, "he had told McCary that his creditors could attach these notes." If the words "he said" had preceded the clause last copied there could be no controversy about the witness' meaning. It would be an affirmation of what Taylor had said to witness, and would have been, if offered alone, legal evidence. Expressed as it is, we are left in doubt whether the witness was attempting to repeat what Taylor had said to him, or only the opinion the witness Buford had formed, or the inference he had drawn from what Taylor said to him. Doubts such as this must be resolved against the party excepting. The circuit court did not err in excluding this testimony. It was but the conclusion or opinion of the witness as to the effect of what Taylor did say. The witness should have stated his best recollection of what Taylor said, no more. It was for the jury to determine to what extent, if any, it corroborated McCary's statement. But the ruling may be vindicated on another principle. The offer was of Taylor's statement, or rather, of the witness' inference from it, as a whole. It was objected to as a whole, and was excluded as a whole. The part of the sentence which asserts that Taylor "corroborated the McCary statement in full" was clearly inadmissible. When there is a general offer of testimony, a part of which is legal and a part illegal, and there is a general objection to its admission, the court is not required to separate the good from the bad, but may reject the whole. 1 Brick. Dig. p. 886, § 1186; 3 Brick. Dig. p. 443, § 571.

Many assignments of error are found in the record, but counsel have argued only two of them. We will confine what we have to say further to those two assignments, for we think there is nothing in the others. The argument is confined to charges 1 and 3, given at the instance of plaintiff, each presenting substantially the same question. Cases of transfer of property in alleged fraud of creditors have been very often before this court. We have drawn a distinction between the cases in which existing indebtedness is the consideration of the sale, and the sale is claimed to be in payment thereof, and sales upon a new consideration, paid or promised. In *Dollins v. Pollock*, ante, 904, (at the present term,) we have cited many authorities bearing on this question, several of which draw the distinction between the two classes of cases. We need not repeat them here. In the present case it is not claimed that McCary & Barr, the sellers, were indebted to Taylor, the purchaser. The sale was made on a new consideration, partly paid presently, but the bulk was on a credit.

It is not contended that the purchase price was materially less than the value of the store-house and goods. The real issue in such a case as this is whether the sellers were insolvent or in failing circumstances, and whether the purchaser, Taylor, had actual or constructive notice of their financial condition. *Hodges v. Coleman*, 76 Ala. 103; *Tompkins v. Henderson*, 88 Ala. 391, 3 South. Rep. 774. The appellants contend that in charges 1 and 3 the circuit court confined the investigations of the jury to the two inquiries, insolvency *vel non* of McCary & Barr, and notice to Taylor of their condition, whereas the charge should have gone further, and submitted to them the inquiry of Taylor's good faith in making the purchase. This contention is based in part, if not mainly, on the statement in the bill of exceptions that "there was some evidence in the case which tended to show that the purchase of the goods, store-house, and lot by Taylor from McCary & Barr was *bona fide* on Taylor's part; and there was some evidence in the case tending to show that said purchase was *mala fide* on Taylor's part." This, it is contended, shows that there was evidence, not found in the record, which bore on the question of Taylor's good faith in making the purchase, or, at least, that such inference should be drawn. The bill of exceptions states that one or more witnesses testified that Taylor had said he knew McCary & Barr were in failing circumstances, and that he gave as reasons for his knowledge or opinion the low price at which they were selling goods, and the high prices they were paying for cotton. This testimony, if believed, tended strongly to prove that Taylor was guilty of bad faith in the purchase he made, and, without more, justified the said statement in the bill of exceptions. For a failing debtor to put his tangible property out of view, leaving his debts unpaid, is very bad faith. Taylor denied making such admission, and the verdict of the jury tends to show they believed him, and did not credit the opposing witness or witnesses. But the bill of exceptions negatives the inference the appellants seek to draw from the recital copied above. It states: "There was other evidence introduced on the trial of the case, but the foregoing is substantially all of the evidence that is material to a proper understanding of the exceptions reserved by the defendants." The bill of exceptions further states that "counsel, both for plaintiff and defendants, in argument, insisted before the jury that the principal question for the jury to determine from the evidence in ascertaining whether the plaintiff was entitled to recover was whether at the time Taylor purchased the goods, store-house, and lot he had knowledge or notice of McCary & Barr's insolvency, or had information of some fact or circumstance which should have caused Taylor to make inquiry as to whether they were solvent or insolvent; whether Taylor had, at the time of the trade, either actual or constructive notice of McCary & Barr's insolvency or embarrassed condition; defendants' counsel insisting in argument that the jury were authorized by a pre-

ponderance of the evidence to find that Taylor at the time of the trade had such notice, either actual or constructive, and plaintiffs' counsel insisting that the evidence failed to show that Taylor had such notice or information, actual or constructive." The bill of exceptions informs us that the fact of McCary & Barr's insolvency was not controverted. Charges 1 and 3 are a very accurate statement of the law governing the transaction shown by this record. *Machine Co. v. Zeigler*, 58 Ala. 221; *Cromelin v. McCauley*, 67 Ala. 542; *Lehman v. Kelly*, 68 Ala. 192; *Shealy v. Edwards*, 75 Ala. 411, 78 Ala. 176; 2 Brick. Dig. p. 18, § 71. If there was a phase of the case supposed not to be covered by the general principle (the record does not inform us there was such) it should have been the subject of a special explanatory or qualifying charge asked by defendants. There is no error in the record, and the judgment must be affirmed.

WHITE V. SHEFFIELD & T. ST. RY. CO.

(*Supreme Court of Alabama*. May 21, 1890.)

DETINUE—CLAIM BY THIRD PERSON—DAMAGES.

1. In detinue for an engine, a claim by a person not a party to the action was interposed, under Sess. Acts Ala. 1888-89, No. 59, providing for such intervention. It appeared that plaintiff in detinue had purchased the engine, which was shipped to one M. over defendant's railroad; that while on defendant's tracks plaintiff's president and the consignee gave claimant an order to take possession of the engine; that claimant then paid the freight due to defendant, and took some steps in the removal of the engine, but it remained on defendant's tracks. The evidence did not show whether claimant paid the freight with his own money or with money furnished him by plaintiff, or that he was one of plaintiff's officers. *Held*, that it was a question for the jury whether claimant obtained possession of the engine at plaintiff's request, and whether he paid the freight with his own money, so as to entitle him to possession of the engine until the money was refunded to him.

2. On the trial of the right of property of a third person, who has interposed a claim, the claimant cannot raise the question as to whether the persons who caused the action of detinue to be instituted were rightful officers of plaintiff corporation, entitled to sue in its name.

3. The question whether the plaintiff made a demand for the property before bringing the action cannot be raised on the trial of the right of property of an intervening claimant.

4. Plaintiff cannot recover as damages both rent and the ordinary wear and tear of the property sued for, as rent includes ordinary wear and tear.

Appeal from circuit court, Colbert county; H. C. SPEAKE, Judge.

Kirk & Almon, for appellant. *J. B. Moore*, for appellee.

STONE, C. J. The appellee brought suit against the East Tennessee, Virginia & Georgia Railroad Company for the recovery of "one dummy engine of the value of two thousand dollars, with the value or hire thereof during the detention." The suit was instituted under our statute, (Code 1876, § 2942; Code 1886, § 2717,) which is a substitute for the common-law action of detinue. Under the statutory action, if affidavit be made and bond given, as the statute requires, the sheriff is commanded to take the property into possession, and

under such order the sheriff did in this case take the engine into his possession. That statutory action of detinue has not been tried, so far as the record informs us. We have also in this state a statutory action, or collateral proceeding, which is known as "a trial of the right of property." It was created to meet the exigency presented when the sheriff, under execution or attachment against one, seizes goods as the property of the defendant in the process, which goods a third person, stranger to the process, claims are his property. It fills the office (but does not supersede it) of the common-law action of trespass, when a stranger to the process alleges that a levy has been made on the property which does not belong to the defendant, but to him, the claimant. A later statute extended the remedy of a claim suit, or trial of the right of property, to actions of statutory detinue, whenever property is seized in such action, which a third person, stranger to the suit, claims is his property. Code 1876, § 3350; Act approved February 26, 1889, (Sess. Acts, No. 59.) The mode of instituting such claim or collateral suit is as follows: "When a suit is brought for the recovery of personal property *in specie*, under the provisions of section 2717 of the Code of Alabama, and the defendant shall neglect for five days to give bond, as required therein, if the property seized is claimed by a person not a party to the suit, and affidavit and bond be executed as required by law in cases of trial of right of property when levied on by writ of *heri facias*, the property must be delivered to the claimant, and the affidavit and bond be returned by the officer having in charge the property claimed, with the summons, upon which the same proceeding must be had as in other trials of the right of property." It will be seen that when, in a statutory detinue suit, a claim to the property is interposed by "a person not a party to the suit," * * * the same proceeding must be had as in other trials of the right of property." It follows that, in determining the questions raised by this record, we must be governed by the rules which would govern us if the engine had been levied on under execution or attachment at the suit of the appellee street railway company against the East Tennessee, Virginia & Georgia Railroad Company, and a claim had been interposed by a third person under sections 3004 or 3012 of the Code of 1886. For the rules in such claim suits, see authorities in notes to the sections cited. And we may state that section 2611 of the Code of 1886—the statutory interpleader—can exert no influence in the trial of this cause, for the proceeding is not under that statute.

No question can be raised in this case as to the rightful use of the corporate name of the Sheffield & Tusculumbia Street Railway Company in bringing the suit out of which the present one grew. Whether the persons who caused the action of detinue to be instituted were the rightful officers of the corporation, entitled to sue in its name, was a question in which the claimant, as such, had no interest. It was foreign to the issue raised by his claim, which only raised the question of title be-

tween the plaintiff in detinue suit and the claimant, White. When the plaintiff made the proof it did, showing that when the suit was commenced, and when the engine was seized by the sheriff, it was standing on a railroad track which was under the management and control of the East Tennessee, Virginia & Georgia Railroad Company, it showed a *prima facie* right to sue that railroad company for the recovery of the engine; and a claimant under the statute would not be heard to assert that the possession was held in his interest, and subject to his control, unless the legal right of the claimant was paramount to that of the street railway company; for that was the issue in this claim suit. If the plaintiff proved its legal right to the engine, White, the claimant, could not defend on the ground, if true, that the East Tennessee, Virginia & Georgia Railroad Company had not the possession of the engine when the suit was commenced; for such proof could not aid in determining whether the street railway's or White's was the better title. These plain principles relieve us of the consideration of many questions which have been pressed in argument.

There does not appear to have been any denial in the trial court that the Sheffield & Tuscumbia Street Railway Company purchased and paid for the engine, and that it was its property. The claimant in his testimony admitted it belonged to the street railway company. In maintenance of White's claim, interposed in this case, several motions were made in the court below, and were overruled. What we have already declared shows there was no merit in those several motions.

Another ground was taken in defense by White, which in his testimony he states as follows: "He had an order from the president of the Sheffield & Tuscumbia Street Railway Company for the engine, and took possession of it at his request, and that he paid about three hundred and forty dollars to settle the freight due on the engine; that the Memphis & Charleston Railroad Company had been in possession of the engine, had brought it to Tuscumbia, and that he got possession of it from the Memphis & Charleston Railroad Company on the order of H. B. Tompkins, the president of the Sheffield & Tuscumbia Street Railway Company, and also an order from T. D. McMillan, the consignee; that he took possession of it on the 10th day of May, 1887; that he had not removed the engine from the track of the railroad when suit was brought." The detinue suit was instituted May 11, 1887; and the foregoing is the entire testimony introduced tending to support White's claim to the engine. He testified further that no demand for the engine had been made of him before the suit was brought. The question of demand of the engine *vel non* before the action of detinue was brought against the East Tennessee, Virginia & Georgia Railroad Company may be a material question when that suit comes to be tried. White, the claimant, cannot raise it in this action. It does not concern him.

In considering the main question in this

cause, we cannot regard the plaintiff street railway company and Tompkins, its alleged president, as representing different interests. No testimony was received or is found in the record which shows any difference of interest; nor should such testimony have been received in this suit. We must therefore treat the Sheffield & Tuscumbia Street Railway Company as the plaintiff in the suit, and Tompkins as its president, as testified by White; and White must be treated as the agent of the street railway company, acting under the order of Tompkins, its president. Testimony was offered tending to show that White was superintendent, but it was ruled out on objection of plaintiff, and we are left without proof that he filled any office or special trust in relation to the company. His own testimony, copied above, contains all the information furnished us of his connection with the street railway company, except that he testified to repairs he had had put on the engine after he obtained possession of it under his claim-bond. Stripped of all superfluous matter,—matter which does not affect the issue in this claim suit,—the facts may be summarized as follows: The Sheffield & Tuscumbia Street Railway Company purchased and paid for the engine, and had it shipped and consigned to McMillan, its then president, at Tuscumbia. It had arrived, and was in the depot of the railroad at the point of delivery, but the freight charges, \$340, were unpaid. On May 10, 1887, McMillan, ex-president and consignee, and Tompkins, president, of the street railway company, gave White an order to take possession of the engine, and pursuant thereto he paid to the railroad company the freight due on the engine, and took some steps towards its removal, but it remained on one of the tracks of the railroad company. On May 11, 1887, the action of detinue was commenced by the street railway company against the railroad company for the recovery of the possession of the engine, and, under an order of seizure issued in said suit, the sheriff took possession of it, and a few days afterwards White interposed his statutory claim, and inaugurated the present suit. It will be observed that White testified that he paid the freight charges as one of the conditions on which he could obey the orders of McMillan and Tompkins, (in other words, the orders of the street railway company,) and thereby obtain possession of the engine. This presents the sole ground shown by him on which he can base any right to claim the engine. He does not state with whose money he made the payment. If he made it with funds furnished him for the purpose, he has shown no claim whatever to the engine. So, if it had been shown that in what he did he was acting in the capacity of superintendent, the presumption would be that he paid with corporate funds, and this would give him no rightful claim to hold the engine. But, as we have shown, the testimony does not authorize us to infer and announce as facts either of the foregoing categories. The testimony showing at most that he was only a private agent, acting at the in-

stance and request of the street railway company, the inference is not absolutely repelled that he paid the freight charges with his own money. Acting, as he did, under the request of the street railway company, and not shown to have been other than a private agent, if he paid his own money as a necessary means of obeying the request, and obtaining possession of the engine, and in obedience thereto he did obtain such possession, this gave him a lien on the engine for his reimbursement, and would overcome the plaintiff's right to recover the possession from him until he was repaid the money he had thus paid out. *Guesnard v. Railroad Co.*, 76 Ala. 453; *Story*, Ag. § 373; 1 *Amer. & Eng. Enc. Law*, 428, and note; 4 *Walt, Act. & Def.* 326; *Muller v. Pondir*, 55 N. Y. 325; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142. In the present case it was a question for the jury, under proper instructions, whether White obtained possession of the engine at the request of the plaintiff, and whether he paid the freight with his own money. If he did, he could retain the possession against the street railway company until the money was refunded, or tendered to him. On the evidence, it cannot be affirmed, as matter of law, that White did not pay the freight bill out of his private funds, and it follows that the circuit court erred in giving the general charge in favor of the plaintiff. *Dollins v. Pollock*, — Ala. —, ante, 904.

Under no circumstances could plaintiff recover as damages both rent and ordinary wear and tear. The former includes the latter. This action, as we have shown, is a collateral proceeding in an action of statutory detinue. When decided, it will settle and determine the conflicting right to the engine as between the street railway company and White, the claimant. The recovery, if in favor of the plaintiff, is not decisive of the action of detinue against the railroad company. That is yet to be tried. Reversed and remanded.

CRESCENT BREWING CO. v. HANDLEY et al.
(*Supreme Court of Alabama*. May 22, 1890.)

LIABILITY OF SURETY—PLEADING.

1. Where persons have become sureties on a bond conditioned that H. shall pay for goods to be furnished to him, individually, and H. forms a partnership with another, the sureties are not liable for the default of the firm, though they knew of and consented to its formation, parol evidence being inadmissible to show such knowledge and consent, and thus to vary the terms of the bond.

2. In an action on the bond H.'s partner, who was likewise a surety, alleged in his plea that he had abandoned a business which paid him a certain sum per month to go into business with H., and he sought to reduce plaintiff's recovery by that sum. Plaintiff replied, but pending the trial, which was by the court without a jury, he moved for leave to withdraw his replication, and to demur to the plea. *Held*, that it was error to deny his motion.

Appeal from city court of Decatur.

S. H. Gruber, for appellants. *Wert & Speake*, for appellee.

STONE, C. J. This case was tried by the judge of the city court, without a jury. The Crescent Brewing Company, a corpora-

tion, entered into a written, executory agreement with Handley, by which it bound itself to furnish to him its manufactured goods (beer) to be sold at Decatur, in this state. The agreement contains various stipulations to be performed, some by the brewing company, and others by Handley. Among the latter is the agreement by Handley to pay for the beer to be shipped to him by the brewing company, expressing the prices and when and how to be paid for, etc. As part of this agreement, Handley was required to and did enter into a further agreement, with sureties, for "the full and complete performance by the above-bounden B. T. Handley of all the covenants made by him in the written contract, which is made a part of this bond. But, upon failure or default on the part of said B. T. Handley so to do, then we agree to pay to the said brewing company any loss or damage it may sustain by reason of said failure." This additional agreement was signed by Handley, Petty, Krou, Albes, and Edwards. Both agreements are on one sheet of paper, and the testimony was that the first was not to be considered a completed and binding contract until the second was executed with sureties. Before any steps were taken under this contract after its complete execution, Handley took Petty into partnership with him in the adventure, and the business was entered upon and conducted in the name of Handley & Co., composed of Handley and Petty, and the brewing company was notified of it. The shipments were made to Handley & Co., and all dealings were conducted in the firm name, and not in the individual name of B. T. Handley. Shipments of beer were made to Handley & Co., and the present suit was brought to recover a balance due for goods so shipped. We may state in passing that the complaint is scarcely specific enough in averring that beer was shipped to Handley, or Handley & Co., under the contract. The complaint, as we understand it, contains a single count, though there are two clauses in it which speak of the breach. The suit is on the contract as expressed in the writing, and to the complaint as thus framed we must confine our rulings. The record does not contain the pleas that were interposed, but from the replications filed, the testimony given in, and the rulings of the court, we are able to determine what the issues were. Krou, Albes, and Edwards defended on the ground that they were only sureties; that by the terms of their contract they were bound only for defaults in not carrying out the contract made by Handley with the brewing company, and were not bound for any default Handley & Co. or Handley and Petty might commit. This was the contract they made, and this the contract declared on. Such is certainly the law. A surety may stand on the letter of his contract, and is bound only by its terms. His liability cannot be varied without his consent. A material alteration made in the terms of the contract to which his assent is not obtained, even though beneficial to him, or lightening the burden on him, absolves him absolutely from all burdens imposed by the contract. 3 Brick.

Dig. p. 374, §§ 18-21, incl.; City Council v. Hughes, 65 Ala. 201; Anderson v. Bellen-ger, 87 Ala. 334, 6 South. Rep. 82.

The testimony tends to prove that Krou, Albes, and Edwards did not sign the agreement declared on until after the partnership between Handley and Petty was formed, and the presumption is strong that when they signed they knew the partnership had been formed. We base this presumption on the testimony, which is not denied, that Petty himself procured these sureties to become bound, and to execute the paper. We feel authorized to infer that they were induced to sign mainly, if not entirely, by Petty's becoming associated in the business venture. If this be true, then the alteration was made with their consent, and, but for a principle to be stated presently, they could be held accountable for the default of Handley & Co. upon a count properly framed to meet the terms of the changed contract. That principle may be thus stated: When parties enter into a written contract the presumption is that all oral agreements, anterior or contemporaneous, not expressed in the writing, are waived; and it is not permissible to make proof of such oral agreement to vary the legal import of the writing. This is an inflexible rule of evidence. 8 Brick. Dig. p. 417, § 186. The rule is not applicable to certain exceptional cases, but the present case does not fall within any of the exceptions. Hart v. Clark, 54 Ala. 490.

The facts of this case bring it directly within the rule of exclusion. When the sureties signed the agreement they either did or did not know that Petty was to be a partner with Handley in the business venture. If they did not know it, then they did not consent to the altered terms of the contract, and are not bound by it. If they did know it, and intended to guaranty a faithful performance of the contract by Handley & Co., then the rule of evidence will not permit that intention to be proved, because it varies the terms and legal effect of the writing. And chancery will not reform a contract made under such circumstances. Clark v. Hart, 57 Ala. 390. We find no error in the rulings of the city court, so far as they affect the liability of the sureties, Krou, Albes, and Edwards. As we have said, the pleas of Petty not being in the record, we have to consult the replications and testimony to learn what they were. From them we learn that one ground of defense relied on was that he, Petty, in consequence of entering into this contract, had given up another business, by which he could have made \$115 per month, and he sought to abate plaintiff's recovery by that sum. This plea was wholly without legal merit, and tendered an immaterial issue. Beck v. West, 87 Ala. 213, 6 South. Rep. 70, and authorities cited. The trial court considered this plea frivolous, and would have sustained a demurrer to it if it had been interposed. Plaintiff, however, took issue on the plea, and the result would be that to the extent the proof sustained the plea the defense was made good, unless there was a replender. Mudge v. Treat, 57 Ala. 1.

Pending the trial, and on two several

occasions, plaintiff asked leave to withdraw its replication, and demur to the plea. This the court refused. If the issue had been pending before a jury we would hold that the motion was prematurely made. It should come in such case after verdict rendered, when, in a case like the present, it would be error to overrule it. Watson v. Brazeal, 7 Ala. 451; Masterson v. Gibson, 56 Ala. 56; Ex parte Pearce, 80 Ala. 195. In the present case, both law and facts were submitted to the court without a jury, and no reason exists why the motion should not be entertained pending the trial. The city court erred in overruling plaintiff's motion for leave to withdraw its replication, and to file a demurrer to the plea of defendant Petty. Reversed and remanded.

KIRKPATRICK et al. v. BOYD et al.

(Supreme Court of Alabama. May 23, 1890.)

SALE UNDER EXECUTION—RENT—RIGHTS OF PURCHASER.

The purchaser of land under an execution, which issued from the federal court, and was in the hands of the marshal before the defendant therein had made a lease of the land, is entitled to the rent due and unpaid under such lease, as against one who had purchased the note given for such rent, without notice of the execution creditor's claim.

Appeal from circuit court, Madison county; H. C. SPEAKE, Judge.

This was an interpleader at law, for rent of land, between the assignee of the rent note and the purchaser of the land at the sheriff's sale under an execution. There was judgment for plaintiffs, and defendants appeal.

Ward & Betts, for appellants. Humes, Walker & Shelley, for appellees.

STONE, O. J. It is objected for appellants that the alleged judgment under which Boyd & Boyd acquired their title to the land was in fact no judgment, because the attorney appointed for the purpose is not shown to have confessed any judgment, and the record fails to show that Tanner, the defendant in that suit, was otherwise brought into court. Coming before us collaterally, as this question is attempted to be presented, we are not prepared to say there is anything in the objection, even if we concede it is raised by the record. But the record fails to raise the question. In the trial below a jury was waived, and the testimony was submitted to the court for trial and decision by him. He made a special finding of the facts, and that finding must be treated as we would treat a special verdict. One of the special facts found by the trial court was that "the above-named plaintiffs [Boyd & Boyd] recovered judgment against John T. Tanner in the circuit court of the United States * * * on the 2d day of November, 1887, for the sum of," etc. The exception reserved is in the following language: "To which judgment of the court the defendant excepted." The question of the confession of judgment *vel non* is not shown to have been mooted in the court below, and the exception does

not bring it before us. Boyd & Boyd recovered a judgment against Tanner November 2, 1887. Execution was issued on said judgment November 7, 1887, and came to the hands of the United States marshal on the same day. This execution was levied on the plantation known as the "Ragland Place," as Tanner's property, January 2, 1888, but from some misdescription the process was returned without a sale. An *alias* execution was issued March 20, 1888, was levied on the land April 21, 1888, and, pursuant to advertisement duly made, the marshal sold the lands June 4, 1888. Boyd & Boyd, became the purchasers, and received the marshal's deed the next day. Within 10 days after that time, and while the crops on said land were still growing and immature, Boyd & Boyd gave written notice to Tanner and the tenants cultivating said land that they claimed and demanded the rents accruing for that year, and the possession of said lands. The foregoing are the facts on which Boyd & Boyd base their claim to the rent money. Tanner, defendant in the judgment, let the lands to rent for the year 1888, by agreement entered into December 26, 1887, and to secure the agreed rent took from the lessees, or tenants, their non-commercial, sealed note or bond for the sum of \$1,000, payable to himself, and due December 15, 1888. This paper he traded for value to C. E. Hatcher & Co. by blank indorsement, without date, and C. E. Hatcher & Co. subsequently, on February 4, 1888, traded and indorsed it to Kirkpatrick & Co., as collateral security for a debt due them from C. E. Hatcher & Co. Neither C. E. Hatcher & Co. nor Kirkpatrick & Co. had notice of Boyd & Boyd's claim or lien, at the time they severally acquired the rent note or bond. These are the facts which go to make up the alleged right of Kirkpatrick & Co. to the proceeds of the rent note. The tenants having paid the rent money into court, and having been discharged by consent of the parties, the question is whether Boyd & Boyd, on the one hand, or Kirkpatrick & Co. on the other, are entitled to the money, less the sum of \$50, which, by mutual agreement, was applied otherwise. The circuit court adjudged that Boyd & Boyd were entitled to the money. There are authorities which hold that when real estate is sold at public, judicial sale, which is at the time held by a tenant under an undetermined lease, and there is no exception or reservation as to the rent, then all rent which has not been paid or has not matured and fallen due at the time of the sale and conveyance passes with the freehold, and becomes the property of the purchaser, even though there may have been a previous attempt to assign such non-matured rent contract to a third person. One reason which may be given for the ruling is that unpaid and immature rent, promised for use and occupation of land for a term not yet fully expired, is practically the usufruct, or product of the realty, and is part and parcel of it; and that hence a conveyance of the land is a conveyance of its future product. *Bank v. Wise*, 3 Watts, 394; *Van Wicklen v. Paulson*, 14 Barb. 654; *Stout v. Kean*, 3 Har. (Del.)

82; *Martin v. Martin*, 7 Md. 368; *Townsend v. Isenberger*, 45 Iowa, 670; 2 Tayl. Landl. & Ten. (8th Ed.) § 447, and note. Several of the cases we have cited are based substantially on the reason we have given. We need not, in this case, go to the full extent of the principle stated, and we leave that question undecided until it comes properly before us. Before Tanner granted the lease in this case, the execution of plaintiffs was in the hands of the marshal, and operated a lien on all the leviable interest which Tanner then held in the land. Its use, enjoyment, and occupation were among the valuable attributes it possessed. It is these attributes which mark and distinguish the superior value of a title with present right of possession, as contrasted with an estate in remainder or reversion, the term of the particular estate not having expired. No one will question the greater market value of an estate with the right of present enjoyment, than of a mere remainder or reversion in the same land, with no right of present enjoyment, or present usufruct. Now, on all these elements of value and of vendible property, Boyd & Boyd had a lien for the enforcement of their execution which Tanner was without the power to impair by any individual act he might attempt to perform. No one will deny that he was without power to defeat the lien by a sale of the land. A lease is a qualified sale; a sale of a term, instead of a sale of the fee. A lessee acquires an estate by his lease, which may be levied on and sold under execution; an estate less than a freehold, but still an estate. It may run for any number of years, not exceeding 20. Can it be supposed that after the lien attached Tanner could have let the land for a long term, say 20 years, disposed of the rent contract to a third party, and thus have reduced the available value of the plaintiffs' lien by one half or more? And if not for 20 years, for what shorter term could he have made a valid lease, and a valid disposition of the rent contract? *Kane v. Mink*, 64 Iowa, 24, 19 N. W. Rep. 852. The circuit court did not err in its judgment. There is nothing in our former rulings which is opposed to what we have above declared. *Tubb v. Fort*, 58 Ala. 277; *Coffey v. Hunt*, 75 Ala. 236; *Steed v. Hinson*, 76 Ala. 298; *Insurance Co. v. Oliver*, 78 Ala. 158; *Oliver v. Insurance Co.*, 82 Ala. 417, 2 South. Rep. 445.

Affirmed.

BOLLING V. KIRBY *et al.*

(Supreme Court of Alabama. May 23, 1890.)

SALE—WHEN TITLE PASSES—CONVERSION.

1. Where a note is given in payment for a machine to which title is to remain in the seller until the note is paid, and is left with a third person, who is to receive chattels in payment, and surrender the note to the maker, and after this surrender is made the chattels are claimed under execution by the maker's creditors, the redelivery of the note by him to the third person, agreeing that it should be considered that no payment had been made, vests the title to the machine again in the seller, though the holder of the note had no other authority than to receive payment thereof, and surrender it.

2. Where the seller thereafter demands the machine from the purchaser's wife, he having left the state, and her father refuses to allow the seller to take it, he is guilty of a conversion of it.

3. But if such refusal was only to procure time to determine whether it had been paid for, with an agreement that if it had not it should be surrendered, the father is not liable for conversion where the original purchaser comes and removes the machine in the mean time, without his knowledge or consent.

Appeal from circuit court, Marshall county.

This was an action of trover brought by the appellees, Kirby & Bro., against the appellant, William Bolling, and sought to recover damages for the alleged conversion of a sewing-machine. The defendant pleaded the general issue, and issue was joined on this plea. Upon the trial, as shown by the bill of exceptions, J. F. Kirby, one of the plaintiffs, testified, in substance, as follows: That on the 7th day of September, 1885, he sold to Thomas Bishop and his wife a sewing-machine, taking therefor a certain instrument in writing, in words and figures as follows: "On Nov. 15, 1885, after date, I promise to pay to the order of F. M. Kirby & Bro. thirty dollars, with interest at the rate of ten per cent. per annum after maturity, until paid. The Esty sewing-machine, style 3, plate No. 14,895, for the use of which, to the maturity hereof, this note is given, is and shall remain the property, and under the control, of F. M. Kirby & Bro., or assigns; and for default of payment, or if the said F. M. Kirby & Bro. deem the machine in unsafety, by removal or otherwise, it shall, on demand, be returned to F. M. Kirby & Bro., or assigns, in good order, and with *pro rata* pay for its use, which shall be three dollars per month. It is understood and agreed that F. M. Kirby & Bro. own this machine absolutely, and the title remains in them until the machine is paid for in full." This note or instrument was signed by said Thomas Bishop and wife, and attested by J. F. Kirby. The testimony for the plaintiffs then tended to show that the plaintiffs made an agreement with said Bishop that they would take young cattle in payment for the machine, valuing them at a certain price, and this agreement was indorsed on the instrument; that when the note fell due, or a short time thereafter, one of the plaintiffs went to the home of said Bishop, but Bishop was not at home, and the wife told him that her husband had the cattle with which to pay for the machine, and he thereupon told her to tell her husband to bring them to Gunter'sville, and he would leave the note with a certain man, who would deliver the note to him when he turned over enough cattle to amount to the amount due on the note; that he did leave the note with one Hooper, with instructions as above stated; that on the next day, or shortly thereafter, the said Bishop brought in the cattle, and upon showing them to the said Hooper, Hooper agreed to take them, and turned over the said note to Bishop; that immediately thereafter one Spooner and one Bains said, "Them's our cattle," and said that he had a judgment, execution, or mortgage

against them, when the said Hooper said, "Let me see it." The defendant moved the court to exclude all this evidence as to what said Spooner and Bains said, and what Hooper said to them, but the court overruled the motion, and the defendant duly excepted. The plaintiffs then proved that one of them went to Bishop's house in the fall of 1886, to get the machine, and found that Mrs. Bishop was living on the defendant's place, in a house a short distance from the residence of the defendant, she being the daughter of the defendant, and that said Bishop, the husband, had gone to Arkansas; that he then went into the defendant's house and demanded the machine, when Mrs. Bishop came to her door and said that the machine had been paid for by her husband by giving cattle therefor; that the "defendant told him then and there that he could not take the machine off; that she had paid for it, and it was hers;" that he then tried to sell the machine to the defendant, but that he would not buy it; and that, after talking about it awhile, the defendant agreed to come to Gunter'sville the next day, and see whether or not the machine had ever been paid for by his daughter's husband; and that he did come to Gunter'sville, and upon finding out that the machine had not been paid for he agreed to bring the machine into town, or send it in, and leave it at the office of John G. Winston, Jr., plaintiffs' attorney; but this he never did. There was proof, however, that defendant started to town with the machine, but for fear of breaking it had some one to take it off the wagon. It was further shown that when said Bishop turned over the cattle to said Hooper, and the said Spooner and Bains laid claim to the cattle, the said Bishop then made arrangements with Spooner and Bains, and turned over the cattle to them, and handed the note made by him to Kirby & Bro. back to said Hooper. The defendant testified as a witness in his own behalf, and testified to pretty much the same facts as introduced in evidence by the plaintiffs. Among other things, he testified that when he moved his daughter, Mrs. Bishop, to his place, she had a machine, and that this machine was put in her house, and was under her control, and that he never had anything to do with it after that; that she claimed that the machine had been paid for with cattle; and that when he went to Gunter'sville, and found out that the machine had not been paid for, he told Kirby if he was willing to risk it "he would tell the boys to bring it down on a cotton wagon," as they were then hauling cotton; and that he never saw the machine after this, and did not have anything else to do with it, and it was afterwards carried off by said Thomas Bishop. After giving the general charge, the court, at the request of the plaintiffs in writing, gave the following charges: (1) "If the jury believe the evidence, the note which has been offered in evidence vests the title to the machine in the plaintiffs." (2) "If the jury believe the evidence, the note has not been paid under the evidence in this case, and is sufficient to vest title to the property in the plaintiffs." (3) "If defend-

ant had the machine in his possession, or under his control, and promised plaintiffs he would deliver it at Winston's office, and afterwards permitted some one else to take the machine out of his possession, or from under his control, whereby the machine was lost to plaintiffs, defendant is liable to plaintiffs for the value of the machine." (4) "If the defendant had the property in his possession, or under his control, and agreed to deliver it to plaintiffs, then he became the bailee of plaintiff, and it was his legal duty to keep the machine and deliver it to plaintiffs." (5) "If defendant by himself, or some of his hands in his employ, and by his direction, got the machine and placed it on his wagon, and started to town with it, then the machine was under his control, and if he afterwards permitted some one else to take it out of his control, whereby it was lost to plaintiffs, this was a conversion, and he would be liable to plaintiffs for the value of the property." (6) "If defendant told Kirby that he could not take the property from Mrs. Bishop, then this is a circumstance to which the jury may look to see whether defendant had control of the machine or not, and if he did have control of the machine, and refused to let Kirby have it, then this would be a conversion." (7) "If the jury believe from the evidence that the defendant had possession of the machine, or under his control, and defendant promised plaintiff, or a member of their firm, to deliver the machine to them at Winston's office at Guntersville, it was his legal duty to do it; and if in disregard of this duty he permitted some one else to take it away out of his control, whereby it was lost to plaintiffs, he is liable for its value, and the jury should so find." The defendant reserved an exception to each of these charges, as given, and asked in writing the following: (1) "If the jury believe the evidence, they will find the issue in favor of the defendant." (2) "If the jury find from the evidence that all the defendant did in reference to the machine was to move it, with his daughter, to a house on his place, and came to town to make inquiry as to what was the truth as to the payment of the note given by Bishop for the machine, and that he allowed his daughter, Mrs. Bishop, to remain on in a house on his place, and that the machine was afterwards carried away by Bishop, one of the makers of the note, this would not make him guilty of a conversion of the sewing-machine, and the verdict of the jury should be for the defendant." (3) "If the jury should find from the evidence that the plaintiff did in fact go to the defendant's house, and demanded the machine, and that the machine was there, this would not, of itself, constitute a conversion; and if this be all that defendant did in the way of converting the machine to his own use, the verdict of the jury should be for the defendant." (4) "If the jury find from the evidence that Bishop and his wife did in fact buy a machine from plaintiffs, and make the note in evidence; that Bishop went off, or left the country, and that the defendant did move Mrs. Bishop, his daughter, to a house on his plantation, and that the plaintiff Kirby

went to Mrs. Bishop's house, and demanded the machine, and that she claimed that the note had been paid, and that Kirby was not entitled to the machine, and that Bolling, who was there, then told Kirby that he could not take the machine away, or that he, Bolling, would not allow him to take it away, and that Bolling did, on the next day, come to town and agree with Kirby that he would bring the machine to town, and deliver it to plaintiffs' attorney, Winston, and did not in fact deliver said machine to said Winston, but that the machine was allowed to remain at the house occupied by Mrs. Bishop, and that Bishop and his wife did actually afterwards remove the machine from the country,—this would not be a conversion by the defendant, and their verdict should be for the defendant." (5) "If the jury find from the evidence that Hooper was authorized by plaintiffs to receive cattle from Bishop in payment of the note in evidence, and that Bishop did in fact deliver cattle to Hooper, and that Hooper accepted the cattle and delivered the note to Bishop, the title to the cattle instantly vested in the plaintiffs, and this was a payment of the note, and the title to the machine then and there vested in Bishop, and out of the plaintiffs; and though the jury may believe that certain persons (Bains and Spooner) came up and claimed the cattle, and that Bishop gave the note back to Hooper,—this would not reinvest the plaintiffs with the title to the machine, unless the plaintiffs show to the jury that Hooper had authority to make such a contract; and if he was only an agent, authorized to receive the cattle, he had no authority to rescind the trade, and reacquire the title to the machine, and the plaintiffs in this event cannot recover, and they should find for the defendant." (6) "If the jury find from the evidence that the plaintiffs have a legal title to an Esty sewing-machine, style 3, plate No. 14,895, yet, before they can recover, they must prove to a reasonable certainty that the defendant converted to his own use an Esty sewing-machine, style 3, plate No. 14,895, and if the evidence does not satisfy the jury that the defendant converted this identical machine, they must find for the defendant." (7) "If the jury believe from all the evidence that Hooper was the agent of Kirby & Bro. for the special purpose of receiving the cattle from Bishop, and that this was all the authority Hooper had, and that Bishop did deliver the property to Hooper as such agent of Kirby & Bro. in payment of the note in controversy, and that Hooper did deliver the note to Bishop, then this was a payment of the debt, and the title to the machine vested in Bishop, and without further evidence the defendant ought to recover." (8) "Before the jury can find a verdict for the plaintiffs they must believe, from all the evidence, that Bolling had the possession of the machine, and while he had possession of the machine he converted it to his own use; and if they find that he did not convert it, they should find for defendant." (9) "If the jury believe from all the evidence that Hooper was a special agent to receive the cattle

and deliver the note in controversy, then the jury ought to find for the defendant." (10) "If the jury believe the evidence, they will find that the defendant was not the bailee of the plaintiffs." The court refused to give each one of these charges as requested by the defendant, and to each such refusal the defendant duly excepted. There was judgment for the plaintiffs, and the defendant now prosecutes this appeal, and assigns the rulings of the court on the evidence, and the giving and refusing to give the several charges requested by the plaintiffs and the defendant, as error.

Lusk & Bell, for appellant.

MCCLELLAN, J. We do not doubt that the title to the machine involved in this action remained in the plaintiffs below, under the contract put in evidence, until the purchase money thereof was paid. In considering the question whether the transaction between Hooper and Bishop was a payment, it may be admitted that Hooper was the special agent of plaintiffs to receive cattle in payment, and to deliver up the paper, and that he did so receive the cattle and deliver up the paper as that, without more, the debt was satisfied; and it may be further conceded that he had no authority to enter into an arrangement with Bishop by which creditors of the latter, having a lien of some sort on the property, were allowed to take the cattle, and the note was handed back to him by Bishop, and the satisfaction thereof obliterated and expunged, so to speak. Yet we do not doubt that Bishop had full authority to make this arrangement, and that the lack of power to this end in Hooper was cured by the ratification of his unauthorized act in this behalf by his principals, the present plaintiffs. The note did not bind the wife. 2 Brick. Dig. 98; *Walker v. Struve*, 70 Ala. 167. Under the facts of the case, the delivery of the cattle in payment of the note was no more than an exchange of that property for the machine, vesting title to the machine in the husband alone; and this, even had the cattle belonged to the wife, of which there is no proof. *Woods v. Dunlap*, 73 Ala. 169; *Kennon v. Dibble*, 75 Ala. 351. The title thus being in Bishop alone, it was entirely competent for him to agree that the payment which had so vested it in him should be considered as not having been made, and that it should revert in Kirby & Bro., and this agreement he must be held to have made by handing the note back to Hooper in consideration of the cattle being applied to another debt owed by him. The rulings and instructions of the court on this part of the case were free from error.

It is not essential to a conversion which will support the action of trover that the defendant should have the complete manuecaption of the property. An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner, and in denial of his rights, is a conversion. *Freeman v. Scurlock*, 27 Ala. 407; *Conner v. Allen*, 33 Ala. 515. Hence it is not important that when Kirby went to

the residence of the defendant to demand the machine it was not in his possession, strictly speaking, but in that of Mrs. Bishop, who then lived on his premises, if the defendant interfered to prevent, and did prevent, the plaintiff from then taking possession of it, by the unqualified assertion of a title inconsistent with the plaintiffs', and an unconditional refusal to allow the plaintiffs to take the property away. Whether the defendant had the possession in himself or not, such intermeddling in defiance of plaintiffs' right was a conversion. But if there was a *bona fide* controversy as to whether payment had been made, and if the defendant, while asserting payment, and predicating his right to prevent a removal of the property on title in Bishop, springing out of payment, recognized the controversy and uncertainty as to whether payment had been made, and declined to allow the machine to be removed until the truth of that matter could be ascertained, and it was thereupon agreed between him and Kirby that he should go to Guntersville the next day and satisfy himself about it, and that if he found the note had not been paid the property should be surrendered to the plaintiffs, these facts would not constitute a conversion. Such a qualified and conditional refusal by Mrs. Bishop would have been reasonable and justifiable under the circumstances, and would not have afforded any evidence of a conversion by her; and the interference of Bolling in her behalf stands upon the same footing. *Dent v. Chiles*, 5 Stew. & P. 383; *Butler v. Jones*, 80 Ala. 436, 2 South. Rep. 300. In such case the plaintiffs are held to have assented to the retention of possession by Mrs. Bishop, pending the investigation agreed on, and no action for conversion can be predicated on a possession so retained until a demand and refusal to deliver after the assent has been withdrawn, or the time covered by it has lapsed. *Voltz v. Blackmar*, 64 N. Y. 646; *Finch v. Clarke*, Phil. (N. C.) 335.

Conversion which will sustain trover must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it, or an appropriation of it by the defendant to his own use, or to the use of a third person, in disregard or defiance of the owner's right, or a withholding of possession under a claim of title inconsistent with the title of the owner. *Glaze v. McMillon*, 7 Port. (Ala.) 279; *Gray v. Crocheron*, 8 Port. (Ala.) 191; *Freeman v. Scurlock*, supra; *Conner v. Allen*, supra; *Threat v. Stamps*, 67 Ala. 96; *Railroad, etc., Co. v. Lampley*, 76 Ala. 357, 368; *Tinker v. Morrill*, 39 Vt. 477; *Burroughes v. Bayne*, 5 Hurl. & N. 296; *Fouldes v. Willoughby*, 8 Mees. & W. 539; 2 Greenl. Ev. § 642. It is immaterial whether the conversion or appropriation be for the benefit of the defendant or of a third person. "The true inquiry is, 'Does the defendant exercise a dominion over the property in exclusion or defiance of the plaintiff's right?' If he does, that is in law a conversion, be it for his own or another person's use." *Cooley, Torts*, 448; *Liptrot v. Holmes*, 1 Kelly, 381-391.

Conversion upon which recovery in trover may be had, however, must be a positive tortious act. Non-feasance, or neglect of legal duty, or mere failure to perform an act made obligatory by contract, by which property is lost to the owner, will not support the action. *Sturges v. Keith*, 57 Ill. 451; *Bailey v. Moulthrop*, 55 Vt. 17; *Rogers v. Huie*, 56 Amer. Dec. 363; *Ragsdale v. Williams*, 49 Amer. Dec. 406. A bailee is not liable in trover for a loss of property through larceny from him, or because of negligence resulting in its destruction. *Hawkins v. Hoffman*, 6 Hill, 586; *Packard v. Getman*, 4 Wend. 613. If the bailee undertakes to carry the property to the owner, and fails to do so, and it is subsequently lost while in his possession, through no positive misconduct of his, he is not liable for conversion. *Farrar v. Rollins*, 37 Vt. 295. But if he does any affirmative act inconsistent with the bailment, and known by him to be so, trover will lie against him. *Jones v. Hodgkins*, 61 Me. 480. As if, having notice of the claim of the true owner, he delivers the property to another person, or permits another to take it out of his possession, whereby it is lost to the plaintiff, he is liable for its value in this form of action. *Dearbourn v. Bank*, 58 Me. 278; *Phillips v. Brigham*, 26 Ga. 617; *Railroad Co. v. Kidd*, 35 Ala. 209.

Each of the several charges given by the court below at the request of the plaintiff is supported by one or another of the principles we have announced. Only one of them is objectionable in any respect, and that not in such sort as will work a reversal. Charge No. 6 is argumentative in that it directs that the jury may look to certain testimony, etc., as determining whether defendant had control of the property; but, while the charge might have been refused on this ground, the giving of it is not a reversible error. *Brick-Works v. Allen*, 86 Ala. 185, 5 South. Rep. 454.

Of the charges asked by the defendant, the first and tenth direct a verdict for the defendant, if the jury believe the evidence. We suppose these charges, as also charges 5, 7, and 9, were requested on the theory that the cattle transaction, to which reference has been had, was a payment of Bishop's note, and operated a divestiture of plaintiffs' title. This position, as we have seen, is untenable, and it follows that charges 1, 5, 7, 9, and 10 were properly refused. Charge No. 4 is bad in that it required the jury to find that Bolling had not converted the property, although they should believe that when Kirby demanded it from Mrs. Bishop, Bolling interfered, and unqualifiedly, and unconditionally, refused to allow him to remove it, and by these means prevented its removal. Charge No. 6 would have defeated a recovery unless the jury believed Bolling converted the machine to his own use, when he would have been, as we have seen, equally liable for a conversion to the use of Bishop or Mrs. Bishop, or for a delivery to either of them, if he had possession or control of it after notice of plaintiffs' claim. Charge No. 8 is open to the

same infirmity as No. 6, and, moreover, is misleading, at least in its requirement of evidence of possession in the defendant, since the jury might thereby have been induced to the conclusion that his intermeddling with the property while, in strictness, the possession was in Mrs. Bishop, was not a conversion, although it was in one aspect of the evidence a palpable dominion over it to the exclusion of plaintiffs' rights.

The defendant also requested the following charge: "If the jury find from the evidence that all the defendant did in reference to the machine was to move it, with his daughter, to a house on his place, and come to town to make inquiry as to what was the truth as to the payment of the note given by Bishop for the machine, and that he allowed his daughter, Mrs. Bishop, to remain in a house on his place, and that the machine was afterwards carried away by Bishop, one of the makers of the note, this would not make him guilty of a conversion of the sewing-machine, and the verdict of the jury should be for the defendant." This charge was refused, and an exception reserved. As we read the evidence, every fact it hypothesizes is based on testimony in the case. It is therefore not abstract. It presents the defendant's aspect of the case, not upon a part of the testimony, but on all of it. The jury are not restricted in determining whether they will believe the facts hypothesized to the evidence in behalf of the defendant, but they are directed to consider the whole evidence, and, if upon that consideration they find these facts to be true, they must find for the defendant. If the charge asserts a correct proposition of law, therefore, it should have been given. *Alexander v. Wheeler*, 78 Ala. 167; *Munkers v. State*, 87 Ala. 94, 6 South. Rep. 357. Our opinion is that the charge asserts a sound principle of law. If the facts stated were found to exist by the jury, the only act the defendant did in connection with the property was in conservation of it,—he gave it shelter,—a "kindness to the owner, done without any intention of injury to the thing, or of converting it; an act perfectly consistent with the right of the owner, and his dominion over it." *Conner v. Allen*, supra; *Dent v. Chiles*, supra. And, though he thus gave shelter to the property, it was as property the possessory right, at least, to which was in Mrs. Bishop, and on these facts he never disturbed her possession, or acquired any possession in himself that would have authorized or enabled him to have prevented the removal of the machine by Bishop. The charge ought to have been given. So ought charge No. 2. The bare possession of property, without some wrongful act in the acquisition of possession, or in its detention, and without illegal assumption of ownership, or illegal user or misuser, is not a conversion. *Glaze v. McMillion*, 7 Port. (Ala.) 279.

For the errors committed in refusing to give the two charges last considered, the judgment of the circuit court is reversed, and the cause remanded.

ABERNATHY et ux. v. O'REILLY.*(Supreme Court of Alabama. May 23, 1890.)***PETITION TO SELL DECEDENT'S LAND.**

Under Code Ala. 1886, § 2104, providing that an intestate's land may be sold by the administrator for the payment of debts, where the personal estate is insufficient therefor, and section 2106, providing that the administrator shall make application to the probate court for such sale, a decree for the sale of lands, rendered on a petition of the administrator alleging that the personal property is insufficient to pay the debts, without any averment that there are debts, is void, even on collateral attack.

Appeal from probate court, Madison county; THOMAS J. TAYLOR, Judge.

Upon the petition of the appellee, as administrator, for the sale of the real estate of the decedent's estate, the probate court granted an order for the sale of the land described in said petition. Upon the order being granted, the lands were sold, but pending the confirmation of said sale the appellants filed a petition to the said probate court to set aside the former decree of sale, and hold the same for naught, and alleged as a ground for such order setting aside the former order that the petition of the administrator for the sale of the land did not allege that there were any debts owing by the estate; that said petition does not allege the existence of any debts of said estate, and their actual and estimated amount; that "said petition does not allege that Alice O. Dean, one of the distributees of said estate, is a married woman;" and that the petition fails to allege that the husband of Rebecca Abernathy was over 21 years of age. Upon the hearing of this petition, the court held that the former petition by the administrator alleged enough to give the probate court jurisdiction, and that the said petition by the appellants be overruled and denied. Petitioners appeal, and assign the decree of the lower court as error.

Humes, Walker & Sheffey, for appellants.
William Richardson, for appellee.

STONE, C. J. The present proceeding originated in a petition filed by O'Reilly, the administrator, for an order to sell real estate to pay the debts of Susan Denty, his intestate. Code 1886, § 2104 et seq. The averment of the petition is "that the personal property of the estate of said decedent is insufficient to pay the debts of the said estate," without any averment that there were debts, or the amount of them. The existence of a debt is a fundamental condition of the jurisdiction of the probate court to grant such order of sale. *Owens v. Childs*, 58 Ala. 113. Without such averment the probate court does not acquire jurisdiction, and a decree rendered on such defective petition is not simply reversible. It is a nullity, and must be so treated, even on collateral attack. *Tyson v. Brown*, 64 Ala. 244; *Robertson v. Bradford*, 70 Ala. 385, 73 Ala. 116.; *Meadows v. Meadows*, Id. 356; *Landford v. Dunklin*, 71 Ala. 594; *Wilburn v. McAlley*, 63 Ala. 436; *Quarles v. Campbell*, 72 Ala. 64; *Whitman v. Reese*, 59 Ala. 532; *McCorkle v. Rhea*, 75 Ala. 213; *Ballard v. Johns*, 80 Ala. 32; *Morgan v. Farned*, 83

Ala. 367, 8 South. Rep. 798. Whenever the petition on its face makes a sufficient case for relief, subsequent irregularities, or the omission of qualifying facts not shown in the petition, do not render the proceedings void on collateral attack. 1 Brick. Dig. p. 939, § 355; *Pollard v. Hanrick*, 74 Ala. 334; *Whitlow v. Echols*, 78 Ala. 206; *Lyons v. Hamner*, 84 Ala. 197, 4 South. Rep. 26; *Townsend v. Steel*, 85 Ala. 580, 5 South. Rep. 351. The petition should have averred that Mrs. Dean was a married woman, and the name of her husband, if known or ascertainable, should have been given. *Bingham v. Jones*, 84 Ala. 202, 4 South. Rep. 409. The probate court erred in not granting the prayer of Mrs. Abernathy's petition. Reversed and remanded.

McDONALD v. CARNES et al.*(Supreme Court of Alabama. May 23, 1890.)***EVIDENCE—ENTRIES IN BOOKS OF ACCOUNT.**

1. Original entries made in the ordinary course of business, and contemporaneously with the transactions to which they relate, are admissible in evidence, such entries being corroborated by the party who made them, or, in case of his death, or indefinite absence from the state, proof of his handwriting being given.

2. On the hearing of an administrator's application for final settlement, it is error to admit evidence that he paid a claim against the estate on the agreement that if he should not be allowed therefor on final settlement the money should be refunded him, as such agreement has no bearing on the validity of the claim against the estate.

Appeal from probate court, Marshall county; T. A. STREET, Judge.

Application of A. J. McDonald, as administrator of M. P. Carnes, deceased, for a final settlement. The court disallowed several items of credit on the administrator's account. The administrator appeals, and assigns various rulings as to the admission of evidence as error.

Lusk & Bell, for appellant. *O. D. Street*, for appellees.

SOMERVILLE, J. 1. The original entries made by a person in his own books, or made by his clerk, when apparently done in the ordinary course of business, and contemporaneously with the transaction to which such entries relate, are generally admissible in evidence to prove the correctness of all items within the knowledge of the person making them. Such entries are required to be corroborated by the testimony of the party who made them, if he is living, inasmuch as they are not self-proving; but if he be dead, or insane, or indefinitely absent from the state, proof of his handwriting will be sufficient. *Dismukes v. Tolson*, 67 Ala. 386; *Bank v. Knapp*, 15 Amer. Dec. 181, note, 191-194; *Elliott v. Dycke*, 78 Ala. 150; *Davis v. Tarver*, 65 Ala. 98; *Setchel v. Kelgwin*, 57 Conn. 473, 18 Atl. Rep. 594; 1 Greenl. Ev. §§ 118-120. The case of *Moore v. Andrews*, 5 Port. (Ala.) 107, decided in 1837, holding the contrary view, is opposed to the weight of authority, and to our more recent decisions. The evidence introduced by appellant was sufficient under this rule *prima facie* to authorize the admission in evidence of entries on the shop books of Jordan, Manning

& Co., and of Wallace Henry, deceased. In each case the handwriting of the person making the entry was satisfactorily proved, and this was supplemented with the further proof either of the death of such party, or his indefinite absence from the state. The items covered by the first nine assignments of error were erroneously excluded, so far as we can discover from the record.

2. The probate court also erred in admitting in evidence the alleged agreement between R. N. Bell, Esq., and the executor of Henry, that the latter would refund the money paid him on the account claimed to be due from the estate of Carnes to said Henry's estate, in the event the court should disallow the credit on the present settlement. There was nothing in this precautionary agreement which could have any bearing on the correctness of the account as a proper claim against the estate. If it was just and correct, and no valid objection existed, it was a proper credit for the administrator upon proof of its payment. Otherwise not. These were the only issues for the probate court to decide. Henry's executor, Rives, was not introduced or offered as a witness, and conceding, therefore, that this agreement showed him to be interested, this was immaterial. The record contains no statement from which we can discern the nature of the objections raised to the other contested items of the account, except in a most general way. If we were to attempt to rule on them in detail we might do injustice to the parties. The following principles will probably be sufficient for the purposes of another trial.

3. The various items on the credit side of the administrator's account may be proved by the affidavit of any competent witness, as well as by other satisfactory evidence, when not contested. Code 1886, § 2141.

4. But *ex parte* affidavits are not sufficient if objected to, and better evidence is required. *Clark v. Guard*, 73 Ala. 456, 461. Upon a contest of any item of the account, the burden of proof is cast on the administrator to prove it by the same degree of evidence which the creditor himself would be required to produce, if he had been forced to an action for its recovery. *Jenks v. Terrell*, Id. 238.

5. The better practice is to file written objections to all contested vouchers, stated with sufficient certainty to raise a specific issue of law or fact.

6. Where objection is taken that the item or account is barred by the statute of limitations of three years, it should also show that the claim in question is an open account. *Clark v. Guard*, Id. 456.

7. An administrator is not bound to plead the statute of limitations, when he has personal assets on hand sufficient to pay such claims as may have been barred by lapse of time. But a different rule prevails where a resort to realty, or to money arising from the sale of realty, is necessary in order to pay claims of this character. An objection is good, therefore, that an administrator had used money arising from the sale of land to pay a debt or other demand barred by the statute of limitations. *Pollard v. Sears*, 28 Ala. 484;

Teague v. Corbitt, 57 Ala. 529. The money arising from the sales of personalty in this case appears from the record to have amounted to \$1,065.01. If, therefore, the debts claimed to have been barred did not reach over this amount, and it does not affirmatively appear that any of them were paid with real assets, the issue of the statute of limitations would be immaterial.

8. Where a receipt for money paid is presented by the administrator as a voucher, it is not self-proving, but, if contested, the signature to the receipt must be proved, or else the fact of payment must be shown by other evidence than a receipt. *Wright v. Wright*, 64 Ala. 88; *Gaunt v. Tucker*, 18 Ala. 27. The judgment is reversed, and the cause remanded.

FITE *et al.* v. KENNERMER.

(*Supreme Court of Alabama. May 23, 1890.*)

BILL IN EQUITY—AMENDMENT

A bill alleged that certain land was conveyed to complainant and her husband; that they made to defendants, to secure a debt of the husband's, a mortgage, in which complainant was not named or designated as grantor, but which was signed by her; that the land was sold under the mortgage, defendants becoming the purchasers; that complainant had an undivided half interest in the land. *Held*, that an amendment, alleging that the land could not be equitably divided among the tenants, and inserting a special prayer for a sale of the land for the purpose of partition in place of a special prayer that she be placed in possession of her interest as tenant in common, was properly allowed, as there was no radical change in the cause of action, and the relief was the same kind,—partition,—though obtained in a different manner.

Appeal from chancery court, Jackson county; THOMAS COBBS, Chancellor.

The original bill in this case was filed by the appellee, Sarah Kennermer, against the appellants, and sought to have a mortgage made by the husband of the complainant declared null and void as to her interest in the lands sought to be conveyed therein, and removed as a cloud on her title. By amendment to the original bill, the complainant alleged that the lands in controversy could not be equitably divided among the tenants in common, and prayed a sale of said lands for partition. All the other facts and averments of the bill are sufficiently set forth in the opinion. The defendants demurred to the bill as amended, and moved to dismiss the same, on the ground that the amendment introduced an entirely new cause of action. The chancellor overruled the demurrer and motion to dismiss, and on final hearing granted the relief prayed in the amendment, and each of these decrees are here assigned as error.

Watts & Son and *J. E. Brown*, for appellants. *Norwood & Ashley*, for appellee.

CLOPTON, J. The assignments of error, pressed in argument, relate to overruling the demurrers to the original and amended bills, and the motion to dismiss for want of equity. Since the decision in *Bank v. Rice*, 4 How. 225, the rule has been regarded as settled beyond question that

a person whose name does not appear, and who is not otherwise designated as a grantor, in the body of a deed or mortgage of lands, does not become such by merely signing the instrument and affixing his seal jointly with another, who is named and designated, and the conveyance does not operate to pass his estate or interest in the land. *Harrison v. Simons*, 55 Ala. 510; *Madden v. Floyd*, 69 Ala. 221. Complainant is not named, nor is she otherwise designated as a grantor in the mortgage which she seeks by the bill to have removed as a cloud on her title to an undivided half interest in the land, the subject of this suit. Her husband, who owned the other half interest only, is named and designated, and he alone conveys. Though complainant affixed her signature and seal jointly with her husband, the mortgage, not containing any words of conveyance, or evidencing an intention to convey her estate or interest, is void as to her. *Blythe v. Dargin*, 68 Ala. 370. It is true that in an action of ejectment, whether brought by complainant against the mortgagee, or by the mortgagees founded on the mortgage, she would not be required to offer extrinsic evidence to show the inherent defect in order to recover in the one case, or to defeat a recovery in the other. The mere exhibition of the mortgage would be its condemnation. It may be conceded that as a court of equity will not intervene to remove a deed void on its face, as a cloud on the title, if this was the only purpose of the bill, it would be without equity. The record, however, does not disclose that any action was taken by the chancellor on the demurrer to the original bill, and it does not seem to be controverted that complainant is entitled to the relief granted, if the amendment to the bill was properly allowed; for under the bill as amended, the cancellation of the mortgage is sought as preliminary and incidental to the ultimate relief of partition. The propriety of the amendment is, therefore, the only question necessary to be considered.

The statute of amendments to bills is broad and liberal, extending to striking out or adding new parties, or to meet any state of evidence which will authorize relief. Before final decree, the amendment of the bill is a matter of right. The limitations upon its exercise are that it shall not operate an entire change of parties, nor make a new case, nor work a radical departure from the cause of action stated in the original bill. New matter or a new claim may be introduced entitling complainant to additional or different relief from that specially prayed in the original bill, if it is not repugnant to its prayer and purpose. Whether the original bill contained equity, whether it presented a case of which the court could take cognizance, entitling complainant to relief, is not a material inquiry. If it did not, supplying or correcting its deficiencies was the proper office of an amendment. *Prickett v. Sibert*, 75 Ala. 315; *Seals v. Pfeiffer*, 81 Ala. 518, 1 South. Rep. 267. The original bill alleges that complainant and her husband jointly purchased, in November,

1888, the land, and took a conveyance to themselves jointly. In November, 1884, they made a mortgage to Fite, Porter & Co., to secure a debt due by her husband. The mortgage, which is made an exhibit to the bill, shows it to be a conveyance by the husband alone. The mortgagees sold under a power of sale contained therein, and became the purchasers through an agent, and took and remained in possession until they sold or contracted to sell to Hill, who went into possession. It further alleges that an undivided half interest in the land is her statutory separate estate. Stripped of all redundant and superfluous allegations, the bill shows a tenancy in common between complainant and Fite, Porter & Co., or their vendee, each owning a moiety,—all the facts necessary to authorize the court to decree a partition. Under the general prayer for relief, the complainant can obtain any relief appropriate to the case made by the bill, and not repugnant to the specific relief prayed, though in the special prayer she may have mistaken the relief to which she is entitled. *May v. Lewis*, 22 Ala. 646. The amendment merely inserted an allegation that the land cannot be equitably divided among the tenants in common, and struck out the special prayer that "complainant be placed in possession as tenant in common of her said interest in said real estate," inserting in lieu thereof a special prayer for a sale of the land for the purpose of partition. In no respect are any of the averments of the original bill changed. The case made by the bill, as originally framed, remains the same, with the single exception of an averment necessary to obtain a sale for partition under section 3262 of the Code. No new case is made, nor is there a radical departure from the cause of action stated in the original bill; nor is there the introduction of an inconsistent claim entitling complainant to relief of a wholly different character. The relief,—partition,—is of the same kind, though obtained by a sale instead of a division. The amendment was properly allowed. Affirmed.

HAYS v. SOLOMON.

(*Supreme Court of Alabama. May 30, 1890.*)

EXCEPTION TO INSTRUCTIONS—ARREST OF JUDGMENT.

1. Under Code Ala. § 2758, which permits a party to reserve by bill of exceptions any charge or decision of the court that would not otherwise appear of record, the exception must be taken before the jury retires; and an exception to a portion of the general charge comes too late when taken after the jury has returned and asked for further instructions.

2. Where a complaint, in one of its counts, states a good cause of action, a judgment based on a general verdict in plaintiff's favor will not be arrested because of the insufficiency of another count which had not been previously objected to, as Code Ala. § 2835, expressly provides that no judgment can be arrested for any matter not previously objected to, if the complaint contains a substantial cause of action.

Appeal from circuit court, Talladega county; LEROY F. Box, Judge.

Action on a promissory note by E. Solomon against James H. Hays and James F.

Thomas, as partners. There was a verdict and judgment against both defendants, and James H. Hays appeals.

E. H. Hanna, for appellant. *Knox & Bowie*, for appellee.

CLOPTON, J. The court having given a general charge to which no exception was taken at the time, the jury retired to consider their verdict. After remaining but a short time, they returned and asked further instructions, which the court gave, and while the jury were in the act of retiring the second time defendant excepted to a part of the general charge given in the first instance. Section 2758 of the Code prescribes: "Either party in any civil case, during the trial of the cause, may reserve, by bill of exceptions, any charge, opinion, or decision of the court touching the cause of action which would not otherwise appear of record." Under the statute the rule recognized in practice has been that the exception must be taken before the jury leave the bar. *Montgomery v. Gilmer*, 33 Ala. 116; *Reynolds v. State*, 68 Ala. 507. The exception came too late. The motion in arrest of judgment was based on the ground that one count in the complaint is insufficient and defective, for reasons specially assigned. Whether a judgment should be arrested because of amendable defects in the complaint, it is not necessary to decide. The finding of the jury was general. Since the statute of 1824, of which section 2835 of the Code is a substantial re-enactment, a general finding, when the complaint contains good and bad counts, has been referred to the good counts. The section provides: "No judgment can be arrested, annulled, or set aside for any matter not previously objected to, if the complaint contains a substantial cause of action." It is not controverted that one of the counts in the complaint sets forth a substantial cause of action, and the defective count was not previously objected to. The motion was properly overruled. Affirmed.

CURRY V. SHELBY.

(Supreme Court of Alabama. May 26, 1890.)

CONDITIONAL ORDER—PHYSICIANS—COMPENSATION.

1. A written direction to pay, when collected, the proceeds of a particular claim against a third person held by the drawee as attorney of the drawer, is merely an equitable assignment of the claim; and the law does not raise, in favor of the payee against the drawer, a promise to pay in the event that the claim cannot be or is not collected.

2. Where a physician, in the beginning, renders his services solely on the patient's responsibility, the burden is on him to prove that on his proposal to discontinue them a third person agreed to become responsible therefor; and in the absence of an express agreement to that effect the mere fact that the third person requested him not to discontinue his visits, and that after the patient's death the third person, who had been appointed administrator, failed to deny his responsibility for the claim, on the presentation of a bill against him individually, will not warrant the direction of a verdict in the physician's favor, but the question of the individual liability of the third person should be left to the determination of the jury.

3. Where the only question in an action by

a physician for his services, the rendition of which is not disputed, is whether a third person agreed to become responsible therefor, testimony that the patient had himself employed another physician is properly excluded as irrelevant.

Appeal from circuit court, Madison county; H. C. SPEAKE, Judge.

Assumpsit by A. B. Shelby against Burwell J. Curry on a written order drawn by the defendant in favor of the plaintiff. The complaint also contained the common counts, seeking to recover for the professional services rendered by the plaintiff. The defendant pleaded the general issue, statute of frauds, and that said order was on a special fund, and was a conditional order. After the introduction of all the evidence, the court, at the written request of the plaintiff, gave the general charge in favor of the plaintiff, and the defendant duly excepted to such charge. On the examination of Dr. J. J. Dement, after testifying as to his attendance upon F. L. Hammond, the defendant's counsel asked the witness, "Who employed you to attend Judge Hammond?" to which witness replied: "I was employed by Judge Hammond himself. He said to me after I got there that he wanted me to attend to his case." The plaintiff objected to the introduction of this testimony, and moved the court to exclude it, which the court did, and the defendant thereupon excepted. There was verdict and judgment for plaintiff, and defendant appeals.

L. W. Day, for appellant. *Humes, Walker & Sheffey*, for appellee.

CLOPTON, J. The complaint contains the common counts, and a special count declaring on a written order drawn by defendant in favor of plaintiff. The suit is really founded on defendant's personal liability for services rendered by plaintiff as physician to F. L. Hammond, who was the father of the wife of defendant, and to whose house he was carried when injured. The sole question we deem necessary to consider is the propriety of the affirmative charge given in favor of the plaintiff. The order upon which the special count is founded is not an absolute, unconditional promise to pay the sum specified therein, but a direction to pay, out of a particular fund, the proceeds of a particular claim against a third person, held by the drawee as the attorney of the drawer, when collected. It does not import a promise to pay if the claim is not collected. Whether, therefore, the order was given in consideration of the release and discharge of Hammond's estate from liability, or in compromise of the claim preferred against defendant personally, it constitutes merely an equitable assignment of the claim particularized therein. Such being its nature, the law does not raise, in favor of the payee against the drawer, a promise to pay in the event the claim, from the proceeds of which its payment is directed, cannot be or is not collected. Plaintiff is not entitled to recover under the special count on the mere ground that the draft has not been paid. *Averett v. Booker*, 15 Grat. 163. As, however, it appears that the draft was not received as payment unless paid, plaintiff is not pre-

cluded from recovering on his original debt, at least to the amount of the order, and the circumstances under which it was given may be considered in determining the question of defendant's personal liability to plaintiff for his services. The question then arises, is the liability of defendant a conclusive legal implication from the evidence, which is uncontradicted? The main facts upon which plaintiff relies are: That defendant went for him two or three times to go and see Hammond, which he did; and on two occasions he proposed to discontinue his attendance, when defendant requested him to continue his visits; and that after Hammond's death he presented his bill, which was for \$500, to defendant, as a claim against him individually, and asked its payment, when he did not deny his responsibility, but objected to the amount; and, after a dispute and some angry words, he wrote the order above mentioned, and handed it to plaintiff, saying he would give him that, would not pay him another cent, and if he did not take that he would not get anything. Plaintiff further testified that he rendered the service after defendant went for him until he quit in January, 1884, in consequence of his request. If these facts stood alone, an agreement on the part of defendant to pay plaintiff for his services would be clearly implied; but there are qualifying facts, in connection with which they should be considered. Immediately upon hearing of Hammond's injury, plaintiff went to see him, and rendered medical assistance without request by defendant, who was not at home, and was then visiting him, when defendant went for him to go and see Hammond; and when he proposed to discontinue his visits Hammond and the wife of defendant united in requesting him not to do so. The account for services was charged on the books of plaintiff to Hammond, and when the bill was presented to defendant he was his administrator, but this was unknown to plaintiff. Though plaintiff, in the beginning, may have rendered services solely upon Hammond's responsibility, in the absence of a special contract, he was not bound to continue to do so, and had the right to discontinue, and enter into a contract with defendant to become responsible for his subsequent services; but in such case the burden is on him to show not only a discontinuance or a proposal to discontinue, but also an agreement on the part of defendant to be responsible. Plaintiff testified that he had no conversation with defendant as to who was to pay for his services. There is no pretense of an express agreement. In the absence of such it was necessary for plaintiff, in order to entitle him to the affirmative charge, to prove facts undisputed, from which the law would conclude an actual, though implied, agreement. The cause of plaintiff's proposals to discontinue his attendance does not appear. Though the evidence is not conflicting, it is oral, and manifestly inferences are to be drawn therefrom upon consideration of all the facts and circumstances. Every person who may go for the regular attending physician when needed by his patient, or

who, from considerations of friendship or humanity, may request him not to discontinue his attendance, does not render himself responsible for the services of the physician. Whether he does or not depends upon the attendant circumstances. However well satisfied the court may be as to the proper inferences, if there be any evidence, however weak, from which an adverse inference may be drawn, the case cannot properly be taken from the jury. *De Polster v. Gilmer*, 82 Ala. 435, 2 South. Rep. 878. There is no error in the exclusion of the testimony of Dr. Dement objected to. It was irrelevant, not tending to shed any light upon the issue between the parties. Reversed and remanded.

JONES v. DARDEN.

(*Supreme Court of Alabama. May 26, 1890.*)

NEGLECT—PLEADING—STALLION SERVING MARE.

A complaint that defendant undertook, for reward, to have his stallion serve plaintiff's mare, and so negligently performed his undertaking that, in the effort to serve, through defendant's negligence the stallion so injured the mare that she died, sufficiently alleges the duty and negligence of defendant.

Appeal from circuit court, Chambers county; J. A. DOWDELL, Judge.

Action for the loss of a mare injured while being served by defendant's stallion. The complaint is as follows: "Plaintiff claims of defendant the sum of \$250 as damages for this: that defendant was, on the 4th day of May, 1889, the owner of a stallion, which he used for hire in standing to serve mares. On the day and year aforesaid, plaintiff was the owner of a sorrell mare, which the defendant on the day aforesaid undertook, for a reward agreed to be paid by plaintiff, to have served by said stallion. Plaintiff avers that the defendant so negligently performed his said undertaking that said stallion, in the effort to serve said mare, and because of the negligence of the defendant in managing and controlling him in that respect, so injured said mare that thereafter, to-wit, on the 11th day of May, 1889, she died of such injuries, to the damage of plaintiff as aforesaid." A demurrer to the complaint was overruled, and there was a verdict and judgment for the plaintiff.

N. D. Denson, for appellant. W. J. Samford and J. M. Chilton, for appellee.

SOMERVILLE, J. The complaint seems to us to be sufficient, and not liable to the supposed defects suggested by the demurrer of the defendant. The defendant would be liable to the owner of the mare not only for any injury resulting from the viciousness of the stallion known to his owner, which was the proximate consequence of the service undertaken, but also for any injury resulting from a want of ordinary care or lack of skill on the part of the defendant, or his agent, or, in other words, any negligence on their part, in managing and controlling the stallion in the process of the service. The fact of negligence was charged in such form as that

a material issue, in law or fact, would be taken thereon by the adverse party, and this is all the statute requires. Code 1886, § 2684; Railroad Co. v. Crenshaw, 65 Ala. 566; Railroad Co. v. Jones, 83 Ala. 376, 8 South. Rep. 902; Railroad Co. v. Thompson, 62 Ala. 494. The demurrer to the complaint was properly overruled, and the judgment is affirmed.

GLENN V. LYNN.

(Supreme Court of Alabama. May 27, 1890.)

INTOXICATING LIQUORS—CONSTITUTIONAL LAW—LICENSES.

1. Under Const. Ala. art. 4, § 2, providing that "each law shall contain but one subject, which shall be clearly expressed in its title," the provision of Act Feb. 10, 1883, (Acts 1882-83, p. 842,) entitled "An act to establish a separate school-district, to be known as the * * *, and for the appointment of a board of trustees for said school-district, with certain powers and privileges," which requires, as a condition precedent to the granting of a liquor license, that the applicant have the recommendation of such board as to his moral fitness, is unconstitutional, the words of the title, "with certain powers and privileges," having no force.

2. Under Code Ala. § 1819, requiring as a condition precedent to the granting of a liquor license that the applicant produce to the judge of probate a recommendation signed by 20 householders and freeholders residing within the corporate limits of the town in which he proposes to engage in the business, a petition to compel the probate judge to issue a license, stating that applicant produced the recommendation of more than 20 householders and freeholders of "said town and district," is not sufficient, as it does not show that they all reside within town limits.

3. The petition should also show that applicant has filed the affidavit required by section 1320 as a condition precedent to obtaining a license.

Appeal from circuit court, Russell county; J. M. CARMICHAEL, Judge.

The appellee, Moses T. Lynn, petitioned the appellant, E. H. Glenn, as probate judge of Russell county, to grant him a license to retail spirituous and vinous liquors within the "Peabody district" in the town of Girard. Upon the hearing of this petition, the probate judge refused to grant him the license prayed for. The petitioner thereupon filed his petition to the circuit judge, asking that a peremptory writ of *mandamus* be issued from said circuit court, compelling the said Glenn, as judge of probate, to issue to the petitioner a license as prayed. The defendant, Glenn, filed his demurrer to the petition, alleging, among other things, that the twelfth section of the act involved was constitutional, that the petitioner had not complied with the requirements thereof, and that upon the facts as alleged in the said petition the petitioner was not entitled to the relief prayed. Upon the hearing of the demurrer, the court overruled it, and decided that the petitioner was entitled to the relief prayed for, and thereupon ordered a *mandamus* issued to the defendant, requiring him to issue a license to the petitioner. The said Glenn, as judge of probate, now prosecutes this appeal, and assigns the judgment of the lower court on the demurrer, and the rulings thereon, as error.

J. B. Mitchell and Watts & Son, for appellant. L. W. Martin, for appellee.

CLOPTON, J. The judge of probate of Russell county refused to issue a license to appellee, on his application, to retail spirituous and vinous liquors in the town of Girard, on the specified ground that he failed to produce the recommendation, as to his moral fitness, of the board of trustees of the Peabody school-district. The district was incorporated by a special act of the general assembly, approved February 10, 1883, entitled "An act to establish a separate school-district, to be known as the 'Peabody School-District,' in Russell county, Alabama, and for the appointment of a board of trustees for said school-district, with certain powers and privileges." Acts 1882-83, p. 342. The twelfth section of the act provides "that no licenses shall be granted for the sale of spirituous, vinous, or malt liquors within said district to any person, firm, or corporation without the recommendation of such board of trustees as to their moral fitness." The contention of appellee is that the act violates the mandate declared in section 2 of article 4 of the constitution, that "each law shall contain but one subject, which shall be clearly expressed in the title." This constitutional provision has been so often considered, and its construction and purposes so repeatedly announced, that a repetition of them is unnecessary. A casual examination of the act exhibits the wide range of its provisions. The first five, seventh, eighth, and eleventh sections relate to the territorial area of the district, the ascertainment of the will of the citizens as to its establishment, the election of trustees, their organization, the right to a proportionate share of the state school fund, the power of the trustees to pass by-laws for the government of their own body, and ordinances for the inauguration of a system of education, and for the protection of the public school interests in the district, and to purchase lands, and erect and rent school-houses, and employ teachers, all apparently pertinent and germane to the establishment and organization of a school-district, and the control and management of the public schools in the district. The sixth and tenth sections confer upon the president of the board of trustees the same jurisdiction, power, and authority, and entitle him to the same fees as a justice of the peace in the precinct in which the district is situated and also power and authority to enforce such ordinances as shall be adopted by the board of trustees for the protection of the schools, school grounds, and buildings in the district, against disorderly persons, and to punish violations of such ordinances by fine and imprisonment. They also authorize a majority of the board to elect one or more marshals, who shall have the same power and authority, and be entitled to the same fees as constables. By the thirteenth section the board of trustees is empowered to require any person, firm, or corporation desiring to engage in the business of retailing liquors in the district to pay for and take out a license, to be issued by the president,

and jurisdiction is given him to try and punish violations of this section, declaring engaging in such business without having first paid the amount required for such license to be a misdemeanor.

The title of the act considered in the case of *Montgomery v. State*, 88 Ala. 141, ante, 51, was "to constitute the town of Blountsville and vicinity in Blount county a separate school-district." The seventh section prohibited the sale of liquors within the district, and made the violation of the provision a misdemeanor. This section was held not to be pertinent or germane to, nor indicated or foreshadowed by, the subject expressed in the title. That case seems to be decisive of the question raised in the present case; but it is insisted that the last clause of the title of the act under consideration, "and for the appointment of a board of trustees for said school-district, with certain powers and privileges," distinguishes it from the act passed upon in *Montgomery v. State*, and takes it without the operation of the principle announced in that case. What has been said in reference to a title in which the words "for other purposes" were used is applicable to a title containing the words "certain powers and privileges." "These latter words, 'for other purposes,' must be laid out of consideration. They express nothing, and amount to nothing, as a compliance with this constitutional requirement. Nothing which the act could not embrace without them can be brought in by their aid." *Town of Fishkill v. Railroad Co.*, 22 Barb. 634; *Cooley, Const. Lim.* 174. The phrase "certain powers and privileges" has no force under the constitutional provision, nor does it enlarge the comprehensiveness of the subject expressed in the title,—the establishment of a separate school-district. Without expressing the appointment of trustees in the title, provisions for their appointment, with proper powers and privileges, follow as a complement to the general subject, necessary or proper to the control and management of the public schools in the district, and the full accomplishment of the purposes indicated. Without the words referred to provisions can be embraced conferring upon the trustees powers and privileges, which naturally and legitimately pertain to the office of trustees of public schools; such as their establishment, the employment of teachers, and the direction and administration of the internal affairs and public interests of the schools,—such powers and privileges as they have generally possessed, by custom and legislation; with them, subjects alien to these purposes cannot be introduced. While the generality and comprehensiveness of a title is no objection, it cannot be used as a cover for provisions having no necessary or proper connection with the purposes clearly indicated by the title. The words "certain powers and privileges" would not apprise either the legislature or the public that the act contained provisions authorizing the organization of a local police government, and conferring power upon the trustees to enact and enforce in the district police regulations, foreign to the nature, purposes, and objects of a separate

school-district. We are unable to perceive any distinction in principle between the act under consideration and the act involved in *Montgomery v. State*. On the authority of that case, we hold the twelfth section to be unconstitutional.

Notwithstanding the unconstitutionality of the section, we cannot affirm the judgment of the circuit court. The petition for the *mandamus* fails to show that the applicant complied with the statutory requirements preliminary and requisite to the issue of a license. The application was for a license to retail spirituous and vinous liquors in the town of Girard. Section 1319 of the Code requires the applicant, before a license can be granted, to produce to the judge of probate a recommendation in writing, signed by 20 householders and freeholders residing within the corporate limits of the town in which he proposes to engage in the business. The petition states that appellee produced "the recommendation of more than twenty respectable householders and freeholders of said town and district." It does not appear that all of them, though residents of the district, resided within the corporate limits of the town, and the petitioner does not show that the applicant filed or tendered the affidavit required by section 1320. We shall remand the case, that the petition may be amended, if the facts authorize an amendment. Reversed and remanded.

BURTON v. HENRY.

(*Supreme Court of Alabama. May 27, 1890.*)

JOINT OR SEVERAL CONTRACT—ACTION—PROXIMATE DAMAGES.

1. The purchaser of a decree for the sale of a tract of land to satisfy a vendor's lien, as part of the consideration therefor, agreed with his vendor, and with parties who had at various times subsequent to the creation of the lien purchased parts of the land, that before enforcing said decree he would file a petition to determine the order in which the parcels of land should be sold to satisfy the decree, it being further agreed that the original and subpurchasers of the land, or any one of them, might answer and introduce evidence in support of their claims, and that the court should determine the equities between the original and subpurchasers among themselves, and between each and all of them and the purchaser of the decree. *Held*, that the interests of the parties to the contract were several, and therefore one of them might maintain an action for its breach.

2. In an action by one of the subpurchasers for breach of the contract to file a petition to determine the order of sale of the various parcels, damages cannot be recovered for being deprived of the possession of his land, and for expenses incurred in resisting a confirmation of sale, such damages being too remote.

Appeal from circuit court, Etowah county; JOHN B. TALLY, Judge.

Amos E. Goodhue, for appellant. *Denson & Tanner*, for appellee.

MCCLELLAN, J. John Ralls sold a tract of land to Justinian Maddox October 26, 1872, and for a part of the purchase money thereof took a note for \$1,100, which afterwards became the property of one Ward. Maddox subsequently, and at dif-

ferent times, sold parts of the tract to John H. Burton and Prickett et al., respectively. Ward filed a bill to enforce his vendor's lien, and obtained a decree ordering sale of the entire original tract. The representatives of Justinian Maddox, he having died, also obtained a decree against Prickett et al. enforcing the lien for purchase money due on that part of the tract sold to them. A sale was had under this last-mentioned decree subject to the superior lien of Ward, and Sam Henry, the defendant and appellee in this case, became the purchaser. Thereupon said Henry also purchased Ward's decree covering the whole tract, and, as a part of the consideration therefor, agreed with Ward, Burton, Prickett et al. not to enforce said decree before the next term of the chancery court of the district; and that before said next term he would commence proceedings before said court, by petition or otherwise, "to have said court determine and decree which parcel or tract of said lands (if either) shall first be sold to satisfy said decree and costs, and the order in which the other tracts must be sold, if necessary to satisfy the same." It was further agreed that "the defendants in said chancery court," i. e., the original and subpurchasers of the land, "or any one or more of them, may file counter-petitions or answers setting up what they may consider their rights to be in the premises, and evidence may be taken by either of the parties in support or contradiction of each of said petitions or answers." Henry, it was consented, might file the petition required by the agreement in his own name, and the court was to "determine and settle the equities between the said defendants among themselves, and between each and all of them and said Henry, provided that either party shall have the right of appeal," etc. The present action is instituted by Burton, one of the parties to the agreement, and seeks to recover damages for a breach thereof on the part of Henry, in that he not only failed to file the petition, as by the terms of the instrument he bound himself to do, but also that he executed the decree without having the equities of the parties, as to the order in which the several tracts should be sold, settled and determined by the chancery court at the sale thereunder, directed and induced the register to sell all of the land, except that part which had been previously bought by him under the Maddox decree, and himself became the purchaser, and went into possession of all the lands. The special damages alleged consist of the loss of the use of the parcel of land which plaintiff had purchased, and of attorney's fees and costs expended in resisting the confirmation of said sale, and in having the decree confirming the same reversed by this court. The case went off below on demurrers to the complaint. The first ground of demurrer to each count proceeded on the theory that the promise of Henry was made to all the defendants in the cause jointly; that their interest in the contract and its subject-matter was a joint interest, and therefore an action for a breach of the contract could only be maintained in the names of all the con-

tractees. These demurrers were sustained, the court holding that Burton could not sue alone.

This ruling was, in our opinion, erroneous. The contract, while nominally inuring to all the promisees, i. e., is made with all of them, shows upon its face distinct and several rights were intended to be secured. Not only so, it is very clearly indicated that these separate rights may be separately asserted. Moreover, the interest of the promisees is not only not joint, but is in the very nature of things, even aside from the language of the instrument, adverse each to the other, and the proceedings provided for by the agreement for the effectuation of whatever equities the parties respectively had in the subject-matter, whether as between them, or any one of them, and Henry, and also as between themselves, are directly adversary in character. The most casual consideration of the facts outlined above will demonstrate this to be true. Henry's decree covered several parcels of land, each and all of which could be sold if necessary to its full satisfaction. The several parcels were held by different persons, one tract still being held by the original vendee. By reason of conveyances by the original vendee at different times to these persons an equity in favor of such purchasers arose entitling them to have the land still held by the original purchaser first sold, and, if that was not sufficient to pay the decree, then the other tracts should be sold in the inverse order of their alienation by the first vendee. The interest of the holder of each parcel, it is thus manifest, was essentially adverse to every other, and the immunity of each from the burden which in certain contingencies rested on all depended upon having the decree satisfied by a sale of the other's property. The anomaly of requiring all the contractees to join in this action is illustrated by assuming a state of facts which might well have arisen under this contract. Let it be supposed that Henry, having failed to have the priorities settled among the defendants, had proceeded to execute and satisfy his decree by the sale of the tract held by the first alienee of the original vendee, without proceeding at all against the original purchaser or his last vendee, the parcel of both of whom should have been first resorted to. Here the rule insisted on would require the first alienee to join with himself as plaintiff in an action for a breach of the contract other parties, all of whose interest lay in, and were to be subserved by, sustaining the very act, or failure to act, of which he complains, and by which he alone is injured, they being not only not injured, but receiving affirmative benefit therefrom. We know of no rule of pleading which requires the joinder of all the promisees under the facts disclosed in this complaint; but, on the contrary, we conceive the law to be well settled to the contrary. Chit. Pl. 9-13; Boyd v. Martin, 10 Ala. 700; Master-son v. Phinizy, 56 Ala. 336. The appellant, therefore, having a right to maintain this suit in his own name, the averment of the existence, and breach of a valid contract, presented a case which, if proved, entitled him to nominal dam-

ages, regardless of the allegations of special damages, and the error committed in the ruling of the trial court on the first ground of demurrer to each count necessitates a reversal of the cause, whether the special damages alleged are recoverable or not. *Rosser v. Timberlake*, 78 Ala. 162; *Drum v. Harrison*, 83 Ala. 384, 3 South. Rep. 715; *Daughtery v. Telegraph Co.*, 75 Ala. 171.

There was no error in the rulings of the trial court on those grounds of demurrer which went to the sufficiency of the allegations of the complaint as to the special damages sustained by the plaintiff by reason of the breach of the contract. The undertaking of defendant was to file a petition in the chancery court for a decree determining the order in which the several parcels of land constituting the tract against which the decree passed should be sold. This undertaking was violated, it is alleged, by the failure and omission of Henry to file said petition; and this failure is the foundation of the present suit. Henry subsequently proceeded to execute his decree without having the order of sales of the several parcels determined, and sold the whole tract, except that part which he had previously bought under a decree which enforced a secondary lien, became, as we have seen, the purchaser, and went into possession. The special damages claimed result from plaintiff's being deprived of the enjoyment of the parcel of the land formerly held by him, and from expenses incurred by him for court costs and counsel fees in resisting a confirmation of this sale. These damages are too remote. They do not come within the rule frequently laid down by this court, and of almost universal acceptance in other jurisdictions, that the damages claimed must be the natural and proximate consequence of the breach alleged, such as would result in the usual course of things, and hence must be held to be in contemplation of the parties, as distinguished from collateral injury or loss springing out of special circumstances not usually attendant upon such transactions, and which therefore could not be held to have been in the minds of the contracting parties. *Daughtery v. Telegraph Co.*, 75 Ala. 168; *Culver v. Hill*, 68 Ala. 66; *Brigham v. Carlisle*, 78 Ala. 243. It is quite apparent from the complaint that the injuries thus specially complained of were not the natural and proximate result of the breach alleged. Plaintiff was deprived of the land, not proximately by defendant's failure to file the petition, but by reason of other and affirmative action on the part of Henry. Moreover, had the petition been filed, and all the equities among the contractees fully settled, *non constat* but the same result as to the sale of plaintiff's land

would have ensued, and he to the same extent now averred have been deprived of its use and enjoyment. The complaint, therefore, not only fails to show that the failure to file the petition was the efficient cause of this item of damage, but it affirmatively shows the injury moved from another cause, and that, so far from the breach alleged being the necessary and natural cause for the loss, the damage might have followed as necessarily and naturally from a strict performance of the contract. So, too, in respect to counsel fees. The expenditure in that behalf was not rendered necessary by defendant's omission in regard to the petition, but by his independent, affirmative, and subsequent act of making and becoming the purchaser at a sale of the land, the confirmation of which Burton conceived it to be his interest to contest. The necessity for this contest patently arose from the defendant's affirmative conduct in regard to the sale, and not from his passive omission to file the petition required by the contract. Damages resulting from such an intervening cause, and partly from the alleged breach, in such sort that in the absence of either the injury would not have been sustained, are not recoverable. *Burton v. Pinkerton*, L. R. 2 Exch. 340; *Warwick v. Hutchinson*, 45 N. J. Law. 61; *Cahall v. Association*, 74 Ala. 539.

While there are some cases to the contrary, the great weight of authority is to the effect that counsel fees and court costs incurred or expended in the prosecution or defense of suits occasioned or rendered necessary by a breach of contract are not recoverable in action *ex contractu*. There are certain well-established and defined exceptions to this rule,—such as actions on injunction and attachment bonds, and the like, actions on covenants of warranty or of seisin, where there has been an eviction reasonably resisted by the grantee, etc.,—but the present case is not one of them. Expenditures of this class, though growing out of the alleged breach, in the sense that had there been no breach the occasion for them would not have arisen, are yet too remote to have been in the contemplation of the parties, and hence do not constitute an element of legal damage when the suit is on the contract, though the rule might be otherwise if the action be in case, setting out the contract as inducement merely. *Marvin v. Prentice*, 94 N. Y. 295; *Winkler v. Roeder*, 8 Amer. St. Rep. 155, 158, note, 37 N. W. Rep. 607; *Copeland v. Cunningham*, 63 Ala. 394.

For the error pointed out above in sustaining the first ground of demurrer to each count of the complaint, the judgment of the circuit court must be reversed, and the cause remanded.

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NOTE. A star (*) indicates that the case referred to is annotated.

ABATEMENT AND REVIVAL.

Other action pending.

It being a recognized rule of federal jurisprudence that the pendency of a suit in a state court is no ground for a plea in abatement to a suit upon the same matter in a federal court, such rule should be adhered to in the state court as a matter of judicial reciprocity.—*State v. New Orleans & N. E. R. Co.*, (La.) 7 So. 64.

Acceptance.

Of goods, see *Carriers*, 1-4.

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ACCOUNT STATED.

What constitutes.

1. A charge that the retention, without objection, of an account rendered, is conclusive evidence that it is correct, is error which is not harmless, if there is any evidence tending to impeach it.—*Rice v. Schloss*, (Ala.) 7 So. 802.

Pleading.

2. The sufficiency of an affidavit to an account filed with the declaration, cannot be considered on a demurrer to the declaration.—*Elyton Land Co. v. Morgan*, (Ala.) 7 So. 249.

Proof.

3. An account is sufficiently proved to go to the jury by evidence that the book-keepers of the plaintiffs and the defendant have examined it, and eliminated errors, and that it contains those items only which have been passed as correct.—*Rice v. Schloss*, (Ala.) 7 So. 802.

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Adjoining Land-Owners.

See *Boundaries*.

Administration.

See *Executors and Administrators*.

ADULTERY.

Evidence—Instructions.

The court charged: "The fact that a married man makes frequent visits in the day-time, and sometimes at night, to the house of a woman of known bad reputation, without any legitimate business, is a fact tending to show an adulterous connection between them." The evidence that defendant had no legitimate business at the said house was wholly negative in its character, and did not exclude a contrary inference. *Held*, that the charge was erroneous, in denying to the jury the right to draw this inference.—*Hall v. State*, (Ala.) 7 So. 840.

ADVERSE POSSESSION.

Between co-tenants, see *Tenancy in Common and Joint Tenancy*, 4.

Effect on boundaries, see *Boundaries*, 3, 4.

What constitutes.

1. Possession under an executory contract of purchase is adverse, except as to the party contracting to convey, and under whom the possession is held.—*Coogler v. Rogers*, (Fla.) 7 So. 891.

2. Defendants' deed embraced in its calls about half of the lot claimed by plaintiff. Both parties derived title from the same source; but the deed to plaintiff's lot was not in existence, though those through whom she claimed had been in possession for more than 40 years of part of the lot, and of the part in dispute they had during that 40 years once had 10 years' uninterrupted and adverse possession. Defendants had at no time been in possession of the disputed strip for 10 years. *Held*, that plaintiff had a good title by adverse possession, and was entitled to relief.—*Echols v. Hubbard*, (Ala.) 7 So. 817.

3. In ejectment for a tract of land lying between two plantations, plaintiff showed a valid paper title under the former owner of one of them. Defendants showed that B., who owned the other plantation, had, in 1856, surrounded it with a hedge,

inclosing the tract in question, which he claimed as part of his land; that he and his heirs continued in possession, cultivating and controlling the tract until the war, during which the plantation was abandoned, though there was always the *animus revertendi*; that after the war B.'s heirs retook possession of the land, including the tract in question, though it was then unfenced and uncultivated; that in 1874 they put an agent in charge, who took possession of the land, including this tract, and who has remained in possession ever since; that in 1885 he inclosed part of the plantation, including the tract in controversy; that this tract was recognized throughout the neighborhood as part of the plantation, and that neither plaintiff nor any one under whom he claimed had ever asserted title thereto until 1889. *Held*, that defendants, claiming under B., his heirs and vendees, showed a good title by adverse possession.—*Jones v. Gaddis*, (Miss.) 7 So. 439.

4. In an action to set aside a sale of real estate by an administrator, where the complaint alleges that defendant, recognizing the invalidity of its title under such sale, had surrendered the land to an administrator *de bonis non*, which allegation is admitted by demurrer, defendant cannot claim to have acquired title by seven years' adverse possession under its claim of title from the administrator.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

Continuity of possession—Interruption.

5. Title once acquired by an adverse holding is not forfeited by a subsequent interruption, nor by an after possession, lacking in some of the characteristics essential to give title.—*Hoffman v. White*, (Ala.) 7 So. 816.

—Tacking.

6. The possession of successive occupants between whom there is privity may be united to make up the period of adverse possession necessary to constitute a defense against an action of ejectment founded on the true title.—*Coogler v. Rogers*, (Fla.) 7 So. 391.

Color of title.

7. A deed, which had been signed 16 years before, but not acknowledged until within a short time prior to the bringing of an action of trespass *quare clausum*, is admissible in evidence, in connection with plaintiff's possession under it, as color of title, to define his boundaries.—*McInerney v. Irvin*, (Ala.) 7 So. 841.

8. In ejectment for a tract of land lying between two plantations, plaintiff showed a valid paper title under the former owner of one of them. *Held*, that the entry of plaintiff under a valid deed of the adjoining plantation, in which was included the tract in controversy, and his actual occupation of all the land thereby conveyed except this tract, to which he asserted no claim, was not such possession under color of title as could divest defendant's adverse title.—*Jones v. Gaddis*, (Miss.) 7 So. 439.

Effect.

9. Where plaintiff and defendant claim title under the same grantor, 10 years' adverse possession by plaintiff under an unacknowledged deed, prior to the grant to defendant, will establish a superior title by prescription.—*McInerney v. Irvin*, (Ala.) 7 So. 841.

Agency.

See *Principal and Agent*.

Amendment.

Of judgment, see *Judgment*, 13-20.
pleading, see *Equity*, 17-20; *Pleading*, 5-8.

ANIMALS.

Live-stock shipments, see *Carriers*, 12, 13.

Trespassing animals.

1. Under Code Miss. 1880, § 988, providing that, where the joint owner of a partition fence has failed

to keep his portion of it in proper repair, he shall not be entitled to damages against his co-owner for any injury done to his animals which have broken through such fence, the former can recover no damages, although the animals were shot by the latter.—*McCain v. White*, (Miss.) 7 So. 322.

Altering stock-marks.

2. On trial for altering the marks of stock, where the only evidence is that a lamb was found with its mark changed from that of its owner to that of defendant, a conviction should be set aside.—*Dobson v. State*, (Miss.) 7 So. 337.

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See *Pleading*, 3.

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APPEAL.

- I. APPELLATE JURISDICTION.
- II. REQUISITES.
- III. PRACTICE.
- IV. REVIEW.
- V. EFFECT OF APPEAL.
- VI. DECISION.

See, also, *Certiorari*; *Error*, *Writ of*; *Exceptions*, *Bill of*; *New Trial*.

Costs on appeal, see *Costs*, 3.

In criminal cases, see *Criminal Law*, 83-106.

On dissolution of injunction, see *Injunction*, 12, 13.

I. APPELLATE JURISDICTION.

In general.

1. A second appeal to review a ruling on evidence cannot be allowed from a judgment which had once been appealed in its entirety, and disposed of in all particulars and in all its legal effects and bearings.—*Conery v. New Orleans Water-Works Co.*, (La.) 7 So. 590.

2. Under Const. La. art. 81, conferring on the supreme court appellate jurisdiction in all cases wherein "the constitutionality or legality of a fine or penalty imposed by a municipal corporation is in contestation," an appeal will lie from a judgment convicting one of violation of an ordinance of a police jury assuming to regulate the speed of railroad trains in villages of the parish, and imposing a fine therefor.—*State v. Miller*, (La.) 7 So. 672.

Waiver of right to appeal.

3. The defendant having authorized his attorney to abandon the appeal from a judgment against him if he thought that the judgment would be affirmed, the attorney informed him that in his judgment such would be the result, and abandoned the appeal, not having executed a bond or taken up the case on appeal, informing plaintiff's counsel, at the time, that the appeal had been abandoned, and the judgment acquiesced in; the property to recover which the action had been brought was delivered to plaintiff by defendant's counsel, the defendant not objecting thereto; rents due at the time judgment was obtained were paid to plaintiff by defendant's lessee, in accordance with the direction of defendant's agent. *Held*, that there was acquiescence, and that the judgment has been executed, and the right of appeal is lost.—*Ware v. Morris*, (La.) 7 So. 712.

Appealable judgments and orders.

4. In an action to foreclose a mortgage, that decree which adjudges that a certain amount is due under the mortgage, and decrees a sale of the property, is final; and all prior decrees are interlocutory, and come up for review on appeal from the final decree.—*Kimbrell v. Rodgers*, (Ala.) 7 So. 241.

5. An order refusing to grant a license to sell liquor is not a final order or decree, within the meaning of Code Ala. 1886, § 3640, which provides that an appeal may be taken from "any final decree of the court of probate, or from any final

judgment, order, or decree of the judge of probate."—*Ramagano v. Crook*, (Ala.) 7 So. 247.

6. An order dissolving an ancillary attachment is a final judgment at law, from which an appeal lies, although it does not expressly dismiss the attachment proceedings. *Lyman v. Alexander*, 9 Fla. 489, disapproved.—*Williams v. Hutchinson*, (Fla.) 7 So. 552.

7. A decree overruling a plea of recusation of the judge of a court, on the ground of interest, is not in its nature interlocutory, but final, and a suspensive appeal may be taken therefrom.—*State v. Judge Twenty-Sixth Judicial District Court*, (La.) 7 So. 536.

Jurisdictional amount.

8. In an attachment proceeding where a third opponent claims the ownership of a specific item of property, the value of such property is the test of jurisdiction in case of an appeal involving the contested claim of such opponent.—*Wickham v. Nalty*, (La.) 7 So. 609.

9. In a suit to annul a tax-sale of land with a view to subject it to the debts of the former owner, the matter in dispute is the title to the property, and, where that and the amount of claims against it are each admitted to be above the value of \$10,000, the Louisiana court of appeals has no jurisdiction, though the amount of taxes for which the land sold may have been only \$180.—*State v. Judges of the Court of Appeals*, (La.) 7 So. 632.

10. In a suit to restrain a gas company from removing a meter from plaintiff's house, which it threatens to do unless an additional rental of \$4 a month be paid, the amount in controversy, where defendant's charter will expire in 35 years, is less than \$2,000, and the supreme court of Louisiana cannot entertain an appeal in such case.—*Harmony Club v. New Orleans Gas-Light Co.*, (La.) 7 So. 583.

11. In attachment proceedings, where a third opponent claims a privilege on the proceeds of the property attached, the value of that property, and not the amount claimed therein under a prior lien or privilege, is the proper test of the appellate jurisdiction.—*Wickham v. Nalty*, (La.) 7 So. 609.

12. Defendant in a petitory action averred that the land in dispute was of the value of \$2,500, and he called in his vendor in warranty, asking judgment against him for that sum. Judgment was rendered for plaintiff in the action for the land, and for defendant against the warrantor for \$1,200. Held, that the supreme court has jurisdiction of an appeal by the warrantor from the judgment against him, as the amount in dispute is more than \$2,000.—*Huntington v. Bordeaux*, (La.) 7 So. 553.

13. Where the defendant in a petitory action is in possession of the whole tract described in the petition, but by his answer claims only a part thereof, the controversy cannot, for the purpose of excluding the jurisdiction of the court of appeals, be restricted to the land claimed by defendant.—*State v. Judges of Court of Appeals*, (La.) 7 So. 744.

14. The supreme court is without jurisdiction upon the claim against the succession in less than \$2,000, and the fund to be distributed does not exceed that amount.—*Succession of Dougart*, (La.) 7 So. 794.

15. The supreme court has no jurisdiction over a controversy, the sole object of which is to recover as costs an amount below the limit of its appellate jurisdiction, where the judgment, though rendered by it, with costs, has been satisfied, and is defect.—*Succession of Dougart*, (La.) 7 So. 794.

Appeals from inferior courts.

16. An appeal to the Mississippi supreme court in a case begun before a justice, and appealed to the circuit court, lies only when the judgment, exclusive of costs, cannot be discharged on payment of less than \$50.—*Clark v. Gresham*, (Miss.) 7 So. 224.

II. REQUISITES.

Notice.

17. The appearance of appellee in the lower court to urge dismissal of appeal before the return-day thereof does not operate as a waiver of citation.—*Schmitt v. Rabasse*, (La.) 7 So. 746.

18. By Code Prac. La., in cases of appeals taken by petition not filed in open court, in presence of the adverse party, citation is essential.—*Schmitt v. Rabasse*, (La.) 7 So. 746.

Time of taking.

19. An appeal is taken within a year from the rendition of the decree when a sufficient undertaking has been filed within that time, there being no other condition precedent; as by Code Ala. § 3631, the citation does not issue until after the appeal is taken, and need not be served more than 10 days before the return-day of the appeal.—*Kimbrell v. Rodgers*, (Ala.) 7 So. 241.

20. Appeals from judgments in cases, under Rev. St. La. § 2804, making appeals in intrusion into office cases returnable either to the supreme court in New Orleans or at one of the sessions in the country, must be made returnable within 10 days to the supreme court at New Orleans, or at one of its country sessions, immediately following the judgment.—*State v. Fowler*, (La.) 7 So. 180.

Bond.

21. Where a *supersedeas* order made in a chancery appeal to the supreme court requires that the bond shall be conditioned for the payment of damages and costs, and a bond conditioned for the payment of costs only is taken and approved by the clerk of the circuit court as a compliance with the order, the bond is insufficient, and the approval of it will be vacated by the supreme court.—*McMichael v. Eckman*, (Fla.) 7 So. 865.

22. Where an appeal is taken by a sheriff under the act of February 17, 1838, (McClell. Dig. p. 841, §§ 8, 9,) from an order directing him to pay over money to a plaintiff in execution, and the penalty of the appeal-bond is less than the amount of the sum and costs ordered to be paid, the appeal will be dismissed on the ground of the insufficiency of the bond.—*Scott v. Milton*, (Fla.) 7 So. 82.

23. Under Code Prac. La. art. 575, requiring that, on a suspensive appeal, the bond shall be "for a sum exceeding by one-half the amount for which the judgment was given, interest accrued at its date forms part of the amount of the judgment, but not costs nor accruing interest."—*Palaud v. Illinois Cent. R. Co.*, (La.) 7 So. 899.

24. Where the evidence adduced by a defendant in error on a motion to vacate a *supersedeas* raises serious doubts as to the sufficiency of the sureties, and no evidence is offered by plaintiff in error to meet the representations made by such proof, the *supersedeas* will be vacated.—*Hayes v. Todd*, (Fla.) 7 So. 851.

25. A *supersedeas* bond which does not identify the decree appealed from will not be accepted or approved by the supreme court.—*McMichael v. Eckman*, (Fla.) 7 So. 865.

26. An application by plaintiff in error for an allowance of time within which to file a new *supersedeas* bond, where his former one has been held insufficient, is not ground for continuing the pending *supersedeas*, or delaying the entry of the order vacating it.—*Hayes v. Todd*, (Fla.) 7 So. 851.

III. PRACTICE.

Assignments of error.

27. Assignments of error, made jointly by all the appellants, as to matters which are injurious to some of them only, will be disregarded.—*Kimbrell v. Rodgers*, (Ala.) 7 So. 241.

Record.

28. The fact that the original record in a cause is lost or mislaid is no excuse for failure to file a transcript seasonably on a regularly obtained and perfected appeal, since on a proper showing appellant might have obtained an extension of time.—*Succession of Lulu*, (La.) 7 So. 585.

29. When the return-day for filing a transcript has been extended, and the transcript is filed after the expiration of the extension, the appellant is not entitled to the three days of grace which follows a return-day.—*Succession of Gast*, (La.) 7 So. 68.

30. Notwithstanding a suggestion or statement in the brief of counsel that an order appearing in

the appeal transcript was taken from the motion docket, it will be presumed that it was duly recorded in the minutes of the term of the court at which it appears from the transcript that the motion was heard and determined, such transcript being certified by the clerk as containing a correct transcript of the "record of the judgment."—*Williams v. Hutchinson*, (Fla.) 7 So. 852.

81. When copies of papers are made exhibits to a bill of exceptions which states that an offer was made to read in evidence the originals, which were identified by a witness, and referred to by others, and no objection to their competency appears to have been made, the papers will be considered as in evidence in the case.—*Rice v. Schloss*, (Ala.) 7 So. 802.

IV. REVIEW.

In general.

82. Where a party destroys an instruction given in lieu of one which he asked, the case will be considered on appeal as if the instruction not given was not in the record.—*Yazoo & M. V. R. Co. v. Williams*, (Miss.) 7 So. 379.

Objections not made below.

83. In a suit to enforce a mechanic's lien the affidavit which takes the place of a declaration described defendants as partners. The *præcipe* and writ were amended so as to describe them as "late partners;" but the amendment was not carried into the affidavit. *Held* that, where no objection was made to the variance below, it is too late to urge it on appeal.—*Emerson v. Gainey*, (Fla.) 7 So. 824.

84. Objections to evidence on the ground of incompetency cannot be made for the first time on appeal.—*Rice v. Tobias*, (Ala.) 7 So. 765.

Discretion of trial court.

85. No appeal lies from a decree awarding costs, unless there is an abuse of the judicial discretion of the chancellor.—*Weiss v. Louisville, N. O. & T. Ry. Co.*, (Miss.) 7 So. 890.

Presumption.

86. Where the indorsement of an officer on a writ of attachment shows a sufficient levy on land if wild or unoccupied, but insufficient if cultivated or occupied, the supreme court, in an action to have the attachment set aside, will treat the levy as a valid levy on wild or unoccupied land, in the absence of any averment in the debtor's bill that the land was in fact cultivated or occupied.—*Drysdale v. Biloxi Canning Factory*, (Miss.) 7 So. 541.

87. When the record contains no note of evidence the supreme court will presume, in accordance with established precedents, that, in rendering judgment, the judge *quo* proceeded upon proper evidence.—*Succession of Moore*, (La.) 7 So. 661.

Sufficiency of evidence.

88. Where a jury was waived, and the issues submitted to the chancellor, his finding will not be disturbed, unless without evidence to support it.—*Walker v. Walker*, (Miss.) 7 So. 491.

Rulings on evidence.

89. Where it is doubtful whether witness was attempting to repeat what was said to him, or was merely giving the conclusion he had drawn from what was said to him, the exclusion of the testimony is not error.—*Kellar v. Taylor*, (Ala.) 7 So. 907.

Harmless error.

40. Plaintiff sued for the price of certain water-meters, and defendant counter-claimed, alleging a breach of warranty and special damages. A demurrer thereto was sustained, but the questions as to warranty and breach thereof were tried under other issues, and a verdict rendered against defendant for the full amount claimed. *Held* conclusive that there was no breach of warranty, and sustaining the demurrer was harmless error.—*Capital City Water Co. v. National Meter Co.*, (Ala.) 7 So. 419.

Matters not apparent of record.

41. There can be no review on appeal of the action of the court on demurrer to a bill, when the record does not disclose what it was, except by what seems to be a mere docket direction of the chancellor to the register.—*Park v. Lide*, (Ala.) 7 So. 805.

Objections waived.

42. Though rule 90, equity practice in the Florida circuit courts, requires all applications for rehearing to be by petition, where an application for rehearing on an order dissolving an injunction is made by motion, objection thereto cannot be raised for the first time on appeal, as failure to make it when the application is made waives the objection.—*Peck v. Spencer*, (Fla.) 7 So. 642.

V. EFFECT OF APPEAL.

Stay of proceedings.

43. On appeal from the granting of a temporary injunction against the sale of intoxicating liquors, on the ground that the license was granted without authority, a *supersedeas* will not be granted, for the injunction bond will sufficiently indemnify appellant, in case it is determined that the injunction was improvidently awarded, while a *supersedeas* bond would furnish no indemnity to the community for the damages that might result from illegal sales, should it be determined that the license was improperly granted.—*Jacoby v. Shomaker*, (Fla.) 7 So. 855.

VI. DECISION.

In general.

44. In an action by the state against the principals and sureties on a bond given by them as lessees of the penitentiary, defendants pleaded that they had been discharged from liability by a transfer of the lease to a third party under an act of the legislature, and, while the case was pending, the attorney general and counsel for the defense submitted to the supreme court for their decision the question whether the transfer had such effect. *Held*, that the decision was only intended to settle the law on the facts as stated in the plea, and, though for defendants, did not preclude the state from traversing the plea, and having a trial of the issue thereby raised.—*Hamilton v. State*, (Miss.) 7 So. 282.

45. In an appeal taken by motion in open court, all parties to the suit who are not appellants are appellees, and all are concluded by the judgment rendered on appeal.—*Conery v. New Orleans Water-Works Co.*, (La.) 7 So. 590.

Affirmance.

46. In an action to set aside a conveyance as made by a deceased debtor in fraud of his creditor, the grantee pleaded that the creditor had not filed his claim in the probate court within nine months after the debtor's estate had been declared insolvent, as required by Code Ala. 1886, § 2233. *Held*, that the creditor whose demurrer to this plea was overruled, and who suffered a final decree to be rendered against him without asking for leave to reply, cannot file a replication to the plea of non-claim, after the expiration of the term at which the decree was rendered, and after its affirmance on appeal by the supreme court.—*Herstein v. Walker*, (Ala.) 7 So. 831.

Dismissal.

47. The law of Louisiana requires appellant to furnish the necessary stamps for the citation of appeal, and when, owing to his failure so to do, the citations are not issued and served, his appeal will be dismissed.—*Schmitt v. Rabasse*, (La.) 7 So. 746.

48. On a motion to dismiss an appeal, appellee may urge want of citation and other reasons, and all the reasons must be considered as urged in the alternative.—*Schmitt v. Rabasse*, (La.) 7 So. 746.

49. On motion to dismiss an appeal for want of citation, the appellee, by relying on grounds supplementary to the want of citation, does not waive that ground.—*Schmitt v. Rabasse*, (La.) 7 So. 746.

50. The law of Louisiana requires the appellees to file all their grounds for dismissal of appeal within three days. Hence, provided they plead want of citation as the first ground, it will not be waived by the subsequent addition of other grounds.—*Schmitt v. Rabasse*, (La.) 7 So. 746.

51. Since, under Const. La. art. 81, the supreme court has jurisdiction of tax-suits in which the amount involved is less than \$2,000 only where the legality or constitutionality of the tax is involved an appeal from a judgment for license taxes of a less amount will be dismissed *ex proprio motu*, where the pleadings in the cause contain no suggestion as to the illegality or unconstitutionality of the tax.—*State v. Frank*, (La.) 7 So. 474.

52. The failure to file a transcript of appeal seasonably, on a regularly obtained and perfected appeal, is equivalent to an abandonment of the same, and warrants the dismissal of another similar appeal, subsequently obtained.—*Succession of Liula*, (La.) 7 So. 585.

53. Where there has been no legal service on appellee of a citation 25 days before the term of the supreme court, to the first day of which it was made returnable, as required by the laws of Florida, nor was the writ placed in the hands of an officer authorized to serve it, a new citation, returnable to a day in term, will not be granted by that court, but the appeal will be dismissed.—*Williams v. Hutchinson*, (Fla.) 7 So. 852; *Jensen v. Walther*, Id. 854.

54. A motion to dismiss an appeal on account of the failure of the appellant to file the transcript in the supreme court on or before the first day of the term to which the appeal is returnable cannot be based upon the transcript filed by the appellant before the entry of the motion, under *Thomp. Dig.* p. 448, § 1, providing that the appellee shall produce a certificate of the clerk of the court below that such appeal has been taken.—*Kimball Lumber Co. v. Ruge*, (Fla.) 7 So. 873.

Questions raised on motion to dismiss.

55. A judgment rendered declaring a surety good and solvent, and allowing an appellant to furnish a new bond, cannot be reviewed on a motion made in the supreme court to dismiss the appeal taken from the judgment on the merits of the controversy.—*Huntington v. Bordeaux*, (La.) 7 So. 553.

Remand for further testimony.

56. In a suit against a railroad company for personal injuries, the supreme court will notice a relevant fact proved in a prior suit by another plaintiff growing out of the same accident; and, in furtherance of justice, the second case will be remanded for testimony on that point.—*Palau v. Illinois Cent. R. Co.*, (La.) 7 So. 839.

Application.

For insurance, see *Insurance*, 4-7.
removal of causes, see *Removal of Causes*.

ARBITRATION AND AWARD.

Submission.

1. When in a pending suit the case is referred to arbitrators, no statement in writing signed by the parties of the matter in dispute, as required by Code Ala. § 3223, is necessary, as that section only applies to disputes submitted when no suit is pending.—*Snodgrass v. Ambester*, (Ala.) 7 So. 840.

Appointment of arbitrators.

2. When one of the arbitrators agreed on by the parties to a pending suit declines to act, and another is substituted by agreement, a memorandum of the substitution on the submission is not necessary, under Code Ala. § 3223, which requires such memorandum in cases submitted when no suit is pending.—*Snodgrass v. Ambester*, (Ala.) 7 So. 840.

Argument of Counsel.

See *Criminal Law*, 32, 33; *Trial*, 3.

Arrest of Judgment.

See *Judgment*, 17.

ASSAULT AND BATTERY.

By teacher, see *Schools and School-Districts*, 5.
With intent to kill, see *Homicide*, 10-12.

Criminal prosecution — What constitutes.

Where a person aims and discharges a pistol at another, and raises a stick within striking distance as if to strike him, and the latter, to prevent injury to himself, seizes the former, and they struggle together, the former is guilty of assault and battery.—*Englehardt v. State*, (Ala.) 7 So. 154.

Assessment.

Of taxes, see *Taxation*, 10-17.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Validity.

1. A deed of assignment for benefit of creditors, directing the assignee "to dispose of, for cash or otherwise, as is customary or according as the law directs, or shall be agreed upon by a majority of the said creditors, all of said property," etc., is not void for ambiguity, but will be interpreted to direct the assignee to sell for cash or on time, as is customary in cases of assignments, or as the law directs in such cases, or to sell for cash or on credit, as a majority of the creditors may agree.—*Baum v. Pearce*, (Miss.) 7 So. 548.

2. An assignment with preferences, for benefit of creditors, which provides—*First*, for all creditors mentioned in Schedule A; *second*, for those in Schedule B; and, *third*, for those in Schedule C,—is not void, as vesting the assignee with indefinite discretion, because of a clause directing assignee to pay any omitted creditor *pro rata* with those mentioned in Schedule C.—*Armstrong v. Guenther*, (Miss.) 7 So. 499.

Retention of property by assignor.

3. An assignment for benefit of creditors is fraudulent in law if the assignor, after the execution of the deed of assignment, retains possession and control of choses in action which are included in the deed; and his intention with reference thereto is immaterial.—*Baum v. Pearce*, (Miss.) 7 So. 548.

Reservation of exemptions.

4. A reservation of "all legal exemptions" contained in an assignment for benefit of creditors renders it executory, and title will not pass as against an attachment until the debtor's right of selection of exempt property has been exercised.—*Myers v. Conway & Co.*, (Ala.) 7 So. 689.

Fraud.

5. The fraudulent intent of the assignor did not avoid an assignment for the benefit of creditors when neither the assignee nor the creditors knew of, or participated in, the fraud.—*Truss v. Davidson*, (Ala.) 7 So. 812.

6. The fact that, while a deed of assignment for the benefit of creditors was in course of preparation, the assignor, without the knowledge of the assignee or of the creditors, sold goods at reduced prices, and failed to pay over the proceeds to the assignee, does not avoid the assignment.—*Truss v. Davidson*, (Ala.) 7 So. 812.

The assignee—Actions.

7. That an assignee for the benefit of creditors, pending a suit against a sheriff to recover goods attached after the assignment, agreed with the assignor that the sheriff might sell the goods at private sale, did not constitute an abandonment of the suit; and its only effect was to limit the amount of the recovery to the sum realized at the sale.—*Truss v. Davidson*, (Ala.) 7 So. 812.

Associations.

See *Corporations; Insurance.*

ASSUMPSIT.

When lies.

1. Where plaintiff and defendant enter into a contract under which defendant is to cut and saw timber on plaintiff's land, defendant to receive three-fourths of the lumber and plaintiff one-fourth, plaintiff cannot maintain *assumpsit* for money had and received on defendant's refusal to turn over plaintiff's fourth, the title to which has always remained in him, and no part of which has ever been sold.—*Snodgrass v. Coulson*, (Ala.) 7 So. 786.

2. *Assumpsit* for money had and received does not lie against one who has purchased cotton alleged to have been mortgaged to plaintiff, when it does not appear that defendant has sold the cotton, or held it long enough to raise a presumption of its sale.—*Moody v. Walker*, (Ala.) 7 So. 246.

3. A woman who keeps a room in her house to be visited and occasionally occupied by her concubine, without any contract for the payment of rent by the latter, cannot enforce such payment.—*Stringer v. Mathes*, (La.) 7 So. 220.

Pleading.

4. Where the complaint in *assumpsit* contains two common counts, and a third declaring on a written agreement to purchase stock of plaintiff corporation for a sum certain, a special plea assuming to answer the whole complaint, but alleging only fraud in the procurement of the instrument set out in the third count, is demurrable, as answering only a part of the complaint.—*Werth v. Montgomery Land & Imp. Co.*, (Ala.) 7 So. 193.

Evidence.

5. In an action against the succession of G. to recover plaintiff's share of money received by G. in a cattle transaction, the only evidence in plaintiff's favor was his own testimony that he had an interest in the cattle, and that G. had concealed from him the fact that he had been paid for the cattle, which had been taken by the federal army. It was shown that on the hearing of G.'s claim for such cattle before the southern claims commission, plaintiff made affidavit that he had purchased the cattle for G., and he testified that he had no interest whatever in the claim then pending. It appeared, furthermore, from the number of cattle bought for G., and the number taken by the army, that there had been a heavy loss in the herd, but no reduction was made in plaintiff's claim to correspond to this loss. For 10 years prior to G.'s death no demand was made for plaintiff's claim. *Held*, that the evidence was not sufficient to entitle plaintiff to recover.—*Footo v. Godwin*, (La.) 7 So. 844.

6. A lessee agreed to tear down and reconstruct certain buildings at his own expense. Plaintiffs contracted with him to do the work, and the specifications provided for the insertion of certain joists in a wall left standing. The lessor objected to this as unsafe, and at his suggestion an architect proposed a different plan, which was adopted by the lessee's superintendent. The lessor, being notified, made no objection. The suit was brought to recover for the extra work as done at his request. *Held* no evidence of a request, and a verdict was properly directed for defendant.—*Thorn v. Roman*, (Ala.) 7 So. 423.

7. The plaintiff having given her father money which three years before she received from him, and the circumstances tending strongly to show that it was put in her hands for safe-keeping, it is not material error to charge, in an action against the father's estate for money lent, that the plaintiff's possession does not raise the presumption of ownership.—*Ray v. Jackson*, (Ala.) 7 So. 747.

ATTACHMENT.

See, also, *Execution; Garnishment.*

For witness, see *Witness*, 24-26.

Papers in attachment proceedings as evidence, see *Evidence*, 24.

Levy.

1. Code Ala. § 2956, authorizing an attachment issued by a justice for a sum exceeding his jurisdiction, and returnable in the circuit court, to be levied by the constable in whose beat the process issued, provided the amount does not exceed the amount of the constable's bond, refers only to the regular constable; and such a levy by a special deputy is void.—*Carter v. Palmer*, (Ala.) 7 So. 531.

2. Where defendants in attachment are described in the affidavit and in the writ as "O. & J. P., partners under the style of P. Bros.," the attachment may be levied either on partnership effects or on the individual property of the members, the obligations of partners under the laws of Alabama being joint and several.—*Dollins v. Pollock*, (Ala.) 7 So. 904.

Lien.

3. Where an attachment has been sued out against the defendants in an action, and plaintiffs suffer a voluntary nonsuit in such action, which, however, is set aside on their motion at the same term, the lien of that attachment is left as it was before the nonsuit was granted.—*Dollins v. Pollock*, (Ala.) 7 So. 904.

4. Where property has been seized on attachment, and the claim of a third person thereto interposed, it is in the custody of the law, and cannot be transferred to a receiver appointed on the filing of a creditors' bill at the suit of other creditors of the defendant.—*Dollins v. Lindsey*, (Ala.) 7 So. 284.

Priority.

5. A creditor who, after an insufficient levy of a writ of attachment, files a bill to set aside as fraudulent a conveyance made by the debtor to his wife before the attachment, and thereby fixes a lien under Code Miss. §§ 1843, 1845, has priority, though the decree setting aside the conveyance, and subjecting the land to his debt, is not rendered till after judgment for plaintiff in the attachment proceedings.—*People's Bank v. West*, (Miss.) 7 So. 513.

Return.

6. The return of a writ of attachment of land occupied as a residence by defendant, which recites that it was levied on the land, describing it by metes and bounds, and that a true copy of the process was delivered to defendant, is insufficient, under Code Miss. § 2424, requiring that in such case the officer shall go to the house of defendant, and there declare that he attaches the land; and section 2425, which requires the officer serving the writ to make a full return of his proceedings,—and no lien is fixed thereby.—*People's Bank v. West*, (Miss.) 7 So. 513.

Procedure.

7. Failure by an attaching creditor to comply with Rev. Code Miss. 1880, § 2487, which requires him, in case of attachment against a non-resident defendant, to file "with the proper officer his affidavit, if the affidavit for the attachment does not contain such notice, showing the post-office address of the defendant, or that he has made diligent inquiry to ascertain it without success," will nullify all subsequent proceedings in the cause.—*Drysdale v. Biloxi Canning Factory*, (Miss.) 7 So. 541.

8. Code Ala. § 2936, providing for notice by publication of attachment against the property of a non-resident, applies as well to attachments based on a fraudulent disposition of his property by the debtor as to those based on the fact that he has left the state.—*Dollins v. Pollock*, (Ala.) 7 So. 904.

9. Under Rev. Code Miss. 1880, § 2423, which provides that, if defendant in attachment proceedings can be found, the officer serving the writ shall summon him to appear and answer the action, a failure by the officer to summon defendant or to show that he could not be found is fatal to the attachment proceeding.—*Drysdale v. Biloxi Canning Factory*, (Miss.) 7 So. 541.

Claims by third persons.

10. The affidavit for attachment is not admissible in evidence on the trial of the claims of third

persons who allege that they had purchased the property levied on before the levy.—*Dollins v. Pollock*, (Ala.) 7 So. 904.

11. Where goods attached upon the ground of fraud were claimed by a purchaser from defendant, and, on trial of the issue of defendant's indebtedness, the transfer was shown to be fraudulent on his part, the burden was on the claimant, on the question of sustaining the attachment, to show that he was an innocent purchaser for value.—*Richards v. Vaccaro*, (Miss.) 7 So. 506.

Wrongful attachment.

12. Plaintiff's agent presented a bill to defendant, which the latter offered to pay if a certain undisputed credit were allowed thereon. The agent refused the offer, and immediately attached defendant's property. *Held*, that the attachment was wrongful, and damages were properly awarded therefor.—*Feld v. Portwood*, (Miss.) 7 So. 492.

Attestation.

Of wills, see *Wills*, 3.

ATTORNEY AND CLIENT.

Argument of counsel, see *Criminal Law*, 32, 33; *Trial*, 3.

Retainer and authority.

1. An attorney retained to defend a suit to sell land under a deed of trust has no authority, after rendition of a decree of sale, to bind defendant by consenting to a certain manner of sale.—*Person v. Leathers*, (Miss.) 7 So. 391.

2. The defendant sent a claim to a mercantile agency for collection, instructing them by letter that they or their attorneys were authorized to make any arrangements deemed by them necessary to a prompt collection thereof. Subsequently the attorney of defendant notified the plaintiffs, the attorneys in whose hands the claim was placed by the agency, of a settlement thereof, and directed a surrender to the debtor of the papers in their hands. *Held*, that this evidence did not show an employment of plaintiffs by defendant, and that defendant was not liable for the services performed.—*Milligan v. Alabama Fertilizer Co.*, (Ala.) 7 So. 650.

Lien for services.

3. An attorney retained by a legatee to procure the establishment of a will has no lien for his services on the legacy to his client.—*Fuller v. Cason*, (Fla.) 7 So. 870.

Baggage.

See *Carriers*, 26.

BAIL.

When allowed.

1. Under Declaration of Rights Fla. § 9, making all offenses bailable except "capital offenses, where the proof is evident or the presumption great," bail will be denied a person under indictment for murder where the evidence adduced is such that if a jury had found a verdict of guilty of a capital offense a judge would sustain the conviction, or refuse to grant a new trial.—*Thrasher v. State*, (Fla.) 7 So. 847.

2. Where a party is in custody under an information charging him with a bailable felony, and the judge of the criminal court of record before which he is charged refuses to take any action whatever in the case, either as to bail or trial, on the ground that he is disqualified by reason of interest and affinity to act, and it does not appear to the supreme court on a *habeas corpus* proceeding that the judge is disqualified, bail conditioned for the party's appearance before the criminal court of record will be allowed.—*Ex parte Harris*, (Fla.) 7 So. 1.

Surrender of principal.

3. Under Code Ala. 1886, § 4420, providing that bail may, at any time before they are finally discharged, exonerate themselves by surrendering

the defendants, they are released from all liability by a surrender made after default and judgment *nisi* requiring them to show cause why it should not be made final.—*Bearden v. State*, (Ala.) 7 So. 755.

Release—Arrest for another offense.

4. Where defendant has been released on bail, his subsequent arrest for another offense does not, *ipso facto*, discharge the sureties on the bond.—*Tedford v. State*, (Miss.) 7 So. 359.

Forfeiture.

5. When the forfeiture of an appearance bond has been set aside, the accused stands before the court as though no proceeding of forfeiture had taken place; and it is his duty, in complying with the conditions of the bond, to appear from day to day until the charge against him is legally disposed of, and for his failure so to do a second judgment of forfeiture may be rendered.—*State v. Cornig*, (La.) 7 So. 698.

6. Where the surety in an appearance bond in a criminal case files a motion to set aside a forfeiture thereof, which is taken under advisement, and the forfeiture is subsequently set aside on motion of the prosecuting attorney, the surety cannot object to a second judgment of forfeiture that his motion to set aside the former one is still pending undisposed of.—*State v. Cornig*, (La.) 7 So. 698.

7. Under Const. La. art. 180, declaring that the criminal district court of the parish of Orleans shall have general criminal jurisdiction only, such court may enter a judgment of forfeiture of an appearance bond in a criminal case, that being a proceeding criminal in its nature.—*State v. Cornig*, (La.) 7 So. 698.

Proceedings on bail-bond—Judgment.

8. A judgment *nisi* against a principal and his sureties on a bail-bond recited that they had bound themselves by a recognizance instead of a bail-bond. At the next term this recital was amended to show that it was taken on a bond, and judgment final was entered. *Held*, that the mistake in the recital was, at most, an irregularity, assignable for error on appeal, and did not affect the validity of the judgment in a collateral attack.—*State v. Ricketts*, (Miss.) 7 So. 283.

9. An absolute judgment may be taken against the sureties alone on a forfeited bail-bond, under Code Miss. § 3043, which provides that judgment final may be rendered on a forfeited bail-bond on a return of "Not found" to two writs of *scire facias* thereon.—*Thompson v. State*, (Miss.) 7 So. 403.

10. Failure to dismiss the suit against the principal before taking final judgment against the sureties cannot be assigned for error on appeal by the latter, under Code Miss. § 1440, which provides that no appellant shall be entitled to a reversal because of an error in the judgment against another not affecting his rights.—*Thompson v. State*, (Miss.) 7 So. 403.

— Scire facias.

11. In a suit in the nature of a *scire facias* to revive a judgment of forfeiture of an appearance bond in a criminal case, where the minutes of the court contain no record of the forfeiture, the record cannot be supplied by parol testimony.—*State v. Doyle*, (La.) 7 So. 699.

12. In a suit, in the nature of a *scire facias*, to revive a judgment of the forfeiture of an appearance bond in a criminal case, and to cause execution to issue thereon, it is not necessary to advertise the loss of the bond before giving evidence of its description, as required by Rev. Civil Code La. art. 2280, as the suit is not founded on the bond, but on the judgment of forfeiture.—*State v. Doyle*, (La.) 7 So. 699.

13. A *scire facias* which cites defendants to appear at the next term of the circuit court to be held in G. is not void for omission of the day of the month, as the law fixes the date for the beginning of the term.—*State v. Ricketts*, (Miss.) 7 So. 283.

Bailment.

See *Carriers*; *Pledge*.

BANKS AND BANKING.

Taxation.

1. Real estate owned by a bank constitutes part of its assets, within the meaning of Code Miss. §§ 557, 558, as amended by Laws 1888, providing that banks shall pay a privilege tax, whose amount varies with their "capital stock or assets," in lieu of all other taxes.—*Vicksburg Bank v. Worrell*, (Miss.) 7 So. 219.

— Constitutional law.

2. Code Miss. 1880, §§ 557, 558, as amended by Laws 1888, which provide for a privilege tax to be paid by banks, and vary the amount with reference to the capital stock or assets, and declare that such tax "shall be in lieu of all other taxes, state, county, and municipal, upon the shares and assets of said banks," are not unconstitutional under Const. Miss. art. 12, § 13, which declares that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals," as the legislature has the power to exempt property from taxation whether the owners be corporations or natural persons.—*Vicksburg Bank v. Worrell*, (Miss.) 7 So. 219.

3. Nor do they violate section 16, which declares that "no county shall be denied the right to raise, by special tax, money sufficient to pay for * * * conveniences for the people of the county, * * * provided the tax thus levied shall be a certain per cent. on all tax levied by the state," as by this section the right of the counties under it is limited to the levy of "a certain per cent. on all tax levied by the state," and the subjects of taxation are to be determined by the legislature.—*Vicksburg Bank v. Worrell*, (Miss.) 7 So. 219.

Insolvency.

4. A person directed his bank to pay certain debts, which would mature during his absence, and gave a check to cover the amount. The bank paid one creditor with a sight draft on its own correspondent, and failed before the draft was paid. A receiver was appointed, and plaintiff, holder of the draft, filed a bill to have the receiver declared a trustee of the assets for its benefit. *Held*, that a trust was not created by the mere revocable direction of the debtor, to which plaintiff was not a party.—*Louisville Banking Co. v. Paine*, (Miss.) 7 So. 462.

National banks—Stockholders' inspection of books.

5. Code Ala. 1886, § 1677, which provides that stockholders of all private corporations have the right to have access to, and inspection and examination of, the books, records, and papers of the corporation, at all reasonable and proper times, applies to national banks located within the state; and *mandamus* will lie against the officer having custody of the books to enforce the right.—*Winter v. Baldwin*, (Ala.) 7 So. 734.

6. The rights of stockholders conferred by the above statute are not curtailed by, nor is the statute in conflict with, Rev. St. U. S. §§ 5240, 5241, which provide that national banks are subject to examination by an officer appointed by the comptroller of the treasury for that purpose, and that they shall not be subject to visitatorial powers other than those authorized by congress, or vested in the courts of justice.—*Winter v. Baldwin*, (Ala.) 7 So. 734.

Bill of Exceptions.

See *Exceptions, Bill of*.

Bills and Notes.

See *Negotiable Instruments*.

Bona Fide Purchasers.

See *Vendor and Vendee*, 20.

Of corporate stock, see *Corporations*, 12.

BONDS.

See, also, *Principal and Surety*.

For injunction, see *Injunction*, 10.

Of bridge builder, see *Bridges*, 3-5.

county treasurer, see *Counties*, 4-7.

On appeal, see *Appeal*, 21-26.

Actions on bonds.

Under Code Miss. §§ 1754, 1755, providing for giving an indemnity bond to a sheriff levying on property, conditioned to pay to any person "claiming title to the property seized" all damages sustained by such person in consequence thereof, and declaring that "any person claiming the property levied on may prosecute a suit" on the bond, persons who claim a right in property levied on by virtue of a deed of trust given to secure a debt due them cannot sue on such a bond, as usces, in the name of the sheriff.—*Marshall v. Stewart*, (Miss.) 7 So. 284.

BOUNDARIES.

Map—Street line.

1. Under a deed of land bounded by a street, according to a map referred to, the line of the street as actually surveyed is the boundary of the land conveyed.—*Andreu v. Watkins*, (Fla.) 7 So. 876.

Conflicting conveyances.

2. Where parties owning contiguous estates derive title from a common author, and a controversy arises as to the boundary between them, the elder title must be first satisfied, and, when that title conveys a fixed quantity of land, the holder is entitled to take such quantity.—*Keller v. Shelmire*, (La.) 7 So. 587.

Adverse possession.

3. The possession of one who makes a fence, intending to put it on the true line, and, believing that he has done so, holds up to it under a claim of right, is adverse, and, if open, actual, and continuous for the statutory period, it vests in him absolute title, though before the limitation had run in his favor he had doubts as to his title, or a belief that the strip next the fence did not belong to him.—*Hoffman v. White*, (Ala.) 7 So. 816.

4. Possession taken and held under a claim of right by one of the owners of adjacent lands to an erroneous line agreed on by them under a belief that it is correct is adverse, and, if continued for the statutory period, ripens into a perfect title.—*Hoffman v. White*, (Ala.) 7 So. 816.

BREACH OF THE PEACE.

Indictment.

A charge that defendant did willfully disturb the peace of one H. by saying to him that, if he did not "dry up," he would "slap hell" out of him, and that, if he got up out of that chair, he would kill him, does not allege a criminal offense, under Code Miss. § 2769, punishing the willful disturbance of the peace of any family or person by loud or unusual noise, or by any tumultuous or offensive conduct, nor under section 2770, making it an offense to enter the dwelling-house of another, and, in the presence or hearing of the family or of any member thereof, make use of "abusive, profane, vulgar, or indecent language."—*Brooks v. State*, (Miss.) 7 So. 494.

BRIDGES.

Powers of counties.

1. The building of a bridge in a town to carry one of its streets, which is not a county highway, across a river, where such bridge will be of no benefit to the inhabitants of the county outside of the town, is not a "county purpose," for which alone such county is authorized by Const. Fla. art.

9, § 5, to assess and impose taxes.—*Skinner v. Henderson*, (Fla.) 7 So. 464.

2. Under the Florida statutes authorizing counties to build bridges within their limits without restriction as to locality, the charter of a city authorizing it to build bridges within its corporate limits does not affect the authority of the county to assist in the building of such bridges where they are a benefit to its inhabitants outside of the city, although they are constructed under contracts with the city, which is to control them after completion.—*Skinner v. Henderson*, (Fla.) 7 So. 464.

Bond of builder.

3. Where a bridge builder executes a bond conditioned that the bridge built shall be "kept in good repair," and shall "remain safe continuously for the period of five years, for the passage of travellers," etc., and said bridge is washed away by flood within less than five years, an action will lie on the bond for breach thereof, upon failure to rebuild.—*Meriwether v. Lowndes County*, (Ala.) 7 So. 198.

4. Code Ala. 1896, § 1457, which provides that where a bridge is guaranteed by the bond of the builder to stand for a stipulated period, and said bridge is washed away, the commissioners' court shall, upon the fact being made known to them by any freeholder of the county, notify the contractor to rebuild, and, in case of his refusal or neglect to do so in a reasonable time, shall order suit to be brought on such bond, does not make the giving of such information by a freeholder a condition precedent to the action of the court in giving notice to rebuild, or its authority to order suit brought, but it makes a duty, otherwise discretionary, mandatory on the court.—*Meriwether v. Lowndes County*, (Ala.) 7 So. 198.

5. Where the bond of a contractor recites that the consideration paid by the county is both for the work of building a bridge and for the execution of the bond, and one of the undertakings of said bond is an obligation to keep the entire bridge in good repair for a stipulated period, the obligor cannot avoid his liability to rebuild as to one span because the county furnished all the materials for this part of the bridge, and paid him the additional sum of \$25 for superintending its erection.—*Meriwether v. Lowndes County*, (Ala.) 7 So. 198.

Injuries from defects.

6. Where a bridge maintained by a railroad company as an approach to a crossing is reasonably safe and convenient for the use of the traveling public, the company is not responsible for an injury sustained by the stepping of plaintiff's mule through a hole which is near one end of the bridge, and out of the usual route of travel.—*Patterson v. South & North Ala. R. Co.*, (Ala.) 7 So. 487.

Burden of Proof.

See *Evidence*, 6, 7.

BURGLARY.

Indictment.

1. An indictment which charges an offender with breaking and entering a store-house, used as a dwelling-house, in which a person was at the time residing, is equivalent to charging that the offender did break and enter a dwelling-house, a person being lawfully therein; and such indictment contains the essential elements of the crime of burglary, and is sufficient.—*State v. Frank*, (La.) 7 So. 181.

— Variance.

2. Where an indictment for the burglary of a store lays the ownership of the premises in "W. H. B., business manager" of a private corporation, while the evidence shows that the store belongs to the corporation, the variance is not cured by the fact that the manager also used the store as a post-office, with which the corporation had nothing to do; the presumption being, in conformity to the custom of the country, that he carried on the post-

office as licensee of the corporation, and not as its tenant.—*Aldridge v. State*, (Ala.) 7 So. 48.

Evidence.

3. Where there is evidence that defendant had a defective foot, and that tracks made by the burglar showed a similar deformity, an instruction that the jury could not find defendant guilty from this fact alone is properly refused, as it singles out one criminalizing circumstance, thus tending to mislead and confuse the jury, and necessitating an explanatory charge.—*Cooper v. State*, (Ala.) 7 So. 47.

4. Defendants were indicted for burglary under Rev. St. La. § 850, in that they, with intent to kill, broke and entered the house of one D., they being armed at the time with dangerous weapons. Defendants admitted the breaking and entering, and it was shown that while they were leaving the house D. shot at them, and they returned his fire and seriously wounded him. They offered evidence to show that they constituted an unlawful organization of "Regulators" or "White Caps," and as such went to D.'s house for the purpose of breaking up an unlawful cohabitation between him and a certain woman, and that they proposed to effect their purpose by whipping the woman. *Held*, that the evidence was admissible as tending to show that their intent was not to kill, since without proof of the intent as charged in the indictment defendants could not be convicted.—*State v. Meche*, (La.) 7 So. 578.

— Sufficiency.

5. There were \$600 worth of goods in a store at the time of an alleged burglary, and upon going to the store some time during the night the owner found that some one was inside, whereupon he hallooed, and the defendant and another person jumped out of a window which had been broken open, and upon entering the store the owner found various articles of merchandise packed in sacks. *Held*, that the evidence was sufficient to warrant the jury in finding that the defendant broke and entered the building with the intent to steal goods of the value of more than \$20.—*Clifton v. State*, (Fla.) 7 So. 868.

Instructions.

6. On a trial for burglary, a requested charge, that "the jury may look to the fact that the defendant worked with Mr. Black [the owner of the house entered] after this alleged offense, to see whether or not this shows guilty conscience on his part; and, if they think it tends to show innocence on his part, then they ought to consider such evidence, and give the defendant the benefit of all proper inferences,"—is properly refused, as being merely argumentative.—*Riley v. State*, (Ala.) 7 So. 104.

7. The indictment charged the defendant with breaking and entering a store in the night-time, with intent to commit larceny, and the court charged the jury, if they found that the defendant broke and entered the building as charged in the indictment, they should convict. *Held*, that the charge referred to the indictment in its entirety, the time of the breaking and entering being included, and was therefore not erroneous in not charging more specifically that the breaking and entering must be in the night-time.—*Clifton v. State*, (Fla.) 7 So. 868.

CANALS.

Liabilities of canal company.

No obligation having been imposed by contract or express provision of law upon the defendant canal company to build levees along the banks of its canal, a city through which the canal passed was not authorized to construct such levees, and recover the cost thereof from defendant.—*City of New Orleans v. Carondelet & Canal Nav. Co.*, (La.) 7 So. 68.

Cancellation.

Of contracts, see *Equity*, 2-10.

CARRIERS.

See, also, *Horse and Street Railroads; Railroad Companies.*

Of goods—Delivery and acceptance.

1. A car-load of bricks was consigned to plaintiff at "Cloverfield Sta." There was no station agent or side track there, and no one was upon the ground to receive the bricks. After waiting a few minutes, during which the locomotive whistle was repeatedly sounded, the car was carried to a station a mile beyond, and left upon a side track. Held that, since the loaded car could not be left upon the track, it was the duty of the company to unload and leave the bricks upon the ground, and, the freight having been prepaid, plaintiff was entitled to recover their value.—*Louisville & N. R. Co. v. Gilmer*, (Ala.) 7 So. 654.

2. The fact that, on the following day, certain tenants of plaintiff asked at the station if plaintiff's bricks had come, and unloaded and placed them upon the ground, was not sufficient, in the absence of other proof of authority, to show that they received them as his agents.—*Louisville & N. R. Co. v. Gilmer*, (Ala.) 7 So. 654.

3. In an action by the assignee of a bill of lading against a railroad company for failure to deliver part of the items mentioned therein, it is a good defense for the railroad company to show that it gave the bill of lading on delivery to it of a warehouse receipt authorizing the delivery to it of the items mentioned therein, and that only those items were delivered to it which it afterwards delivered to plaintiff.—*Hazard v. Illinois Cent. R. Co.*, (Miss.) 7 So. 280.

4. Act Miss. 1886, making a bill of lading in the hands of an innocent purchaser conclusive evidence of the receipt by the railroad company of the items mentioned therein, is not retroactive, as it is not a mere rule of evidence, but changes the character and legal effect of the contract evidenced by the bill of lading.—*Hazard v. Illinois Cent. R. Co.*, (Miss.) 7 So. 280.

— Liability for loss or injury.

5. The burden is on a carrier which delivers goods in a damaged condition, and which are shown to have started on their journey over connecting lines in good condition, to show that the injury did not occur by its default.—*Mobile & O. R. Co. v. Tupelo Furniture Manuf'g Co.*, (Miss.) 7 So. 279.

6. Though the measure of damages in an action against a common carrier for failure to deliver cotton which it has undertaken to transport is the value of the cotton at the point of destination, with interest from the time it should have been delivered, less freight charges, yet evidence of the value at the point of shipment is relevant to the inquiry as to value at the point of delivery; and the carrier cannot complain that the proof of value is confined to the place of shipment, as the presumption is that the value there is less than at the point of destination.—*Echols v. Louisville & N. R. Co.*, (Ala.) 7 So. 655.

— Liability as warehousemen.

7. The liability of a carrier, as such, does not end, and its liability as a warehouseman begin, until a reasonable time after the goods have reached their destination, and have been deposited in the carrier's depot or warehouse, or otherwise made ready for delivery to the consignee. Explaining *Railway Co. v. Kidd*, 35 Ala. 209.—*Columbus & W. Ry. Co. v. Ludden*, (Ala.) 7 So. 471.

8. Notice to the consignee of the arrival of the goods at their destination is not necessary before the reasonable time begins to run after which the carrier's liability as such terminates, and its liability as a warehouseman begins, unless the place of destination is a town of 2,000 inhabitants, having a daily mail, in which case such notice is required by Code Ala. § 1180.—*Columbus & W. Ry. Co. v. Ludden*, (Ala.) 7 So. 471.

9. As to what is a reasonable time after the lapse of which liability as a carrier ends, and that of a warehouseman begins, is a question of law

for the court.—*Columbus & W. Ry. Co. v. Ludden*, (Ala.) 7 So. 471.

10. The fact that the consignee lives 23 miles from the place to which the goods are consigned will not be considered in determining what is a reasonable time after the arrival of the goods within which he should have called for them.—*Columbus & W. Ry. Co. v. Ludden*, (Ala.) 7 So. 471.

11. Where a piano, which could have been removed from the carrier's depot in about an hour, was shipped over a continuous line of railroad, and the distance from the place of shipment to the destination is such that the property might reasonably have been expected to arrive on the day of the shipment or the next day, and it is allowed to remain three days after its arrival, the carrier will be held liable only as a warehouseman.—*Columbus & W. Ry. Co. v. Ludden*, (Ala.) 7 So. 471.

— Live-stock shipments.

12. A railroad company, which, without giving the shipper an opportunity to attend to the loading, puts cattle carried over its own line in cars furnished by another company, hauls them over a connecting track, and then delivers to it, is liable, in tort for breach of duty growing out of the contract of shipment, for injuries in transit over the second line, caused by negligence at the time of the transfer in not supplying bedding and partitions, and in overcrowding, though the contract of shipment limits the carrier's liability to "gross or wanton negligence," and to that of a forwarding agent only in delivering to the next line, and provides that the shipper is to load and unload and care for the cattle.—*Alabama G. S. R. Co. v. Thomas*, (Ala.) 7 So. 763.

13. An agent at a station at which cattle are to be turned over by one railroad company to another, who has authority to keep them in the original cars, or to transfer to others, acts in the scope of his employment in telling the shipper that there will be no change, and thereby relieves him of the duty imposed by the bill of lading of preparing and loading the cars.—*Alabama G. S. R. Co. v. Thomas*, (Ala.) 7 So. 763.

— Limiting liability.

14. A provision in a carrier's receipt that, if the value of the goods delivered is not stated by the shipper at the time of shipment, and specified in the receipt, the holder will not demand more than a particular sum for loss or damage, exempts the carrier from greater liability, only when the loss occurs without negligence on its part, and the burden is on the carrier to show absence of negligence.—*Southern Exp. Co. v. Seide*, (Miss.) 7 So. 547.

— Connecting lines.

15. In an action against the last but one of a chain of connecting carriers for loss and damage to goods shipped over its line, where it is shown that the goods were delivered to the first carrier in good order, but were damaged in part, and some lost when delivered by defendant to the last carrier, the burden is upon defendant to show that the loss or damage had occurred when it received the goods, since such facts are peculiarly within its own knowledge, and the presumption is that the goods remain in the condition in which they were originally shipped; and, if it fails to show this, plaintiff is entitled to recover.—*Savannah, F. & W. Ry. Co. v. Harris*, (Fla.) 7 So. 544.

Of passengers—Contract of carriage.

16. A brakeman employed on a freight train in charge of a conductor has no implied authority to bind the company by a contract of passage, and his permission to a person to ride does not make such a person a passenger.—*Candiff v. Louisville, N. O. & T. Ry. Co.*, (La.) 7 So. 601.

17. Plaintiff's husband bought for her a regular ticket, to be used on a freight train with passenger-coach attached, which was run under special regulations posted at the stations, to the effect that the train could not be required to stop at the platforms of stations to take on or put off passengers. Special tickets, in accordance with such regulations, were sold for this train, but the agent at the time had none on hand, and the husband

was acquainted with the regulations. Plaintiff and her husband waited on the platform for the train to be pulled up, not because they expected it to do so as a custom, but because they had been informed by a by-stander that he had requested the conductor to do so, and the train pulled out and left them. Plaintiff then bought another regular ticket for the passenger train, which did not pass till night, and brought an action against the company for damages. *Held* that, as the regulation prescribed was a reasonable one, plaintiff was not entitled to recover.—*Connell v. Mobile & O. R. Co.*, (Miss.) 7 So. 844.

Injuries to passengers.

18. As defendant's train was approaching a station, its name was called, and the train was stopped very soon thereafter, to take the side track for the passage of another train. When it stopped, plaintiff, whose destination it was, went out of the rear door of the car, and was descending with one foot on the first step of the car, and the other about touching the ground, when the train moved to go forward to the depot, which caused him to fall. The place of the stoppage was in a cut, about 300 yards from the depot building. It was about 1 o'clock p. m. All the surroundings indicated that the spot at which he attempted to leave the train was not the proper place for alighting. *Held*, that defendant was not liable for the injuries caused by the fall.—*Smith v. Georgia Pac. Ry. Co.*, (Ala.) 7 So. 119.

19. In an action for injuries received by plaintiff, a colored man, while a passenger on defendant's train, it appeared that he was requested to leave a car where he was seated, and go into another car, because of his boisterous conduct, but refused to go into the other car, and remained on the car platform, where he received the injuries sued for, from another passenger. *Held*, that instructions that, as the law required separate accommodations on railroad trains for white and colored people, if defendant's failure to provide such separate cars was the proximate cause of plaintiff's injuries, he could recover, were properly refused.—*Royston v. Illinois Cent. R. Co.*, (Miss.) 7 So. 820.

20. On being told by an ordinary passenger that he heard an unusually loud noise, and felt a jolt which made the car jump and aroused him, the conductor, who makes a reasonable inspection, and finds no cause for alarm, is not bound to stop the train, and his failure to do so will not make the carrier liable for a resulting injury to a passenger caused by a broken wheel.—*Irelson v. Southern Pac. Ry. Co.*, (La.) 7 So. 800.

Contributory negligence.

21. In an action against a railroad company for personal injuries, the evidence showed that plaintiff, a man of 65, on a dark and cold night, after waiting in the snow and becoming numb, attempted to board a moving train; that, with a valise in one hand, he seized the railing with the other, and attempted to leap upon the platform, but missed his footing, and was dragged 150 yards, during which time he held onto the valise. *Held*, that plaintiff was guilty of such contributory negligence that he could not recover.—*McMurtray v. Louisville, N. O. & T. Ry. Co.*, (Miss.) 7 So. 401.

22. In such case the fact that defendant's train did not stop a reasonable time, so as to allow plaintiff to get on, does not render defendant liable.—*McMurtray v. Louisville, N. O. & T. Ry. Co.*, (Miss.) 7 So. 401.

23. A passenger on a street railway who is a resident of the municipality must be held to know the rule as to the place of stopping of trains of street-cars prescribed by an ordinance of the city.—*North Birmingham St. R. Co. v. Calderwood*, (Ala.) 7 So. 860.

24. If the conductor of the street-car was not in his place on the car, and the train stopped anywhere on the street in apparent response to the pulling of the bell-cord by plaintiff, and she, believing reasonably that the stop was made for the purpose of allowing her to alight, was injured in attempting to do so, the question of contributory

negligence is one of fact for the jury.—*North Birmingham St. R. Co. v. Calderwood*, (Ala.) 7 So. 860.

Damages.

25. Where a train fails to stop at a flag station which is a passenger's destination, and he jumps from the train, receiving no injury, he cannot recover exemplary damages, but can recover nominal damages only.—*Kansas City, M. & B. R. Co. v. Fite*, (Miss.) 7 So. 223.

Baggage.

26. A passenger on a railroad, upon arriving at his destination, contracted with a transfer company to procure his baggage from the depot and deliver it at his residence, and he surrendered his checks to the company. It then refused to deliver the baggage to him until it was paid certain extra charges for transportation claimed by the railroad company, though the owner tendered the price agreed to be paid for its own service, and, on his refusal to pay these extra charges, it retained his checks for a time, and then gave them up to the railroad company. *Held* that, under the contract, the transfer company was responsible for the delivery of the baggage, and the owner might enforce his rights against it by suit and sequestration.—*Da Ponte v. New Orleans Transfer Co.*, (La.) 7 So. 606.

CARRYING WEAPONS.

What constitutes offense—Amendment of statute.

1. Code Miss. § 2985, providing that "any person not being threatened with, or having good and sufficient reason to apprehend, an attack," shall not carry concealed weapons, was amended by act March 9, 1888, which provided that the words "or having good and sufficient reason to apprehend an attack" be stricken out. *Held*, that the words "an attack" were not intended to be stricken out, and that, on a trial for violation of the section, evidence for defendant of a threatened attack on him was admissible.—*Earhart v. State*, (Miss.) 7 So. 347.

Election of offenses.

2. As the act of carrying a concealed weapon is continuous, the introduction of evidence of possession and concealment at different times, covered by the one continuous act, does not put the state to an election of the particular moment of the offense for which it will proceed to prosecute.—*Etruss v. State*, (Ala.) 7 So. 49.

Instructions.

3. In a prosecution for carrying a concealed pistol, where the only witness introduced testifies that he did not see the pistol, but that its impression on the outside of defendant's coat "was so distinct and plain that he could tell the length of the pistol, as well as its shape and size, and even the shape of the hammer," the jury alone are competent to draw the inference that the impression was made by a pistol, and a charge that they must find defendant guilty is erroneous.—*Cotton v. State*, (Ala.) 7 So. 143.

Cattle.

See *Animals*.

CERTIORARI.

When lies.

Where an action is brought under the Louisiana landlord and tenant act for the ejectment of a contumacious tenant before a justice of the peace who has apparent jurisdiction, the district court on appeal has the same jurisdiction under Code Prac. La. art. 1129, declaring that such appeals are "to be tried in the appellate court *de novo*;" and *certiorari* will not lie to it on the ground of want of jurisdiction.—*State v. Coco*, (La.) 7 So. 620.

Change of Venue.

See *Criminal Law*, 16-19.

Character.

See *Criminal Law*, 51, 53.

CHATTEL MORTGAGES.**Validity.**

1. A mortgage on the crop to be grown on the land, to be thereafter selected under a contract for the rental of a given quantity, or one tract out of a larger tract, is a valid mortgage, in equity, of the crops grown on the land selected, and an instruction that, at the time of giving the mortgage, the mortgagor must have rented a definite place on which the crop was grown, is properly refused as misleading.—*Keith v. Ham*, (Ala.) 7 So. 234.

2. Under Code Ala. 1886, § 1781, which provides that "a mortgage of personal property is not valid unless made in writing, and subscribed by the mortgagor," when, by request of the mortgagors, part of the property embraced in the mortgage is released, and other property substituted by interlineation, the mortgage, as altered, is valid.—*Winslow v. Jones*, (Ala.) 7 So. 262.

Description.

3. A deed of trust conveying "one ten-horse-power engine and boiler, James Leffel make," is void for uncertainty of description.—*Leffel v. Miller*, (Miss.) 7 So. 824.

Consideration.

4. A mortgage purporting on its face to have been given "in consideration of advances made for the year 1884, and to secure the same," reciting the amount to be the sum of \$100, is *prima facie* sufficient, as to consideration, between the immediate parties to the instrument.—*Dyer v. State*, (Ala.) 7 So. 267.

Lien—Priorities.

5. S. mortgaged his crop to plaintiffs, but the deed was not recorded until he had executed another mortgage to defendant. Defendant, before taking his mortgage, inquired of S. whether plaintiffs did not hold a mortgage against him, and was informed that they did, but that it was on other property, and did not include the crop. *Held*, that the information was not sufficient to put defendant on inquiry as to what was included in the prior mortgage.—*Simpson v. Hinson*, (Ala.) 7 So. 264.

Prosecution for removing mortgaged property.

6. An indictment for removing mortgaged property charged that the mortgage lien covered two cows and two calves. The mortgage purported to be given on two cows. *Held* no variance, as the offspring of mortgaged animals, which are born after the making of the mortgage, are subject to the lien of such incumbrance.—*Dyer v. State*, (Ala.) 7 So. 267.

7. On an indictment for removing mortgaged property, the recalling of a witness to prove the value of the mortgaged animals, which was permitted to the state after the giving of the oral charge by the court, was within the discretion of the court, and furnishes no ground of reversible error.—*Dyer v. State*, (Ala.) 7 So. 267.

8. It appearing, on an indictment for removing mortgaged property, that defendant's wife acted as agent both of her husband and the mortgagee in having the cotton shipped to Rome via Owen's Landing, her acts, within the scope of her agency, should have been received in evidence.—*Dyer v. State*, (Ala.) 7 So. 267.

9. The mortgagee's letter of instruction to defendant's wife was to have a bale of the mortgaged cotton shipped to Rome, Ga., and his verbal instruction to defendant himself was to "haul the cotton to Owen's Landing, and ship it to Rome." *Held*, that the delivery of the cotton at Owen's landing, where it was destroyed by fire, was not a delivery to the mortgagee, at his subsequent risk.—*Dyer v. State*, (Ala.) 7 So. 267.

10. Though a mortgagee is bound civilly by an assignment of the mortgage, executed by another as his agent, his silent partner being present at the

time, and by the representations of the partner that the mortgage debt was the only claim held by the firm against the property, he cannot be held criminally unless it be shown that he knew or had knowledge of the transfer and representations.—*Foster v. State*, (Ala.) 7 So. 185.

11. One who has assigned a mortgage on a crop, and has acquired a landlord's claim for unpaid rent, is not criminally liable for removing the crop, if he acquired the lien after transferring the mortgage, nor if he acquired it before, unless he knew that when the mortgage was transferred such representations had been made as would estop him from asserting any other lien.—*Foster v. State*, (Ala.) 7 So. 185.

Action against third party for conversion.

12. Though a landlord's lien is superior to a mortgage on the crop, a purchaser from the mortgagor is not, in an action for conversion by the mortgagee, entitled to show, in reduction of damages, that part of the amount paid by him for the crop was by the mortgagor paid to his landlord.—*Keith v. Ham*, (Ala.) 7 So. 234.

13. In an action for the conversion of a crop by a subsequent mortgagee, the excess of the proceeds of the sale of the crop over the debt secured by defendant's mortgage cannot be recovered as money had and received.—*Simpson v. Hinson*, (Ala.) 7 So. 264.

Collection.

Of taxes, see *Taxation*, 19-21.

Color of Title.

See *Adverse Possession*, 7, 8.

Community Property.

See *Husband and Wife*, 16-21.

Complaint.

In criminal cases, see *Criminal Law*, 2.

Compromise.

See *Payment; Release and Discharge*.

Conditional Sales.

See *Sale*, 4-8.

Confession.

Evidence, see *Criminal Law*, 45-49.
Of judgment, see *Judgment*, 1.

CONFLICT OF LAWS.**Contracts.**

1. In a suit in Mississippi on a contract executed in another state, the defense that the contract was made on Sunday, and is void, cannot be set up, if it is not void under the law of the state in which it was made.—*McKee v. Jones*, (Miss.) 7 So. 348.

2. Where an agent for non-resident dealers has authority only to exhibit samples and receive orders, which he communicates to his principal for acceptance or rejection, an order so transmitted is similar in every respect to an order to purchase sent direct by the buyer to the seller, and when accepted and filled, and the goods delivered to the carrier, and insured by the buyer, it is a completed contract, and governed by the laws of the state of the vendor's residence.—*Clafin v. Meyer*, (La.) 7 So. 189.

Constables.

See *Sheriffs and Constables*.

CONSTITUTIONAL LAW.

Delegation of power to regulate traffic in liquor, see *Intoxicating Liquors*, 1.

Taxation of banks, see *Banks and Banking*, 2, 3.

Titles of laws.

1. Act La. 1884, No. 56, entitled "An act to provide for the supply of water to the city of New Orleans by the New Orleans Water-Works Company, in cases of the municipal taxation of said company; to authorize provision to be made for the payment of water supply;" and "to regulate the payment of taxes imposed on said company, contrary to the exemption given in its charter;"—does not violate Const. La. art. 29, providing that every law shall embrace but one object.—*Conery v. New Orleans Water-Works Co.*, (La.) 7 So. 8.

2. Under Const. Ala. art. 4, § 3, providing that "each law shall contain but one subject, which shall be clearly expressed in its title," the provision of Act Feb. 5, 1885, entitled "To constitute the town of Blountville and vicinity, in Blount county, a separate school-district," which prohibits the sale of intoxicating liquors within the district, is unconstitutional.—*Montgomery v. State*, (Ala.) 7 So. 51.

3. Under the provisions of article 53 of the constitution, the general appropriation bill alone may embrace several items or objects of expenditures of state revenues. All other appropriations shall be made by separate bills, each embracing but one object. *Held*, that Act No. 51 of 1888, entitled "An act making appropriations to pay deficiencies due by the state for the years 1885, 1886, and 1887," not being a general appropriation bill, and embracing in its body four different and distinct objects, is unconstitutional and void.—*Klein v. State Treasurer*, (La.) 7 So. 280.

4. Under Const. Ala. art. 4, § 2, providing that "each law shall contain but one subject, which shall be clearly expressed in its title," the provision of Act Feb. 10, 1883, (Acts 1882-83, p. 342), entitled "An act to establish a separate school-district, to be known as the * * *, and for the appointment of a board of trustees for said school-district, with certain powers and privileges," which requires, as a condition precedent to the granting of a liquor license, that the applicant have the recommendation of such board as to his moral fitness, is unconstitutional, the words of the title, "with certain powers and privileges," having no force.—*Glenn v. Lynn*, (Ala.) 7 So. 924.

Local or special laws.

5. Const. La. art. 46, prohibiting the general assembly from passing any local or special law fixing the rate of interest, exclusively applies to contests between individuals. It does not apply to the regulation of interest on license taxes imposed by a municipal corporation.—*City of New Orleans v. Firemen's Ins. Co.*, (La.) 7 So. 82.

Trial by jury.

6. An act conferring jurisdiction to try misdemeanors on indictment, without a constitutional provision for a trial by jury, is void.—*Collins v. State*, (Ala.) 7 So. 260.

7. Const. Ala. 1875, art. 1, §§ 7, 12, which provide that "the right of trial by jury shall remain inviolate," and that in all prosecutions by indictment the accused shall have "a speedy public trial, by an impartial jury" of the county or district in which the offense was committed, contemplates a common-law jury of twelve men, and Acts Ala. 1888-89, p. 501, prescribing that in Barbour county a jury for the trial of a misdemeanor on an indictment shall consist of eight men, is unconstitutional.—*Collins v. State*, (Ala.) 7 So. 260.

Taxation.

8. Act La. No. 76 of 1886 provides that "corporations, associations, partnerships, and individuals of foreign governments, doing fire, river, inland, navigation, or marine insurance business in this state," shall, under certain circumstances, pay a tax on their gross receipts. *Held*, that the act creates a property tax, and, being confined to

a particular class, is in violation of the requirement of the state constitution that "all property shall be taxed in proportion to its value."—*Parker v. North British & M. Ins. Co.*, (La.) 7 So. 599.

9. Code Miss. 1880, §§ 557, 585, as amended by Laws 1888, providing that banks shall pay a privilege tax, whose amount varies with their capital stock or assets, in lieu of all other taxes, does not violate section 20, art. 12, of the constitution, declaring that taxation shall be equal and uniform throughout the state, and that all property shall be taxed in proportion to its value, since the legislature, having power to exempt property from taxation, may provide that a privilege tax be substituted for all others on the property to be taxed.—*Vicksburg Bank v. Worrell*, (Miss.) 7 So. 219.

10. The provision of Act La. 1888, No. 80, for the adjudication to the state of land sold for taxes, is not in conflict with Const. La. art. 210, providing that there shall be no forfeiture for non-payment of taxes, but the property shall be advertised and sold.—*Martinez v. State Tax Collector*, (La.) 7 So. 798.

11. Assessments under Laws Ala. 1884-85, pp. 620-622, authorizing the city of Birmingham to assess abutting owners for paving streets and like improvements in proportion to the benefit, and make such assessments a lien, are not a tax, within Const. Ala. art. 11, § 1, which requires that all taxes shall be assessed in exact proportion to the value of the property levied on, and section 7, which provides that no city shall levy a larger rate of taxation, in any one year, than one-half of one per centum of the value of the property as assessed for state taxation during the preceding year, and the act of 1884-85 is constitutional.—*City of Birmingham v. Klein*, (Ala.) 7 So. 386.

12. The charter of the city of Birmingham, § 20, subd. 25, provides that "if there is any property in the city on the 1st day of January of the then current year, which was not in the city on the 1st day of January of the preceding year, * * * and consequently not assessed for state taxation during the preceding year, then it shall be lawful for the clerk of the board, and it shall be his duty, to assess such property * * * at a fair valuation, * * * which shall be added to the valuation as assessed for state taxes for the preceding year," and the municipal taxes assessed on the resulting valuation. The provision is likewise extended to improvements erected in the preceding year, and enhancing the value of the property. *Held*, that this section is in violation of Const. Ala. art. 11, § 7, which provides that "no city * * * shall levy or collect a larger rate of taxation in any one year on the property thereof than one-half of 1 per cent. of the value of such property as assessed for state taxation during the preceding year."—*Elyton Land Co. v. City of Birmingham*, (Ala.) 7 So. 901.

License tax.

13. Act La. 101 of 1886, § 12, which provides an annual license for every individual carrying on the business or profession of master builder, or mechanic who employs assistance, does not contravene the provisions of Const. La. art. 206, which exempts from the payment of a license tax those who are employed in mechanical pursuits.—*Theobalds v. Conner*, (La.) 7 So. 689.

Prohibiting smoking in street cars.

14. Ordinance No. 4197 of the city of New Orleans, approved January 2, 1890, which prohibits smoking in street cars under penalty of fine and imprisonment, is not unconstitutional, since it neither deprives any one of personal liberty nor invades any right of private property.—*State v. Heidenhain*, (La.) 7 So. 621.

Mandamus to enforce contracts.

15. Act La. No. 123 of 1889, which authorizes *mandamus* proceeding to coerce specific performance of contract obligation in certain cases, is not unconstitutional, for it is a general statute, remedial in character only, divesting no vested right, and impairing no obligation of contract.—*State v. New Orleans City & L. R. Co.*, (La.) 7 So. 606.

Contempt.

Violation of injunction, see *Injunction*, 14.

Contest.

Of wills, see *Wills*, 8, 9.

Continuance.

In criminal cases, see *Criminal Law*, 20-23.

CONTRACTS.

See, also, *Assignment for Benefit of Creditors*; *Carriers*; *Chattel Mortgages*; *Deed*; *Frauds*, *Statute of*; *Fraudulent Conveyances*; *Insurance*; *Interest*; *Landlord and Tenant*; *Mortgages*; *Negotiable Instruments*; *Partnership*; *Pledge*; *Principal and Agent*; *Principal and Surety*; *Release and Discharge*; *Sale*; *Specific Performance*; *Usury*; *Vendor and Vendee*.

Estoppel by, see *Estoppel*, 14, 15.

Of cities, see *Municipal Corporations*, 18-19.

corporations, see *Corporations*, 6, 7.

hiring, see *Master and Servant*, 1.

insurance, see *Insurance*, 1, 2.

Rescission, see *Equity*, 2-10.

Nature and requisites.

1. The fact that the vendor said, during the negotiations for the sale of land in an incorporated land company to defendant, for which he received his notes in payment, that he would sell enough land and stock to pay defendant's notes as they matured, is not sufficient to establish a contract to that effect.—*Lakeside Land Co. v. Dromgoola*, (Ala.) 7 So. 444.

2. Where, in negotiations for the sale of certain coal, it is the understanding and intention of the seller that the sale shall take effect on August 18th, while the buyer understands that it is to take effect on August 20th, and the seller does not communicate his understanding to the buyer until after the proposed agreement is signed, there is no contract for want of mutual assent.—*Pittsburgh & S. Coal Co. v. Slack*, (La.) 7 So. 230.

Validity.

3. A writing signed by defendant reciting that he has received a relinquishment of a lease "for consideration of \$150, to be paid in ten days," is a sufficient promise of defendant to pay such amount.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

Performance.

4. Where there is no provision in a building contract against accident or inevitable necessity, the contractor cannot recover a sum retained by the owner as security for the faithful completion of the work, though the house, when nearly completed, was destroyed by fire without the contractor's fault.—*Cutcliff v. McAnnally*, (Ala.) 7 So. 381.

Actions on.

5. The purchaser of a decree for the sale of a tract of land to satisfy a vendor's lien, as part of the consideration therefor, agreed with his vendor, and with parties who had at various times subsequent to the creation of the lien purchased parts of the land, that before enforcing said decree he would file a petition to determine the order in which the parcels of land should be sold to satisfy the decree, it being further agreed that the original and sub purchasers of the land, or any one of them, might answer and introduce evidence in support of their claims, and that the court should determine the equities between the original and sub purchasers among themselves, and between each and all of them and the purchaser of the decree. *Held*, that the interests of the parties to the contract were several, and therefore one of them might maintain an action for its breach.—*Burton v. Henry*, (Ala.) 7 So. 925.

6. Defendant, in consideration of the relinquishment of a lease by plaintiff, obligated himself to pay a certain sum. By the relinquishment plaintiff gave up all his right and claim to the

premises "that I have by virtue of a five-years lease," etc. In an action to recover from defendant the amount he agreed to pay, the evidence showed that the owner of the premises wished to sell, and could not do so on account of the lease, and that defendant acted as his agent, or as agent of the expected purchaser, in securing the relinquishment. *Held*, that the validity of the lease, the time it had to run, or whether the relinquishment vested any interest in defendant, are immaterial questions, since the obligation was given in consideration of the relinquishment, to make way for the sale without regard to the character of the lease.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

Pleading.

7. In an action on an agreement to pay a certain sum for relinquishment of a lease, whether plaintiff had such an interest in the premises as would support the relinquishment goes to the question of the consideration defendant received, for the liability he incurred, and need not be shown by the complaint.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

Evidence.

8. In an action for breach of a contract to "harden and temper, in a workman-like manner," certain hoe and scythe blades, the burden is on the plaintiff to establish that the materials used in their manufacture were of such quality that the blades could by proper treatment have been efficiently tempered and hardened.—*Hood v. Diaston*, (Ala.) 7 So. 732.

9. In an action for breach of a contract to "harden and temper, in a workman-like manner," certain hoe and scythe blades, where the business manager of defendant, called as a witness, has detailed the terms of the contract, he is properly permitted to state that defendants "had performed their part of the agreement."—*Hood v. Diaston*, (Ala.) 7 So. 732.

10. In an action for breach of a contract to "harden and temper, in a workman-like manner," certain hoe and scythe blades, where one of plaintiff's witnesses has testified that defendants unskillfully placed as many as 50 dozen blades in the furnace at a time, which was unworkman-like, it is competent for defendants to discredit such statement by proving that to have done so would have cooled the furnace, and greatly delayed the work.—*Hood v. Diaston*, (Ala.) 7 So. 732.

Contributory Negligence.

See *Negligence*, 5-7; *Master and Servant*, 20.

Conversion.

See *Trover and Conversion*.

Conveyances.

See *Chattel Mortgages*; *Deed*; *Fraudulent Conveyances*; *Mortgages*; *Sale*; *Vendor and Vendee*.

CONVICTS.

Hiring out convicts—Liability on bond.

The principal and sureties in a bond to secure performance of a contract, dated February 28, 1876, for the hiring of convicts for more than one year, are not liable thereon for a default in payment for labor employed after the first year; the contract being illegal and inoperative for any longer term.—*State v. Pollard*, (Ala.) 7 So. 765.

CORPORATIONS.

See, also, *Banks and Banking*; *Carriers*; *Horse and Street Railroads*; *Insurance*; *Municipal Corporations*; *Railroad Companies*; *Schools and School Districts*.

Inspection of books by stockholders of national banks, see *Banks and Banking*, 5, 6.
Taxation of stock, see *Taxation*, 3, 4.

Privileges of officers.

1. Under Act Tenn. Feb. 1846, incorporating a railroad company, and providing that the "officers and servants of said company shall be exempt from military duty except in cases of invasion or insurrections, and shall also be exempt from serving on juries, and working on public roads," and under Act Ala. Jan. 1850, incorporating the same road, and allowing the company "all the rights, powers, and privileges" granted by the former charter, a servant of the company is exempt from working on public roads in Alabama.—*Johnson v. State*, (Ala.) 7 So. 253.

2. The exemption from such duty is not a mere personal privilege to the officers or servants of the company, but is a right or privilege of the corporation itself.—*Johnson v. State*, (Ala.) 7 So. 253.

Election of officers.

3. Under a by-law of a corporation providing that "the directors shall elect from their number a president, vice-president, and such other assistants as are necessary, said assistants to hold their office at the pleasure of the directory," the president is not included in the term "assistants."—*Archer v. Whiting*, (Ala.) 7 So. 58.

Enjoining corporation from voting stock in another corporation.

4. Where a transportation company, holding the majority stock in an ice and cold storage company, proposes to deal with the latter by having its cars re-leased at the works of that company at a nominal price, it may be enjoined from voting its stock in that company at the election of directors; but if the first-named corporation acts only through organizations under its control, an injunction will not be granted.—*American Refrigerating & Construction Co. v. Linn*, (Ala.) 7 So. 191.

5. Where one corporation acquires a majority of the stock of another corporation, and the two have substantially the same field of operation, so that the profits of one may be enhanced by a diminution of those of the other, or where there is a conflict of interest between the two in the matter of expenditures, or in the division of earnings, the corporation owning the majority of stock, its agents and employees, and all other persons acting in its interest, may be enjoined from voting its stock in the election of officers of the rival corporation, or from exercising the power a majority of stock confers in controlling and governing such corporation.—*Memphis & C. R. Co. v. Wood*, (Ala.) 7 So. 108.

Contracts.

6. A promissory note payable to the order of a corporation, and a mortgage securing the same, were assigned by its president and secretary; the assignment being, in substance: "We, the undersigned, D. R. T., president, and C. S. B., secretary, of the P. & W. N. Co., have transferred to J. C. the attached mortgage and note, and on the part of said company have hereto attached our names and affixed our seals,"—they signing their individual names, and using statutory private seals. *Held*, that the assignment is upon its face the act of the company, through these officers, and not the individual act of the officers; and a bill setting up the assignment, and alleging that the officers had authority to make it, shows a valid transfer of the note and mortgage to the assignee, and is not demurrable as not showing that the company had parted with its title to these instruments.—*Lay v. Austin*, (Fla.) 7 So. 143.

7. The execution by a trading corporation of a mortgage of its property as security for money borrowed in the prosecution of its business is not *ultra vires*. The power exists by implication, in the absence of charter limitations.—*Wood v. Meyer*, (Miss.) 7 So. 359.

Stock.

8. Subscribers for stock of an incorporated company, whose capital is fixed at a certain sum, whose shares are limited to a certain number, and whose charter provides that payment shall be made as may be determined by the board of directors, cannot be compelled to pay until the whole

capital has been subscribed for and the board has called for payment, unless it is shown that by their acts they have waived their rights in those regards.—*Exposition Ry. & Imp. Co. v. Canal St. R. Ry. Co.*, (La.) 7 So. 627.

9. One who subscribes for stock of a corporation does so with reference to the laws of the state under which the corporation is organized; and a subscriber for stock in a Virginia corporation is liable for an assessment thereon made after he has transferred the stock, as Code Va. 1873, c. 57, § 26, provides that "no stock shall be assigned on the books without the consent of the company until all the money which has become payable thereon shall have been paid, and on any assignment the assignee and assignor shall each be liable for any installments which may have accrued, or which may thereafter accrue, and may be proceeded against, in the manner before provided," by action or motion.—*Morris v. Glenn*, (Ala.) 7 So. 90.

10. Where a subscriber to the capital stock of a corporation gives in payment his demand notes, a call by the directors for the unpaid subscription is not necessary to enable the assignee of the corporation to sue on the notes, or to file a bill to subject to their payment property fraudulently conveyed by the subscriber.—*Ruse v. Bromberg*, (Ala.) 7 So. 384.

11. In a suit by legatees against a railroad company for the value of shares of its stock owned by the testator, it appeared that the executor had surrendered the stock to a committee of reorganization, and had taken therefor negotiable certificates, to be redeemed by a new issue of stock when the reorganization was effected. These certificates were transferred by the executor after his removal by the court from the trust, and after various transfers they were taken up by the company, and the new stock issued to the holders. *Held*, that the railway company was liable for the value of the stock at the time of the new issue.—*Mobile & O. Ry. Co. v. Humphries*, (Miss.) 7 So. 522.

— Rights of bona fide purchasers.

12. A *bona fide* purchaser of certificates of stock, upon which a power of attorney, authorizing their transfer to any person, is indorsed by the person in whose name the certificates were issued, and who was the last registered stockholder, takes them relieved of a trust existing back of the registry, though the transfer to such purchaser is not registered.—*Winter v. Montgomery Gas-Light Co.*, (Ala.) 7 So. 773.

Members and stockholders.

13. Where a corporation, at the time its stock is subscribed for, has by law (Code Ala. 1876, § 1816) a lien on the stock for unpaid subscription, to enforce which a suit in equity may be maintained, and is also authorized to sue its stockholders at law for such subscription, a statute (Code Ala. 1886, § 1674) giving such corporation a lien on the shares of its stockholders for any debt or liability due from them, and authorizing it to sell such shares on notice to the stockholder, merely enlarges the remedy for legal rights already existing, so far as the sale of stock for unpaid subscription is concerned, and is not unconstitutional when applied to subscriptions made before its passage.—*Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, (Ala.) 7 So. 398.

14. Dividends declared on stock in a corporation are payable on demand, and until demand and refusal prescription does not begin to run against the person entitled.—*Armant v. New Orleans & C. R. Co.* (La.) 7 So. 35.

15. Where the stock of an expiring corporation is merged into the stock of a new one, organized as its successor, acquiring its franchises and assuming its obligations, a provision inserted in the charter of the new company, forfeiting dividends not claimed within three years from the time when declared, is not binding upon the old stockholders, except from the time when, expressly or by implication, they consent thereto by assuming the quality of stockholders in the new company. An old stockholder, who has been ignorant of his rights and of the transfer, and who claims his dividends as soon as informed of their existence, cannot be

affected by such provision except *in futuro*.—*Armant v. New Orleans & C. R. Co.*, (La.) 7 So. 85.

16. A stockholder in a railroad company who, at a meeting of the stockholders, votes for the lease of the road to another company, cannot, while his company continues to be committed to the lease, attack its validity.—*Memphis & C. R. Co. v. Grayson*, (Ala.) 7 So. 122.

Members and stockholders—Actions by.

17. An averment by stockholders that, before filing a bill, they requested the corporation to bring suit, which it neglected to do, is sufficient to authorize them to sue in their own names.—*Memphis & C. R. Co. v. Wood*, (Ala.) 7 So. 108.

Dissolution.

18. A suit in equity, against a corporation by one of its stockholders, to dissolve the corporation because of a fraudulent sale of land made to it by a director after the incorporation, cannot be maintained. The proper remedy is a suit by the corporation, through its lawful agents, or, on their refusal to act, by one then a stockholder to set the sale aside.—*Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, (Ala.) 7 So. 393.

19. In a suit against a corporation to enjoin it from selling complainant's stock to pay the balance due on his subscription, and to dissolve the corporation because of a fraudulent sale of land to it by a director, the president of the corporation, against whom no fraud is charged nor relief prayed, cannot be made a party for purposes of discovery.—*Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, (Ala.) 7 So. 393.

20. In a suit to dissolve a corporation because of a fraudulent sale to it by a director, the latter is a necessary party.—*Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, (Ala.) 7 So. 393.

Foreign corporations.

21. A bill in equity by a foreign corporation, to have a loan evidenced by notes secured by a mortgage declared a lien on land, which shows on its face that the loan was made by complainant in the state, is demurrable, unless it alleges that, when the loan was made, complainants had complied with Const. Ala. art. 14, § 4, embodied in Act Ala. Feb. 28, 1887, requiring a foreign corporation, before doing business in the state, to file in the office of the secretary of state an instrument in writing designating at least one known place of business in the state, and an authorized agent or agents thereat.—*Christian v. American Freehold Land & Mortgage Co.*, (Ala.) 7 So. 427.

22. The prosecution or defense of an action is not the doing of business in the state, within the meaning of such acts.—*Christian v. American Freehold Land & Mortgage Co.*, (Ala.) 7 So. 427.

23. The single act of making one loan of money, and taking a mortgage to secure it, in Alabama, by a foreign corporation engaged in the business of loaning money on mortgages, when it has no place of business or agent in the state, is a violation of Const. Ala. art. 14, § 4, providing that no foreign corporation shall do "any business" in the state without having at least one known place of business, and an authorized agent, therein.—*Farrior v. New England Mortgage Security Co.*, (Ala.) 7 So. 200.

COSTS.

Discretion of court, see *Appeal*, 35.
Of garnishee, see *Garnishment*, 4.

Right to.

1. Code Miss. 1880, § 1497, providing that, if plaintiff shall not recover more than \$150, he shall not recover costs, unless the judge certifies that plaintiff had reasonable ground to expect to recover more than that sum, has reference to actions *ex contractu* only, and no such certificate is necessary to carry costs in an action for damages to land by improper construction of defendant's railroad.—*Kansas City, M. & B. R. Co. v. Mabry*, (Miss.) 7 So. 224.

Taxation.

2. A stipulation in a note to pay "all costs for collecting the above, not less than ten per cent." includes an attorney's fee for bringing suit.—*Williams v. Flowers*, (Ala.) 7 So. 439.

Costs on appeal.

3. Outlays for printing the brief required by the rules of the supreme court are not charges susceptible of being taxed as costs of appeal, which the party cast is condemned to pay.—*Cline v. Crescent City R. Co.*, (La.) 7 So. 66.

In criminal cases—Enforcement.

4. Code Ala. § 4503, provides that, if a fine and costs are not paid or a judgment confessed therefor, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county. Section 4504 provides that if, on conviction, judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid or judgment confessed therefor, then the court may impose additional hard labor for such period as may be sufficient to pay the costs, etc. *Held*, that where defendants have been convicted of carrying on a lottery, which offense, under Code Ala. § 4065, is punishable by fine without imprisonment, and have paid the fine imposed, but refused to pay the costs, payment of the same may be enforced by sentence to hard labor, under the above sections.—*Ex parte Joice*, (Ala.) 7 So. 2.

Co-Tenancy.

See *Tenancy in Common and Joint Tenancy*.

Counter-Claim.

See *Set-Off and Counter-Claim*.

COUNTIES.

See, also, *Bridges; Highways; Schools and School-Districts*.

Aid to railroads, see *Railroad Companies*, 6.

Bond of bridge builder, see *Bridges*, 3-5.

Powers, building bridges, see *Bridges*, 1, 2.

Liabilities—Claims of jurors.

1. A fund set apart under Code Ala. 1886, § 906, making the claims of jurors and for certain other expenses preferred claims against the county, and requiring the county treasurer to set apart a sufficient fund for their payment, can be used for the payment of the current claims of those classes only, and juror's certificates for services previously rendered are not entitled to payment out of it.—*Allen v. Watts*, (Ala.) 7 So. 190.

County board.

2. It is the duty of county commissioners, under Act Fla. June 7, 1889, which "provides for the appointment of county boards of health in and for the several counties," etc., to cause a tax to be assessed and levied, not to exceed in any year one mill on the dollar, to defray the expenses of the board of health of the county, when proper request is made for that purpose by said board.—*State v. Rose*, (Fla.) 7 So. 870.

3. In Mississippi, the power of a board of supervisors over court-houses, and sites for court-houses, is complete and exclusive, and no court can interfere with the exercise of this power, so long as it is exercised only unwisely, and without discretion; and the purchase of a site for a court-house, the county having already a court-house site, is not such a usurpation of power as will warrant the interference of the courts.—*Rotenberry v. Board of Sup'rs*, (Miss.) 7 So. 311.

Treasurer's bond.

4. The bond of a county treasurer required to be given by McClell. Dig. Fla. p. 323, § 5, in an amount double that which may at any one time come into his hands, is security for the proper performance of his duty in regard to school funds, of which he is made the custodian by section 6, as

well as in regard to any other county funds in his hands.—*Perry v. Woodberry*, (Fla.) 7 So. 488.

5. The fact that the county commissioners, in fixing the amount of the county treasurer's bond, failed to consider the school funds, of which he is made custodian by McClel. Dig. Fla. p. 823, § 6, as money that might come into his hands, is no defense to the sureties in an action on such bond for the treasurer's failure to account for school funds received by him.—*Perry v. Woodberry*, (Fla.) 7 So. 488.

6. In an action on the bond of a county treasurer for his failure to account for school funds, of which he is made the custodian by McClel. Dig. Fla. p. 823, § 6, an averment in the answer that the bond was not intended to cover the school funds, and that the surety signed it with that understanding and belief, is a conclusion of law, and is demurrable.—*Perry v. Woodberry*, (Fla.) 7 So. 488.

7. An action on a county treasurer's bond for failure to account for school funds that have come into his hands is properly brought in the name of the governor, to whom such bond is given, to the use of the board of public instruction, which, by McClel. Dig. Fla. pp. 907, 908, §§ 25-27, is given sole control and management of such funds.—*Perry v. Woodberry*, (Fla.) 7 So. 488.

COURTS.

See, also, *Judge; Justices of the Peace; Removal of Causes.*

Jurisdiction in criminal cases, see *Criminal Law*, 1.

Other action pending in federal court, see *Abatement and Revival*.

Term-time and vacation.

1. Act La. 1873, No. 102, p. 181, provides that the judges of the district court shall have authority to try at chambers a rule upon any defaulting tax-collector and that it shall be their duty, on application of the district attorney, within 10 days, to proceed in a summary manner and try the same. Act 1882, No. 96, provides that the trial of such rule shall be within three days after application of the district attorney. Act 1888 gives to the tax-collector the right to proceed summarily, by rule against a person assessed, as well during vacation as in term-time. *Held*, that it is the ministerial duty of the district judge to try such rule against a defaulting tax-collector at chambers, when it cannot be heard and determined in term-time.—*State v. Buckner*, (La.) 7 So. 65.

2. A district court may adjourn to a day after an intervening term of the court of appeals, and a record of a conviction on the day before the time for a term of that court, and a sentence six days later, discloses no error.—*State v. Euzebe*, (La.) 7 So. 784.

State courts.

3. The courts of Alabama have jurisdiction of a suit in tort against a domestic railway corporation for the breach in another state of a duty imposed by a contract of shipment made in Alabama. *Central R., etc., v. Carr*, 76 Ala. 388, distinguished.—*Alabama G. S. R. Co. v. Thomas*, (Ala.) 7 So. 762.

— Supreme courts.

4. The supreme court has no original jurisdiction to consider a motion to quash an information impeaching an officer, on the ground that the information was not concurred in by 12 jurors, and was not based on the evidence of witnesses examined or on legal documentary evidence, but such objections must be first raised in the court to which the report is presented.—*State v. Savage*, (Ala.) 7 So. 7.

— Circuit courts.

5. The grant to the county courts by Const. Fla. 1868, amended 1875, art. 6, § 11, of authority "to discharge the duties usually pertaining to courts of probate, subject to the direction and supervision of the appellate and equity jurisdiction of the circuit court as may be provided by law,"

does not limit or restrict the equitable jurisdiction of the circuit courts in the matter of estates of decedents, under article 6, § 8, vesting in the circuit courts "original jurisdiction in all cases in equity."—*Deans v. Wilcoxon*, (Fla.) 7 So. 168.

— County courts.

6. Code Ala. § 4201, gives the county courts jurisdiction of misdemeanors, and its judgment of conviction for a misdemeanor is valid though the court may have conceived that it was acting under an unconstitutional statute, (Act Feb. 20, 1889.)—*In re Gibson*, (Ala.) 7 So. 888.

Covenants.

In lease, breach, see *Landlord and Tenant*, 3, 4.

CREDITORS' BILL.

When lies.

1. The fact that a creditor has brought an action against his debtor, which may result in judgment, and execution in the creditor's favor, will not entitle him to have a fraudulent assignment for the benefit of creditors set aside before he has obtained such judgment, and issued execution thereon.—*Post v. Roach*, (Fla.) 7 So. 854.

Procedure.

2. As the undivided interest of a judgment debtor in notes and a mortgage cannot be reached by garnishment or execution, the judgment creditor's proper remedy is by bill in equity, joining as parties the makers and the other payees of the note, under Code Ala. § 8540, providing that, where an execution is returned unsatisfied, he may bring a bill of discovery; and the court may bring any other party before it, and decree the interest of the judgment debtor in any property discovered to the satisfaction of the debt.—*Martin v. Carter*, (Ala.) 7 So. 510.

Joinder of claims in favor of separate creditors.

3. The assignee of two creditors of a common debtor may unite both claims in one bill under Code Ala. § 8544, permitting simple contract creditors to proceed in equity to subject property of the debtor, fraudulently conveyed, to their claims.—*Ruse v. Bromberg*, (Ala.) 7 So. 884.

Decree.

4. Where a creditors' bill does not seek to set aside the debtor's assignment for the benefit of creditors, and no fraud in making the assignment is shown, it is error to decree that the property assigned shall be held subject to a judgment and execution on the creditors' claim obtained after the commencement of the creditors' suit.—*Post v. Roach*, (Fla.) 7 So. 854.

Consent decree.

5. A consent decree entered on bill by several attaching creditors of defendant settling the respective priorities of such creditors, precludes defendant from contesting the further prosecution of one of the attachment suits in another county against certain property by one of such creditors, to whom the decree gave that property, in order to perfect his lien as against defendant's creditors, who were not parties to the decree.—*Gattman v. Gunn*, (Miss.) 7 So. 285.

CRIMINAL LAW.

See, also, *Bail; Grand Jury; Habeas Corpus; Indictment and Information; Witness.*

Attachment for witness, see *Witness*, 24-26.

Costs, enforcement, see *Costs*, 4.

Defacing index-boards, see *Highways*, 4.

Election of offenses, see *Carrying Weapons*, 2.

Particular crimes, see *Adultery; Assault and Battery; Breach of the Peace; Burglary; Carrying Weapons; Disturbance of Public Worship; Drunkenness; Embezzlement; Forgery; Gaming; Homicide; Intoxicating Liquors*, 23-

34; *Larceny; Lotteries; Mayhem; Miscegenation; Obstructing Justice; Perjury; Prize Fighting; Rape; Robbery.*

Responsibility of insane person for crime, see *Insanity*, 1, 2.

Tenant's removal of crops, landlord's lien, see *Landlord and Tenant*, 5.
Venue, see, also, *Larceny*, 2.

Jurisdiction.

1. When defendant, in a misdemeanor case, demands a trial by jury, the case must be transferred to the circuit court, under Code Ala. § 4219, and a judgment rendered by the county court is void.—*In re Gibson*, (Ala.) 7 So. 838.

Complaint.

2. Code Ala. 1886, § 4236, provides that "the forms for proceedings before the county court, under the provisions of the preceding article, or other substantially the same, may be used by a justice of the peace, in cases tried before him." Section 4204, a section of the preceding article, declares that when a party, desiring to bring a charge of misdemeanor before the county court, makes affidavit in writing before the judge thereof or some justice of the peace of the county that he has probable cause to believe, and does believe, that an offense, designating it by name, or by some other phrase, which, in common parlance, designates it, has been committed by some person (naming the offender) on the person or property of another, (naming the person injured,) the judge of the court or justice of the peace shall issue his warrant of arrest. *Held*, that an affidavit before a justice of the peace, charging that defendant stole, in the county of Montgomery, certain personal chattels from the premises of the complainant, setting forth the property, but averring neither the value nor ownership, was sufficient to give the justice jurisdiction so as to constitute his judgment the proper basis of appeal.—*Williams v. State*, (Ala.) 7 So. 101.

Former jeopardy.

3. Acts Ala. 1888-89, pp. 518, 526, (amended charter of the city of Montgomery,) provides that, "in all cases where a person is convicted or acquitted before the recorder * * * of an offense which is a misdemeanor under the laws of the state, such conviction or acquittal shall be a bar to a prosecution of such person for such offense before any state court." *Held*, that the provision was only prospective in its operation, and did not apply to a case where the conviction before the recorder had occurred prior to the amendment.—*Englehardt v. State*, (Ala.) 7 So. 154.

4. Where, on the plea of former jeopardy, it appears that the jury were discharged before a verdict on the former trial, and it is claimed by the state that it was because of their inability to agree, the length of time allowed for their deliberation is a question of fact for the jury, and the sufficiency of the time is a question for the court.—*Helm v. State*, (Miss.) 7 So. 487.

5. In such case, on the question of whether the jury were discharged because they could not agree, the testimony of the trial judge, and of the jurors who were discharged, as to the facts which constituted the legal necessity for the discharge, and as to the failure to agree, is admissible.—*Helm v. State*, (Miss.) 7 So. 487.

6. Defendant having been tried under an indictment for selling mortgaged property, consisting of a cow, a calf, and 900 pounds of cotton, and having been found "guilty of removing 500 pounds of cotton," the verdict and judgment entered thereon constitute an acquittal, and a bar to further prosecution as to all of the charges, except as to the 500 pounds, though set aside at his instance.—*Foster v. State*, (Ala.) 7 So. 185.

7. Where one has been convicted of murder, and been granted a new trial, and, while the case was pending, another indictment has been found against him, and a *not pros.* entered as to the former one, there has been no such former jeopardy as will bar a trial under the second indictment.—*Gibson v. State*, (Fla.) 7 So. 878.

8. The plea of *autrefois acquit* must be disposed of before the plea of not guilty, and the refusal or failure of the court to so dispose of it is error.—*State v. Edwards*, (La.) 7 So. 678.

9. The plea of *autrefois acquit* being a plea in bar, it is error to refuse to allow defendant to show thereunder, by matter outside of the record, that the indictment is not maintainable.—*State v. Edwards*, (La.) 7 So. 678.

10. The defendants were jointly indicted for burglary and larceny, in a single count. The jury returned a verdict finding them guilty of larceny. The judge requested the jury to return, and consider the case again, and find a verdict according to the instructions given them; reminding them that the court had not submitted to them whether the defendants were guilty of larceny or not, as an independent offense, and that their finding was not responsive. Thereupon, the jury failing to agree upon a verdict, they were discharged, and a new jury were impaneled, by whom a verdict of guilty of burglary and larceny was rendered. *Held*, that the verdict of the jury first rendered was legal and valid, and the defendants could not be again put in jeopardy by a new trial under the same indictment.—*State v. St. Clair*, (La.) 7 So. 718.

11. A plea of former acquittal, in which it does not appear that the offense with which defendant was charged was committed in the district of the justice before whom the trial was had, will not protect defendant from further prosecution for the offense in the proper court, as the justice had no jurisdiction of the case under Code Miss. § 2216, (Laws 1888, p. 58,) which gives justices of the peace jurisdiction to try offenses only when committed in their several districts, unless there be no justice in the district in which the offense was committed, in which case the trial may be had in an adjoining district.—*Smith v. State*, (Miss.) 7 So. 208.

12. A plea of former acquittal to an indictment for disturbing religious worship by assault and battery and profane swearing is not sustained by proof of a former acquittal on a charge for the assault and battery, as defendant might properly be convicted on the indictment for disturbing religious worship by evidence of the swearing only.—*Smith v. State*, (Miss.) 7 So. 208.

13. A plea of former conviction to an indictment for disturbing religious worship is not sustained by showing a former conviction for intoxication and profanity indulged in on the same occasion, where the evidence shows that defendant was guilty of disturbing religious worship by other modes than by being drunk and profane, as there is a want of identity of the two charges.—*Ball v. State*, (Miss.) 7 So. 353.

14. On an indictment for gambling, a plea of *autrefois acquit*, in that defendant at the same term of court was acquitted of the charge of keeping a gambling house, is demurrable, as the two offenses are separate and distinct, under the laws of Florida.—*Tuberson v. State*, (Fla.) 7 So. 858.

Venue.

15. It is exclusively within the province of the jury in a criminal case to determine whether the venue is proved, and the supreme court has no authority to review their finding in the premises on appeal.—*State v. Starka*, (La.) 7 So. 540.

Change.

16. Under Code Ala. § 4435, providing that an application for change of venue "must be made as early as practicable before the trial, * * * and the refusal of such application may, after final judgment, be reviewed and revised on appeal," where several successive applications for change of venue are refused, the last refusal only can be reviewed on appeal.—*Hawes v. State*, (Ala.) 7 So. 302.

17. An application for change of venue was supported by defendant's affidavits showing such excitement and prejudice against him, several months before the trial, as would have entitled him to a change. The affidavits of seven reputable witnesses testified that this excitement and preju

dice continued to the time of the trial, and infected the proceedings, but this was rebutted by the affidavits of 65 reputable witnesses, who had apparently better opportunities for knowing, which affirmed that the prejudice did not then exist, and that defendant could have a fair trial. *Held*, that it was not error to overrule the application, without examining witnesses *ore tenus* on the issue presented.—*Hawes v. State*, (Ala.) 7 So. 302.

18. On a murder trial, a change of venue is not warranted by defendant's testimony that at the time of his arrest a mob was formed to hang him, and that the officer who arrested him avoided the mob by going a certain route, and by the testimony of two other witnesses that people generally believe defendant guilty, where the arresting officer testifies that he never heard of any mob.—*Rains v. State*, (Ala.) 7 So. 815.

19. On an indictment for murder, it is within the discretion of the court to deny a motion for change of venue on the ground of prejudice against defendant, the existence of which, as shown by attempts to lynch defendant theretofore, is sworn to by 6 witnesses, where 15 witnesses equally credible deny that any such prejudice exists at the time of the trial.—*State v. Dent*, (La.) 7 So. 694.

Continuance.

20. On an indictment for murder, it is not error to refuse a continuance on the ground of the absence of a witness who is out of the state and was not served, where it is not shown that defendant was ignorant of his absence, that his testimony is material, and that his attendance can be secured for an early trial.—*State v. Johnson*, (La.) 7 So. 670.

21. An application for a continuance on account of the absence of a witness, unsupported by affidavit, cannot be considered.—*State v. Perique*, (La.) 7 So. 599.

22. Where an affidavit of continuance sets forth the names and residence of the witnesses, the character and materiality of their testimony, the exercise of proper diligence, and the ability to procure attendance of the witnesses if the trial be deferred, the refusal to grant the continuance, without qualification and without reason, is error.—*State v. Butler*, (La.) 7 So. 669.

23. A motion for a continuance, made for the first time by an attorney assigned to defend an accused in a capital case, ought to be allowed, when supported by his affidavit that he has not had sufficient time to prepare a suitable and valid defense, which he believes there is in the case; less than 48 hours having intervened between his appointment and the calling of the case, which involves questions of fact and law which require much study and research.—*State v. Deschamps*, (La.) 7 So. 183.

Conduct of trial.

24. When a motion has been made to exclude the witnesses from the court-room, it is in the discretion of the trial judge to allow any of them to remain.—*Riley v. State*, (Ala.) 7 So. 149.

25. The refusal to exclude a witness from the court-room during the examination of another witness is discretionary with the trial court, and not reviewable on appeal.—*McGuff v. State*, (Ala.) 7 So. 35; *Barnes v. Same*, *Id.* 88.

26. Where during the progress of a trial the original indictment, on which defendant has been arraigned, is lost, and another indictment, identical with it, is returned by the same grand jury then in session, and substituted, and afterwards the original, being found again, is handed to the jury on its retirement, there is no error.—*Helm v. State*, (Miss.) 7 So. 457.

27. Where a motion is made which does not in its very nature disclose the ground on which it is rested, and counsel refuses to state the ground, it is not error to overrule the motion.—*Riley v. State*, (Ala.) 7 So. 149.

28. On trial for murder, when witnesses for the defense were introduced, they were cautioned by the state attorney to tell the truth, and nothing but the truth. *Held*, that the state attorney had no authority to thus caution the witnesses, and that such remarks had a tendency to confuse them

and to cast suspicion upon their evidence.—*Hodge v. State*, (Fla.) 7 So. 593.

29. If courts have power to compel a personal examination of the prosecutrix in prosecutions for rape, it is a matter of judicial discretion, not reviewable on appeal.—*McGuff v. State*, (Ala.) 7 So. 85.

30. A defendant in a capital case cannot complain that at one term a day in the next was fixed for his trial, nor that an order was made on that day that the cause be passed to a later one.—*Maxwell v. State*, (Ala.) 7 So. 824.

31. The presence of an accused in court is sufficiently shown by a minute entry reading as follows: "In this case the prisoner, F. A. C., represented by his counsel, S., D. and W., and the district attorney, being all present in open court, the jury come," etc.—*State v. Callegari*, (La.) 7 So. 180.

Argument of counsel.

32. Where counsel, in commenting on the evidence, states a circumstance which has not been proven, and, on objection being made, states that the remark was inadvertently made, and withdraws it, and asks the jury to ignore it, and the court instructs the jury to disregard it, the verdict will not be set aside on account of the inadvertence.—*Cheatham v. State*, (Miss.) 7 So. 304.

33. Under Code Miss. § 1608, allowing the accused to testify in his own behalf in any prosecution for an offense against the person or property of another, and providing that his failure to do so in any case shall not prejudice him, or be commented on by counsel, comments of the district attorney on the failure of defendant to testify on a trial for burglary are ground for reversal of a judgment of conviction.—*Eubanks v. State*, (Miss.) 7 So. 462.

Trial of co-defendant.

34. One who was jointly indicted with another for murder severed in his defense, and, when put on the stand by the state on the trial of the other, he refused to testify, on being warned that his testimony might be used against him on his own trial. He was then allowed to be arraigned so that the state might have time to serve the *venire* and indictment on him to expedite his trial at that term. *Held*, that this was not prejudicial to defendant then on trial.—*State v. Johnson*, (La.) 7 So. 670.

Recalling witnesses.

35. It is in the discretion of the trial judge to allow a witness previously examined to be recalled at any stage of the trial.—*Riley v. State*, (Ala.) 7 So. 149.

Objections to evidence.

36. An objection that the court erred in overruling the objections to questions put to a witness is too vague; and, unless the questions and the objections thereto are pointed out, they will not be considered by the appellate court.—*Hodge v. State*, (Fla.) 7 So. 598.

Evidence.

37. Evidence that a third person, who was suspected of the crime, fled from the county soon after it was committed, is inadmissible.—*Kemp v. State*, (Ala.) 7 So. 413.

38. In a criminal prosecution, evidence to show what the accused, testifying in his own behalf, had stated on a previous trial on the same charge, in which the jury had failed to agree, is inadmissible to impeach him, if it appears that the defendant did not testify at all on the second trial, at which he was convicted.—*State v. Brownson*, (La.) 7 So. 328.

39. Where defendant, in a prosecution for murder, testifies in his own behalf, he may be asked, on cross-examination, where he was from the time of the killing until his arrest.—*Rains v. State*, (Ala.) 7 So. 315.

40. On a trial for burglary, it is proper to exclude testimony that the prosecuting witness had made statements out of court that he might have been mistaken in thinking that defendant was the burglar, and that the testimony of one of defend-

ant's witnesses on a former trial had shaken him up considerably, where these declarations were not contradictory of his evidence on the trial.—*Cooper v. State, (Ala.) 7 So. 47.*

41. On trial for murder, the testimony of a witness as to his conclusions from, and understanding of, the conduct and intentions of defendant is properly excluded.—*Hodge v. State, (Fla.) 7 So. 593.*

42. It is error to allow a witness, not an expert, to state his opinion as to whether certain tracks were made by defendant.—*Riley v. State, (Ala.) 7 So. 149.*

43. A book in which all the ordinances of a town are recorded, kept in its custody, is sufficient proof of the existence of an ordinance therein, in a prosecution for drunkenness.—*Boones v. Common Council of Alexander City, (Ala.) 7 So. 437.*

44. On an indictment for larceny, evidence of attempts by accused to intimidate a witness for the prosecution is admissible as tending to establish a presumption of guilt, even though he has been acquitted of the charge of intimidating such witness; for he is entitled to introduce the record of such acquittal in rebuttal.—*State v. Baden, (La.) 7 So. 553.*

Evidence—Confessions.

45. If information derived from a confession of crime leads to the discovery of material facts, which go to prove the commission of the crime, so much of the confession as strictly relates to the facts discovered will be received in testimony, though the confession may not be shown to have been voluntary.—*Lowe v. State, (Ala.) 7 So. 97.*

46. Where confessions appear to be voluntary, and are admitted in evidence without objection, it is proper to refuse to give instructions which, in effect, deny the right of the jury to consider them at all.—*McGuff v. State, (Ala.) 7 So. 85.*

47. A statement by the officer who arrested defendant for forgery, made to him: "I have known you a long time, and will help you all I can; and, if you say you did not forge that paper, I'll see M., and get him to compromise it with you. If you did do it, it might be best for you to say so; but, if you did not, stick to it that you did not."—is not sufficient to render a confession made by defendant to the officer inadmissible.—*Dotson v. State, (Ala.) 7 So. 259.*

48. Defendant, having excepted generally to the refusal of the court to exclude an entire confession, part of which was admissible, cannot complain that some parts of the confession should have been excluded.—*Lowe v. State, (Ala.) 7 So. 97.*

49. Where the bill of exceptions sets out only part of the evidence, it will be presumed, if necessary in order to sustain the admission of a confession not shown to be voluntary, that material facts were discovered after the confession, and from the information derived therefrom.—*Lowe v. State, (Ala.) 7 So. 97.*

—Accomplices.

50. The refusal of the court to charge that "the testimony of an accomplice uncorroborated is not sufficient to convict," is not error, where the record fails to show that any accomplice testified in the case.—*Tuberson v. State, (Fla.) 7 So. 858.*

—Character.

51. Evidence of a witness on cross-examination, as to defendant's character, that he "had heard for the last few years that defendant had frequent difficulties with and struck his wife," is admissible.—*Hawes v. State, (Ala.) 7 So. 303.*

52. When a witness, properly introduced to impeach the reputation for chastity of the prosecutor in a rape case, has stated positively that he knew her general reputation, his competency is not destroyed because, on cross-examination as to the nature of his knowledge, he states that he has heard 10, 15, or 20 persons speak of her character in that respect, and say that it was bad.—*State v. Reed, (La.) 7 So. 132.*

53. Where a witness has testified that the relations between himself and defendant "were not intimate, and he did not know where defendant lived," he cannot testify as to his personal opin-

ion of defendant's good character.—*Holmes v. State, (Ala.) 7 So. 193.*

—Variance.

54. On an indictment for perjury, it is a question for the jury whether there is a variance between the charges of the indictment and the proof offered to sustain them.—*State v. Gonsoulin, (La.) 7 So. 633.*

55. An indictment charged that defendant, as broker, received certain merchandise from "G. P. H. & Co.," and that he sold it and received the money for account of "G. P. H." The evidence showed that the money was received for account of G. P. H. & Co., and there was no evidence that G. P. H. was a member of that firm. Held, that the variance was fatal.—*Folkinghorne v. State, (Miss.) 7 So. 247.*

Instructions.

56. It is not error to refuse to give instructions to the jury which had already been substantially given.—*Coleman v. State, (Fla.) 7 So. 367.*

57. Where a charge is susceptible of two constructions, the construction will be adopted by the supreme court which is least favorable to the party asking it.—*Smith v. State, (Ala.) 7 So. 103.*

58. The tendency of a charge, unexplained, that "it is better that ninety-nine guilty men should escape than that one innocent man should be punished" is to mislead; and it is not error to refuse to charge it.—*Lowe v. State, (Ala.) 7 So. 97.*

59. A charge that statements of jurors on their *votr dire*, that they had no fixed opinion against capital punishment, and that they believed conviction could be had on circumstantial evidence, in no way interfered with their right to determine the amount or degree of proof necessary to convict, is properly refused, as misleading the jury to believe that they could acquit if the evidence were wholly circumstantial, though convinced beyond a reasonable doubt.—*Hawes v. State, (Ala.) 7 So. 303.*

60. A charge, in a prosecution for murder, that, when the prosecution relies on circumstantial evidence alone, proof, by a preponderance of evidence, of a single fact inconsistent with defendant's guilt, calls for his acquittal, is properly refused where there is positive testimony that defendant committed the killing, and no fact inconsistent with his guilt is shown.—*Rains v. State, (Ala.) 7 So. 815.*

61. Under Code Ala. § 2754, providing, *inter alia*, that the court may state the evidence to the jury when it is disputed, the court may state the theories which the evidence for both prosecution and defense, respectively, tends to establish.—*Hawes v. State, (Ala.) 7 So. 303.*

62. On trial for murder a refusal to charge that the testimony of an accomplice "should be subjected to the severest scrutiny, and acted on with the greatest caution," and to advise the jury not to convict on the uncorroborated testimony of accomplices, is not reversible error.—*Cheatham v. State, (Miss.) 7 So. 204.*

63. A charge that the jury are not to try the case by the arguments of counsel, who, by "the study of a life-time, * * * learn how to distort, change, color, and discolor facts, in order that they may use them to the advantage of their clients," is erroneous, as it virtually deprives the defendant of the benefit of counsel, and as it intimates that facts stated by counsel are not those shown by the evidence and so is in violation of *McClell. Dig. Fla. c. 52, § 34*, providing that the court shall charge only on the law of the case.—*Gibson v. State, (Fla.) 7 So. 376.*

64. Objections to the giving of an oral charge to the jury, in a criminal case, instead of a written one, as required by *McClell. Dig. Fla. c. 52, § 34*, are waived, if not made before the retirement of the jury.—*Gibson v. State, (Fla.) 7 So. 376.*

65. It is not error to refuse to charge that "if a witness has willfully testified falsely to any material fact the jury should disregard his evidence altogether," as this would be an invasion of the province of the jury.—*Lowe v. State, (Ala.) 7 So. 97.*

66. On an indictment for murder the defendant requested the judge to give a certain charge, which was given, but the judge failed to sign and seal the charge, and to declare the charge given. *Held*, not to be error, as the defendant had the benefit of the charge, and as there was no exception at the time to the failure of the judge to sign and seal the charge, or to pronounce the charge given.—*White v. State*, (Fla.) 7 So. 857.

Reasonable doubt.

67. A charge that, "unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they must find the defendant not guilty," is correct.—*Riley v. State*, (Ala.) 7 So. 104; *Id.* 149.

68. Where the court has charged the jury that before they can convict defendant of murder they must be satisfied that he has been proven guilty of the offense, "fully, clearly, conclusively, satisfactorily, and that to a moral certainty, and beyond all reasonable doubt," it is not error to explain that the terms used meant that they must be convinced of his guilt "beyond a reasonable doubt."—*Lowe v. State*, (Ala.) 7 So. 97.

69. An instruction that it is as much the duty of the jury to acquit in case of reasonable doubt as it is their duty to convict in case of moral certainty of defendant's guilt is properly refused, as it is a mere argumentative generalization of the duty of jurors.—*Cooper v. State*, (Ala.) 7 So. 47.

70. A charge instructing the jury that they must put upon any part of the testimony a construction favorable to the defendant, if reasonable, invades their province, and is calculated to mislead them.—*Smith v. State*, (Ala.) 7 So. 108.

71. A conviction will not be reversed for a failure to charge that guilt must be proved beyond a reasonable doubt, the evidence not being preserved, and the record not showing that the court's attention was called to the omission.—*Kurtz v. State*, (Fla.) 7 So. 869.

Custody and conduct of jury.

72. The use of wine at a meal will not vitiate the finding of the jury, when not attended by misconduct, and it is not shown that any member was under the influence of liquor.—*State v. Bellow*, (La.) 7 So. 782.

Separation.

73. Separation of a juror from his fellows, by going to an adjoining room to wash his hands, in view of the officer in charge, is not cause for a new trial.—*State v. Bellow*, (La.) 7 So. 782.

Verdict.

74. A juror is an incompetent witness by whom to impeach the verdict of the jury of which he was a member.—*State v. Richmond*, (La.) 7 So. 459.

75. On an indictment which charges defendant in one count with assault with intent to murder, and in another with "willfully, maliciously, and feloniously inflicting, with a dangerous weapon, on C. a wound less than mayhem," a verdict of "wounding less than mayhem" is responsive to the second count of the indictment, and is good.—*State v. Mason*, (La.) 7 So. 668.

76. A general verdict of "guilty," on an indictment which charges offenses of the same character disjunctively, as allowed by Crim. Code Ala. § 4885, is not reversible error, nor ground for motion for new trial.—*McGuff v. State*, (Ala.) 7 So. 35.

77. A verdict of "imprisonment for life" need not specify the place of confinement, where that is provided for in the statute under which defendant was convicted.—*McGuff v. State*, (Ala.) 7 So. 35.

New trial.

78. On motion to recall sentence and grant a new trial, a witness testified that one D. was present and heard the statements desired to be introduced in support of the motion, but no steps were taken to secure D.'s presence until three days afterwards, and the court then waited until the following day for him. The same witness testified that two other persons heard the same statements, but these persons, though they were subpoenaed and appeared, were not introduced. *Held*, that the

court's refusal to wait longer for D. was not unreasonable.—*Helm v. State*, (Miss.) 7 So. 487.

Judgment—Motion in arrest.

79. It is no ground for a motion in arrest of judgment that defendant, a negro, indicted for murder, was tried by a jury composed exclusively of white men, where the record does not show that any juror was excluded on account of his race or color.—*State v. Ford*, (La.) 7 So. 698.

80. A motion in arrest of judgment based on the fact that the jury took with them in their retirement the indictment, on which was indorsed a verdict of guilty rendered by a former jury, but which fact did not appear of record in the court below, is properly overruled.—*Cooper v. State*, (Ala.) 7 So. 47.

Disqualification of jurors.

81. Two witnesses testified that a juror said that if he could get on the jury he would hang the accused, but the evidence being conflicting, and the two witnesses related to the accused by marriage, and one of them an enemy to the juror, the trial court did not err in overruling the motion for a new trial.—*Yates v. State*, (Fla.) 7 So. 880.

82. After conviction for carrying a concealed weapon, defendant moved for a new trial on the ground that one of the jurors was a first cousin of the first witness, whose name was indorsed on the indictment, and who was in charge of the place where and when the pistol was said to have been exhibited; that he did not know this fact when he accepted the juror; and that his counsel, in making inquiry before accepting the jury, was informed that there was no relationship between them. *Held*, that the refusal of the motion was discretionary.—*Daniels v. State*, (Ala.) 7 So. 887.

Appeal and error.

83. A decree overruling a motion to dismiss an appeal is interlocutory, and is revisable until before final adjudication on the merits of the case, and, when found erroneous, can be rescinded.—*State v. Fowler*, (La.) 7 So. 180.

Jurisdiction.

84. Under Const. La. art. 81, providing that the supreme court shall have appellate jurisdiction in criminal cases whenever the punishment of death or imprisonment at hard labor may be imposed, or a fine exceeding \$800 is actually imposed, a defendant indicted for murder may appeal though the jury found him guilty of assault with intent to kill, and he was sentenced to pay a fine of only \$100.—*State v. Guillory*, (La.) 7 So. 690.

85. Where the object of a proceeding is to have execution issue on a judgment of forfeiture of a bond in a criminal case, it is a criminal, and not a civil, proceeding; and the jurisdiction of the supreme court is to be tested by the character of the crime charged in the indictment.—*State v. Doyle*, (La.) 7 So. 699.

Deposit by appellant.

86. An appellant from a recorder's sentence, condemning him to pay a fine, and, in default, to be imprisoned for a number of days, for the violation of a municipal ordinance, is bound, as a condition precedent to the filing of the transcript of appeal, to deposit with the clerk the amount provided by the rule; Act La. 1884, No. 16, providing that all expenses incurred by the prosecution of persons accused or convicted of crimes shall be paid by the respective parishes, etc., and Act La. 1886, No. 19, providing that no costs shall be demanded from any one accused in a criminal prosecution, not applying to proceedings for violations of city ordinances.—*State v. Heuchbert*, (La.) 7 So. 829.

Trial de novo.

87. An appeal taken from the judgment of a justice in a criminal proceeding cuts off all inquiry into the inaccuracies of the affidavit filed as the basis of the warrant of arrest, and the city court has authority to try the case *de novo*, without an indictment or presentment by a grand jury; Code Ala. 1886, § 4231, relating to cases taken by appeal from the judgment of a justice, providing that "the trial in the circuit or city court shall be *de*

nemo, and without indictment or presentment by the grand jury, but the solicitor shall make a brief statement of the cause of complaint."—*Williams v. State*, (Ala.) 7 So. 101.

Appeal and error—Record and bill of exceptions.

88. Where the record on appeal in a criminal case presents neither bill of exceptions, motion to quash or in arrest, nor assignment of errors, and there is no error patent on the face of the record, the judgment will be affirmed.—*State v. Turley*, (La.) 7 So. 715.

89. Counsel of an accused cannot take testimony to disprove statements of facts by the trial judge in a bill of exceptions.—*State v. Callegari*, (La.) 7 So. 180.

90. A bill of exceptions taken to the refusal of the trial judge to cause to be reduced to writing testimony designed to lay the foundation for the admission of voluntary declarations of defendant, who was indicted for larceny, cannot be sustained where it does not show the nature and substance of the testimony; that there existed a difference between the accused and the judge as to the facts; that the testimony was illegally admitted, and was insufficient for the purpose for which it was offered, and that by its not being thus taken the accused has sustained real injury.—*State v. Anderson*, (La.) 7 So. 687.

91. When the record on appeal contains no bill of exceptions, motion in arrest of judgment, or assignment of error, and there is no error on the face of the record, the verdict and judgment will not be disturbed.—*State v. Bertin*, (La.) 7 So. 668.

92. A judgment of conviction in a criminal case will be reversed, on appeal, where the record fails to show where the court was held in which the indictment was found and the trial held.—*Fox v. State*, (Miss.) 7 So. 221.

93. When it is alleged in a motion for new trial that the judge used improper language to or in the presence of the jury, the language imputed to the judge will not be considered, if not incorporated in the bill of exceptions.—*White v. State*, (Fla.) 7 So. 857.

94. The denial of defendant's motion for a new trial on an information for gambling on the ground that the jury after failing to agree were sent out a third time without their consent, in violation of *McCiel Dig. Fla. p. 448, § 23*, will not be reviewed on appeal, where the fact that they were so sent out is not made to appear by a bill of exceptions, but the only evidence of it is an entry to that effect on the motion docket of the trial court.—*Tuberson v. State*, (Fla.) 7 So. 858.

95. The statements made by the trial judge in a bill of exceptions will be taken as correct on appeal when those made by counsel differ from them.—*State v. Euzabe*, (La.) 7 So. 784.

96. Where a *certiorari* has issued on appellants' motion to complete the record, on appeal from a conviction for the violation of a municipal ordinance, and, though five months have elapsed, the appellants have neglected to take out and serve the writ, the appeal will be dismissed.—*State v. Ferguson*, (La.) 7 So. 670.

Review.

97. An objection, made for the first time on appeal, that a pleading made below had been presented too late, cannot be considered by the appellate court.—*State v. Lubin*, (La.) 7 So. 68.

98. The supreme court of Louisiana has appellate jurisdiction, in criminal cases, on questions of law alone; and it will not review the refusal of the lower court to grant a motion for a new trial, based solely on an alleged deficiency of evidence to make out a case.—*State v. Deschamps*, (La.) 7 So. 703.

99. The action of the trial court in overruling defendant's motion for a new trial will not be reviewed by the supreme court.—*Cooper v. State*, (Ala.) 7 So. 47.

100. Defendant, who was jointly indicted with another for selling intoxicating liquors without a license, cannot complain of the admission of alleged improper evidence against his co-defendant, who

was acquitted, which evidence in no way affected defendant.—*Segars v. State*, (Ala.) 7 So. 46.

101. Where a person has been excused from serving on a jury without having been sworn as to the truth of his excuse, a party who did not object in the court below cannot avail himself of the error.—*Riley v. State*, (Ala.) 7 So. 149.

102. On a trial for murder, in which the defendant has offered testimony that, 10 days before the killing, the deceased went to his home, and made an assault on his wife, the admission of evidence that a certain negro "had lived on a part of the 40 acres constituting the defendant's homestead" is reversible error; the appellate court being unable to "see affirmatively that it did not injure the defendant," though it is "utterly unable to see that it did or could" have done so.—*Maxwell v. State*, (Ala.) 7 So. 824.

103. Where defendant obtains a jury before exhausting his peremptory challenges, and his witnesses in large numbers respond promptly and testify freely, and the court, after seeing the temper and conduct of the jurors on their *voir dire*, denies a motion for a new trial, the supreme court will take these matters into consideration in determining the question whether there was error in refusing a motion for a change of venue.—*Cheatnam v. State*, (Miss.) 7 So. 204.

104. Acts Ala. 1888-89, pp. 631-634, § 15, organizing the criminal court of Pike county, confers upon convicted parties the right of appeal to the supreme court. But where a jury is waived, and the judge tries the facts, the decision of the court upon the facts is, in legal effect, equivalent to the verdict of a jury, and will not be reviewed on appeal.—*Boyd v. State*, (Ala.) 7 So. 268.

Presumptions.

105. The supreme court will not presume a fact not shown by the record, and make it a ground of reversal.—*Duncan v. State*, (Ala.) 7 So. 104.

106. A jury was told to convict, if they found that the offense was committed within two years before the filing of an information drawn under a statute that had not been in force so long. The evidence not being preserved, *held*, that it will be presumed that the offense proved was committed after the statute took effect, and that the error was harmless.—*Kurtz v. State*, (Fla.) 7 So. 869.

107. Though the record fails to show that a copy of the *venue* and indictment was served on defendant as ordered, it will be presumed to have been done, in the absence of objection in the trial court.—*Breden v. State*, (Ala.) 7 So. 268.

108. On an indictment for forgery, where the trial is completed in a day, without any adjournment, and defendant was present when the jury was impaneled, it will be presumed on appeal that he was present when the verdict was returned, unless his absence is expressly shown.—*State v. Clement*, (La.) 7 So. 635.

Cross-Bill.

See *Equity*, 14.

Cross-Examination.

See *Witness*, 12, 18.

Curators.

See *Executors and Administrators*.

DAMAGES.

Caused by injunction, see *Injunction*, 15.

For breach of warranty, see *Sale*, 2.

continuing trespass, see *Trespass*, 2, 3.

injuries to passengers, see *Carriers*, 25.

malicious prosecution, see *Malicious Prosecution*, 8.

Exemplary damages.

1. Vindictive damages in an action for injuries at a railroad crossing can only be recovered when the evidence shows that defendant has been guilty of gross negligence.—*Patterson v. South & North Ala. R. Co.*, (Ala.) 7 So. 437.

Proximate and remote.

2. The purchaser of a decree for the sale of a tract of land to satisfy a vendor's lien, as part of the consideration therefor, agreed with his vendor, and with parties who had at various times subsequent to the creation of the lien purchased parts of the land, that before enforcing said decree he would file a petition to determine the order in which the parcels of land should be sold to satisfy the decree, it being further agreed that the original and sub purchasers of the land, or any one of them, might answer and introduce evidence in support of their claims, and that the court should determine the equities between the original and sub purchasers among themselves, and between each and all of them and the purchaser of the decree. *Held*, in an action by one of the subpurchasers for breach of the contract to file a petition to determine the order of sale of the various parcels, that damages cannot be recovered for being deprived of the possession of his land, and for expenses incurred in resisting a confirmation of sale, such damages being too remote.—*Burton v. Henry*, (Ala.) 7 So. 925.

Measure for torts.

3. In an action for assault and battery, the pecuniary condition of both parties may be considered in estimating damages.—*Eltringham v. Earhart*, (Miss.) 7 So. 846.

4. Where the testimony as to the value of an animal killed by a railroad company does not indicate whether the estimate of the value given was based upon the market price, if there is such a price to govern, or upon actual value, and there is nothing to show that an effort was made to ascertain from the witnesses on what basis the valuation was made, the supreme court will not set aside the verdict on the mere supposition that this basis was not the market value.—*Jacksonville, T. & K. W. Ry. Co. v. Wellman*, (Fla.) 7 So. 845.

5. Plaintiff shipped a stallion in a freight-car of defendant, and to insure ventilation left the side door open, nailing some strips of board across the opening. The slats were kicked off, and the stallion escaped uninjured, and, after wandering some distance, strayed upon the track at another point, and was killed by defendant's train. *Held*, that the measure of damages is the value of the horse, and is not limited by the terms of the shipping contract, which stipulated that, for any injuries resulting from a failure of the company to perform its conditions, "the amount claimed should not exceed, for a stallion or jack, \$200."—*Louisville & N. E. Co. v. Kelsey*, (Ala.) 7 So. 648.

Practice.

6. Where plaintiff demanded \$5,000 damages for the negligent act of the defendant, an objection that punitive damages could not be recovered, because not claimed in the declaration, cannot be sustained.—*Southern Exp. Co. v. Brown*, (Miss.) 7 So. 818.

7. It is not error to refuse to charge that the jury should "find for plaintiff for such amount of damages as the proof may show she ought to receive," as the amount of the recovery should be limited to that claimed in the complaint.—*North Birmingham St. R. Co. v. Calderwood*, (Ala.) 7 So. 860.

Dangerous Premises.

See *Negligence*, 3, 4.

DEATH BY WRONGFUL ACT.**When action lies.**

1. In an action against a railroad company for the death of plaintiff's intestate, it was shown that defendant had constructed, at the termination of its track on Black river, an elevator, which was used in lowering and raising freight, on an incline track extending from its depot, on the bank, to the water's edge; and the intestate, having prepared for shipment a small cargo of fish, and placed same on the platform of the elevator, undertook to ride thereon, without defendant's consent and con-

trary to its orders, up to the station, when the wire rope by means of which the car was operated suddenly broke, while the car was ascending, and caused the injury and death of deceased. *Held*, that plaintiff cannot recover, because the deceased was not a passenger, and no contractual relations existed between him and the defendant; he being a mere stranger or trespasser on the company's property.—*Snyder v. Natchez, R. R. & T. R. Co.*, (La.) 7 So. 582.

Who may sue.

2. A father, the death of whose minor son, in the service of another, is caused by the negligence of a fellow-servant, cannot sue the master; his liability for injury so caused having been created by the employe's act of February 12, 1885, (Code Ala. 1886, §§ 2590-2593,) and section 2591 providing that, if such injury results in the death of the servant, his personal representative may sue therefor, and that the damages recovered shall be distributed according to the statute of distributions. The action so given by this section is not extended to the father, also, by virtue of Code Ala. 1886, § 2588, Act Jan. 28, 1885, providing that, where the death of a minor is caused by the wrongful act of another, his agents or servants, the father or the personal representative may sue.—*Lovell v. De Bardelaben Coal & Iron Co.*, (Ala.) 7 So. 756.

Compromise by widow.

3. Under Rev. Code Miss. 1880, § 1510, giving the widow of a person whose death was caused by the wrongful act of another the right to sue therefor, and providing that, where she has children, the amount recovered "shall be distributed as personal property of the husband," the widow, pending an appeal by defendant, may compromise the case by accepting a certain sum in satisfaction of the judgment, and such compromise is binding on decedent's infant children.—*Natchez Cotton-Mills Co. v. Mullins*, (Miss.) 7 So. 542.

Pleading.

4. If in a suit for the death of a minor son in the service of another, caused by the negligence of a fellow-servant, the father would rely on the hiring having been without his consent, or the son put at work whose dangers he could not appreciate and avoid, by reason of his youth and want of experience, those facts must be pleaded.—*Lovell v. De Bardelaben Coal & Iron Co.*, (Ala.) 7 So. 756.

Decedents.

Transactions with, see *Witness*, 4-8.

DECEIT.**When action lies.**

An action for deceit will not lie for a statement by defendant, on employing plaintiff to do a piece of grading, as to its cubic contents, unless it appears that plaintiff did not have equal means of knowledge, as the statement related to a matter resting in opinion, and plaintiff had no right to rely on it.—*East v. Worthington*, (Ala.) 7 So. 189.

Declaration.

See *Evidence*, 15, 16.

DEED.

See, also, *Fraudulent Conveyances; Vendor and Vendee*.

Estoppel by, see *Estoppel*, 1.

Description.

1. The plaintiff and defendant owned adjacent lots. The latter put a fence on what both supposed to be the line, but it left 5 feet of his lot on the plaintiff's side. Afterwards the defendant conveyed to the plaintiff 20 feet off the east end of his lot. *Held*, that the 20 feet are to be measured from the true line, and that parol evidence is not admissible to show an intent to convey a strip 20

feet wide, lying wholly on the defendant's side of the fence.—*Andreu v. Watkins*, (Fla.) 7 So. 878.

Delivery.

2. A deed delivered by an agent, after the grantor's death, in pursuance of directions previously given by the latter, conveys no title.—*Weisinger v. Cooke*, (Miss.) 7 So. 495.

Construction and effect.

3. Under a deed expressing a nominal consideration, but in fact having none, and granting land on condition that "the estate conveyed shall not vest until and unless the grantees shall on or before May 1, 1889, pay \$20,925, or shall, on or before Jan. 1, 1889, pay \$30,000," no title can vest unless one or the other of the payments is made on the day fixed therefor, though the grantors have then given notice that they revoke the option, and withdraw all the propositions therein contained.—*Borst v. Simpson*, (Ala.) 7 So. 814.

4. The preamble in a deed recited that the grantor had previously donated to a county certain lands for a county-site, on which the court-house was situated; but the granting clause conveyed it to the president of the board of police and his successors, "for the use of the county of T. and town of A." There was no former deed. *Held*, that the recital in the preamble was controlled by the granting clause, and did not impose a condition that the land should be used for a county-site.—*Miller v. Board of Sup'rs*, (Miss.) 7 So. 429.

5. When land is conveyed "for the use of the county of T. and town of A." the mere removal of the court-house to another site is not sufficient evidence of an intention to abandon the land, or devote it to other than town and county purposes, to entitle the heirs of the grantor to recover the land for condition broken.—*Miller v. Board of Sup'rs*, (Miss.) 7 So. 429.

6. Where the equitable owner of land executes a quitclaim deed to be held in escrow, and delivered to the grantee on the affirmation by the supreme court of a judgment rendered in his favor in a litigation involving the land, the affirmation of the judgment, and the delivery of the deed to the grantee, will carry with it the legal title acquired by the equitable owner while the litigation was pending in the supreme court.—*Prewitt v. Ashford*, (Ala.) 7 So. 831.

7. A deed recited that grantors, in consideration of \$1,000 to be paid within 10 days, as agreed, "hereby sell, convey, and warrant to the said * * * all that portion of land, * * * excepting only that portion * * * upon which our residence is built. * * * And we hereby sell, convey, and warrant to the said * * * the above-described reservation of home and lot of ground upon the payment to us, or our administrators, of the sum of \$500." The grantee was put in possession of the first-mentioned tract, but not of the home lot. *Held*, that there was a sale only of the land, exclusive of the residence lot, and it was optional with the grantee whether he would take the latter at the price named.—*Atkinson v. Sinnott*, (Miss.) 7 So. 289.

— Land bordering on river.

8. A sale of property with a front on a certain street, extending between certain lines to the river, without guaranty of measurement, conveys *batture* or alluvion rights as effectually as if the land had been sold fronting on the river between the same lines to the street line.—*Meyers v. Mathis*, (La.) 7 So. 605.

9. Express mention in a deed, when the property fronts on the river, that the right of *batture* is sold with it, is surplusage; for, without such declaration, the purchaser acquires the *batture* or alluvion rights.—*Meyers v. Mathis*, (La.) 7 So. 605.

Defacing Index-Boards.

See *Highways*, 4.

Default.

Judgment by, see *Judgment*, 2-5.

Delivery.

Of deed, see *Deed*, 2.
goods, see *Carriers*, 1-4.

Demurrer.

See *Pleading*, 1, 2.

DEPOSITION.

Time of filing cross-interrogatories.

1. Code Ala. 1886, § 2803, requires cross-interrogatories to be filed within 10 days after notice to take depositions, in order that a commission may then issue, and, if they are filed after that time, but before it is in fact issued, they cannot be stricken from the files.—*East Tennessee, V. & G. R. Co. v. Watson*, (Ala.) 7 So. 818.

Right to use.

2. Proof of the testimony of a witness beyond the jurisdiction of the court, in answer to interrogatories, is not admissible where it is not shown that his deposition was used on a former trial, or that defendant had notice of the filing of the interrogatories, or was called on to cross-examine the witness.—*American Union Tel. Co. v. Daughtry*, (Ala.) 7 So. 660.

To perpetuate testimony.

3. Code Ala. 1886, § 2823, which provides that "the testimony of a witness may be taken conditionally and perpetuated, as provided in this article," applies only to witnesses who are not parties.—*Winter v. Elmore*, (Ala.) 7 So. 260.

In criminal cases.

4. Code Ala. §§ 4465, 4466, provide that in certain cases depositions may be taken in behalf of one accused of crime. Section 4467 permits them, in like cases, to be taken in behalf of the state, "when the defendant files his written consent thereto." *Held*, that where depositions taken for defendant, but not offered by him, were offered for the state, it was error to admit them against his objection, under Const. Ala. art. 1, § 7, which guarantees to every one charged with an indictable offense the right "to be confronted by the witnesses against him."—*Anderson v. State*, (Ala.) 7 So. 499.

DESCENT AND DISTRIBUTION.

See, also, *Executors and Administrators*; *Wills*.

Rights of surviving spouse.

1. Act Fla. March 6, 1845, providing that, if a married woman die in this state without children surviving her, the husband shall be entitled to administration, and to all her property, both real and personal, applies as well where the wife is under 21 years of age, as where she has attained that age.—*Coogler v. Rogers*, (Fla.) 7 So. 391.

2. Rev. Civil Code La. art. 917, declaring that the surviving husband or wife shall succeed to the estate of a decedent who has left "neither lawful descendants, nor lawful ascendants nor collateral relations," contemplates the failure of lawful collateral relations, and does not authorize a person to inherit from the illegitimate son of her sister, to the exclusion of his wife.—*Montegut v. Bacas*, (La.) 7 So. 449.

Advancements.

3. In an action by forced heirs for reduction of donations, the disposable quantum must be calculated exclusively upon the conditions existing at the death of the decedent; and where the debts due at the death exceed the value of the property found in the succession, there can be no disposable portion for the satisfaction of legacies; and no subsequent changes, whether by increment in value of the property, or by extinguishment of debts, can affect the case.—*Ball v. Ball*, (La.) 7 So. 567.

4. The demand for reduction of donations can be urged by forced heirs alone; and executors, as such, cannot be heard to champion their rights.—*Ball v. Ball*, (La.) 7 So. 567.

5. Under Rev. Civil Code La. art. 1805, providing that, in order to determine the disposable portion of a succession and the *legitime* of the heirs, the amount of donations *inter vivos* is fictitiously added to the property belonging to the donor at the time of his death, where property is held in community between the surviving wife and the deceased, and a donation is made from the latter to the former, this fictitious addition of the amount of the donation must be made to the active mass of the community, and not to the donor's separate estate; for the donation cannot change the character or amount of the respective rights of the spouses, in the matrimonial community.—Succession of Moore, (La.) 7 So. 561.

Rights of heirs.

6. The ascertainment of the disposable portion of a succession and of the *legitime* of the heirs are incidents of the settlement of the succession, and must be fixed before it is wound up, and its property turned over to the usufructuary or heirs.—Succession of Moore, (La.) 7 So. 561.

7. In an action by heirs of a wife to recover land of defendant, who claims under foreclosure of a mortgage by the husband of his interest in land conveyed to him and his wife jointly, parol evidence is inadmissible to show that the transaction was a disguised donation from the wife to the husband, he paying no consideration therefor, in fraud of her forced heirs, and hence void under Rev. Civil Code La. arts. 1752, 1754.—Dohan's Heirs v. Dohan, (La.) 7 So. 569.

8. An heir has the right to be discharged from the payment of his ancestor's debts, out of his own property, by abandoning the effects of his ancestor's succession to his creditors; the right of preserving the identity of his own property from that of his ancestor's succession; and the right of claiming out of the ancestor's succession the debts that are due to him therefrom; but to do so he must safeguard his acceptance of the succession by a clear and distinct reservation of the benefit of inventory.—Succession of Murray, (La.) 7 So. 126.

Suit to settle estate.

9. A demurrer to a bill to settle the estate of a person who died without descendants, on the ground that it does not state whether there are other collateral relations than the one sued, will be sustained, since all collateral relations are necessary parties to such proceeding, under Code Ala. 1886, §§ 1915, 1917, 1919, 1924, relating to the distribution of estates among collateral relations.—Word v. Word, (Ala.) 7 So. 412.

Destroyed Records.

Establishment, see *Records*.

DETINUE.

Pleading.

1. In a complaint in detinue, brought by a married woman, a general averment that the property sued for is her separate property is sufficient, without any allegation as to the time and manner of her acquiring title.—Daniel v. Hardwick, (Ala.) 7 So. 183.

Claims by third persons.

2. In detinue for an engine, a claim by a person not a party to the action was interposed, under Sess. Acts Ala. 1888-89, No. 59, providing for such intervention. It appeared that plaintiff in detinue had purchased the engine, which was shipped to one M. over defendant's railroad; that while on defendant's tracks plaintiff's president and the consignee gave claimant an order to take possession of the engine; that claimant then paid the freight due to defendant, and took some steps in the removal of the engine, but it remained on defendant's tracks. The evidence did not show whether claimant paid the freight with his own money or with money furnished him by plaintiff, or that he was one of plaintiff's officers. *Held*, that it was a question for the jury whether claimant obtained possession of the engine at plaintiff's request, and whether he paid the freight with his

own money, so as to entitle him to possession of the engine until the money was refunded to him.—White v. Sheffield & T. St. Ry. Co., (Ala.) 7 So. 910.

3. On the trial of the right of property of a third person, who has interposed a claim, the claimant cannot raise the question as to whether the persons who caused the action of detinue to be instituted were rightful officers of plaintiff corporation, entitled to sue in its name.—White v. Sheffield & T. St. Ry. Co., (Ala.) 7 So. 910.

4. The question whether the plaintiff made a demand for the property before bringing the action cannot be raised on the trial of the right of property of an intervening claimant.—White v. Sheffield & T. St. Ry. Co., (Ala.) 7 So. 910.

Damages.

5. Plaintiff cannot recover as damages both rent and the ordinary wear and tear of the property sued for, as rent includes ordinary wear and tear.—White v. Sheffield & T. St. Ry. Co., (Ala.) 7 So. 910.

Devise and Legacy.

See *Wills*.

DISCOVERY.

Interrogatories—Effect of answer.

1. When the plaintiff, having no counter-letter, proceeds *in limine* to probe the conscience of the defendant by evoking his answers to interrogatories, such answers stand as part of the pleadings; and, if they are destructive of plaintiff's action, an exception of no cause of action will lie.—Godwin v. Neustadt, (La.) 7 So. 744.

2. Though answers to interrogatories on facts and articles may generally be contradicted, yet, when evoked as a substitute for a counter-letter, to prove what could otherwise be proved by nothing but a counter-letter, such answers cannot be contradicted by anything but a counter-letter.—Godwin v. Neustadt, (La.) 7 So. 744.

Dismissal.

Of appeal, see *Appeal*, 47-54.
suff, see *Equity*, 22.

Dissolution.

Of corporations, see *Corporations*, 18-20.
injunction, see *Injunction*, 11-12.

DISTURBANCE OF PUBLIC WORSHIP.

Evidence.

On joint indictment of two persons for disturbing religious worship, it was proved that one of defendants left the place of worship, a camp-ground, after night, and called to "the boys" to follow him; that others went out with him, and there was firing of pistols, and much boisterous conduct, in and around the camp-ground for several hours. As to the defendant who first went out, the evidence showed clearly that he was guilty; and, as to the other, the evidence was that he was arrested with the crowd. He also failed to furnish any explanation of his being out at 9 o'clock in the morning, and in the crowd, when arrested. *Held*, that the evidence sustained a verdict of guilty as to both defendants.—Ball v. State, (Miss.) 7 So. 353.

DIVORCE.

Jurisdiction.

1. The courts of Louisiana will not entertain a suit for divorce on the ground of the wife's abandonment, where she left her husband in Massachusetts before he acquired a residence in Louisiana, and has never returned to him, since there has never been a matrimonial domicile in the latter state which the wife could abandon.—Heath v. Heath, (La.) 7 So. 540.

Grounds.

2. Divorce on the ground of extreme cruelty will be denied where there is no actual bodily violence, unless the abuse or neglect complained of be such as damages health, or renders cohabitation intolerable and unsafe, or unless there are threats of mistreatment of such flagrant kind as to cause reasonable and abiding apprehension of bodily violence, so as to render it impracticable to discharge marital duties.—*Palmer v. Palmer*, (Fla.) 7 So. 864.

3. Occasional outbursts of passion, petulance, readiness to anger, frequent and unreasonable complaints, though made in a loud-voiced, boisterous manner, if these are only calculated to render the relations between the parties unpleasant and disagreeable, or simply unhappy, do not furnish sufficient cause for divorce.—*Palmer v. Palmer*, (Fla.) 7 So. 864.

4. Code Ala. 1886, § 2322, provides that either party to a marriage is entitled to a divorce from the bonds of matrimony "when the other was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state." *Held*, that "physically incapacitated," as here used, means substantially the same as "impotent."—*Anonymous*, (Ala.) 7 So. 100.

Practice—Physical examination.

5. On a bill for divorce on the ground of physical incapacity, it was decreed that complainant and defendant be required to submit their persons to examination by physicians.—*Anonymous*, (Ala.) 7 So. 100.

Documents.

As evidence, see *Evidence*, 20-24.

Donatio.

See *Gifts*.

DRUNKENNESS.

As ground for removal of officer, see *Office and Officer*, 4, 5.

As excuse for crime.

Voluntary drunkenness does not justify an assault and battery, and is admissible only to reduce the grade of a crime, where the question of intent, malice, or premeditation is involved.—*Engelhardt v. State*, (Ala.) 7 So. 154.

Duplicity.

In indictment, see *Indictment and Information*, 7.

DURESS.**What constitutes.**

Defendant, on receiving a deed of trust to secure a debt, inserted therein, without authority, a description of the replevied property, which plaintiff, on threat of a criminal prosecution, delivered to the trustee, and which was bought in by defendant at the sale. *Held*, in replevin for the goods, that a verdict directed for plaintiff was proper.—*Graham v. Jones*, (Miss.) 7 So. 496.

Dying Declarations.

See *Homicide*, 86-88.

EJECTMENT.

See, also, *Adverse Possession*.

By state, see *States and State Officers*.

When lies.

1. Where the grantee in a deed conveying land held adversely by another institutes ejectment in the name of the grantor against the person holding adversely, the action will not be dismissed at the instance of the defendant, on the ground that it was brought without the knowledge or consent

of the grantor, or that he neither has nor claims any interest in the land.—*Coogler v. Rogers*, (Fla.) 7 So. 891.

Parties.

2. Where a conveyance is made of lands which at the time are in the adverse possession of one not a party to the deed, ejectment will not lie in the name of the grantee to such deed, but only in the name of the grantor.—*Coogler v. Rogers*, (Fla.) 7 So. 891.

Pleading.

3. The description in the declaration, and in plaintiff's chain of title, of the land sought to be recovered in ejectment, as the "north part of the south-west quarter of lot two," is insufficient.—*Lazar v. Caston*, (Miss.) 7 So. 831.

Evidence.

4. Under Code Miss. § 2491, requiring either party in ejectment on demand of the other party to file a bill of particulars, giving an abstract of the title under which he claims, and providing that in default thereof no evidence of such title shall be given, the bill, when filed, is an admission of record that the party claims under the chain of title therein referred to, and, where the bills of both parties set out a common source, plaintiff need not establish the chain of title back of such source.—*Gillum v. Case*, (Miss.) 7 So. 551.

Judgment.

5. Where the verdict in ejectment is for "five-sevenths of the land described in this complaint, to-wit, certain land in "range 8 east," when in fact the land is described in the complaint as being in "range 7 east," it is not error to reject the description under the *videlicet* in the verdict as surplusage, and render judgment for the land as described in the complaint.—*Howze v. Dew*, (Ala.) 7 So. 239.

Mesne profits and improvements.

6. Where the husband enters in good faith on the land of his wife, under her will and a judicial decree that its provisions be executed, and the will is afterwards adjudged void for want of required formalities in its execution, the heir at law of the wife can recover rents for such land only from the time of judicial demand.—*Miller v. Shumaker*, (La.) 7 So. 466.

7. A defendant in ejectment, holding in good faith under color of title, who takes the benefit of a defense under Code Ala. 1886, § 2706, limiting his liability for mesne profits to one year, cannot receive compensation for his improvements under sections 2702-2706, *Id.*, and is chargeable only with the value of the use and occupation of the land, as it came to him, without regard to the increase by reason of the improvements.—*Southern Cotton Oil Co. v. Henshaw*, (Ala.) 7 So. 760.

Election.

Of offenses, see *Carrying Weapons*, 2.

ELECTIONS AND VOTERS.**Regulations as to form of ballot.**

Rev. Code Miss. 1880, § 137, providing that all ballots shall have "a space of not less than one-fifth of an inch between each name, * * * and a ticket different from that herein prescribed shall not be received or counted," is mandatory and must be strictly complied with.—*Keller v. Toulme*, (Miss.) 7 So. 508.

EMBEZZLEMENT.**What constitutes.**

1. Defendant hauled several bales of cotton to a gin-mill for the owner of the cotton. One of the bales he marked with his son's name, and he also took the receipt for it in the same name. Afterwards, on being questioned as to the number of bales he had taken to the mill, he turned the receipt over to the owner. *Held*, that defendant was not guilty, within Code Ala. 1886, § 3793, which re-

quires that to prove embezzlement defendant must be shown to have fraudulently converted property to his own use, or fraudulently secreted it with intent to convert it to his own use.—*Fenny v. State*, (Ala.) 7 So. 50.

Indictment.

2. The fact that an indictment for embezzlement of money charges that defendant, as broker, received certain merchandise from "G. P. H. & Co.," and that he sold it, and received the money for account of "G. P. H.," is no reason for quashing it.—*Folkdinhorne v. State*, (Miss.) 7 So. 347.

Evidence.

3. In a prosecution of a clerk of the circuit court for converting to his own use solicitor's fees in certain cases, proof offered of other acts of embezzlement, of similar character, committed by the defendant, was admissible, being material to show the knowledge and intent with which the particular acts charged were committed, and tending to rebut any inference of accident or mistake.—*Stanley v. State*, (Ala.) 7 So. 273.

4. Defendant was indicted for converting to his own use moneys paid into his office, or received by him in his official capacity as clerk of the circuit court. The solicitor elected to charge defendant with having embezzled the solicitor's fees in five specified cases. *Held*, that evidence showing the conviction of the defendants in the cases elected, and confessions of judgment for the fines and costs; also, the issue of executions, the collection of the solicitor's fees by the sheriff, and the receipts of defendant for the same,—was admissible to show that defendant had received the fees in his official capacity.—*Stanley v. State*, (Ala.) 7 So. 273.

5. In a prosecution for embezzlement, by a clerk of the circuit court, of solicitor's fees in certain cases, transcripts of the reports made to the auditor by defendant, as clerk, of the amount of solicitor's fees in such cases, having been properly certified, were receivable in evidence.—*Stanley v. State*, (Ala.) 7 So. 273.

EMINENT DOMAIN.

The power.

1. The constitution of Louisiana authorizes the expropriation of lands for railroad necessities, on previous payment of the value thereof and of damages, when any have been sustained.—*Shreveport & A. Ry. Co. v. Hollingsworth*, (La.) 7 So. 693.

Compensation.

2. In an action against a railroad company for damages to property, it appeared that plaintiff's grantor purchased a block with reference to a map showing that part of the street on which it was situated was reserved for railroad purposes, and sold a half interest in part of it to plaintiff, who, after the railroad had been built, purchased the other half interest, and the balance of the block. *Held*, that the reserved right was the only interest essential to be acquired by defendant as against plaintiff; and, being acquired, plaintiff cannot complain of the construction of a necessary embankment by defendant as a nuisance.—*Evans v. Savannah & W. R. Co.*, (Ala.) 7 So. 753.

3. Damages for the taking, and injury to the land, belong to the owner at the time of the injury, and did not pass to a grantee with the title to the land.—*Evans v. Savannah & W. R. Co.*, (Ala.) 7 So. 753.

4. Interest is allowable on the amount allowed as the value of land taken for the right of way of a railroad, from judicial demand, when the company has taken possession, and has not paid prior thereto, but on the damages only from judicial liquidation.—*Shreveport & A. Ry. Co. v. Hollingsworth*, (La.) 7 So. 693.

5. The sworn assessment list furnished by a land-owner to the assessor, giving the market value in money of his land, as required by Code Ala. §§ 470-486, is admissible in a proceeding to con-

demn a right of way across the same land, instituted at about the time the list was made, not merely to discredit the land-owner's testimony in the condemnation proceeding, but as independent evidence of the value of the land.—*Birmingham Mineral R. Co. v. Smith*, (Ala.) 7 So. 684.

Equalization.

Of taxes, see *Taxation*, 18.

EQUITY.

See, also, *Creditors' Bill*; *Discovery*; *Fraudulent Conveyances*; *Injunction*; *Mortgages*; *Partition*; *Partnership*; *Quietting Title*; *Specific Performance*; *Trusts*.

Equitable liens, see *Liens*, 1-3.

Jurisdiction, see, also, *Injunction*, 1-3.

Laches, see *Mortgages*, 23; *Specific Performance*, 4-6.

Pleading, see *Injunction*, 9.

Reformation of mortgage, see *Mortgages*, 3.

Jurisdiction.

1. Equity has jurisdiction to enforce the charge of a legacy on land, though an action at law would also lie.—*Cady v. Cady*, (Miss.) 7 So. 216.

Rescission and cancellation of contracts.

2. An authentic act of sale, under Rev. Civil Code La. art. 2286, is full proof between the parties thereto; and, in the absence of fraud, error, violence, or other matter affecting the consent, the parties to such acts can only assail their validity and reality in two modes, viz.: (1) By a counter-letter; (2) by the answers of his adversary to interrogatories on facts and articles.—*Godwin v. Neustadt*, (La.) 7 So. 744.

3. Between 1878 and 1884, inclusive, defendant, a merchant, had a running account with plaintiff, an illiterate negro, furnishing him goods and supplies, and taking the cotton grown by him in payment. On suit to cancel a conveyance given to secure a balance appearing on the books of defendant at the close of the transactions, the cause was referred to a commissioner to state an account, and many additional credits were allowed plaintiff upon evidence consisting of general estimates of the number of bales grown each year, based upon the number of acres planted, and the character of the crop as being good, bad, or fair, etc., which, it was testified, were for the most part delivered to defendant. Many debits of goods furnished plaintiff's tenants or croppers were stricken out for lack of proof of a contract to pay them, though it appeared that the course of business was for the croppers to deliver their cotton to plaintiff to be applied to the discharge of their accounts with defendant. *Held* such evidence was of too indefinite a character to overcome book entries which for years had been treated as correct by both parties.—*Dickerson v. Thomas*, (Miss.) 7 So. 503.

4. An instrument will not be canceled for fraud of defendant in putting it in the form of an absolute deed, when complainants intended it as a contract to convey, where it appears that complainants agreed to convey the land to defendant, that he has performed his part of the agreement, and that specific performance thereof would give him a deed exactly like that sought to be canceled.—*Atkinson v. Sinnott*, (Miss.) 7 So. 239.

5. The vendees intending to purchase about 8,000 acres, a deed was prepared containing more, and, the number to which title would be approved being unknown, they agreed to pay for any excess. The lands were described by legal subdivisions, and the number of acres in each stated, but not in the total. The vendees' attorney had the deed for two months, examining the title, after which it was delivered on payment of the price of 8,000 acres. The lands were examined by one or more of the vendees, and by an expert sent by them, and were shown not to lie in a compact body by a map given them by the vendors. *Held*, in a suit to enforce a lien for the balance of the purchase money,

in which the vendees seek to rescind for false representations that the excess of acreage was considerable, and that the lands lay in a compact body, rescission could not be granted, the vendees having, with the means of information at hand, purported to make an investigation, which but for their own negligence would have led to the truth.—*New Orleans & A. Coal & Min. Co. v. Musgrove*, (Ala.) 7 So. 747.

6. In an action to rescind an exchange of lands on the ground of fraudulent representations as to the value of the lots conveyed by defendant, complainant testified that defendant said the lots would be very valuable, and would come into market soon, and that he considered them worth \$2,000 each; and that they would sell for \$1,000 each at forced sale. *Held* that, although the lots could not have been sold for more than \$500 each, the representations afforded no ground for relief, being merely an expression of opinion, and not an affirmation of fact.—*Lookwood v. Fitta*, (Ala.) 7 So. 467.

7. A bill to rescind a contract of sale of land, which avers that defendants, by false representations that they had a sufficient title, induced plaintiffs to enter into the contract, when in fact the title was in another, of which plaintiffs were ignorant, is sufficient without alleging the facts to show want of title in defendants.—*Orendorff v. Tallman*, (Ala.) 7 So. 821.

8. Where the bill avers that complainants have not, nor ever had, possession of the land, it need not allege that they have abandoned or restored it to defendants.—*Orendorff v. Tallman*, (Ala.) 7 So. 821.

Rescission and cancellation of contracts

—Undue influence.

9. The validity of a conveyance is not affected by reason of having been obtained by undue influence and misrepresentations of a son, when the actual purchaser thereof for valuable consideration neither participated therein nor had notice thereof.—*Dent v. Long*, (Ala.) 7 So. 640.

10. A deed made two years before the death of a grantor will not be set aside for undue influence in an action commenced six years thereafter by her heirs, who had at all times been aware of her mental condition, when it appears that the parties cannot be placed *in statu quo*.—*Dent v. Long*, (Ala.) 7 So. 640.

Accounting.

11. On a suit to cancel a conveyance given by plaintiff, an illiterate negro, to secure a balance appearing on the books of defendant, when it appears that defendant's books showed grossly excessive charges of interest, and in some cases double charges, the conveyance will be canceled, and an accounting ordered.—*Dickerson v. Thomas*, (Miss.) 7 So. 508.

Pleading—Bill.

12. A general demurrer to a bill as for want of equity, will be overruled if there is any equitable ground of relief stated in the bill.—*El Modelo Cigar Manuf'g Co. v. Gato*, (Fla.) 7 So. 28.

13. Where a bill for foreclosure alleges that the mortgagor's wife, "Matilda C.," joined him in the execution of the mortgage, a demurrer for want of parties in that "Martha C." is not joined as a party defendant is properly overruled.—*Cradock v. American Freehold Land & Mortgage Co.*, (Ala.) 7 So. 196.

—Cross-bill.

14. On bill to enjoin the sale of land under execution, a cross-bill praying an issue *devisavit vel non*, to determine the validity of a will under which plaintiffs claim the land, is demurrable, as it seeks no affirmative relief, and serves but to accumulate costs, since the court could as well direct the issue on motion or *sua sponte*.—*Carter v. Harvey*, (Miss.) 7 So. 286.

—Multifariousness.

15. A bill filed by heirs to settle an estate, and making an administrator *de bonis non*, and the administrators of a previous administrator *de*

bonis non, and the owner of the only indebtedness existing against the estate, which indebtedness is assailed as invalid, parties, is not multifarious.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

16. A bill by a minority stockholder of a corporation, against the majority holder, another company, and the person who induced the complainant and others to build the plant and organize the corporation, alleged that the defendant company, which received its stock in payment for useless machinery sold the corporation, had called a meeting for the avowed purpose of assuming control and issuing bonds to itself, and prayed an injunction to restrain the defendant company from voting its stock, and that the stock be canceled. *Held*, that it was multifarious, as it showed no combination between the defendants, and no connection between the wrongs charged against them, and because no common relief was prayed against them, and because the corporation itself was the proper party plaintiff in such a suit.—*American Refrigerating & Construction Co. v. Linn*, (Ala.) 7 So. 191.

—Amendment.

17. A wife's land having been sold under a mortgage, and bid in by her husband's brother, who afterwards conveyed to him, a bill by her heirs, charging that he had paid the debt with her money, and that the foreclosure was collusive, cannot, on failure of proof that the mortgage was not a valid and subsisting lien, be amended so as to charge him as having purchased in trust for his wife, and to compel a conveyance on repayment of his expenditures in removing the incumbrance.—*Park v. Lide*, (Ala.) 7 So. 805.

18. A bill alleged that certain land was conveyed to complainant and her husband; that they made to defendants, to secure a debt of the husband's, a mortgage, in which complainant was not named or designated as grantor, but which was signed by her; that the land was sold under the mortgage, defendants becoming the purchasers; that complainant had an undivided half interest in the land. *Held*, that an amendment, alleging that the land could not be equitably divided among the tenants, and inserting a special prayer for a sale of the land for the purpose of partition in place of a special prayer that she be placed in possession of her interest as tenant in common, was properly allowed, as there was no radical change in the cause of action, and the relief was the same kind.—*partition*,—though obtained in a different manner.—*Fite v. Kennemer*, (Ala.) 7 So. 920.

19. An amended paragraph of a bill which avers the assignment of certain claims to plaintiffs at a certain time is not demurrable, as a departure from the case made in the original bill, where the claims set up in the amended paragraph were in the original bill, and were relied on by claimants from the beginning, and where on former appeals no defects were pointed out except that the claims were insufficiently stated, and where the only change made is in showing when and in what manner the claims were acquired.—*Conner v. Smith*, (Ala.) 7 So. 150.

20. Where a bill alleges that certain land was sold to respondent, and that six notes were given for the unpaid purchase money, and copies of two of the notes, which are averred to have been assigned to complainant for value, are filed as exhibits, an amendment which strikes out the averment of assignment, adds a co-complainant, and attaches as exhibits copies of two more notes, which had matured before the bill was filed, does not constitute a new case, and is not a radical departure from the case originally stated.—*Johnson v. Durner*, (Ala.) 7 So. 245.

Time for taking testimony.

21. It is within the discretion of the court to refuse a petition for the enlargement of the time to take testimony under equity rule Fla. 71, which allows "three months, and no more, * * * for the taking of testimony after the cause is at issue, unless the judge shall, upon special cause shown, enlarge the time," where the petition is not filed

until two months after the expiration of the time allowed by the rule, and the only excuses offered for the delay are offers of compromise, which the adverse party denies were made, the necessity of procuring the testimony of witnesses in a distant state, and sickness of petitioner, from which he recovered, however, before the expiration of the time limited by the rule.—*Magbee v. Kennedy*, (Fla.) 7 So. 529.

Practice—Dismissal.

23. On a motion to dismiss for want of equity, a bill praying that an account be taken "to determine the amount put in the firm of B. & H., or in to the partnership business, by orators' intestate, B., and how much is still due him or his estate thereon," and further praying for a decree against said H. for the amount so found due, the bill will be considered as if already amended so as to allege the amount of the partnership debts, the amount of the profits and expenses, and the amount received by each, and to contain a prayer for the settlement of the whole partnership; and, so viewed, it contains equity, and the motion to dismiss is properly denied.—*Haynes v. Short*, (Ala.) 7 So. 157.

Bill of review.

28. A bill of review, for error of law apparent upon the record, will lie, although the decree sought to be reviewed is a final decree, consequent upon a decree *pro confesso*, for failure of the defendant to plead.—*Frentiss v. Paisley*, (Fla.) 7 So. 56.

Decree.

24. A decree of a court of chancery which establishes that lands have been purchased by a husband with his wife's separate estate, will not divest the husband and his grantees of the legal title to the land, and vest it in the wife, though it in express terms purports to do so, as the statutes of Alabama do not give chancery courts authority to transfer title from one party litigant to another by mere decree, except on a party's failure to comply with directions therein fixing a specified time by which the conveyance shall be made.—*Prewitt v. Ashford*, (Ala.) 7 So. 381.

Reversal of decree — Restitution of money paid.

25. The chancellor has the power to make an order for restitution of money paid on a decree afterwards reversed on appeal, when the parties are before him, and there is shown to have been a decree, payment thereunder, and a reversal thereof.—*In re Walter*, (Ala.) 7 So. 400.

ERROR, WRIT OF.

See, also, *Appeal; Certiorari; Exceptions, Bill of; New Trial.*

Appearance.

1. An application to the appellate court for leave to withdraw the transcript with a view to testing its correctness, is an appearance in that court, and cures defects in the service of the *sci. fa. ad aud. errores*.—*Williams v. La Penotiere*, (Fla.) 7 So. 869.

Dismissal.

2. A writ of error will not be dismissed because part of the record was filed after it issued on a transcript previously filed on appeal.—*Williams v. La Penotiere*, (Fla.) 7 So. 869.

8. Damages having been assessed, as for a frivolous appeal, because the transcript was not filed in time, a writ of error in the same case will not be dismissed for a failure to pay such damages.—*Williams v. La Penotiere*, (Fla.) 7 So. 869.

Estates.

See *Homestead; Tenancy in Common and Joint Tenancy.*

ESTOPPEL.

Res adjudicata, see *Judgment*, 8-12.

By deed.

1. Where one who conveys lands held adversely is estopped to claim them as against the adverse occupant, the estoppel extends to his grantees.—*Coogler v. Rogers*, (Fla.) 7 So. 391.

By record.

2. In a suit for partition between the heirs of an alleged owner of the land, one of the defendants, a married woman living with her husband on the premises in controversy, is not estopped, as a tenant in common, from setting up title in her husband by adverse possession.—*Cooper v. Fox*, (Miss.) 7 So. 349.

In pais.

3. In an action on a note, defendant cannot set up an agreement that certain counter-claims against the payee of the note would be considered as payments, where it appears that he afterwards recovered judgment in an independent action against payee for those claims.—*C. Aultman & Co. v. Gamble*, (Ala.) 7 So. 248.

4. One who conspires with the widow of a deceased owner of land to procure a fraudulent tax-title cannot deny the title of the deceased owner's heirs.—*Chiles v. Gallagher*, (Miss.) 7 So. 208.

5. Where the owner of land has declared that he has no interest therein, and refused to defend suits to enforce liens thereon, he is estopped to claim it against one who purchased on the faith of such declarations.—*Coogler v. Rogers*, (Fla.) 7 So. 391.

6. The validity of a mortgage executed to a foreign corporation not having an office or known place of business or an agent in the state, prior to the act of February 28, 1887, "to give force and effect to section 4, art. 4, of the constitution of the state of Alabama," cannot be questioned by the mortgagor, who has received the benefit of the contract, after foreclosure and consequent satisfaction of the debt, before the sale is disaffirmed.—*Sherwood v. Alvis*, 83 Ala. 115, 8 So. 807, followed.—*Craddock v. American Freehold Land Mortgage Co.*, (Ala.) 7 So. 196.

7. The operation of an estoppel of a stockholder to dispute a lease given by the corporation is between the corporation and its shareholder; the company itself is not estopped to proceed against the lessee for the avoidance of the lease.—*Memphis & C. R. Co. v. Grayson*, (Ala.) 7 So. 122.

8. Where one has brought an action on a contract of sale and recovered judgment for the purchase money, he is estopped to say that his assumption, in the act of sale, of certain notes due by his vendor and set up by his vendee, into whose possession they have come, as a counter-claim, was a simulation.—*Johnson v. Flanner*, (La.) 7 So. 455.

9. The fact that a husband, in buying machinery with his wife's funds, which is thereafter affixed to her land, does not disclose his agency to the seller, does not estop the wife in a subsequent controversy with creditors of the husband other than the seller from asserting her ownership of the machinery.—*Arnold v. Elkins*, (Miss.) 7 So. 531.

10. Plaintiff delivered to defendant express company certain notes, with instructions to deliver them to K. & Co., to take their receipt and to return it to plaintiff. The notes were delivered to K., the managing partner of K. & Co., who stated to defendant's agent that they were intended for him, and gave his individual receipt therefor, which was sent to plaintiff. Several times within the next year plaintiff delivered other notes to defendant, with which precisely the same course was pursued. The notes not being collected, plaintiff demanded their return from K. & Co., who denied ever having received them. K. was then insolvent, and plaintiff sued the express company for damages for the loss of the notes. Held that by failing to repudiate defendant's action in delivering them to K., as it had notice of such action, and by acquiescing therein in subsequent transac-

tions, plaintiff is estopped to complain of it.—*Wilson Sewing-Mach. Co. v. Southern Exp. Co., (La.) 7 So. 710.*

11. Defendant, who had gone into possession of land belonging to his father, and continued in the possession after his father's death, agreed with the other heirs to submit to arbitration "all deeds and paper titles of every kind to any property now claimed by us, formerly belonging to said estate," (of their deceased father,) the award to be "final and binding." The award held that the land occupied by defendant belonged to the estate of the father, and directed it to be sold by the administrator for debts. *Held*, that defendant was estopped to contend that his possession was adverse, though the administrator, instead of selling under the award, procured an order of sale from the probate court.—*Burrus v. Meadors, (Ala.) 7 So. 469.*

12. In case a widow signs an official inventory of the husband's succession, stating that certain land in his name belongs to his principal, she will be concluded thereby unless she show that it was signed in error; but her admission cannot affect the interest of her minor children as heirs of one-half.—*Sagory v. Bouny, (La.) 7 So. 785.*

13. A grant to a railroad company of a right of way "not exceeding one hundred feet in width," with the right to use "so much land as the officers may deem necessary," is not an absolute grant of 100 feet; and the company having located its road, occupying a narrower strip, and having acquiesced for years in the occupation of the land bordering on the strip by other grantees, cannot eject them, and widen its right of way.—*Vicksburg & M. R. Co. v. Barrett, (Miss.) 7 So. 549.*

In pais—By contract.

14. A husband who has been a party to an authentic act by which it is declared that the wife purchases with her separate paraphernal funds, and for her separate benefit, is estopped from contradicting the verity of such recitals unless he first prove that such recitals were embodied in the act through fraud, error, or violence.—*Succession of Bellande, (La.) 7 So. 585.*

15. Where a husband has been a party to an authentic act, whereby it is declared that the wife purchases the property therein conveyed with her separate paraphernal funds, and its terms are communicated to him at the time, he cannot avoid their effect, in a contest with her heirs as to the ownership of the property, by saying that he did not understand the legal significance of the terms used.—*Succession of Bellande, (La.) 7 So. 585.*

EVIDENCE.

See, also, *Deposition; Witness.*

In action on contract, see *Contracts*, 8-10.

— insurance policy, see *Insurance*, 14.

— negotiable instrument, see *Negotiable Instruments*, 17-19.

criminal cases, see *Burglary*, 8-5; *Criminal Law*, 37-55; *Embezzlement*, 8-5; *Forgery*; *Gaming*, 8, 4; *Homicide*, 22-42; *Intoxicating Liquor*, 29, 30; *Larceny*, 9-13; *Miscegenation*, 2-5; *Perjury*, 7; *Rape*, 8-6; *Robbery*.

Of master's negligence, see *Master and Servant*, 11-13.

negligence, see *Negligence*, 11, 12.

payment, see *Payment*, 2.

sale of good-will, see *Good-Will*, 2.

set-off, see *Set-Off and Counter-Claim*, 4.

Pleading and proof, see *Pleading*, 9-11.

Proof of release, see *Release and Discharge*.

Reception, see *Trial*, 2.

Records of marriages, see *Marriage*, 3, 4.

Rulings on, see *Appeal*, 89.

Weight and sufficiency, review, see *Appeal*, 88.

Judicial notice.

1. In a prosecution in Alabama of an employee of a railroad company for failure to work the public road, a decision of the supreme court of Tennessee, declaring the exemption of the servants of such railroad from the duty of working the public roads by Act Tenn. Feb. 1846, to be un-

constitutional, cannot be considered by the court in Alabama unless it is put in evidence.—*Johnson v. State, (Ala.) 7 So. 253.*

2. The principle that courts will take judicial notice of all matters of a public nature, or of facts that are commonly known by well-informed persons, does not authorize the court to assume that the lines of the constituent members of a consolidated railroad company, when completed according to their charters, will be so located as to admit the passage of trains from one to the other continuously, without break or interruption.—*Georgia Pac. Ry. Co. v. Gaines, (Ala.) 7 So. 332.*

Presumptions.

3. Where a mortgagor wrote, postpaid, and addressed, a letter to the mortgagees, at their usual place of residence, requesting the cancellation of the mortgage, it will be presumed that the letter was received by them.—*Steiner v. Ellis, (Ala.) 7 So. 803.*

4. Where a merchant has in his possession, and sells, cotton on which there is a landlord's lien, and a writ enjoining the sale has been served on him, and it is shown that, a few days before the writ was served, he had notice of the lien, and had possession of the cotton until the day of such service, it will be presumed, in the absence of proof of the exact time of such sale, that it was made after service of the writ.—*Newman v. Bank of Greenville, (Miss.) 7 So. 403.*

5. In an action against a street railway company for personal injuries received by reason of alleged negligent repairs to a bridge which the company was charged with keeping in repair, it is proper to refuse the charge that the fact that the employes who made such repairs were not called to testify for defendant affords a presumption of negligence, where the superintendent of the company testifies that he endeavored to find the employes who made them, but failed to do so.—*Peets v. St. Charles St. R. Co., (La.) 7 So. 638.*

Burden of proof.

6. In a suit on an open account, the burden is on the plaintiff to show the balance due after giving credit for all payments.—*Rice v. Schloss, (Ala.) 7 So. 802.*

7. When the debtor admits the correctness of the account, but says that he has paid it, the burden is on him to prove the payment.—*Snodgrass v. Caldwell, (Ala.) 7 So. 834.*

Best and secondary evidence.

8. Parol evidence of the purport of printed rules for brakemen carried on trains was properly rejected when the absence of the printed rules was not accounted for.—*Georgia Pac. Ry. Co. v. Propst, (Ala.) 7 So. 635.*

9. In an action against a railroad company for killing plaintiff's mule, the oral testimony of one of defendant's employes as to the accident is not to be excluded, on the ground that he made a contemporaneous written report to defendant, as required to do by its regulations, and that such report is the best evidence in the premises.—*Jacksonville, T. & K. W. Ry. Co. v. Wellman, (Fla.) 7 So. 845.*

10. A deed is not shown to have been lost, so as to admit secondary evidence of its contents, by merely showing by one witness that it once existed, and that he last saw it in his desk at home.—*Echols v. Hubbard, (Ala.) 7 So. 817.*

11. Secondary evidence of the contents of a document cannot be given, unless it be shown to have been lost or destroyed; and, if lost, careful search must have been made at the place where it was last known to be, or where it would most likely be found.—*Foster v. State, (Ala.) 7 So. 185.*

12. Secondary evidence, offered by defendant as to the contents of a written lease, will not be allowed where he testifies that the writing has been misplaced, and that he has made diligent search for it, and thinks it is lost or destroyed, but admits that it is probably among certain private papers carefully packed away for safe-keeping, which he has neglected to examine.—*Burks v. Bragg, (Ala.) 7 So. 154.*

13. The fact that the original papers in an action tried before a justice of the peace cannot be found either by the party in whose favor the judgment was rendered, or by the justice, will not warrant the introduction of parol evidence regarding the judgment, in the absence of a showing that the justice had been in office continuously since its rendition, or that he had succeeded, after being out one or more terms, to the same justiceship that he held at the time of the rendition of the judgment; the presumption being that his docket and papers have been turned over to his successor in office, as required by law.—*Roach v. Privett*, (Ala.) 7 So. 808.

Hearsay.

14. Where, in reply to the debtor's claim that the account had been partially paid by a delivery of corn to the creditors, one of them testifies that they had paid for the corn by turning over some of their notes to the debtor, testimony by the debtor that the creditors had subsequently collected these notes, "which I can prove," is properly excluded as hearsay, since the natural import of the language is that the debtor had no personal knowledge of the collection.—*Snodgrass v. Caldwell*, (Ala.) 7 So. 884.

Declarations and admissions.

15. Declarations made by one in possession, as to how he acquired title, are not admissible in its support.—*Ray v. Jackson*, (Ala.) 7 So. 747.

16. In an action on an account, a copy of the last page from the book of original entries, containing the footing of the entire account, to the correctness of which the debtor did not object on its exhibition to him, is admissible in evidence as an admission by him, though it is incompetent as an original entry.—*Snodgrass v. Caldwell*, (Ala.) 7 So. 884.

Opinion evidence.

17. Where it is impracticable to lay before the jury all the details bearing on the distance a horse can be seen along a railroad track, the opinions of witnesses may be received.—*East Tennessee, V. & G. R. Co. v. Watson*, (Ala.) 7 So. 813.

18. In an action for personal injuries, an expert may be permitted to testify that they were occasioned by a fall of some kind, but he cannot give his opinion about specific facts of the fall, as to which he does not pretend to know anything.—*Patterson v. South & North Ala. R. Co.*, (Ala.) 7 So. 457.

19. In an action for burning cotton, by sparks from defendant's engines, where the cotton was loaded by plaintiff on flat-cars, without covering, the opinion of a witness as to whether or not it would have burned if it had been loaded in box-cars or covered is not admissible.—*Louisville, N. O. & T. Ry. Co. v. Natchez, J. & C. R. Co.*, (Miss.) 7 So. 850.

Documents.

20. A party, in offering written documents in evidence, has the right to restrict their effect as evidence to a definite purpose, and is not compelled to offer them for whatever they may be worth as evidence.—*Succession of Murray*, (La.) 7 So. 126.

21. The power conferred by the Code of Mississippi on courts of chancery to remove the disabilities of minors is a special statutory power, not judicial; and a decree removing such disability is not admissible in evidence, in a suit against a minor for goods furnished her, until it is shown that the court acquired jurisdiction to render it.—*Marks v. McElroy*, (Miss.) 7 So. 408.

22. Original entries made in the ordinary course of business, and contemporaneously with the transactions to which they relate, are admissible in evidence, such entries being corroborated by the party who made them, or, in case of his death, or indefinite absence from the state, proof of his handwriting being given.—*McDonald v. Carnes*, (Ala.) 7 So. 919.

23. The testimony of the operator in charge of defendant's office, from which a telegram was sent, that he sent away all the papers found there

shortly after the telegram was sent, and that he has been informed that they were destroyed, is not competent to show the destruction of the telegram for the purpose of admitting parol evidence of its contents.—*American Union Tel. Co. v. Daughtry*, (Ala.) 7 So. 660.

24. Where plaintiff replevied property taken from him by attachment in a suit for rent and for the price of supplies, and at the trial proved his title, it was error to exclude the papers in the attachment proceeding, offered by defendant, on the ground that the affidavit did not show the dates on which the claims for rent and supplies became payable; that the justice's signature to the writ was not preceded by the words "witness my hand," etc.; and that the bond was not dated or approved by the justice issuing the writ, and recited that the leased premises were situate in the second district of Chickasaw county, when they were really in the first district. Such objections were frivolous.—*Payne v. Stovall*, (Miss.) 7 So. 502.

Parol evidence.

25. Where a deed of trust of lands from a husband to his wife is recited to be for a valuable consideration, parol evidence is inadmissible, in a contest between the heirs of the former and the devisees of the latter, to show that no such consideration was actually paid.—*Ohmer v. Boyer*, (Ala.) 7 So. 663.

26. In an action for the purchase price of land, where the defendant seeks to set off certain notes of plaintiff's vendor which plaintiff in the act of sale to him assumed to pay, oral evidence that such assumption was a simulation, and that the consideration of the transaction between plaintiff and his vendor was a different one, is inadmissible.—*Johnson v. Flanner*, (La.) 7 So. 455.

27. Under Rev. Civil Code La. art. 2440, which provides that testimonial proof of a verbal sale shall not be admitted, parol evidence is not admissible to prove that a third person, who was vested with the title to real estate, received it for the use of the intended vendee, where there is no attempt to prove fraud in the transaction.—*Dohan's Heirs v. Dohan*, (La.) 7 So. 669.

28. The relinquishment of a lease, and defendant's obligation to pay for it, being executed on the same day, each in consideration of the other, are to be construed as one transaction; and, in the interpretation of such agreement, the court may admit oral testimony to show that defendant acted as agent of the owner of the premises, who wished to obtain the relinquishment in order that he might sell and give possession.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

29. Parol testimony is inadmissible to show that defendant's liability to pay was dependent upon the consummation of such sale, since it tends to fix a condition on a written obligation which on its face shows an absolute promise.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

30. A vendor sold land with the purpose of forming an incorporated land company, which was done, receiving notes in payment therefor. In a suit on one of the notes, the maker alleged as a defense that the vendor had promised him, as an inducement to enter the company, that he would sell enough of its stock and lands at a profit to pay defendant's notes as they matured; which he had not done. Held, that this agreement, being verbal, and previous or contemporaneous, is presumed to be merged in the written contract, and oral evidence of it was improperly admitted.—*Lakeside Land Co. v. Dromgoole*, (Ala.) 7 So. 444.

Competency and relevancy.

31. In an action to recover property which the owner's agent unlawfully disposed of, the accounts or statements made by the agent to his principal, in which the property figures as the property of the principal, are receivable in evidence to prove title to the property on the part of the principal.—*Sagory v. Metropolitan Bank*, (La.) 7 So. 688.

32. On an issue as to the value of a horse the owner may testify that it was "a very fine colt," "fine stock," "sired by a trotting horse," "its mother a fine blooded mare," and he may use

kindred expressions illustrating its qualities, including "beauty of form" and "gracefulness of movement."—*East Tennessee, V. & G. R. Co. v. Watson, (Ala.) 7 So. 813.*

83. Where the only issue is as to the payment of an account, testimony that the creditors had executed their note to the debtor after an alleged settlement of the account is properly excluded, on an admission by the debtor's counsel that the note was not in any way connected with the settlement.—*Snodgrass v. Caldwell, (Ala.) 7 So. 834.*

Weight.

84. If in a suit between a land-owner and a builder, architects and contractors are employed as experts to estimate the cost of a building, and they differ materially, the truth in most cases may be found in the estimate most favorable to the land owner.—*Hart v. Dreyfous, (La.) 7 So. 781.*

Examination.

Of witness, see *Witness*, 9-11.

EXCEPTIONS, BILL OF.

See, also, *Appeal; Certiorari; Error, Writ of; New Trial.*

When taken.

1. A bill of exceptions not tendered and approved within the time prescribed in the order of the court will be stricken from the record, and all assignments of error based on it will be disallowed.—*Gaston v. State, (Ala.) 7 So. 340.*

Necessary contents—Evidence.

2. Under Code Ala. 1886, § 2762, which provides that, on the failure or refusal of the presiding judge to sign a bill of exceptions, "the supreme court must receive such evidence of the facts as may be deemed by it satisfactory, and proceed to hear the cause as if the bill had been signed by the court," evidence which shows without conflict that a bill of exceptions truly states both the facts as they appeared in evidence and the rulings of the court sought to be reviewed, that the bill was tendered to the judge before the adjournment of the term, and that he failed or refused to sign it, warrants the supreme court in declaring the bill of exceptions to be established as if signed.—*Montgomery & E. Ry. Co. v. Perryman, (Ala.) 7 So. 833.*

EXECUTION.

See, also, *Attachment; Garnishment; Judicial Sales.*

Restraining payment of proceeds, see *Infundation*, 8.

Issuance.

1. Under Code Ala. 1886, § 3345, providing that a justice must, unless otherwise directed, after the lapse of five days from rendition of judgment, issue a writ of *fiert facias* for the satisfaction of the judgment, the fact that the writ is issued before the lapse of the five days does not render the writ void, and is of no avail in a collateral impeachment of the proceedings under it.—*Waldrup v. Friedman, (Ala.) 7 So. 510.*

Levy.

2. Under Code Ala. 1886, § 3345, providing that an execution issued by a justice shall be returnable not more than 60 days from the date of its issue, a levy thereafter made, and all subsequent proceedings founded on it, are void.—*Waldrup v. Friedman, (Ala.) 7 So. 510.*

3. Where personal property has been levied on by a duly-authorized officer, the levy is not invalidated, as between the parties, by delivering it to the wife of defendant to keep until the day of sale, and defendant is bound to restore the property at that day, if in his possession.—*McCullough v. McClintock, (Ala.) 7 So. 149.*

Property subject to levy.

4. A judgment debtor who pays out of his own effects most of the purchase money for land which

is conveyed to his wife has no interest in the land which is subject to sale under execution, under Code Ala. 1886, § 2892, which provides that "executions may be levied on real property to which the defendant has a legal title or a perfect equity, having paid the purchase money, or in which he has a vested legal interest in possession, reversion, or remainder."—*Goodbar v. Daniel, (Ala.) 7 So. 254.*

Claims by third persons.

5. The claimant's issue in Mississippi cannot be raised where the property levied on is real estate.—*Laffel v. Miller, (Miss.) 7 So. 824.*

6. Where an affidavit of title to property levied on under execution is made, and a claim-bond executed, and upon the trial the property is found liable to execution, and, upon failure to deliver by the claimant within 10 days, the claim-bond is indorsed, "Forfeited," and returned, the constable is unauthorized to accept affidavit of claim and claim-bond from another party, while the property is withheld, so as to defeat the plaintiff's right to execution.—*Cooper v. Davis, (Ala.) 7 So. 145.*

Sale.

7. Under Rev. Civil Code La. § 2266, providing that all judicial sales of real property by sheriffs in the city of New Orleans shall be void except between the parties thereto unless they are recorded, where property is so adjudicated, but the adjudication is not recorded, a sale of the property by the judgment debtor passes a good title as against the adjudicatee.—*Huntington v. Bordeaux, (La.) 7 So. 553.*

8. The purchaser of land under an execution, which issued from the federal court, and was in the hands of the marshal before the defendant therein had made a lease of the land, is entitled to the rent due and unpaid under such lease, as against one who had purchased the note given for such rent, without notice of the execution creditor's claim.—*Kirkpatrick v. Boyd, (Ala.) 7 So. 913.*

9. Where a judgment creditor buys property at sheriff's sale to which the judgment debtor has no title, and credits the amount of his bid on his judgment, the credit is *pro tanto* a satisfaction of the judgment, and a court of equity cannot vacate the sale on the ground that the judgment debtor has no title.—*Goodbar v. Daniel, (Ala.) 7 So. 254.*

Sheriff's deed—Cancellation in part.

10. Where a lot, part of which constitutes a debtor's homestead, is sold and conveyed by the sheriff under execution, the deed may be canceled as to the homestead, and maintained as to the other portion.—*Semmes v. Wheatley, (Miss.) 7 So. 430.*

EXECUTORS AND ADMINISTRATORS.

See, also, *Descent and Distribution; Wills.*

Actions, transactions with decedents, see *Witness*, 4-8.

Appointment.

1. In contests for the administration of successions, the court is not bound to appoint two to settle the estate, though they have equal claims.—*Succession of Gaines, (La.) 7 So. 738.*

2. A judgment emancipating a minor, domiciled out of the state, clothes him with the right of being appointed, on a proper showing of capacity and solidity, administrator of a succession in which he is a beneficiary heir present.—*Succession of Gaines, (La.) 7 So. 738.*

3. Rev. Civil Code La. art. 1044, providing that if all the beneficiary heirs be minors their tutors can claim the preference for the administration, applies as well to female as to male tutors.—*Succession of Boudreaux, (La.) 7 So. 453.*

4. Under Rev. Civil Code La. art. 1044, providing that "if all the beneficiary heirs be minors their tutors can claim the preference for the administration and it shall be given them," it is within the discretion of the court to appoint as administrator the grandmother and legal tutrix of a child of decedent by a former marriage, in prefer-

ence to the mother and natural tutrix of his children by a second marriage, where both are qualified.—Succession of Boudreaux, (La.) 7 So. 453.

5. It is not necessary that formal letters should issue in case of grants of administration to the county administrator.—Weir v. Monahan, (Miss.) 7 So. 291.

6. The decree of the court of competent jurisdiction, appointing a testamentary executor who has duly qualified, stands *prima facie* valid, and an exception to the capacity of the executor, not putting at issue the regularity of his appointment and qualification, but based on grounds extraneous to the probate proceeding, throws on the executor the burden of proving them, and, in absence of proof, the exception is properly overruled.—Armant v. New Orleans & C. R. Co., (La.) 7 So. 35.

— Collateral attack on order of appointment.

7. An order of court appointing the county administrator, administrator of a deceased administrator's estate, cannot be collaterally attacked, on the ground that the decedent left no property subject to administration.—Weir v. Monahan, (Miss.) 7 So. 291.

Assets.

8. When a widow who has possession of a note payable to testator, but not indorsed by him, nor shown to have been delivered to her, presents such note to the makers, claiming it as her own, and takes from them a new note, payable to herself, in the place of it, she does not thereby get such possession of the debt as will enable her to acquire the right to it by lapse of time; but it remains a debt due the estate, for which suit may at any time be brought by the executors, or those entitled to receive it.—Bule v. Bule, (Miss.) 7 So. 344.

9. Where, however, payments have been made to her on the debt, lapse of the statutory period will bar a suit to recover them from her.—Bule v. Bule, (Miss.) 7 So. 344.

Control of property.

10. Where the succession of a decedent is being administered for the benefit of creditors of the succession, no part of the property can be removed from the administrator's control by individual creditors of the surviving spouse.—Webre v. Lorio, (La.) 7 So. 460.

Administrator de bonis non.

11. The owner of a claim against an estate, holding unadministered property of it, may properly procure the appointment of an administrator *de bonis non* to take possession of the property, and surrender the property to him.—Deans v. Wilcox, (Fla.) 7 So. 163.

12. Under the laws of Florida before the act of February 16, 1870, governing sales of real estate by administrators for the payment of debts, an administrator *de bonis non* might consummate an incomplete sale made by his predecessor.—Deans v. Wilcox, (Fla.) 7 So. 163.

Allowance of claims.

13. A 12-months bond, which operates as a vendor's privilege, must, in the settlement of a succession, be paid by preference and priority over all other privileges except the expenses for the sale of the property, affixing seals, and other expenses necessary to the sale of the property.—Succession of Rogers, (La.) 7 So. 692.

14. An administrator who claims a privilege on personal property of the succession, and sells the real estate and personal property in bulk, without separate appraisement, loses his privilege.—Succession of Rogers, (La.) 7 So. 692.

15. The fact that an administratrix is joint owner of an indebtedness of the estate with a surety on her administration bond does not of itself extinguish the claim to the extent of her interest, on the ground that debtor and creditor are united in the same individual; nor will such be the re-

sult of her being the sole owner.—Deans v. Wilcox, (Fla.) 7 So. 163.

Settlement and accounting.

16. The amount of commissions due an administrator of a succession is matter for determination on final account, and will not be considered on an annual or provisional account.—Succession of Sparrow, (La.) 7 So. 611.

17. On the hearing of an administrator's application for final settlement, it is error to admit evidence that he paid a claim against the estate on the agreement that if he should not be allowed therefor on final settlement the money should be refunded him, as such agreement has no bearing on the validity of the claim against the estate.—McDonald v. Carnes, (Ala.) 7 So. 919.

18. Where an administrator has made to a minor advances on his share or interest in the succession for purposes of subsistence, schooling, and maintenance, he may carry the same into a succession settlement, and he is not bound to resort to an action against the tutor for settlement; the interest of the minors not having been liquidated, and separated from that of the major heirs.—Succession of Sparrow, (La.) 7 So. 611.

19. An administrator who sues the succession for a debt due to himself, and cites himself as administrator, cannot, by such a proceeding, conclude the creditors of the succession by the judgment rendered in the case; but they, by opposition to his account, can inquire into his claim as though no judgment had been rendered.—Succession of Rogers, (La.) 7 So. 692.

20. In an opposition by legatees to the final account of executors, where the forced heirs intervene and pray homologation of the account, it is too late, after the case has been taken up, the intervention read, without objection, as part of the pleadings, and the evidence heard and concluded, for the legatees to object to having the intervention passed upon for want of issue joined thereon.—Ball v. Ball, (La.) 7 So. 667.

21. Where the major heirs of a succession have bound themselves personally, and to the extent of their virile shares therein, for debts contracted by the administrator with a third person, a settlement of which is to be made in the succession, it is competent for such creditor to intervene on the filing of an account by the administrator, and join the accountant, so as to speed the trial, and enforce the payment of his claim.—Succession of Sparrow, (La.) 7 So. 611.

22. Where an administrator improperly applies a sum to the debit of a succession creditor, and by a judgment of the court it is withdrawn therefrom, and imputed to a different account, the former account is necessarily increased by that much.—Succession of Sparrow, (La.) 7 So. 611.

23. Where M., the county administrator, is appointed administrator of the estate of D., who was the deceased administrator of the estate of P., and also administrator *de bonis non* of the estate of P., an account, filed by him as the final account of D., deceased, as administrator of the estate of P., is proper, and it is immaterial that the account is referred to, throughout the whole proceeding of accounting, as exhibited by M., administrator *de bonis non* of P., where it appears that the account was acted on and passed as the account of the deceased administrator.—Weir v. Monahan, (Miss.) 7 So. 291.

24. When, upon the final trial of an executrix's final account on appeal, the executrix is adjudged and decreed to restate her account "according to law, and the views therein expressed," it is not competent for the executrix to raise new issues, but she is bound to comply with the decree, and restate her account accordingly. The original controversy is at an end, and old issues cannot be again agitated and raised on her restated account.—Succession of Duhe, (La.) 7 So. 327.

Presumption of settlement—Action for conversion.

25. Where the bill in a suit for the conversion of money by an administratrix, brought 33 years after the conversion, contains no averment that

her account was settled within 20 years of the filing of the bill, the presumption is conclusive that it was settled more than 20 years before, and the suit is barred.—*Bass v. Bass*, (Ala.) 7 So. 248.

Sales under order of court.

26. When a succession is in the hands of an executor, and in process of liquidation, the interest of the heirs being merely contingent, they need not be consulted or heard before an application for sale is made, as a condition precedent to the validity of the title of a purchaser.—*Succession of Lehmann*, (La.) 7 So. 33.

27. An administratrix filed a petition in June, 1856, before the probate judge, for the sale of land to pay a claim against her intestate, who died in March, 1856, described as an account of December 20, 1838, for \$28,620, filed and proved as due the estate of E. B., deceased; and an order of sale was made in the following September. A statute then in force (McClel. Dig. § 71, p. 96) provided that, in suits brought against an executor or administrator for the recovery of a debt due upon open account, the court should cause to be expunged from such account every item appearing to have been due five years before the death of the testator or intestate; the act having a saving clause in favor of certain plaintiffs. *Held*, that if the statute applied to proceedings in which the administratrix seeks the action of the court, and acknowledges the validity of the claim, it must be presumed, in the absence of any affirmative showing to the contrary, that the judge of probate made due inquiry in 1856, and found that the claim was of a character that the statutory bar did not apply to, or had been taken out of the bar by a subsequent promise of the decedent, within five years before his death, or that the parties owning it were within some saving clause of the statute.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

28. F. died in March, 1856, and in June his administratrix filed a petition in the probate court for the sale of lands of his estate to pay an account of December 20, 1838, for \$28,620, filed and proved as due the estate of E. B., and in September the judge of probate made an order of sale, and in October a sale of one lot was made to A. E. B. and J. B., the owners of the E. B. estate claim, and the administratrix died in 1860, without having completed the sale, or made a settlement of her administration, and leaving A. E. B. her sole heir and personal representative; and thereupon S. was appointed administrator *de bonis non*, and in 1870 he, as such administrator, made a deed in execution of the sale made by his predecessor, bearing date January 5th, conveying the lot sold, to A. E. B. and J. B., and also including another lot as having been sold, but which the bill alleged was neither sold nor offered for sale, and A. E. B. and the wife of J. B., deceased, executed a deed with warranty of title conveying the lots to S., it bearing date March 21, 1870. On February 7, 1870, S. conveyed to a trust company, with warranty of title, the lot No. 8, alleged not to have been sold by the administratrix. S. died in 1871, without having settled F.'s estate. In 1881 the trust company, who had obtained an assignment of the claim mentioned above, procured D. to obtain letters of administration *de bonis non* on the estate of F., and surrendered lot 8 to him as assets of the estate, and D. applied to the county court for an order of sale of the lot to pay the above claim, and in May an order of sale was made, and in June the property was sold. In 1883 the heirs of F. filed a bill to settle the estate, and claimed that the indebtedness for the payment of which the sale was ordered in 1881 was stale, and barred from the lapse of time. *Held*, on demurrer, that upon the face of the bill the claim did not appear to be so.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

29. The sufficiency of the evidence of the validity of a claim for the payment of which a probate court has made an order of sale of real estate of a decedent is not a jurisdictional fact, and when the evidence is not before the appellate court it is to be conclusively presumed that the court was satisfied of the validity of the claim when it made the order.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

30. Under Code Ala. 1886, § 2104, providing that an intestate's land may be sold by the administrator for the payment of debts, where the personal estate is insufficient therefor, and section 2106, providing that the administrator shall make application to the probate court for such sale, a decree for the sale of lands, rendered on a petition of the administrator alleging that the personal property is insufficient to pay the debts, without any averment that there are debts, is void, even on collateral attack.—*Abernathy v. O'Reilly*, (Ala.) 7 So. 919.

31. Act Fla. Feb. 16, 1870, (McClel. Dig. § 40, p. 86,) provides that the county court may order the sale of land to pay the debts of an estate where they exceed the value of the personality, and the estate is solvent. Act Feb. 27, 1877, (McClel. Dig. § 12, p. 584,) provides for the sale of lands belonging to an insolvent estate under the same proceeding required to sell lands belonging to an estate to pay debts. *Held*, that the county court has jurisdiction to decree the sale of lands to pay debts upon a petition alleging the existence and amount of the debts, and that there is no personal property of the intestate not administered on.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

32. Where a claim against an estate is held by the sureties on the administrator's bond, a settlement of the administration is not necessary to enable the court to make an order for the sale of land to pay such claim, as the court may see from the administrator's accounts whether he is indebted to the estate, in which case no order should be made for the sale of realty to pay a debt due to his sureties.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

33. A probate court which has not acquired jurisdiction over mortgaged property of a succession by an omission or commission, or laches of the mortgage creditor, whose contract contains the pact *de non alienando*, has no authority to order the sale of the property affected to him on the terms of part cash and part credit, after appraisal, when he is entitled to demand a sale for cash, and without appraisal.—*Succession of Thompson*, (La.) 7 So. 477.

34. A mortgage creditor, under the pact *de non alienando*, who applies for executory process shortly after the maturity of his claim, before the death of his debtor, and within 30 days after the opening of the succession, is not dilatory, and cannot be charged with laches or consideration conferring or recognizing jurisdiction of the probate court to grant an *ex parte* order of sale at the instance of the executrix.—*Succession of Thompson*, (La.) 7 So. 477.

35. The validity of an *ex parte* order of sale in a succession proceeding, by an executrix, to pay debts, may be assailed by rule, at the instance of a mortgage creditor whose contract contains the pact *de non alienando*.—*Succession of Thompson*, (La.) 7 So. 477.

36. It will not be assumed that a party making a bid at a sale of land of an intestate, in the names of others, was not authorized to do so; and if the party making a bid in the names of others comply with it, and take title in their names, it is of no concern to the heirs of the intestate whether the person actually bidding was authorized to use the names in which the bid was made.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

37. When the proceeds of a sale made by an executor to pay debts, are not greatly disproportionate to the debts, the sale will not be annulled.—*Succession of Lehmann*, (La.) 7 So. 33.

38. In a proceeding at the instance of the administrator, who is the father but unqualified tutor of a minor, to compel a purchaser to comply with the adjudication to him of succession property, if the minor is a necessary party, he is legally represented therein by the under-tutor.—*Succession of Meyer*, (La.) 7 So. 730.

—Setting aside order.

39. In a bill by heirs to set aside an order by the county court upon a petition giving it jurisdiction in the premises for the sale of the land of an intestate for the payment of his debts, it is not sufficient to allege that they were not valid and

subsisting claims against the estate, but the facts constituting such invalidity must be shown.—*Deans v. Wilcox*, (Fla.) 7 So. 163.

40. Where an order for the sale of lands of an intestate is made under McClel. Dig. Fla. § 40, p. 87, directing that such sale be made for cash, an allegation in a bill to set it aside that the purchasers intend to make no payment other than a credit on the claim to satisfy which the land was sold, is insufficient to warrant the interference of a court of equity.—*Deans v. Wilcox*, (Fla.) 7 So. 163.

— Rights of purchasers.

41. An administrator having sold lands by order of the probate court, and received the price thereof, a decree was entered ordering him to make a conveyance to the purchaser, which was never done. The purchaser, without taking possession, exchanged the lands for others, but gave no conveyance to his vendee. The latter went into possession; and plaintiff, claiming by proper conveyances from him, prayed the court to order the administrator to execute a conveyance to him. *Held*, that the exchange was void under the statute of frauds, and the probate court, having no equitable powers, could not make such order.—*Webb v. Ballard*, (Ala.) 7 So. 443.

42. Code Ala. § 2124, provides that, when the purchase money of lands sold by order of court has been paid "by the purchaser or his heirs, or any other person holding under him, directly or derivatively," the court, on application, shall order a conveyance to such person. *Held*, that one holding possession under the vendee by an exchange void under the statute of frauds was not "holding" under the purchaser, and the court could not properly order the conveyance.—*Webb v. Ballard*, (Ala.) 7 So. 443.

43. Inquiry touching the illegality of an executor's appointment cannot be raised by a purchaser of property of the succession at judicial sale, under an order of court apparently regular, and for the purpose of discharging debts of the deceased, and costs of administration.—*Succession of Lehmann*, (La.) 7 So. 33.

44. Purchasers at succession sales are not bound, at their peril, to inquire, when the property is advertised by an executor, whether the will appointing him, which is valid on its face, is voidable.—*Succession of Lehmann*, (La.) 7 So. 33.

45. When an adjudicatee of property at succession sale makes use of a 12-months bond, on which the deceased is security, in paying the price of adjudication, and, pursuant to an agreement with the holder of said bond, conveys a part of the property purchased to her as a consideration thereof, and thus secures the remainder of the property without consideration, the adjudicatee acquires no title, and the heirs of the deceased inherit the property.—*Scott v. Scott*, (La.) 7 So. 716.

Actions.

46. A suit against the surviving partner and administrator of his deceased partner for a settlement of the partnership accounts, brought within six months after the grant of administration, cannot be maintained under Code Ala. 1836, § 2263, which provides that "no suit must be commenced against an executor or administrator as such until six months, and no judgment rendered against him as such until eighteen months, after the grant of letters testamentary or of administration."—*Word v. Word*, (Ala.) 7 So. 412.

— Limitations.

47. Act Fla. Nov. 10, 1828, (McClel. Dig. p. 97, § 72,) to the effect that no action of debt shall be brought against an executor or administrator upon a judgment obtained against a testator or intestate, nor any *scire facias* issued to revive such judgment, after five years from the qualification of the executor or administrator, and all such judgments, after the expiration of five years, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged, does not apply to other claims than judgment against a testator or intestate; and the presentation of a claim, not in judgment, to an administrator or executor

in due time, stops the running of the statute of limitations.—*Deans v. Wilcox*, (Fla.) 7 So. 163.

EXEMPTIONS.

See, also, *Homestead*.

From taxation, see *Taxation*, 5-9.

Enforcement of right — Setting aside exemption.

When a person is entitled to exemption out of personal property levied on, he has the right to have the exemption set apart in kind; and the entire property levied on cannot be sold and the money value of the exemption remitted to the debtor, when it is not shown that the delay incident to setting aside the property claimed as exempt will be fatal to the interests of the parties concerned.—*McMichael v. Eckman*, (Fla.) 7 So. 365.

Experts.

See *Evidence*, 17-19.

Factorizing Process.

See *Garnishment*.

Factors and Brokers.

Advances to brokers, equitable lien, see *Liens*, 1-8.

FALSE IMPRISONMENT.

When action lies.

One who has been illegally imprisoned for a violation of an injunction has a right of action against those at whose instance, and for whose benefit, the order of imprisonment was made and obtained.—*Barthe v. Larquie*, (La.) 7 So. 50.

Fellow-Servant.

See *Master and Servant*, 18, 19.

Fires.

Set by locomotives, see *Railroad Companies*, 24, 25.

FIXTURES.

What constitutes.

1. A cooking-range fastened to the floor of an hotel is not a fixture.—*John Van Range Co. v. Allen*, (Miss.) 7 So. 499.

2. Where the purchaser of an hotel had actual notice that a cooking-range therein was bought under an agreement that title was to remain in the seller until the price was paid, he cannot hold the range on the ground that it is a fixture.—*John Van Range Co. v. Allen*, (Miss.) 7 So. 499.

Foreclosure.

Of mortgage, see *Mortgages*, 12-23.

Foreign Corporations.

See *Corporations*, 21-23.

Foreign Judgment.

See *Judgment*, 15, 16.

Forfeiture.

Of bail-bond, see *Bail*, 5-7.

FORGERY.

What constitutes.

1. On petition for a writ of *habeas corpus*, it appeared that petitioner was imprisoned upon a charge of forgery of a draft. There was nothing on the face of the draft to induce the belief that

the signature thereto was not genuine, and there was no other evidence to show that the petitioner did not sign the draft with his true name, or that the draft had been altered in any respect for the purpose of fraud or deceit. *Held*, that the charge of forgery was not made out, and the petitioner was entitled to his discharge.—*In re Brandau*, (Fla.) 7 So. 523.

Indictment.

2. An indictment which charges that defendant forged the indorsement of a bill of exchange, but does not allege the amount of such bill, is sufficient to render evidence of the forgery admissible thereunder.—*State v. Clement*, (La.) 7 So. 685.

Instructions.

3. On a trial for forgery the defendant requested the following charges: "(1) if the jury believe from the evidence that the writing offered in evidence is so imperfect and obscure that it is unintelligible without reference to extrinsic facts, they should find defendant not guilty; (2) if the jury believe from the evidence that proof outside of the writing was necessary to explain it, they should find defendant not guilty;" and "(3) if the jury believe that the facts necessary to explain the written instrument are not averred in the indictment, and it is necessary to resort to these facts to explain said writing, then they should find defendant not guilty." *Held*, that they involved the interpretation of a paper writing by the jury, and were properly rejected.—*Dotson v. State*, (Ala.) 7 So. 259.

Former Jeopardy.

See *Criminal Law*, 3-14.

Fraud.

See *Deceit*; *Fraudulent Conveyances*.

FRAUDS, STATUTE OF.

Sufficiency of memorandum.

1. An order for goods, signed in duplicate by the purchaser on blanks furnished by the seller, specifying in detail what was purchased, by whom, of whom, and on what terms, together with a letter from the seller acknowledging receipt of the order, and promising to ship the goods immediately, constitutes a sufficient written memorandum of a contract of sale.—*Wilkinson v. Taylor Manuf'g Co.*, (Miss.) 7 So. 353.

2. A contract provided that "we agree to buy an interest in four hundred acres of land described below, [the description following,] and agree to pay one hundred and twenty-five dollars per acre for the number of acres set opposite our names. Payments to be made, to-wit: Two-fifths cash; bal. in three equal payments, six, twelve, and eighteen months from date." The agreement was signed by the purchasers, and notes of same date were given for the deferred payments. *Held*, that these writings, taken together, form a sufficient "memorandum," under the statute of frauds, (Code Ala. § 1732).—*Lakeside Land Co. v. Dromgoole*, (Ala.) 7 So. 444.

Agreements relating to lands.

3. An agreement for the future exchange of lands for a piano was released from the operation of the statute of frauds (Code Ala. § 1732, subd. 5) when the vendor received the piano and exercised dominion over it.—*Powell v. Higley*, (Ala.) 7 So. 440.

4. In a suit against a widow and heirs to recover land, title in the plaintiff cannot be established by parol evidence that the deceased as his agent made a loan secured by mortgage on the land, and on default foreclosed and purchased it in his own name, and has never accounted to the plaintiff for the debt secured.—*Sagory v. Bouny*, (La.) 7 So. 785.

Pleading and proof.

5. It need not be alleged in the complaint that the contract sued on is in writing, as required by

the statute of frauds, as such fact properly arises on the proof.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

FRAUDULENT CONVEYANCES.

See, also, *Creditors' Bill*; *Sale*, 7, 8.

What constitutes.

1. The fact that the leasehold was not included in the original bill of sale executed by an insolvent to one of his creditors, but was made to appear therein, after its execution and registration, by an alteration by a person other than the purchaser, does not make the sale fraudulent, since such alteration can only affect the validity of the sale as between the parties to it.—*Chipman v. Stern*, (Ala.) 7 So. 409.

— Sale of stock in trade.

2. A bill of sale of a stock of goods, by tacit agreement to be kept secret, and not registered, given as a security by a debtor, who is permitted to sell at retail, and apply the proceeds to his own use, is fraudulent and void against subsequent, as well as existing, creditors; it being "made in trust for the use of the person making the same," within Code Ala. 1886, § 1730, declaring all transfers of goods so made void against creditors existing or subsequent.—*McDermott v. Eborn*, (Ala.) 7 So. 751.

3. Such a bill of sale is fraudulent and void, though the holder take possession before an attachment or execution is levied or a creditors' bill filed.—*McDermott v. Eborn*, (Ala.) 7 So. 751.

— Consideration.

4. A sale by an insolvent debtor to one of his creditors in consideration of his debt, and of the payment by him of debts due some of the other creditors, is valid, if the entire consideration amounts to the fair value of the goods sold, and no benefit is reserved to the debtor.—*Chipman v. Stern*, (Ala.) 7 So. 409.

5. Where the property sold consists of several kinds, the fact that some of it is sold at less than its value does not render the sale fraudulent, if the valuation placed on the other property exceeds its real value, so that the whole market value of all the property together does not exceed the consideration.—*Chipman v. Stern*, (Ala.) 7 So. 409.

6. A decree was rendered enforcing a vendor's lien on a house and lot belonging to defendant's wife, and defendant, acting for her, borrowed money from B., P. & Co. to pay the debt, having the decree assigned to them as security. Being himself indebted to them, and to secure further advances, he also caused his brother-in-law to execute to them a quitclaim deed of land belonging to himself, which he had mortgaged to his brother-in-law for a fictitious debt of \$4,000. Afterwards, on settlement with B., P. & Co., defendant's wife conveyed to them her house and lot, in consideration of all indebtedness of herself and defendant, but the latter then owed them nothing. To reimburse his wife, defendant had B., P. & Co. execute to her a quitclaim deed of his land, and afterwards, learning that the legal title was still in him, executed a deed to his wife, reciting, as consideration therefor, that he had been indebted to his brother-in-law in \$4,000; that B., P. & Co. had taken an assignment of the debt, and that it had been satisfied by the conveyance of his wife to them of her land. *Held*, that defendant's deed to his wife was without consideration, and was fraudulent as against his existing creditors.—*Hodges v. Hickey*, (Miss.) 7 So. 404.

— Knowledge of grantee.

7. Where merchants in failing circumstances sell their store and goods at a fair price, for a new consideration, the purchaser to make certain payments presently, but the bulk in the future, it is for creditors claiming that the sale is in fraud of their claims to show that the purchaser had actual or constructive notice of his vendors' financial condition.—*Kellar v. Taylor*, (Ala.) 7 So. 907.

What constitutes — Confidential relations.

8. The fact that the payee of a note is the brother-in-law and employer of the maker is not of itself sufficient to show a fraudulent intent as to creditors in the execution of such note.—*Cadiz v. Guidry*, (La.) 7 So. 292.

9. Where the parties to the transfer are near relations, clearer and more convincing proof is required of the *bona fides* of the transaction than when they are strangers.—*Lehman, Durr & Co. v. Greenhut*, (Ala.) 7 So. 299.

— Husband and wife.

10. Where one of two joint owners of lands conveys his interest therein to his wife a month before, but retains the deed in his possession, without recording it, until nearly a year after a judgment is rendered against him and his former joint owner, and it does not appear that either of the parties to the deed were in possession, or asserted a right thereto, until seven months after judgment was rendered, such deed is void as against the judgment plaintiff.—*Robertson v. Durden*, (Ala.) 7 So. 769.

11. Where a purchaser of land causes a half interest therein to be conveyed to his wife as a gift, the wife's interest is liable for his existing debts; a voluntary conveyance being fraudulent in Alabama as to the existing creditors of the donor, without reference to the intent of the parties, the financial condition of the donor, or the kind and value of the property donated.—*Ruse v. Bromberg*, (Ala.) 7 So. 884.

Rights of creditors.

12. A conveyance of land by defendant to his wife was fraudulent as to a judgment creditor of defendant, with the exception of a portion of the tract which had been exempt as a homestead, and to which the wife acquired title. After the recovery of the judgment, the wife mortgaged the whole tract to secure a debt contracted by her. *Held*, that the judgment creditor was entitled to have the exempt portion of the land first subjected to satisfaction of the mortgage.—*Hodges v. Hickey*, (Miss.) 7 So. 404.

13. A judgment creditor has no right to the products of his debtor's labor, which became as soon as produced the property of a third person, and it is immaterial that the debtor refused to make the contract to furnish the products directly, fearing that they might be subjected to the judgment debt, but procured the contract to be made by his wife.—*Buckley v. Dunn*, (Miss.) 7 So. 550.

Actions to set aside.

14. The lien of creditors, who have filed a bill to set aside a mortgage of goods for fraud, is superior to that of an attachment in favor of the mortgagee, levied after he was cited to appear.—*McDermott v. Eborn*, (Ala.) 7 So. 751.

15. In a suit to set aside a transfer of property to a creditor of the grantor, as in fraud of other creditors, where complainant's claims were contracted before the transfer, the *onus* is on the purchasing creditor to show by clear and satisfactory evidence, not only a *bona fide* debt, but also that the amount thereof was not materially less than the fair and reasonable value of the property.—*Lehman, Durr & Co. v. Greenhut*, (Ala.) 7 So. 299.

16. Where an action is brought to set aside a sale on the ground that it was made in fraud of creditors, and the debtor admits that he was indebted to defendants when the sale was made, it is error to refuse to instruct the jury that defendants were not required to prove the items of their account, but that the indebtedness might be shown by the debtor's admissions, or by any evidence that satisfied the jury of the correctness of defendants' claim, as the refusal to give the instruction was calculated to make the impression that, as the account was not before the jury, the fact of the indebtedness was not established.—*Hirsch v. Richardson*, (Miss.) 7 So. 823.

— Joinder of parties.

17. Several contract creditors of the same debtor, having no privity among themselves, may join

in a bill brought under Code Ala. § 8244, to set aside and cancel for fraud a bill of sale, though there is no statute authorizing such joinder.—*Tower Manuf'g Co. v. Thompson*, (Ala.) 7 So. 530.

GAMING.

On Sunday, see *Sunday*, 1.

Indictment.

1. Act Fla. June 7, 1887, provides that "if any person or persons shall play or engage in any game of cards, keno, roulette, faro, or other game of chance, at any place, by any device whatever, for money or other thing of value, he, she, or they so offending shall, on conviction, be imprisoned in the county jail," etc. *Held*, that an indictment under this statute is sufficient, where it charges that defendant and others (naming them) "on the 12th day of April, A. D. 1890, at and in the county, circuit, and state aforesaid, with force and arms, in the woods near the town of Ellaville, said county and state, unlawfully then and there played and engaged in a game of cards for money, which said game of cards was then and there a game of chance."—*Jackson v. State*, (Fla.) 7 So. 863.

2. When an information for gambling sets out the offense with sufficient certainty to notify the defendant fully of the nature of the same, it will not be quashed as being vague and uncertain, nor will the affidavit to the information be held insufficient when it complies with the oath prescribed by the Florida statute on that subject.—*Tuberson v. State*, (Fla.) 7 So. 858.

Evidence—Sufficiency.

3. The defendants were playing a game of cards called "poker," for "corn," upon a bench in a room adjoining a school-house. One of them had his hat under the bench with some "corn" and two dollars in silver in it. No betting was seen or heard by any witness, and a witness for the state stated that he thought the game was being played for "fun," and the defendants stated upon oath that the game was being played for amusement, and that nothing whatever was bet. *Held*, that the evidence was not sufficient to support a conviction of defendants for gambling.—*Oder v. State*, (Fla.) 7 So. 856.

4. The defendant and four other persons were playing a game of "poker" in a room with cards and chips, the chips being of different colors, and varied in values. The defendant took a percentage of the game, and resided in the room. *Held*, that the evidence was sufficient to sustain the verdict of guilty of keeping a gambling room.—*Ransom v. State*, (Fla.) 7 So. 860.

Instructions.

5. On information for keeping a gambling room, under Act Fla. June 7, 1887, a charge that the jury should convict if they found that defendant committed the offense at any time within two years before the information was filed, is harmless error, where the information was filed more than two years after the passage of the act.—*Ransom v. State*, (Fla.) 7 So. 860.

GARNISHMENT.

Liability of garnishee.

1. The answer of the garnishee, which is not contested, disclosing a conditional liability only, a judgment, denying a claim of exemption, interposed by the debtor, is a nullity, and an appeal by him will be dismissed.—*White v. Hobart*, (Ala.) 7 So. 807.

2. Where defendant is in the employ of the garnishee under a contract for one year, but by agreement is allowed to draw his salary a week in advance, and the answer of the garnishee, giving a statement of the dates on which defendant drew his salary, shows that he did not always draw his salary in advance, but sometimes after it was earned, and that, too, since service of the garnishment, a charge that if the jury believe the evidence they must find for the garnishee is erroneous.—*Archer v. Whiting*, (Ala.) 7 So. 58.

3. Where defendant is in the employ of the garnishee, under an agreement that his salary is to be paid by the garnishee weekly in advance, a debt which defendant owes the garnishee cannot be used as a set-off, unless there is some agreement by which the debt is to be paid out of defendant's salary.—*Archer v. Whiting*, (Ala.) 7 So. 53.

Costs of garnishee.

4. Garnishees in an attachment suit, who are entitled to attorney's fees and a *per diem* under the statute of Mississippi, are entitled to satisfy such claim from the moneys of the debtor in their hands.—*Clark v. Gresham*, (Miss.) 7 So. 223.

GIFTS.

Between husband and wife, see *Fraudulent Conveyances*, 11.

Inter vivos.

The possession by the widow of a note payable to testator, but not indorsed by him, nor shown to have been delivered to her, and evidence that he owed her money, are not sufficient to establish her right to the note.—*Buie v. Buie*, (Miss.) 7 So. 344.

GOOD-WILL.

Transfer.

1. A stipulation in a lease of premises on which a certain business has been carried on, that the lessor will not pursue the same occupation in the same neighborhood, is a personal obligation of the lessor; and where he sells property of which the leased premises is a part, and the purchaser puts up buildings opposite to the leased portion, and carries on the same business as that on the leased ground, the obligation of the original lessor does not affect the purchaser, and he cannot be enjoined for this reason from carrying on said business.—*Hebert v. Dupaty*, (La.) 7 So. 530.

Evidence.

2. In the sale of the effects of a business, where an itemized account is made, and a valuation is attached to each item, and no mention is made of the "good-will" of the business, evidence cannot be received to contradict the written act of sale so as to show that the "good-will" formed a part of the act of sale.—*Hebert v. Dupaty*, (La.) 7 So. 530.

GRAND JURY.

Summoning.

1. The words, "to serve as grand jurors for the week," in a *venue* for grand jurors, are inconsistent with the writ required to be issued; and, where it appears that the grand jurors were drawn and summoned for the term, such words are properly treated as surplusage, and do not vitiate an indictment found by such grand jury after the expiration of the week.—*Hawes v. State*, (Ala.) 7 So. 303.

Special grand jury.

2. Since Acts Ala. 1886-87, pp. 151-153, § 17, providing for the organization of juries, leaves in force all former laws not in conflict therewith, and makes no provision for the organization of juries on failure of the proper officers to draw and summon them, a special grand jury, in case of such failure, may be summoned by order of the court, under Code Ala. § 4316, which provides that if, through neglect of the proper officers, no grand jury is returned to serve at any term of the court, the court may by a special order direct the sheriff to summon one forthwith.—*Kemp v. State*, (Ala.) 7 So. 413.

Failure to appoint foreman.

3. Though the record fails to show that any member of the grand jury was appointed foreman by the judge, yet, if the indictment was returned indorsed "A true bill," and signed by one of the grand jury, styling himself "Foreman of the grand jury," the question cannot be raised in the appellate court when no objection was made in the trial court.—*Dotson v. State*, (Ala.) 7 So. 259.

GUARDIAN AND WARD.

Appointment of guardian.

1. Under Rev. Civil Code La. arts. 253, 301, a father cannot abdicate the tutorship of his children, although he be a non-resident, where the interests of his minors in the state are involved in judicial proceedings, and he is present in the state; and hence the appointment of a stranger as dative tutor to such minors, notwithstanding the recommendation of a family meeting, is an absolute nullity.—*James v. Mayor*, (La.) 7 So. 618.

2. Under Rev. Civil Code La. art. 270, providing that, under certain circumstances, the judge shall appoint a dative tutor for a minor "by and with the advice of the family meeting," there can be no valid appointment where the votes of members of the family meeting convened to recommend the appointment of a person as tutor are equally divided between two persons.—*Succession of Arlaud*, (La.) 7 So. 532.

3. Where minors, who with their natural tutor have permanently removed from Louisiana, own property in the state, in the absence of a guardian appointed at their domicile, the Louisiana courts have jurisdiction to appoint a tutor to administer said property.—*Succession of Cass*, (La.) 7 So. 617.

4. The order of a competent court appointing an under-tutor cannot be attacked collaterally, and must stand until vacated or annulled by appeal, or in a direct action of nullity.—*Succession of Arlaud*, (La.) 7 So. 532.

5. A non-resident mother, who has not remarried, may be appointed tutrix of a minor son, who is domiciled out of the state, but has interests there to assert or defend.—*Succession of Gaines*, (La.) 7 So. 783.

Removal of guardian.

6. Where the tutor and the minors permanently leave the state and acquire a residence in another state, the tutorship is ended, and the courts of Louisiana have no jurisdiction of a suit to remove the tutor.—*Succession of Cass*, (La.) 7 So. 617.

Duty of guardian.

7. It is the duty of the under-tutor to act for the minor, whenever the interest of the minor is in opposition to that of the tutor.—*Succession of Meyer*, (La.) 7 So. 780.

HABEAS CORPUS.

Issuance.

Where, on application for a writ of *habeas corpus*, it appears that petitioner is held under a valid judgment, and also under an invalid one, the writ will not be granted.—*In re Gibson*, (Ala.) 7 So. 833.

Harmless Error.

See *Appeal*, 40.

Hearsay Evidence.

See *Evidence*, 14.

HIGHWAYS.

Streets of cities, see *Municipal Corporations*, 20-22.

Road officers.

1. One appointed overseer of a public road by the board of supervisors, in Mississippi, is not subject to be called to work as a hand on another road.—*Dees v. State*, (Miss.) 7 So. 526.

Work on road.

2. The incorporation into a town of a certain district of the parish under the general town incorporation law of Louisiana does not exempt the inhabitants of such town from road duty, which Act 112 of 1888 authorizes police juries to require of all male inhabitants of the parish, with certain exceptions, in absence of any law granting such exemption.—*Sanders v. Levi*, (La.) 7 So. 602.

3. Code Ala. 1886, § 4126, provides that "any person liable to road duty, who willfully fails or refuses, after legal notice, to work the public roads, either in person or by substitute, without a sufficient excuse therefor, must, on conviction," be punished as prescribed by the statute. *Held*, that this statute does not apply to one who, at the time of notice to work on the public roads, is under contract to perform service for his surety on a confession of judgment for the fine and costs imposed on his conviction for a misdemeanor in the circuit court.—*Ward v. State*, (Ala.) 7 So. 298.

Defacing index-boards.

4. Code Ala. 1886, § 1414, makes it the duty of overseers of public roads, when the road forks, or turns out, or crosses another public road, to erect within the same index-boards, with proper directions. Section 4123 makes it an indictable offense "willfully to deface, injure, or destroy any milepost, index-board, bridge, or causeway." *Held*, that an index-board erected by private individuals is within the protection of the law.—*Pullum v. State*, (Ala.) 7 So. 148.

Hiring.

Of convicts, see *Convicts*.

HOMESTEAD.

Sale under execution, cancellation of sheriff's deed, see *Execution*, 10.

Construction of acts.

1. A husband and wife living together constitute a "family," within the meaning of Const. Fla. 1868, art. 9, § 6, relating to homesteads.—*Miller v. Finegan*, (Fla.) 7 So. 140.

2. Code Ala. 1886, § 2563, authorizing the probate court to set apart to a widow a homestead exempt from administration, applies only to cases where the real estate of the decedent does not exceed 160 acres.—*James v. Clark*, (Ala.) 7 So. 161.

Acquisition.

3. In Mississippi, the homestead exemption cannot be allotted in an action of ejectment.—*Lazar v. Caston*, (Miss.) 7 So. 821.

4. Under Code Ala. § 2584, providing that, in homestead exemption contests, the commissioners shall make allotment by metes and bounds, having consideration of the debtor's selection, and the quality and quantity of the real estate, from the land most contiguous to the dwelling, and including the dwelling and appurtenances, the debtor cannot select the land in an irregular and arbitrary manner, and without reference to contiguity, or the former use to which it was put.—*Jaffrey v. McGough*, (Ala.) 7 So. 833; *Alford v. Alford*, Id. 657.

In what allotted.

5. Complainants owned a lot intersected by a public road, on one side of which was the residence, and other buildings, inclosed by a fence. On the other portion were stores rented out by complainants and occupied by tenants. *Held*, that the latter portion of the lot was no part of complainants' homestead. Following *Rhyne v. Guevara*, 6 So. 736.—*Semmes v. Wheatley*, (Miss.) 7 So. 480.

6. Under Code Miss. 1880, § 1248, providing that every citizen, having family, shall be entitled to hold as exempt the land and buildings owned and occupied by him as a residence, provided the land shall not exceed 160 acres in quantity nor \$3,000 in value, and section 1249, providing that every person having a family, residing in any city, town, or village, shall be entitled to hold as exempt the land and buildings occupied by him as a residence, not to exceed \$2,000 in value, a homestead may be located partly within and partly without the limits of an incorporated town.—*Fitz Gerald v. Rees*, (Miss.) 7 So. 841.

Rights of wife and children.

7. Residence by the heirs on the homestead of the ancestor after his death is not necessary to

continue the exemption of it from his debts.—*Müller v. Finegan*, (Fla.) 7 So. 140.

8. The term "heirs" includes an adult son, and an adult grandson, the son of a daughter deceased at the death of the head of the family, notwithstanding they were not at his death living at the home place.—*Miller v. Finegan*, (Fla.) 7 So. 140.

9. A creditor seeking to satisfy a judgment which he has recovered against the administratrix out of the homestead of her intestate, who was the head of a family residing in this state, can claim no advantage from the fact that the wife has elected to take a child's part in lieu of dower.—*Miller v. Finegan*, (Fla.) 7 So. 140.

10. A judgment rendered against an administratrix on an indebtedness of her intestate, not excepted from the exemption provisions of the homestead provisions of the constitution of Florida of 1868, was not a lien on the homestead of the intestate, who was the head of a family residing in this state.—*Miller v. Finegan*, (Fla.) 7 So. 140.

11. Const. Fla. 1868, art. 9, § 8, provided that the exemption of the homestead from forced sale, granted by the first section, to the head of a family residing in this state, should accrue to his heirs; and under it the exemption from such liability for indebtedness of the head of the family passed on his death to whomsoever the title of the homestead descended by virtue of the statute of descents, and became incident to the inheritance of the land.—*Miller v. Finegan*, (Fla.) 7 So. 140.

Conveyance.

12. Under Code Miss. § 1256, providing that no mortgage of a homestead shall be valid unless signed by the wife of the owner, if he be married and living with his wife, where the husband executes a mortgage on the homestead, and the wife does not sign it, her subsequent conveyance of her interest in the homestead to the mortgagee, without her husband's consent, imparts no validity to the mortgage.—*Duncan v. Moore*, (Miss.) 7 So. 321.

HOMICIDE.

When bail allowed, see *Bail*, 1, 2.

Murder.

1. Proof of malice and premeditation need not be direct and positive, but may be deduced from all the facts attending the killing.—*Yates v. State*, (Fla.) 7 So. 860.

2. Where one person, armed with a deadly weapon provided for the purpose, seeks for another to kill him, and on finding him provokes a difficulty in which he does kill him, he is guilty of murder, though the actual killing is done in self-defense.—*Helm v. State*, (Miss.) 7 So. 497.

3. On a trial for murder occurring in a *melee*, it is error to refuse to charge the jury that, "if they believe from the evidence that deceased was of a violent and blood-thirsty character, they are to take such evidence into consideration in determining the degree of the defendant's guilt, provided they find him guilty."—*Smith v. State*, (Ala.) 7 So. 52.

4. Defendant and his brothers were attending an election. The affray resulting in the homicide was begun by one of the deceased, who did something improper and unjustifiable to defendant's brother-in-law. Defendant interfered with offensive words, when the deceased turned on him with a club, and defendant fled, with a brick in one hand and a pistol in the other, warning deceased not to come on him. Deceased, not heeding this warning, sought to come up with defendant. Armed friends of both deceased and defendant joined, as inclination prompted, when the affray became general, and after retreating for a considerable distance, estimated at from 30 to 75 yards, defendant and his friends fired, killing several of their pursuers. *Held* that, though defendant and his brother had previously declared a purpose of killing two of the deceased, the evidence did not warrant a conviction for murder in the first degree.—*Brown v. State*, (Miss.) 7 So. 859.

Manslaughter.

5. In a prosecution for murder, when it appears that defendant, while seeking a difficulty with another, and endeavoring to get to him, was intercepted by deceased solely for the purpose of preventing the difficulty, and that in the scuffle following the fatal shot was fired, no provocation is shown sufficient to arouse such passion as to reduce the homicide to manslaughter.—*Holmes v. State*, (Ala.) 7 So. 193.

Justifiable homicide.

6. Where the evidence shows that defendant was the aggressor, a charge on self-defense authorizing an acquittal without inquiry as to who provoked the difficulty, is properly refused.—*Rutledge v. State*, (Ala.) 7 So. 335.

7. Instructions concerning self-defense which pretermitt all inquiry as to the duty and feasibility of retreat by defendant are properly refused.—*Rutledge v. State*, (Ala.) 7 So. 335.

8. An instruction which hypothesizes the extreme view in favor of defendant, and asserts that even then he could not be acquitted on the ground of self-defense, if he could have retreated and avoided the necessity of striking the fatal blow, is faulty, where the hypothesis does not show that defendant could safely have attempted to escape without increasing his peril.—*Shell v. State*, (Ala.) 7 So. 40.

9. Where one charged with homicide is the original aggressor, he cannot ordinarily justify on the ground of necessity for the killing; but if he withdraws from the conflict in good faith, and clearly shows his desire for peace, his right of self-defense revives, and if he is pursued, and taking life becomes inevitable to save life, he is justified. The question of good or bad faith of the retreating party is, however, of the utmost importance, and should generally be submitted to the jury in connection with the fact of retreat itself; especially where there is any room for conflicting inference on this point from the evidence.—*Parker v. State*, (Ala.) 7 So. 93.

Assault with intent to kill.

10. A charge that if the jury believe defendant was "crazy drunk" at the time of the difficulty they should acquit him of assault with intent to murder is properly refused, where it fails to define "crazy drunk."—*Engelhardt v. State*, (Ala.) 7 So. 154.

11. To support a conviction for assault with intent to murder, specific intent to take life is not essential. An assault with intent to do grievous harm to the person of another, accompanied with ability to effect it, without legal excuse or sufficient provocation, constitutes the offense.—*Smith v. State*, (Ala.) 7 So. 103.

12. It is no ground for a motion in arrest of judgment by one convicted of assault with intent to murder that his co-defendants, who were acquitted, were indicted as accessories when they should have been indicted as principals, there being no accessories in law to the crime charged.—*State v. Butler*, (La.) 7 So. 539.

Indictment.

13. An indictment for murder need not allege the dimensions of the wound which caused the death of deceased.—*Hodge v. State*, (Fla.) 7 So. 593.

14. An indictment for murder is fatally defective which uses "aforesaid" for "aforethought," and charges that defendant "feloniously, willfully, and of his malice aforesaid did kill and murder."—*State v. Green*, (La.) 7 So. 793.

15. In an indictment against a mother for the murder of her new-born infant, the description of the deceased as "a female child, whose name is to said jurors unknown," is sufficient, without setting out the name of its mother.—*State v. Richmond*, (La.) 7 So. 459.

16. An indictment for murder under McClell. Dig. Fla. c. 55, § 2, defining murder as killing "with a premeditated design to effect the death," will not be quashed because it further alleges that the killing was "felonious, willful, and of malice aforethought," and so charges murder at common law as well as under the statute; but the latter terms

may be treated as surplusage.—*Hodge v. State*, (Fla.) 7 So. 593.

Insanity as a defense.

17. The burden is on the accused to establish insanity by a preponderance of the evidence; and a reasonable doubt, raised by all the evidence, will not authorize an acquittal.—*Maxwell v. State*, (Ala.) 7 So. 824.

18. On a plea of not guilty by reason of insanity, it is not error to refuse to charge that, before the jury can convict, they must be satisfied, beyond a reasonable doubt, that the defendant has not established his plea of insanity by a preponderance of the evidence.—*Maxwell v. State*, (Ala.) 7 So. 824.

19. On trial of pleas of not guilty, and not guilty by reason of insanity, under Acts Ala. 1888-89, p. 742, providing for committing to an asylum those acquitted on the latter plea of murder, and other high crimes, an instruction tending to authorize a general verdict of not guilty, on a conclusion based on insanity, is misleading, and is properly refused.—*Maxwell v. State*, (Ala.) 7 So. 824.

20. On an indictment against a woman for the murder of her new-born infant, where there is no evidence tending to show mental derangement of defendant when she gave birth to the child, expert testimony that puerperal mania is of common occurrence at child-birth, and sometimes takes the form of homicidal mania, is inadmissible.—*State v. Richmond*, (La.) 7 So. 459.

21. The trial judge charged the jury that, "when the defense of insanity is set up as an excuse for crime, burden of proof is upon the person alleging it, and he must prove it to the satisfaction of the jury, beyond a reasonable doubt; otherwise the presumption of the sanity of the prisoner will remain in force." Held that this was erroneous, for, when evidence is introduced which tends to overthrow the presumption of sanity, if the jury entertain a reasonable doubt of the sanity of the prisoner, they must acquit.—*Hodge v. State*, (Fla.) 7 So. 593.

Evidence.

22. It is proper to leave to the jury inquiry as to whether defendant was reasonably free from fault in having brought on the difficulty, however strongly the evidence may tend to establish the fact.—*King v. State*, (Ala.) 7 So. 750.

23. Where the evidence is circumstantial, but of such a character as to preclude every hypothesis inconsistent with the guilt of the accused, the verdict will not be set aside as being against the evidence.—*Coleman v. State*, (Fla.) 7 So. 807.

24. On the separate trial of one jointly indicted with others for murder, evidence that the trial judge admitted two of the co-defendants to bail is not admissible to establish the innocence of the defendant on trial.—*State v. Johnson*, (La.) 7 So. 670.

25. On an indictment for murder alleged to have been committed with a knife, which the sheriff afterwards found in a pond, the statement of a witness that he was told by another that the pond was dry, as tending to show the information on which the sheriff acted in making the search, is not prejudicial to defendant, though mere hearsay.—*State v. Johnson*, (La.) 7 So. 670.

26. On a trial for murder, evidence that defendant, immediately after inflicting the death wound on the deceased, pursued and shot at another who was present and took part in the altercation, is admissible, not only as a part of the *res gestae*, but as tending to show the hostile spirit under which defendant acted.—*Smith v. State*, (Ala.) 7 So. 52.

27. On a trial for murder, where the evidence for the prosecution shows an unprovoked, deliberate, and malicious killing, and defendant's testimony shows that he brought on the difficulty which resulted in the killing, and there is no evidence that defendant was in any real or apparent danger which he could not have avoided by retreating, evidence of former difficulties between deceased and defendant, and of deceased's ill feelings towards him, is inadmissible.—*Rutledge v. State*, (Ala.) 7 So. 335.

28. Where such evidence goes to the particular merits of the difficulties, as distinguished from their collective force, it is properly excluded on that ground.—*Rutledge v. State*, (Ala.) 7 So. 886.

— Motive.

29. When defendant testifies that, during the quarrel between himself and deceased which resulted in the homicide, the latter spoke of defendant's daughter, he may be asked on cross-examination if what deceased said was slanderous.—*Rains v. State*, (Ala.) 7 So. 815.

30. On a trial for wife murder, evidence as to the conduct and conversation of the defendant in reference to a girl with whom he was infatuated, done and had both before and after the death of his wife, and his conduct and remarks tending to show dissatisfaction with his wife, is competent, as tending to prove a motive for the commission of the crime.—*Duncan v. State*, (Ala.) 7 So. 104.

31. On a trial for murder of one of defendant's daughters, where there is evidence to support the theory of the prosecution that her killing, and the killing of defendant's wife and another daughter, were each a part of a scheme to accomplish a certain purpose, all evidence tending to connect defendant with the murder of his wife and other daughter is admissible.—*Hawes v. State*, (Ala.) 7 So. 802.

32. Where it appears that the acceptance of a loan by deceased, who was defendant's brother, from a third person, angered defendant, and contributed to the quarrel resulting in the killing, evidence that defendant had previously sued the third person for slander, the suit having been based on deceased's affidavit, but not of the particulars of such suit, is admissible.—*Rains v. State*, (Ala.) 7 So. 815.

— Declarations.

33. On a trial for murder, evidence that deceased had said, on the night previous to the killing, "I am going to win some money to-night, or kill some son of a bitch," where there was no reference to the accused, was inadmissible.—*King v. State*, (Ala.) 7 So. 750.

34. On a trial for homicide, declarations of the deceased made after his wounding, but not *in articulo mortis*, cannot be admitted on the ground that they were against declarant's interest.—*Helm v. State*, (Miss.) 7 So. 487.

35. On an indictment for murder, where the *sceler* or *quo animo* forms an essential or indispensable part of the inquiry, testimony may be offered of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent, notwithstanding they may, in law, constitute a distinct offense.—*State v. Deschamps*, (La.) 7 So. 708.

— Dying declarations.

36. Statements made by deceased on his sick-bed are competent evidence to contradict his dying declarations, though inadmissible as such.—*Shell v. State*, (Ala.) 7 So. 40.

37. Declarations by the deceased immediately after the shooting are admissible as part of the *res gestæ*. They are instinctive words, and not words of narration.—*State v. Euzabe*, (La.) 7 So. 784.

38. Where it appears, on a trial for homicide, that, on the evening before deceased's death, witness found him rational, as witness thought; that he then spoke of dying, said he had no hope of recovery, and wanted witness to attend his funeral, and write his obituary, the dying declarations of deceased are admissible in evidence, though the attending physicians testify that two days before death he was getting irrational, and that this would increase until death, and, in the opinion of one, he had been irrational for two or three days before death.—*Shell v. State*, (Ala.) 7 So. 40.

— Threats.

39. Threats of defendant against deceased, running through many months down to just prior to the killing, are admissible on the question of malice.—*Rains v. State*, (Ala.) 7 So. 815.

40. Continuous threats made by the accused against the deceased, continuing for several

months down to within three weeks of the homicide, are admissible in evidence.—*Hodge v. State*, (Fla.) 7 So. 593.

41. On an indictment for murder, evidence that, on the day deceased was killed, defendant was making threats to "kill a man before sundown" is admissible, and is to be given such weight as the jury, under all the circumstances, may think it entitled to.—*Hodge v. State*, (Fla.) 7 So. 593.

42. On an indictment for murder, where the plea is self-defense, evidence of threats made against defendant by deceased several months before is not admissible where deceased's only overt act prior to the killing, that of shaking his finger in defendant's face, was not sufficient to justify defendant in believing that he was about to carry out such threats.—*State v. Cosgrove*, (La.) 7 So. 714.

Instructions.

43. Where the evidence tends to show a motive for the crime, an instruction based on the hypothesis that there was no motive is properly refused.—*Rains v. State*, (Ala.) 7 So. 315.

44. In a prosecution for the alleged murder of defendant's daughter, it is proper to refuse instructions that, beyond the presumption of innocence, the law presumes that defendant had an affection for his child, and that the jury might consider his natural relations and feelings towards her.—*Hawes v. State*, (Ala.) 7 So. 802.

45. In a prosecution for murder, it is not error to refuse to charge, "If the witness J. fabricated a falsehood in order to shield his own guilt, that the jury may look to that in explanation of the evidence of defendant, and then may acquit," since such instruction intimates that defendant might be acquitted if J.'s testimony were false, without regard to the other evidence.—*Blackshear v. State*, (Ala.) 7 So. 257.

46. An instruction in a murder trial that the jury "might consider any threat against the deceased proved to have been made by the accused, and any motive to kill established by the evidence, together with all the evidence in the case, in making up its verdict," is not so erroneous as to entitle defendant to a new trial, though it might properly be refused.—*Cheatham v. State*, (Miss.) 7 So. 204.

47. In a prosecution for the alleged murder of defendant's first wife, it is proper to refuse instructions that if defendant at the time of his second marriage, which occurred about the time of the alleged murder, believed he had been divorced from his first wife, the law imputes innocent motives to him in contracting the second marriage, as such instructions are irrelevant.—*Hawes v. State*, (Ala.) 7 So. 802.

48. On an indictment for murder, where the evidence tends to show that deceased was killed by a drug administered to her by defendant for the purpose of depriving her of consciousness to enable him to have sexual intercourse with her, an instruction that if the jury believed that defendant caused the death of the deceased in an unlawful manner, but without premeditation, they should find him guilty of manslaughter but not murder, is properly refused.—*State v. Deschamps*, (La.) 7 So. 708.

49. On an indictment of several persons for murder, the court refused defendants' request to instruct that the declarations of one conspirator, after the purpose of the conspiracy is accomplished, are not admissible against the rest, on the ground that the instruction had been given substantially in the general charge. Defendants were convicted, and on motion for new trial, which was refused, the sworn stenographic report of the charge was introduced, from which it appeared that the instruction on the point requested had been inadvertently omitted. *Held*, that its omission was prejudicial, and the judgment would be reversed, and a new trial granted.—*State v. Palfrey*, (La.) 7 So. 686.

— Self-defense.

50. Where there is no proof that deceased had previously struck defendant, except that defend-

ant had given that as a reason for threats he had made, a charge assuming it as a fact is properly refused.—*Rains v. State*, (Ala.) 7 So. 315.

51. Where there is evidence that defendant provoked the difficulty resulting in the killing, a charge that, "to warrant an acquittal on the ground of self-defense, the defendant must have been wholly without fault," is correct.—*Rains v. State*, (Ala.) 7 So. 315.

52. A charge that if defendant did not provoke the difficulty which resulted in the homicide, and deceased had previously made threats against his life which had been communicated to him, the jury might consider those threats in determining whether or not defendant acted in self-defense, is argumentative, and gives undue prominence to one portion of the evidence.—*Rutledge v. State*, (Ala.) 7 So. 335.

53. A request to instruct that if defendant asked deceased about a certain accusation without an intention to provoke a difficulty, and that if, on deceased's reiteration, a scuffle ensued under circumstances which might reasonably induce defendant to believe that he would lose his life or suffer great bodily harm, and that he had no reasonable way to retreat, if he then struck the fatal blow, he was not guilty, is misleading as to what constitutes such great bodily harm as will justify the taking of life.—*Shell v. State*, (Ala.) 7 So. 40.

Conduct of trial.

54. The fact that names of witnesses appear on the back of the indictment for murder imposes no duty on the prosecuting attorney to swear them as witnesses, and defendant has no right to require the prosecution to call and swear them, so that he can cross-examine them.—*State v. Ford*, (La.) 7 So. 696.

— Remarks by judge.

55. A statement by the trial judge that evidently an effort is being made to intimidate the witnesses on the stand is not a comment on the facts.—*State v. Johnson*, (La.) 7 So. 670.

Arguments of counsel.

56. On an indictment for murder, where erroneous statements are made by counsel for the state, which are instantly corrected by the judge, and the jury cautioned against them, the verdict of the jury against defendant will not be set aside.—*State v. Ford*, (La.) 7 So. 696.

Verdict.

57. Under Rev. St. La. § 735, which declares that "there shall be no crime known under the name of 'murder in the second degree,' but on trials for murder the jury may find the prisoner guilty of manslaughter," a verdict of "guilty of assault with intent to kill" is not responsive to an indictment for murder, and is good ground for a motion in arrest of judgment.—*State v. Guillory*, (La.) 7 So. 690.

New trial—Separation of jury.

58. Proof that some of the jurors trying an indictment for murder slept apart in a hall, instead of in a room with the rest, and were alone in a room together while the rest were on the gallery with the sheriff, is not sufficient ground for a new trial, as it does not appear that such separation could have prejudiced defendant; there being no evidence that any other person was in the house at the time.—*State v. Richmond*, (La.) 7 So. 459.

Appeal—Review.

59. When it appears by the record on a murder trial that a juror has been peremptorily challenged by the accused, and did not serve on the jury, the error in the ruling of the district judge declaring his competency will not invalidate the trial, as the accused was not prejudiced thereby.—*State v. Ford*, (La.) 7 So. 696.

HORSE AND STREET RAILROADS.

Keeping streets in repair.

Under a contract between a city and a railroad company, giving a right of way, that the lat-

ter shall keep in good order and condition from curb to curb the streets through which its tracks pass, the company is under no obligation to keep in such condition streets on which its tracks do not pass, and which extend along-side of, and border on, middle or neutral grounds dividing them, on which its tracks do pass, but which do not form part of thoroughfares on which vehicles usually circulate.—*State v. New Orleans City & L. R. Co.*, (La.) 7 So. 606.

HUSBAND AND WIFE.

See, also, *Divorce; Homestead; Marriages.*

Fraudulent conveyances between, see *Fraudulent Conveyances*, 10, 11.

Surrender of insurance policy on husband, see *Insurance*, 8.

Property rights and liabilities.

1. It is error to enter a decree for the recovery of money against a married woman personally, in a suit in equity instituted to set aside a contract for the sale of land on the ground of fraud, and to recover the amount of a cash payment made thereon by the complainant.—*Prentiss v. Paisley*, (Fla.) 7 So. 56.

2. The contract must be with the married woman herself, or her authorized agent, and her land is not bound for materials furnished without her knowledge or consent, under a contract with her husband.—*Wardsworth v. Hodge*, (Ala.) 7 So. 194.

Wife's separate estate—What constitutes.

3. In Alabama, prior to act of February 28, 1887, on a purchase by a husband for his wife, they executing their joint notes, which were afterwards paid out of her money, the property became that of the wife.—*Daniel v. Hardwick*, (Ala.) 7 So. 188.

4. Where a wife owning a horse permits her husband to make several exchanges therewith, in the last of which he receives a mule, and in none of which any paper evidence of title is given or received by either husband or wife, the legal title to the mule is in the husband, and the wife cannot assert her equitable rights as against his mortgagee.—*Harper v. Rudd*, (Ala.) 7 So. 646.

5. Neither can the wife assert title to the mule by six years' adverse possession as against her husband, as, under the statutes in force before the passage of the married woman's act of February 28, 1887, adverse possession could not exist between husband and wife; and, as the legal title to the mule continued to be in the husband after the passage of that act, the possession thereafter will likewise be considered to be in him, and the wife cannot maintain trespass against the mortgagee for his seizure of the mule after Act Feb. 28, 1887, though it be conceded that thereunder the wife may hold property adversely to her husband.—*Harper v. Rudd*, (Ala.) 7 So. 646.

— Wife's power to charge.

6. A life insurance policy, in which a married woman is named as beneficiary, vests a complete title in her as separate paraphernal property, which cannot be pledged as security for the debts of her husband or of the community.—*Putnam v. New York Life Ins. Co.*, (La.) 7 So. 602.

— Conveyances.

7. A wife and her husband gave a deed of trust on the wife's land, which by its recitals was to secure an account due from the husband, and future advances to be made to the husband and wife jointly. The advances were made and the account kept in their joint names, a statement thereof being rendered to each. On settlement the land was sold under the deed to satisfy the debt, without any effort on the part of either the husband or wife to prevent it. Held, that the wife could not, after waiting eight years, sue to set the sale aside on the ground that the debt was due from her husband alone.—*Cross v. Hedrick*, (Miss.) 7 So. 496.

8. Nor can she, after such lapse of time, question the validity of the deed, or the sale under it,

on the ground that the accounts were false, where, though the facts appeared on the face of the accounts, or were in her knowledge, she made no such objection either when the statement was rendered her, or in two subsequent suits against her husband and herself to enforce the debt.—Cross v. edrick, (Miss.) 7 So. 496.

— Investment by husband — Notice imputed to wife.

9. Where a husband purchases property for his wife, the presumption is that the money invested is the wife's separate estate; and under Code Ala. 1876, §§ 2706, 2709, making the husband the trustee of the wife's statutory separate estate, and charging him with the duty of reinvesting the proceeds of its sale, he is the agent of the wife in making the investment; and any knowledge of the husband as to a fraudulent intent of the vendor, acquired while engaged in the transaction of the business as the wife's agent, is imputed to the wife as her knowledge.—Goodbar v. Daniel, (Ala.) 7 So. 254.

Wife's power to contract.

10. No exception to the common-law rule that a married woman is incapable of making a contract that will bind her personally, either in law or equity, is created by the existence of a marriage contract between husband and wife giving her the right to control and manage her separate estate and property the same as if she had remained unmarried.—Prentiss v. Paisley, (Fla.) 7 So. 56.

11. Code Ala. 1886, § 2846, provides that "the wife has full legal capacity to contract in writing as if she were sole, with the assent or concurrence of the husband expressed in writing;" section 3018 provides for a material-man's lien for materials furnished for the construction or repair of any building, "by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor;" and section 3046 provides that "every person, including married women and *cestuis que trustent*, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor,' as used in this chapter." *Held*, that a lien may be acquired under a contract with the agent of a married woman.—Youngblood v. Stage, (Ala.) 7 So. 263.

12. Code Ala. 1886, § 2846, provides that "the wife has full legal capacity to contract in writing as if she were sole, with the assent or concurrence of the husband, expressed in writing." Section 3018 creates a lien for work done or materials furnished in constructing or repairing any building on land, "under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor." Section 3046 provides that "every person, including married women and *cestuis que trust*, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor.'" *Held*, that an oral contract with a married woman is sufficient to create a lien for work done or materials furnished.—Wardsworth v. Hodge, (Ala.) 7 So. 194.

13. The power of a married woman, under Code Ala. 1876, §§ 2707, 2708, to convey, by joint deed of herself and her husband, her separate interests in realty, implies a power to arrange for the security of the purchase money; and where one, upon the sale of land, and under an express agreement, permitted her vendee to obtain a first mortgage loan, a portion of which was paid her as a first installment, and to secure the purchase money took a second mortgage, she will be estopped to deny a waiver of her lien, and to enforce it as against the first mortgagee, who loaned the money on the faith of her agreement.—Wilder v. Wilder, (Ala.) 7 So. 767.

Conveyances and gifts between.

14. Where a husband mortgages land after a parol gift of it to his wife in payment of loans to him from her separate estate, the possession of the wife while residing on the land with her husband is not an adverse possession, under the stat-

ute of limitations, as against the mortgagee.—Gafford v. Strouse, (Ala.) 7 So. 243.

15. Where a husband purchases personal property with his own funds, the fact that he has permanently affixed it to the wife's land is ineffectual to defeat the claims of his creditors, as Code Miss. § 1178, provides that no conveyance of chattels between husband and wife shall be valid as to third persons unless recorded, and that possession of the property shall not be equivalent to recording.—Arnold v. Elkins, (Miss.) 7 So. 521.

Community property.

16. The presumption of law that property bought during marriage in the name of either spouse is community property, attaches to purchases in the name of the wife, although the act contains all necessary recitals as to the paraphernality of the funds with which the price was paid.—Durruty v. Musacchia, (La.) 7 So. 555.

17. When the community is dissolved, the respective interests of the survivor, and of the heirs of the deceased, attach *eo instante*; and, if there be no community debts, their rights of possession and dominion commence, and they thenceforth hold the property in joint ownership.—Succession of Dumestre, (La.) 7 So. 624.

18. Rev. Civil Code La. art. 2420, provides that "the wife, separated from bed and board, who has not, within the delays above fixed, to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same, unless, being still within the term, she has obtained a prolongation from the judge after the husband was heard, or after he was duly summoned." Act No. 4 of 1882 provides that "at the dissolution, for any cause, of the marriage community, it shall be lawful for the wife to accept the community of acquets and gains under the benefit of inventory in the same manner, and with the same benefits and advantages, as heirs are allowed by existing laws to accept a succession under the benefit of inventory." *Held*, that the former statute, which prescribes the time within which she must accept, is not repealed by the latter, which only treats of the manner of acceptance.—Weller v. Van Hoven, (La.) 7 So. 702.

19. Failure of a wife, separated from her husband, to repay to the community sums which had been advanced by it during its existence for the benefit of her separate estate does not amount to taking possession of community property, operating a tacit acceptance, such as is required by Rev. Civil Code La. art. 2420.—Weller v. Van Hoven, (La.) 7 So. 702.

20. Under Rev. Civil Code La. art. 2420, the failure of the wife, separated from bed and board, to accept the community, either expressly or tacitly, within the delays therein prescribed, operates a conclusive and irrevocable renunciation thereof, which bars any subsequent assertion of the community rights.—Weller v. Van Hoven, (La.) 7 So. 702.

21. The share of the surviving wife in the community property may be seized and sold for her individual debt, but the purchaser will take it as she held it, subject to the debts of the community.—Webre v. Lorio, (La.) 7 So. 460.

Actions—Parties.

22. The person in whom the legal title to property is vested in trust for a married woman is a necessary party to a bill seeking to charge the property with the payment of money paid to her.—Prentiss v. Paisley, (Fla.) 7 So. 56.

23. Under Act Ala. Feb. 23, 1887, the husband is not a necessary party defendant to a bill filed to foreclose a mortgage upon lands in which the wife has an interest as her separate estate. Marshall v. Marshall, 5 So. 475, followed.—Kimbrell v. Rodgers, (Ala.) 7 So. 241.

24. Where a mortgage is executed by a wife in the manner prescribed by statute for the relinquishment of her inchoate right of dower, she is a proper party defendant to a suit to foreclose the mortgage, and cut off that right by a sale of the fee.—Kimbrell v. Rodgers, (Ala.) 7 So. 241.

Impeachment.

Of witness, see *Witness*, 15-28.

Improvements.

Recovery for, see *Ejectment*, 7.

Imputed Negligence.

See *Negligence*, 8, 9.

INDICTMENT AND INFORMATION.

For particular crimes, see *Breach of the Peace*; *Burglary*, 1, 2; *Embezzlement*, 2; *Forgery*, 2; *Gaming*, 1, 2; *Homicide*, 13-16; *Intoxicating Liquors*, 25-28; *Larceny*, 3-8; *Mayhem*, 1; *Miscegenation*, 1; *Obstructing Justice*; *Perjury*, 5, 6; *Prize-Fighting*; *Rape*, 2.

Removing mortgaged property, see *Chattel Mortgages*, 6.

Filing.

1. An information filed by the prosecuting attorney of the criminal court of record of Lake county, established by Act Fla. May 11, 1889, making it a court of trial jurisdiction, in the office of its clerk in vacation, does not authorize the clerk to issue a warrant for the arrest of the person so accused of crime, nor do such proceedings give the judge of that court power to fix the bail for the person arrested on a warrant thus issued; and a person so held by the sheriff is deprived of his liberty without due process of law, and is entitled to be discharged on *habeas corpus*.—*Sims v. State*, (Fla.) 7 So. 874.

2. Code Ala. § 4386, requiring an indictment to be indorsed, dated, and signed by the clerk, is directory merely.—*Stanley v. State*, (Ala.) 7 So. 273.

Description of offense.

8. Code Ala. § 3832, under which defendant was indicted for failure to perform services as promised for a surety in a confessed judgment for fine and costs, provides that the failure or refusal of a party who enters into a contract of service on confession of judgment, etc., "without a good and sufficient excuse," to discharge and perform that contract, renders him guilty of a misdemeanor. Held, that an indictment charging such failure or refusal, "without just cause or excuse," is sufficient, under Id. § 4870, which provides that "words used in a statute to define an offense need not be strictly pursued in the indictment; it is sufficient to use other words, conveying the same meaning."—*Giles v. State*, (Ala.) 7 So. 271.

4. Under a statute which denounces the offense of shooting "in" the highway, an indictment which charged defendant with shooting "on" the highway was sufficient.—*Woods v. State*, (Miss.) 7 So. 495.

Description of person.

5. A plea of not guilty to an indictment is an admission that the name by which the defendant is indicted is his true name, and a waiver of the misnomer, if in fact the indictment was originally open to that objection.—*Wells v. State*, (Ala.) 7 So. 272.

6. In a prosecution under Rev. St. La. § 868, which provides for the punishment of "any judge, justice of the peace, sheriff, coroner, constable, or other civil officer," for oppression or extortion under color of his office, it is essential to charge and prove that the accused was an "officer," as designated in the statute.—*State v. Lubin*, (La.) 7 So. 63.

Duplicity—Aider by verdict.

7. Where an indictment charged in the first count that defendant forged an order for the payment of money, and in the second that he forged an indorsement on a bill of exchange, an objection to the indictment for duplicity is too late after verdict.—*State v. Clement*, (La.) 7 So. 685.

Joinder of offenses.

8. When two or more crimes result from a single act, but one indictment will lie, but the different offenses may be separately charged in distinct and different counts, in the same indictment.—*State v. Cook*, (La.) 7 So. 64.

Indorsement.

Of negotiable paper, see *Negotiable Instruments*, 5-11.

INFANCY.

See, also, *Guardian and Ward*.

Appointment of emancipated minor as administrator, see *Executors and Administrators*, 2.

Competency as witness, see *Witness*, 1, 2.

Private sale of property owned in common with minor, see *Partition*, 8-10.

Representation of minor in partition proceedings, see *Partition*, 5.

Sale of liquor to minor, see *Intoxicating Liquors*, 22.

Removal of disability—Jurisdiction.

A district court, by which a non-resident mother has been appointed tutrix of a minor son domiciled out of the state, has jurisdiction of a proceeding by the son against her to be relieved from his disabilities.—*Succession of Gaines*, (La.) 7 So. 783.

Information.

See *Indictment and Information*.

Infringement.

Of trade-marks, see *Trade-Marks*, 4.

INJUNCTION.

Violation, action for false imprisonment, see *False Imprisonment*.

Jurisdiction.

1. Having acquired jurisdiction of a suit to restrain the foreclosure of a mortgage, and for an accounting, the court properly enjoined an action at law upon the notes secured by the mortgage.—*Whitley v. Dunham Lumber Co.*, (Ala.) 7 So. 810.

2. A mortgagor's wife, to whom the mortgagee has delivered the mortgage and evidence of indebtedness as a gift, without executing a written assignment thereof, has not the legal title to the mortgage, and she cannot enjoin the purchaser of the land under foreclosure proceedings instituted by the mortgagee's executor from maintaining ejectment against the mortgagor, her husband; her remedy being either a legal action for the recovery of the proceeds of the sale, or an equitable action to have it set aside.—*O'Connor v. McHugh*, (Ala.) 7 So. 749.

3. In a creditors' bill to reach chattels in the hands of a fraudulent vendee, and to enjoin their disposition, danger of irreparable loss is not shown by the insolvency of the debtor, but that of the fraudulent vendee should also appear to sustain an injunction.—*Fuller v. Cason*, (Fla.) 7 So. 870.

Rights enforced.

4. An injunction will not lie against the appropriation and payment by a city of claims for work done subsequent to that for which plaintiff claims compensation, where no demand has been made upon such city to do any act in recognition of plaintiff's rights.—*State v. City of New Orleans*, (La.) 7 So. 691.

Restraining sale under foreclosure.

5. An injunction arresting executory process for the sale of mortgaged property for cash will be perpetuated, on proof that time was allowed to pay the debt, although part of the claim was due at the institution of the proceedings, in the absence of any prayer by the creditor to restrict the injunction to installments not yet due.—*Penonilh v. Abraham*, (La.) 7 So. 583.

6. Where a bill to enjoin a mortgagee from selling under a power in the mortgage averred payment, but offered to pay any amount that might be found due upon an accounting, and prayed cancellation, or, if something were found still due, to be allowed to redeem, a motion to dismiss for want of equity was properly denied.—*Whitley v. Dunham Lumber Co.*, (Ala.) 7 So. 810.

7. A motion to dissolve a temporary injunction against a sale under a mortgage upon an answer which merely denied payment was properly overruled, where plaintiff prayed for an accounting, and for leave to redeem.—*Whitley v. Dunham Lumber Co.*, (Ala.) 7 So. 810.

Restraining payment of proceeds of execution.

8. One T., a merchant, drew \$17,000 from the bank, and visited his father the same day. The latter was a small merchant in a neighboring town. The next day T. made an assignment for the benefit of creditors. His property was attached and sold. His father settled with some of the creditors, and took judgments against T. Held that, in view of many circumstances connecting the father with the fraud of T., the sheriff would be enjoined from paying to the father on his judgments the money derived from the sale of T.'s goods.—*Memphis Grocery Co. v. Trotter*, (Miss.) 7 So. 550.

Pleading.

9. The equities of a bill being denied by answer, an affidavit of the complainant, which affirms in general terms only the statements of the bill, does not overcome the denial, and will not sustain a preliminary injunction.—*Fuller v. Cason*, (Fla.) 7 So. 870.

Necessity of bond.

10. When a temporary injunction in executory proceedings for the sale of mortgaged property sets up a plea of compensation, and makes the requisite affidavit, he is entitled to a preliminary injunction without bond.—*Newmann v. Irwin*, (La.) 7 So. 799.

Dissolution—Reinstatement.

11. Where a temporary injunction has been granted and then dissolved, and the bill remains on file, and the cause is still within the control of the court, it is not error, on rehearing of the order dissolving the injunction, to vacate that order and reinstate the injunction without a refiling of the bill.—*Fleck v. Spencer*, (Fla.) 7 So. 642.

Appeal.

12. An appeal from an order dissolving an injunction does not of itself reinstate the injunction; but an appeal, and an order that the appeal shall operate as a *supersedeas* to the order, and a compliance with the terms of the *supersedeas* order as to giving bond, do restore the injunction.—*McMichael v. Eckman*, (Fla.) 7 So. 865.

13. An execution sale of personal property was enjoined until \$1,000 worth of personal property should be set aside for complainant as the exemption allowed the head of a family, the property claimed as exempt to be scheduled immediately in the manner directed by law, and remain in the possession of the sheriff. Afterwards the injunction was dissolved on motion of defendants, and, the complainant having appealed from the dissolving order, an order was made that the appeal should operate as a *supersedeas* on the filing and approval of a specified bond. Held, that the supreme court would not vacate or modify the *supersedeas* so as to permit a sale of the entire property, on the ground that it was perishable, and that the sheriff, misunderstanding the scope and meaning of the *supersedeas* order, refused to sell the property, where it is not shown that the property is perishable to the extent that would render the delay fatal to the interests of the parties concerned.—*McMichael v. Eckman*, (Fla.) 7 So. 865.

Violation—Contempt.

14. One not a party to a suit in which an injunction has issued, and to whom such injunction is not directed, cannot be held in contempt, or be pun-

ished for the violation of the writ, although the act prohibited be illegal in itself.—*Barthe v. Larquie*, (La.) 7 So. 80.

Damages.

15. Actual damages only will be allowed because of an injunction, which has been dissolved, when the one obtaining it acted in good faith and under the advice of counsel.—*Riggs v. Bell*, (La.) 7 So. 787.

INSANITY.

As a defense in criminal cases, see *Homicide*, 17-21.

Responsibility for crime.

1. The objection of present insanity may be made at any stage of the proceedings, and requires no special or formal plea, but may be presented orally, or the court may itself suggest, and act upon its own observation.—*State v. Reed*, (La.) 7 So. 132.

2. When raised during the progress of the trial, it is error to refuse to entertain the objection, or to receive evidence, or to determine it in any way.—*State v. Reed*, (La.) 7 So. 132.

Action by guardian of lunatic.

3. In a bill for partition by the guardian of a lunatic, he must sue, not in his own name describing himself as guardian, but in that of his ward.—*West v. West*, (Ala.) 7 So. 830.

Insolvency.

Of banks, see *Banks and Banking*, 4.

Instructions.

See *Criminal Law*, 56-71; *Trial*, 4-10.

INSURANCE.

The contract.

1. Where several policies are taken out in different companies, without any relation to each other, on the same property, they are independent contracts, and the policy in one company cannot be received in evidence to explain or vary what is contained in the other.—*Westinghouse Electric Co. v. Western Assur. Co.*, (La.) 7 So. 73.

2. Where a policy of life insurance is only intended as a security for a previously existing indebtedness of the insured to the beneficiary, and the recitals of this policy clearly indicate that it was issued in the place of a previous one, the company cannot be held liable therefor, where it has been adjudged liable for the full amount of the surrendered policy, in which the wife of the insured was the beneficiary, and which was surrendered without her consent.—*Putnam v. New York Life Ins. Co.*, (La.) 7 So. 602.

Surrender by insured—Consent of beneficiary.

3. A policy of life insurance, in which the wife is named as beneficiary, cannot be converted into separate property of the husband, or into a community asset by its surrender to the insurer by the insured, and the issuance of a new policy, in which another and different beneficiary is named, unless the consent of the former beneficiary is first legally obtained.—*Putnam v. New York Life Ins. Co.*, (La.) 7 So. 602.

Application.

4. Where a policy of insurance upon a gin-house, and the machinery therein, is avoided as to the building by reason of a breach of warranty of the title as contained in the application made a part of the policy, it is likewise avoided as to the machinery, though there was no such breach as to that, its destruction being a necessary consequence of the destruction of the gin-house.—*Western Assur. Co. v. Stoddard*, (Ala.) 7 So. 879.

Knowledge of agent.

5. Where an application for insurance states that the insured is the owner in fee of the prop-

erty, and the policy issued thereon makes the application a warranty upon whose breach the policy shall be void, the insurer cannot avoid the policy on the ground that the insured was in fact only a life-tenant, when that fact was made known to the insurer's agent at the time the policy was issued, notice to him being constructive notice to the insurer.—*Western Assur. Co. v. Stoddard, (Ala.) 7 So. 379.*

6. A policy previously issued on the same property, through the same agent, but from a different company, is not admissible in evidence to show such knowledge as to the state of the title on the part of the agent; it not being shown that he was at that time in any way connected with the defendant company.—*Western Assur. Co. v. Stoddard, (Ala.) 7 So. 379.*

7. In an action on a policy issued on an application misstating the condition of the title, plaintiff cannot recover the loss upon the property as to which there was the breach of warranty, where there is no evidence that the agent was informed of the true state of the title.—*Western Assur. Co. v. Stoddard, (Ala.) 7 So. 379.*

Condition of policy.

8. A condition in an insurance policy that it might be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium, confers no authority to reduce the amount insured.—*Western Assur. Co. v. Stoddard, (Ala.) 7 So. 379.*

9. A suit to recover possession of a dwelling-house on a tract of land assigned to a widow as dower is not such litigation as will cause the forfeiture of a policy of insurance on a gin-house situate on the same tract, which is conditioned to be void if the premises were involved in litigation.—*Western Assur. Co. v. Stoddard, (Ala.) 7 So. 379.*

10. An insurance policy provided that, "if the interest of the assured in the property be other than an absolute fee-simple title, * * * it must be so represented to the company, and so expressed in the written part of this policy." The insured held title as *cestui que trustent*, and under a deed purporting to convey an absolute fee-simple title from the other *cestui que trustent*, and their beneficial ownership was sole and undisputed. *Held*, that their interest was equivalent to an absolute fee-simple title as contemplated by the policy.—*Phoenix Ins. Co. v. Bowdre, (Miss.) 7 So. 596.*

— Waiver.

11. If the agent, with knowledge or notice that the title of the insured is only a life-estate, places the insurance and receives the amount of the premium as upon an absolute title, the insured is entitled to the same compensation for loss as if she held the fee.—*Western Assur. Co. v. Stoddard, (Ala.) 7 So. 379.*

Amount of loss.

12. When property is valued at \$90,000, and an insurance effected on 1-36 of said amount, and there is a total loss, the company is responsible for the amount insured, \$2,500, upon which it received a premium. The policy cannot be construed to mean that the insurer is liable only for 1-36 of the loss.—*Westinghouse Electric Co. v. Western Assur. Co., (La.) 7 So. 73.*

Proofs of loss—Waiver.

13. A fire insurance policy stipulated that the assured, within 30 days after loss, furnish complete proofs thereof, accompanied by a builder's estimate of the value of the building. *Held*, that a general agent of the company having authority "to transact the business of insurance" within the state may, after a loss, bind the company by a parol waiver of those conditions, notwithstanding the policy provides that a waiver shall be void unless in writing, and indorsed thereon.—*Phoenix Ins. Co. v. Bowdre, (Miss.) 7 So. 596.*

Actions on policy—Evidence.

14. In an action on an insurance policy the testimony of the insured that he had no knowledge

of the reduction in the amount of the insurance till it became necessary to examine the policy, while trying to adjust the loss, is admissible, but not testimony as to what he then said.—*Western Assur. Co. v. Stoddard, (Ala.) 7 So. 379.*

INTEREST.

See, also, *Usury.*

Running of interest.

1. In an action against the vendee for specific performance of a contract to purchase land acquired by a married woman during coverture, interest on the cash part of the price is properly allowed only from date of judgment, since the vendee cannot be compelled to accept title until she has rebutted the presumption that the land so acquired by her was community property.—*Durruty v. Musacchia, (La.) 7 So. 555.*

Rate.

2. Under Rev. Civil Code La. arts. 1940, 2924, interest exceeding 5 per cent. cannot be allowed on a sum actually due, in the absence of written evidence of an agreement to pay such.—*Durruty v. Musacchia, (La.) 7 So. 555.*

Interrogatories.

See *Discovery.*

Intervention.

See *Attachment*, 10, 11.

Inter Vivos.

See *Gifts.*

INTOXICATING LIQUORS.

Constitutionality of act—Delegation of power.

1. Under Const. La. art. 170, declaring the sale of alcoholic liquors a police regulation, and conferring upon the general assembly the power to regulate their sale, the general assembly may delegate such power to the several police juries, and may provide a uniform penalty for the violation of any regulations made by them.—*State v. Harper, (La.) 7 So. 446.*

Local option.

2. Act Ala. Dec. 7, 1886, provided for the holding of an election in the county of Calhoun for the purpose of determining whether the sale of intoxicating liquors therein should be prohibited. In case a majority of the votes cast at such election was in favor of prohibition, it was made the duty of the probate judge to give notice of that fact by publication for 30 days. Sections 5 and 6 further provided that after the completion of such notice the selling or giving away of intoxicating liquors should be a misdemeanor punishable by fine and imprisonment. Section 9 provided that, if an election was held under the provisions of the act in 1887, the provisions of the fifth and sixth sections "shall not take effect until after the 30th day of April, 1887," which was more than 60 days after the adjournment of the legislature. *Held*, that this section took the provisions of the act on the subject of the election out of the operation of Code Ala. 1876, § 4448, providing that no penal act shall go into effect until 30 days after the adjournment of the legislature, and that part of the act was in effect from the date of its approval.—*Olmstead v. Crook, (Ala.) 7 So. 776.*

— Election to adopt.

3. The mere fact that the order appointing such election recites that it was made by the court, while the statute in terms confers authority to make it on the judge, is not sufficient to avoid the election where the order is signed by the judge, and professes to be made under the statutory authority.—*Olmstead v. Crook, (Ala.) 7 So. 776.*

4. A publication of the result of the election in all the newspapers of the county being a condition precedent to the taking effect of the prohibition of the act, notice which is not published in all of them is ineffectual; but, where the proper notice is published as soon as the invalidity of the former has been determined, the prohibition will take effect thereafter, as provided by the terms of the act.—*Olmstead v. Crook*, (Ala.) 7 So. 776.

5. Sess. Acts Ala. 1886-87, p. 671, (an act to prohibit the sale, giving away, etc., of intoxicating liquors in Calhoun county), provide (sections 1, 2, 3, 4) for an election to ascertain the wishes of the people as to prohibiting the sale of intoxicating liquors in the county, and that if a majority of the votes be for prohibition the probate judge shall record the result in his office, and give notice for 30 days, by publication in all the newspapers published in the county, that a majority of the qualified voters voted for prohibition; and (sections 5, 6) that after the expiration of said 30 days' notice it shall be unlawful to sell, give away, or otherwise dispose of intoxicating liquors in said county, etc. *Held*, that the publication of the notice of the result of the election in all the papers designated was a condition precedent to the operation of sections 5 and 6, and that the burden of proving such publication was on the state.—*Toole v. State*, (Ala.) 7 So. 42.

6. As there is no provision in the statute for the making or recording of an order of publication, or for the recording of the notice, the record of such order and notice is incompetent and immaterial to prove the publication of the notice.—*Toole v. State*, (Ala.) 7 So. 42.

7. There is no presumption arising from the fact that it was the duty of the judge to have such notice published, that it was in fact published.—*Toole v. State*, (Ala.) 7 So. 42.

8. The certification of the returns of a local option election by a majority of the commissioners is sufficient.—*Fullwood v. State*, (Miss.) 7 So. 432.

— Election to repeal.

9. Under Act Ala. March 19, 1875, (local option law,) providing, in section 11, that after the lapse of 12 months from an election establishing prohibition in a given district, or refusing to repeal it, "any citizen, being a freeholder within such limits, desiring to have the order revoked," may petition for a new election, the new election cannot be called for a territory forming a part only of that for which the first election was held.—*Caldwell v. Grider*, (Ala.) 7 So. 208.

10. A freeholder of that part of the original district in which the new election is sought to be held is entitled to intervene in the proceedings, by petition, to set aside the order for the new election for non-compliance with the statute.—*Caldwell v. Grider*, (Ala.) 7 So. 208.

— Conflict with other liquor legislation.

11. Act Miss. March 16, 1886, amending Code Miss. 1880, § 1112, which prohibits the sale of vinous and other liquors, in quantities of less than a gallon, without a license, provides that any person may sell wine made of grapes, or other fruits grown by himself, in any quantity not less than one pint, without paying a tax or obtaining a license, provided that nothing therein shall be construed to interfere with any local law prohibiting the sale of native wines, etc., and repeals all conflicting acts. *Held*, that it repeals, so far as it is in conflict with it, Act Miss. March 11, 1886, which provides that, upon the submission to and adoption by the qualified electors of any county of local option, it shall not be lawful for any person within such county to sell any alcoholic, spirituous, vinous, malt, or intoxicating liquors.—*Kohlbrunner v. State*, (Miss.) 7 So. 238.

12. Act Fla. March 3, 1883, (chapter 3406,) enacts that no person shall be licensed to sell intoxicating liquors, until he has obtained from the county commissioners a permit to sell the same, to be issued by them on his application, signed by a majority of the registered voters of the election district in which the privilege of selling is to be exercised, and duly proven, and published in the

manner prescribed. *Held*, that this act was not repealed by the nineteenth, or local option, article of Const. Fla. 1885, providing for elections to decide whether the sale of intoxicating liquors shall be prohibited in a county, and giving to a majority vote cast in an election district in favor of prohibition the effect to prohibit sales in such district, although the majority of the aggregate vote of a county may be against prohibition.—*State v. Smith*, (Fla.) 7 So. 848.

Licenses.

13. Act Ala. Feb. 23, 1889, § 7, subd. 10, which authorizes the mayor and city council of the city of A., situated in said Calhoun county, "to license, tax, and regulate * * * retailers," does not of itself repeal the former general act prohibiting the sale of intoxicating liquors in the county, but such repeal can only be effected by the passage of an ordinance under the later act, licensing retailers of intoxicating liquors.—*Olmstead v. Crook*, (Ala.) 7 So. 776.

14. Act La. 1886, No. 101, provides that if liquors are sold in connection with the business of grocer in less quantities than five gallons the license for such additional business shall be that provided for in section 11 of the act. It is further provided that such license shall not be less than \$50. *Held*, that as section 11 is not applicable, that section regulating several distinct kinds of business, with different systems of license, none of which embrace the business of grocer, it was proper to fix the license of a grocer selling in quantities less than five gallons at \$50.—*City of New Orleans v. Clark*, (La.) 7 So. 58.

15. Acts Ala. 1886-87, p. 671, provide that when, at an election in regard to the local prohibition of the liquor traffic, a majority of the voters are in favor of prohibition, it shall be the duty of the probate judge to record the result in his office, and give notice of it for 30 days in all the newspapers published in the county. *Held*, that a peremptory *mandamus* to grant a license would not be issued to a probate judge when it appears that the notice was in process of publication at the time of application for the license, as the effect of its issue would be to decide the constitutionality of the prohibition law before a proper case is presented.—*Ramaguan v. Crook*, (Ala.) 7 So. 247.

16. Under Code Ala. § 1819, requiring as a condition precedent to the granting of a liquor license that the applicant produce to the judge of probate a recommendation signed by 20 householders and freeholders residing within the corporate limits of the town in which he proposes to engage in the business, a petition to compel the probate judge to issue a license, stating that applicant produced the recommendation of more than 20 householders and freeholders of "said town and district," is not sufficient, as it does not show that they all reside within town limits.—*Glenn v. Lynn*, (Ala.) 7 So. 924.

17. The petition should also show that applicant has filed the affidavit required by section 1320 as a condition precedent to obtaining a license.—*Glenn v. Lynn*, (Ala.) 7 So. 924.

Power of municipal corporation.

18. Act Ala. Feb. 23, 1889, incorporating the city of Anniston, in section 7 confers on the mayor and council power to provide for the punishment of any offense punishable under the laws of the state. The same section confers special power "to license, tax, and regulate * * * retailers," etc. *Held*, that as to retailers of intoxicating liquors the general provision is limited by the special one, and, under the authority to license and regulate, the council cannot pass an ordinance prohibiting the sale of liquor.—*Ex parte City of Anniston*, (Ala.) 7 So. 779.

Authority of police jury.

19. Rev. St. La. § 1211, authorizes police juries to make such regulations as to the sale of intoxicating liquors as they may see fit, or to withhold licenses from drinking shops. By section 1212 the state relinquishes all right to grant licenses where they are prohibited by police juries; and section

1215 imposes a uniform penalty for the sale of liquor without a license from the local authorities. *Held*, that a police jury has no authority to pass an ordinance prohibiting the sale of liquor, and fixing a penalty for its violation.—*State v. Harper*, (La.) 7 So. 446; *Police Jury of Lincoln Parish v. Harper*, *Id.* 716.

Illegal sales.

20. Under Acts Ala. 1880-81, p. 148, which prohibits the sale of liquor in "beat number two, known as 'Fairfield Beat,' in Covington county," an order of the commissioners' court of the county, changing the boundaries of the beat so as to add a portion of it to an adjoining beat, does not authorize the sale of liquor in that portion.—*Prestwood v. State*, (Ala.) 7 So. 259.

21. Where intoxicating liquors are sold at a bar, contrary to law, by a person apparently in charge as clerk, the sale is, in the absence of evidence to the contrary, a sale by the owner of the bar.—*Fullwood v. State*, (Miss.) 7 So. 432.

Sale to minor.

22. Where, at the suggestion of the seller of intoxicating liquors, a by-stander is induced by a minor to purchase liquor for him, and with his money, the effect is the same as if the sale had been made directly to the minor.—*Liles v. State*, (Ala.) 7 So. 196.

Criminal prosecution.

23. Code Ala. § 4037, provides that on indictment for the illegal sale of intoxicating liquors it is sufficient to charge that defendants sold without license, and contrary to law, and on the trial any act in violation of the law may be proved; and that such form shall be sufficient for the violation of any special or local laws. *Held*, that on such indictment, though the solicitor may elect to prosecute defendant under the general statute, he may, on proper evidence, be convicted under the special statute applicable to the place.—*Olmstead v. State*, (Ala.) 7 So. 775.

24. On an indictment for selling intoxicating liquors without a license, under Act Fla. June 13, 1887, § 10, providing that persons making such sales shall be guilty of a misdemeanor, it is no defense that defendant has tendered to the proper officer the license tax prescribed by that act, where the sales were made before the license was granted.—*Roberts v. State*, (Fla.) 7 So. 861.

Indictment.

25. Act Fla. June 13, 1887, § 9, provides that no intoxicating liquors shall be permitted to be sold, unless the license tax imposed by the act is first paid and a license for such sale taken out. Section 10 provides that "any person * * * that shall carry on or conduct any business * * * for which a license is required, without first obtaining such license, shall * * * be guilty of a misdemeanor," etc. *Held*, that an indictment is sufficient under this act which charges that defendant "did engage in and manage the business of a dealer in" intoxicating liquors, without having first taken out a license therefor, as required by law.—*Roberts v. State*, (Fla.) 7 So. 861.

26. Under Act Miss. approved February 1, 1889, prohibiting the sale of malt liquors "at or within three miles of Providence College, situated in the county of Lee and in the state of Mississippi," an indictment charging that defendants sold such liquors "at Nettleton, in violation of an act of the legislature approved February 1, 1889, entitled 'An act to incorporate Providence College,'" etc., and not alleging that the sale was made within three miles of Providence College, is fatally defective.—*Ragan v. State*, (Miss.) 7 So. 280.

27. By the charter of the town of P. it was unlawful to sell vinous, spirituous, or malt liquors, "except for sacramental purposes;" and it was also unlawful to sell liquors in M. county, wherein P. is situated. *Held*, that an indictment which charged defendant with unlawfully selling liquors in P., "not being wine sold for sacramental purposes," was not bad, as charging the offense under both the charter and the general law, although tending to confuse by reason of the immaterial averment ex-

cluding the exception allowed by the charter.—*Stone v. State*, (Miss.) 7 So. 500.

28. In a prosecution for dealing in spirituous liquors without a license, under Act Fla. March 5, 1883, it was not necessary for the indictment to allege that defendant was not a druggist at the time of the sales of liquor, nor that the liquor was not used by a druggist in compounding medicines, and the preparation of prescriptions made by a regular practicing physician. If it was a fact that the liquor was sold as a component part of medicines upon such prescription, it was a matter of defense.—*Baumeil v. State*, (Fla.) 7 So. 371.

Evidence.

29. Under an indictment charging defendant with selling liquors without a license, it is error to admit evidence of more than one sale.—*Stone v. State*, (Miss.) 7 So. 500.

30. On a trial for unlawfully selling intoxicating liquor, where it is apparent that the indictment refers to a sale testified to by a witness for the state, it is error to ask defendant, on his cross-examination, as to a different transaction with respect to intoxicating liquor.—*Bailey v. State*, (Miss.) 7 So. 348.

Presumption.

31. A charge that "the fact that the defendant's place of business was a drug-store does not raise any presumption in his favor; and, if the state has proven to your satisfaction that any single sale of spirituous liquors was made by the defendant, and the defendant has not then shown that such sale was justified under the privileges of a druggist, which he claims, then you should convict,"—is correct.—*Baumeil v. State*, (Fla.) 7 So. 371.

Instructions.

32. On indictment for unlawfully retailing spirituous liquors, the evidence showed that defendant built a lemonade stand, and sold lemonade, in front of a tent which he had hauled to a place where there was a public gathering. A stranger owned the tent, and sold whiskey in it. Defendant kept his ice in the tent, but was not connected with the sale of the whiskey. *Held*, that it was error to charge the jury that if they believed that defendant was owner of the whiskey, or in any way participated in its sale, or encouraged the sale, as agent, servant, or clerk, he was guilty.—*Bollis v. State*, (Miss.) 7 So. 390.

Verdict.

33. Where on an indictment charging, in two counts, (1) selling liquor to a minor, and (2) selling liquor without license,—there is a general verdict of guilty, but the court, on motion for new trial, finds that the second count is not sustained, while the first is, and sentences defendant on that only, defendant cannot complain that the verdict is broader than was warranted by the evidence.—*Jones v. State*, (Miss.) 7 So. 220.

Penalty.

34. Where the penalty prescribed for the violation of the act under which the defendant was convicted was not less than double the amount of the license required to authorize the selling of liquor, \$600, a fine of \$900 for the violation of said act was not excessive.—*Baumeil v. State*, (Fla.) 7 So. 371.

Joinder.

Of offenses, see *Indictment and Information*, &

JUDGE.

See, also, *Justices of the Peace*.

Disqualification.

1. Under McClel. Dig. Fla. p. 337, § 28, providing that no judge shall sit in any cause in which he is interested, or in which he would be excluded from being a juror by reason of interest, the interest which disqualifies a judge is a property interest in the action or its result, in contradistinction to an interest of feeling or sympathy or bias, that would disqualify a juror.—*Ex parte Harris*, (Fla.) 7 So. 1.

2. There is no affinity between a husband's brother and the wife's brother, so as to disqualify the former from sitting as judge in a criminal prosecution in which the wife's brother is defendant, under *McClell. Dig. Fla. p. 837, § 23*, providing that no judge shall sit in any cause in which he would be disqualified by reason of affinity to any of the parties.—*Ex parte Harris, (Fla.) 7 So. 1.*

Plea for recusation.

3. Where a plea for the recusation of a judge assigns none of the grounds defined and limited for recusation by Code Prac. La. arts. 838, 940, it may be treated as frivolous and made for delay, and set aside without reference to a judge *ad hoc* to determine it.—*State v. Chantlain, (La.) 7 So. 669.*

JUDGMENT.

Appealable judgments and orders, see *Appeal, 4-7*.
Decree in equity, see *Equity, 24*.
On bail-bond, see *Bail, 8-18*.

By confession.

1. The right to be served with citation before judgment is one which may be waived by the maker of a note, desiring to confess judgment thereon, at the time of the execution of the note, and such waiver may be afterwards enforced against him according to his agreement.—*Stein v. Brunner, (La.) 7 So. 718.*

By default.

2. That a judgment is by default instead of *nil dicit* is harmless error.—*Elyton Land Co. v. Morgan, (Ala.) 7 So. 249.*

3. Where, in action against five defendants on a note, the declaration is verified under Acts Miss. 1883, c. 46, § 3, and service is had 80 days before the return-term on three, and all five plead the general issue unverified, plaintiff may have judgment by default against the three served, but not against the other two, under section 1 of that chapter, providing that, where process is served 80 days before, actions *ex contractu* shall be triable at the return-term unless a meritorious defense, supported by affidavit, is disclosed by the answer.—*Oglesby v. Stribling, (Miss.) 7 So. 463.*

4. Parties permitting a suit to be tried in their absence, and without counsel, cannot complain of being treated as in default.—*Elyton Land Co. v. Morgan, (Ala.) 7 So. 249.*

5. Defendant testified positively in a proceeding to set aside a judgment by default that he was not served with summons. It appeared that he was absent from the county at the time, and for two days before, and one after, the date of the purported service of the writ. He showed as a defense a release by plaintiffs, which he had been at great pains to acquire. The evidence of the officer in whose hands the writ was placed was indefinite and uncertain, and only to the effect that no returns were made except upon personal service; that it was a frequent custom to send process to persons not officers to serve, and to make returns on their statements of service; and that he had no independent recollection of having served the summons in question. *Held*, that a decree perpetually enjoining the enforcement of the judgment was proper.—*Rice v. Tobias, (Ala.) 7 So. 765.*

Rendition and entry.

6. An order was duly entered upon the record of a term of the circuit court, in the following language, omitting the title of the cause and the signature of the judge: "It appearing that notice was given of this motion, and the same being argued, it is ordered that the motion be granted; to which ruling counsel for plaintiff excepted, and the plaintiff is allowed thirty days to file bill of exceptions and perfect appeal." *Held*, that this is a final judgment as distinguished from a direction for a more formal entry by the clerk.—*Williams v. Hutchinson, (Fla.) 7 So. 852.*

7. A judgment against a non-resident, properly represented in a litigation by a curator *ad hoc*, involving the effect of a judicial mortgage inscription on real estate in this state, ought to be expio-

it, on its face, to that effect, to bind the absentee.—*Durruy v. Musacchia, (La.) 7 So. 555.*

Res adjudicata.

8. Where an application by the administrator for an order of sale of the land to pay a debt of decedent's that is not subject to any exemption is denied, and the widow's invalid claim of homestead exemption allowed, and the estate is subsequently declared insolvent, the creditor cannot subject the land to his debt after the widow's death, as the order allowing the homestead exemption, from which no appeal was taken, is final, and decisive of his rights.—*McDonald v. Berry, (Ala.) 7 So. 838.*

9. Plaintiff, as administrator, seeks to enforce a vendor's lien for an unpaid balance of purchase money. The evidence on a former appeal showed that a number of items sought to be offset as credits *pro tanto*, under a plea of payment of the plaintiff's claim, were cross-demands, and, there being no evidence of an agreement that they should be treated as payments, they were declared to be independent cross-claims. On the second trial, on the same evidence, they were adjudged barred as cross-demands by the statute of non-claim, and a referee was directed to ascertain the amount due on the claim in suit. *Held*, that this was not such an adjudication as to preclude further inquiry into the character of the items by permitting the introduction of additional testimony before the referee.—*McCurdy v. Middleton, (Ala.) 7 So. 655.*

10. A matter tendered as an issue on an executrix's final account, regularly opposed by a creditor of the succession, evidence being adduced thereon *pro et con*, and finally and contradictorily determined by a definitive judgment on appeal, cannot be thereafter litigated between the same parties.—*Succession of Duhe, (La.) 7 So. 827.*

11. Exceptions of estoppel and *res judicata* are well founded to a suit brought to annul a will after the plaintiff therein has freely acknowledged the capacities of the legatees, and after those have been judicially recognized as such by a judgment contradictorily rendered, which has been executed without opposition, and which has passed beyond review.—*Succession of Corriean, (La.) 7 So. 74.*

12. The facts that mortgage creditors brought replevin for mortgaged chattels which had been taken under execution, and that judgment was rendered against them under Code Miss. § 2633, which forbids such an action in such case, and provides a remedy by claimant's issue, do not preclude them from thereafter maintaining a bill to foreclose.—*Conn v. Bernheimer, (Miss.) 7 So. 845.*

Effect on legislature.

13. A judicial decree interpreting a contract authorized by legislative will cannot prevent the legislature from further legislation, authorizing the parties to alter or amend this contract, or to annul the existing and make a new and a different contract.—*Conery v. New Orleans Water-Works Co., (La.) 7 So. 8.*

Lien.

14. Act Feb. 28, 1887, (note to Code Ala. § 2894,) provides that, when a certified copy of the record of a judgment or decree for the payment of money is filed and registered in the office of the probate judge of any county, such judgment or decree "shall be a lien upon all the property of the defendant in such county which is subject to levy and sale under execution; and such lien shall continue for 10 years from the date of such registration." *Held* that, where a judgment creditor instructed the clerk, the day after judgment was rendered, to withhold execution until further order, and the same day filed and registered a certified record of the judgment, the lien of the judgment was preserved paramount to that of a levy under a judgment obtained after such filing and registry.—*Decatur Charcoal Chemical Works v. Moses, (Ala.) 7 So. 637.*

Foreign judgment.

15. A decree rendered in a court of one state controls a decree subsequently rendered between the same parties and upon the same subject-mat-

ter, in another state, although the suit in which the later decree is rendered was instituted first.—*Memphis & C. R. Co. v. Grayson*, (Ala.) 7 So. 122.

16. One who prosecutes an appeal from a judgment of a *nisi prius* court of a foreign state to the supreme court of that state, and who submits himself to the jurisdiction of the appellate tribunal, cannot impeach its judgment, in an action brought thereon in this state, on the ground that the *nisi prius* court had never obtained jurisdiction of his person, as the judgment of the supreme court merges that of the lower court.—*Roach v. Frivett*, (Ala.) 7 So. 808.

Arrest.

17. Where a complaint, in one of its counts, states a good cause of action, a judgment based on a general verdict in plaintiff's favor will not be arrested because of the insufficiency of another count which had not been previously objected to, as Code Ala. § 2835, expressly provides that no judgment can be arrested for any matter not previously objected to, if the complaint contains a substantial cause of action.—*Hays v. Solomon*, (Ala.) 7 So. 921.

Amendment.

18. Clerical errors in a judgment may be amended *nunc pro tunc*.—*Myers v. Conway & Co.*, (Ala.) 7 So. 690.

19. Since Code Prac. La. art. 1129, declares that appeals from a justice of the peace to the district court are "to be tried in the appellate court *de novo*," the latter has the same authority to amend a judgment which it has affirmed on such an appeal as it has to amend a judgment rendered by it in the first instance; and *certiorari* does not lie to it on account of such amendment.—*State v. Cocco*, (La.) 7 So. 620.

20. On its affirmance by the supreme court, a chancellor's decree becomes merged in the judgment and decree of the appellate tribunal, and cannot thereafter be modified by him.—*Herstein v. Walker*, (Ala.) 7 So. 821.

Actions on.

21. The interruption of the prescription of a judgment authorized by Rev. Civil Code La. art. 3547, by the issue of a citation to the defendant or his representative from the court which rendered the judgment, is as effectual as to third persons as it is to parties to the record.—*Lalanne v. Payne*, (La.) 7 So. 481.

Judicial Notice.

See *Evidence*, 1, 2.

JUDICIAL SALES.

Of property of decedent, see *Executors and Administrators*, 26-45.

Under execution, see *Execution*, 7-9.

Effect.

1. Liens, privileges, and mortgages for taxes are excepted from the general rule that judicial sales have effect to cancel mortgages and privileges, and to refer them for satisfaction to the proceeds of sale; as title to the property does not pass to the purchaser until such liens are discharged, under Rev. St. La. art. 2519, prohibiting the execution of any public act of sale of land until all taxes due thereon are paid.—*Succession of Girardey*, (La.) 7 So. 673.

Rights of purchaser.

2. The plaintiff, being the adjudicatee of certain property at a judicial sale, to effect a partition thereof among the heirs of a deceased person, and having received an authentic act thereto, is the holder of a just and translatable title, and entitled to a judgment in a petitory action against a possessor without title.—*Brinkman v. Huyghe*, (La.) 7 So. 76.

Setting aside.

3. In the absence of excuse for the delay, a motion to set aside a sheriff's sale of lands, made

13 years after the sale, will not be entertained, though the purchasers have never obtained possession, and though a suit instituted by them for possession 11 years after the sale has never been brought to trial. Qualifying *Abercrombie v. Conner*, 10 Ala. 298.—*Powder v. Cheeves*, (Ala.) 7 So. 512.

Jurisdiction.

See *Courts*; *Equity*, 1; *Justices of the Peace*.

In criminal cases, see *Criminal Law*, 1.

Of action for divorce, see *Divorce*, 1.

equity, see *Infraction*, 1-8.

On appeal, see *Criminal Law*, 84, 85.

Removal of infant's disability, see *Infancy*.

Jurisdictional Amount.

See *Appeal*, 8-15.

JURY.

Trial by, see *Constitutional Law*, 6, 7.

Competency.

1. A person is not disqualified to serve as a juror simply because he has a bad opinion of defendant's character.—*Helm v. State*, (Miss.) 7 So. 487.

2. On an indictment for murder the fact that a juror states that he would not give the prisoner the benefit of a reasonable doubt, but would convict if there was a preponderance of evidence for the state, will not disqualify him where he further states that if instructed by the court to give the accused the benefit of a reasonable doubt he would do so.—*State v. Ford*, (La.) 7 So. 696.

3. On an indictment for murder, the fact that a juror states that he thinks one ought to be sent to the penitentiary for killing another in self-defense will not disqualify him, where he further states that, if instructed by the court to acquit in case defendant killed deceased in self-defense, he would do so.—*State v. Ford*, (La.) 7 So. 696.

— **Opinion formed on merits of case.**

4. A juror, on examination on *voir dire*, stated that he heard the evidence at a previous investigation, and had formed an opinion as to the guilt or innocence of the accused; that "evidence would have to be very strong to change it;" and that "it would be a hard matter to set aside the evidence he had based his opinion on." *Held*, that he was not a qualified juror.—*King v. State*, (Ala.) 7 So. 750.

5. On an indictment for murder, a "fixed" opinion as to defendant's guilt will not disqualify a juror where it is the result of rumor, and not of bias or prejudice against the defendant, and he states that he would be governed solely by the evidence in making up his verdict, and that he can render a fair and impartial verdict on the evidence.—*State v. Dent*, (La.) 7 So. 694.

6. On an indictment for murder, the fact that a juror has formed an opinion as to defendant's guilt will not disqualify him, where he states that he has no bias or prejudice against defendant, and will be governed entirely by the evidence in making up his verdict.—*State v. Dent*, (La.) 7 So. 694.

7. On an indictment for murder, where a juror in his *voir dire* states that what he had heard about the case has made some impression upon his mind, but that he could go into the jury-box free from bias or prejudice, and try the case fairly and impartially according to the evidence, and the instructions of the court as to the law applicable to the case, he is a competent juror.—*State v. Ford*, (La.) 7 So. 696.

— **Knowledge of language.**

8. On an indictment for murder, where a juror of foreign birth testifies that he knows enough English to enable him to understand what the lawyers and witnesses may say, he is not disqualified by the fact that he does not know the meaning of the terms "bias," "prejudice," and "verdict."—*State v. Dent*, (La.) 7 So. 694.

9. It is not necessary to the competency of a juror that he should be a scholar, and understand the definition of any word used in the course of a trial by witnesses, counsel, and the court; but it is sufficient if he is conversant with the English language so as to understand in substance the argument of counsel, and the testimony of witnesses. —*State v. Ford*, (La.) 7 So. 696.

Summoning and impaneling.

10. Under Act Ala. Feb. 23, 1887, § 2, which provides that "no act passed at the present session of the general assembly shall be repealed or affected in any manner by the adoption of this Code," Code Ala. 1886, § 4449, which prescribes the *venire* to be served on defendant, is modified by the act of February 23, 1887, prescribing the organization of juries in certain counties, though the Code did not go into effect until December 25, 1887. —*Breden v. State*, (Ala.) 7 So. 258.

11. The provisions of the Jefferson county act (Act Ala. Feb. 11, 1889) in regard to the drawing and organization of the third jury to complete the *venire* for capital cases dispenses with the presence of the defendant, and, if the statute were silent, it would not be necessary. —*Maxwell v. State*, (Ala.) 7 So. 824.

12. Art. Fla. March 11, 1879, (McClell. Dig. 621,) provides for the selection, annually, by the board of county commissioners, of a list of persons qualified to serve as jurors, "which list * * * shall be forthwith delivered to the clerk, and by him recorded in the minutes." *Held*, that this requires the list to be recorded in the minutes of the county commissioners, and not in the minutes of the circuit court. —*White v. State*, (Fla.) 7 So. 857.

13. The discharge for cause of two of the jurors drawn for the special *venire* before the case is called for trial, and in the absence of the defendant, and also of one who had been drawn for the regular panel, is impliedly authorized by the Jefferson county act, (Act Ala. Feb. 11, 1889;) and, if not, the discharge would involve no reversible error. —*Maxwell v. State*, (Ala.) 7 So. 824.

14. The facts that jurors are drawn and summoned in compliance with a statute passed after the commission of the offense, and that the clerk had not written up the minutes, and hence there was no record of the order for the *venire*, are no ground for quashing the *venire*. —*Hawes v. State*, (Ala.) 7 So. 802.

15. An objection to jurors on a murder trial that they were summoned by F., a witness for the state, is frivolous, where the jurors have stated on oath that F. did not speak to them about the case, and where the list of jurors to be summoned was furnished by the sheriff, so that F. had no discretion to summon jurors prejudiced against defendant. —*Hodge v. State*, (Fla.) 7 So. 598.

16. Where the record shows no error in drawing and summoning the jury, the presumption is that the officers charged with such duty duly performed it. —*Smith v. State*, (Ala.) 7 So. 52.

Challenges.

17. An act of February 23, 1887, established a general jury system for the state. That of February 11, 1889, "To expedite the trial of capital cases in Jefferson county," provided a mode for drawing and impaneling special jurors, and prescribed the number of peremptory challenges. By an act of February 23, 1889, four sections of the general act of 1887 were re-enacted in full, as amended,—among them, section 17, containing a repealing clause "of all laws and parts of laws, general and special, in conflict with this act;" but no change was made in that clause. *Held*, that the Jefferson county act is repealed so far, only, as its provisions conflict with the four sections as amended. —*Maxwell v. State*, (Ala.) 7 So. 824.

18. Section 13 of the general act, as amended, providing that in capital cases the defendant shall have 21, and the state 14, peremptory challenges, conflicts with and repeals section 8 of the Jefferson county act, allowing 10 and 5, respectively. The other sections of the local act remain in force. —*Maxwell v. State*, (Ala.) 7 So. 824.

Examination on voir dire.

19. It is proper to refuse to ask a juror on his *voir dire* whether or not he has previously had a fixed opinion as to defendant's guilt or innocence. —*Hawes v. State*, (Ala.) 7 So. 802.

Procuring witnesses to show bias.

20. On an indictment for murder one of the *venire* men stated that he had no bias against the accused, whereupon counsel for accused asked for reasonable time to procure witnesses to show the bias of the juror, but without stating how long it would require to procure such witnesses, their residence, or the facts to be proved by them. *Held*, that there was no error in refusing the request. —*Hodge v. State*, (Fla.) 7 So. 598.

Excuses.

21. Sickness of a juror's wife, of such a nature that, in the opinion of her physician, her life depends on her husband's presence, and the knowledge of which incapacitates the juror from performing his duties as such, warrants his discharge, even after defendant's arraignment; especially as Code Ala. § 4453, authorizes the court to discharge a juror on account of his illness, or for any other cause which in the opinion of the court renders it necessary, and such discharge does not operate as an acquittal of defendant. —*Hawes v. State*, (Ala.) 7 So. 802.

Acceptance of juror—Revocation.

22. The state may revoke an acceptance of a juror before the defendant has accepted him, and before the impaneling of the jury is completed, or the trial commenced. —*Daniels v. State*, (Ala.) 7 So. 537.

Right to trial by—Demand.

23. Acts Ala. 1888-89, pp. 816-823, establishing the city court of Decatur, which provide that a plaintiff in a civil action, who wishes a jury trial, must demand the same "at the commencement of the action" by indorsing such demand in writing on the summons or complaint, are sufficiently complied with on appeal from a justice's court to the city court, by a plaintiff who indorses a demand for a jury on the complaint filed by him in the city court before any trial could possibly have taken place under the rules and practice of that court. —*Nixon v. Killain*, (Ala.) 7 So. 761.

JUSTICES OF THE PEACE.

Jurisdiction.

The holder of two bills of exchange accepted at different times, maturing at different times, and each within the jurisdictional amount of a justice of the peace, may maintain separate actions on each in justice's court, though together they exceed the justice's jurisdiction, and though, at his election, he might have sued on both in one action in the circuit court. —*Drysdale v. Biloxi Canning Factory*, (Miss.) 7 So. 541.

Laches.

See *Specific Performance*, 4-6.

LANDLORD AND TENANT.

Rights and liabilities.

1. A tenant of a farm, instructed to take care of the timber, with permission to cut and use the wood from such part as he wanted to clear for cultivation, has no authority to sell trees from land which he is not clearing. —*Ladd v. Shattook*, (Ala.) 7 So. 764.

2. Plaintiffs bought lands of defendant on foreclosure, and afterwards rented them to him for 1887. Before the expiration of the term defendant notified plaintiffs that he claimed the land as owner, and would hold no longer as tenant. *Held*, that he could not repudiate his tenancy without surrendering possession, and, having occupied the lands during 1888, was liable for rent as upon a contract, in the same terms as that of the previous year. —*Robinson v. Holt*, (Ala.) 7 So. 441.

Leases—Breach of covenants.

3. The right of the lessor to sue for damages for breach of a covenant that the lessee will keep the leased premises in repair, and surrender them in as good repair as he received them, does not accrue until the expiration of the lease, and is then governed by Rev. Civil Code La. art. 1933, exception 1, providing that, when the thing to be done by contract must have been done within a given time, which has elapsed, or under certain circumstances which no longer exist, the debtor need not be put in default by a demand for performance to entitle the creditor to damages.—*Payne v. James*, (La.) 7 So. 457.

4. The lessor who has sold the leased premises with the express reservation of the right to recover of the lessee for any damages done the property during the term may at its expiration sue for the breach of a covenant by the lessee to surrender the premises at the end of the term in as good repair as he received them.—*Payne v. James*, (La.) 7 So. 457.

Tenant's removal of crops — Criminal liability.

5. The defendant was indicted under Code Ala. § 3835, for removing certain cotton knowing it to be subject to landlord's lien. There was evidence that it was first moved off the premises to an abandoned house; that the house wherein it was usually stored was burned; and that it was then carried to a certain gin by another party, who did not disclose to the proprietor that it was defendant's cotton. *Held* that, notwithstanding defendant had a contract with the landlord to remove it to said gin, if it was done with intent to defraud, the offense falls within the meaning of the statute; and it was not error to refuse to withdraw such evidence from the jury.—*Money v. State*, (Ala.) 7 So. 841.

LARCENY.**From warehouse.**

1. A trunk near the door of a baggage-room on a platform, covered by the same roof, but not inclosed, which is used as a common passage-way of all going about the depot, is not in a warehouse within Code Ala. 1886, § 8789, punishing larceny therefrom.—*Lynch v. State*, (Ala.) 7 So. 829.

Venue.

2. An offender who has stolen property in one parish and carried it to another may be tried in either parish. The continuance of the asportation is a new caption.—*State v. McCoy*, (La.) 7 So. 330.

Indictment.

3. In an indictment for larceny, description of the thing stolen as "one beef, of the value of fifteen dollars of the property of A. B.," is sufficient.—*State v. Baden*, (La.) 7 So. 582.

4. An indictment for larceny sufficiently describes the kind and value of property stolen as "one lot of silver coin, of the denomination of one dollar each, of the currency of the United States, of the value of twenty-five dollars, of the goods, moneys, and chattels of one J. H. M."—*Porter v. State*, (Fla.) 7 So. 145.

5. An indictment for the larceny of "one lot of silver coin of the United States currency, of the denomination of dollars, half-dollars, quarters, dimes, and five-cent pieces, of the value of twenty-five dollars, a more particular description of which coin is to the jurors unknown, of the goods," etc., is sufficiently specific to warrant a judgment upon a general verdict of guilty.—*Porter v. State*, (Fla.) 7 So. 145.

6. An indictment for larceny charged the taking of one \$10 bill and one \$5 bill in money of the United States of America, of the value of \$15. *Held* to sufficiently designate the kind, denomination, and value of the money stolen.—*Carden v. State*, (Ala.) 7 So. 801.

7. Where an indictment for larceny charges defendant with stealing specified articles, and "other things of the goods and chattels of L." it is too late after verdict to object to the sufficiency of the

description of the articles stolen.—*State v. Anderson*, (La.) 7 So. 687.

8. In an indictment for larceny from a warehouse under Code Ala. 1886, § 3789, declaring it grand larceny, the statement of the place of taking not being so made as to show that it was not intended as an affirmative averment, as under a *videlicet*, it is descriptive of the offense charged, and, on failure to prove it, a verdict cannot be taken for grand larceny, though the value stated is such as to raise the stealing to that grade without regard to the place of taking.—*Lynch v. State*, (Ala.) 7 So. 829.

Evidence—Sufficiency.

9. Where the record fails to show the value of property alleged to have been stolen, a new trial will be granted, without regard to irregularities in the bill of exceptions.—*Gibson v. State*, (Miss.) 7 So. 211.

10. On indictment for the larceny of hogs, there was evidence that the owner of the hogs, hearing two reports of a gun and the squeal of a hog, hurried in the direction of the noise, and on reaching the place heard some one running; that he found two of his hogs dead, one with its throat cut; that defendant was on that morning in the neighborhood, with a gun, on the pretense of duck shooting; that he hastily left the vicinity; that in the evening defendant told the owner he would tell him on Monday who did the shooting; and that on Monday he fled from the county. *Held*, that the evidence was sufficient to go to the jury.—*Kemp v. State*, (Ala.) 7 So. 413.

11. Such evidence sufficiently established the *corpus delicti*.—*Kemp v. State*, (Ala.) 7 So. 413.

12. Shooting the hogs, and cutting the throat of one of them, was sufficient asportation.—*Kemp v. State*, (Ala.) 7 So. 413.

13. A conviction of petit larceny, resting on the unsupported testimony of one witness, which is contradicted in several material matters, which contradiction cannot reasonably be attributed to mistake on the part of such witness, cannot be sustained.—*Day v. State*, (Miss.) 7 So. 836.

Instructions.

14. Where the description in the indictment of the money stolen is sufficient, it is not error to refuse charges based upon the assumption that the grand jury knew a more particular description.—*Carden v. State*, (Ala.) 7 So. 801.

Lease.

Breach of covenants, see *Landlord and Tenant*, 3, 4.

Legacy.

Charged on land, see *Wills*, 13-15.

Levees.

Liability of canal company to build, see *Canals*.

Levy.

Of attachment, see *Attachment*, 1, 2.
execution, see *Execution*, 2, 3.

LICENSE.

Liquor license, see *Intoxicating Liquors*, 13-17.

Marriage license, see *Marriage*, 1, 2.

Taxes, see *Municipal Corporations*, 24-30.

To practice medicine, see *Physicians and Surgeons*, 1.

By state.

1. A bar-room and restaurant, not shown to be a respectable place of business, to which customers are attracted by free concerts, is subject to the license tax imposed by Laws La. 1886, act 101, § 10, on any fixed place for either theatrical, musical, minstrel, concert, dancing, or variety performances.—*State v. Wenger*, (La.) 7 So. 795.

2. Under Code Miss. § 585, which imposes a tax on sewing-machine agencies, a place where ma-

chines are stored, and from which they are taken by persons who seek purchasers in their homes, is an "agency," although the books of account are not kept therein; and, where the tax due on such a place has not been paid, the person in charge thereof is properly convicted of a violation of the law.—*Mitchell v. State*, (Miss.) 7 So. 498.

LIENS.

See, also, *Mechanics' Liens*.

Attorney's lien, see *Attorney and Client*, 8.

Of attachment, see *Attachment*, 3-5.

chattel mortgage, see *Chattel Mortgages*, 5.

judgment, see *Judgment*, 14.

landlord, see *Landlord and Tenant*, 5.

taxes, see *Taxation*, 22.

Vendor's lien, see *Vendor and Vendee*, 12-19.

Equitable liens.

1. An agreement under which defendants were to make advances to a firm of cotton brokers, to be used in paying for cotton to be purchased by them during the ensuing cotton season, on condition that all the cotton bought and paid for should be the property of defendants until they were repaid all money advanced, with the right to ship and sell it whenever deemed necessary for their protection, creates neither a mortgage at law nor a pledge of specific cotton, though it gives defendants an equitable lien on the cotton as it is bought.—*Barnes v. Alabama State Bank*, (Ala.) 7 So. 91.

2. A subsequent agreement, made nearly a year afterwards, — another agreement intervening, — that defendants should pay a note given by the brokers, and cancel a bill of lading on cotton given to secure it; that, in consideration thereof, the brokers should hold all the cotton then on hand, to pay for which defendants had advanced the money, until a designated date; that, if the cotton was not then sold by the brokers, defendants should have the right to sell it, and apply the proceeds in discharge of the brokers' indebtedness, including the note, — is a distinct and independent contract, made without reference to the first agreement, and designed to meet new and different conditions; and it also creates only an equitable lien.—*Barnes v. Alabama State Bank*, (Ala.) 7 So. 91.

3. Before defendants acquired an equitable lien on cotton for moneys advanced to brokers to pay for it, an unindorsed warehouse receipt for 100 bales of cotton, given by the brokers, had come into plaintiff's possession as collateral security for money loaned the brokers. The 100 bales had been set apart, but, after defendants had made their advances, without notice of the plaintiff's claim, 24 of the bales were sold, and others substituted. *Held*, that the brokers' indorsement of the receipt, made after defendants' seizure of the cotton, did not pass to plaintiffs the legal title to the substituted cotton, so as to cut off the intervening equity of defendants.—*Barnes v. Alabama State Bank*, (Ala.) 7 So. 91.

For wages.

4. A party claiming a privilege for salary due him as overseer cannot recover under proof that he was merely a laborer.—*Wickham v. Nalty*, (La.) 7 So. 609.

Life Insurance.

See *Insurance*.

LIMITATION OF ACTIONS.

See, also, *Adverse Possession*.

Against personal representative, see *Executors and Administrators*, 47.

Continuing trespass, see *Trespass*, 2.

For dividend on stock, see *Corporations*, 14.

On judgment, see *Judgment*, 21.

Set-off of claim barred, see *Set-Off and Counter-Claim*, 1.

When statute is applicable.

1. Code 1880, § 2683, provides that if any person, entitled to bring any of the personal actions

mentioned in the previous sections, limiting the time in which they may be brought, "or liable to any such action, shall die before the expiration of the time herein limited therefor, such action may be commenced by or against the executor or administrator of the deceased person, after the expiration of said time, and within one year after the death of such person." *Held*, that this section applies where the deceased person has died before the adoption of the Code, and within the last year for the bringing of the suit.—*Weir v. Monahan*, (Miss.) 7 So. 201.

Running of statute.

2. The statute of limitations does not run against a claim for damages for the breach of a contract, so long as the contract itself may be enforced.—*Conner v. Smith*, (Ala.) 7 So. 150.

3. Prescription does not run against a debt secured by a pledge, as long as the creditor has possession of the pledge, since detention of it is a constant recognition of the debt and renunciation of prescription, which prevents prescription from beginning to run.—*Citizens' Bank v. Hyams*, (La.) 7 So. 700.

4. By Code Miss. 1880, § 1998, an administrator *de bonis non* was authorized to sue on the bond of any former administrator of the estate "where it is insolvent, or where such suit and recovery may be necessary for the payment of the debts of such estate." By section 2694, when the legal title to property, or a right of action, is in an administrator or guardian, the time during which any statute of limitations runs against him shall be computed against the persons beneficially interested, though they may be under disability. *Held*, that where, before the right of the administrator *de bonis non* to sue on the bond of the deceased administrator has been barred by limitation, it becomes no longer necessary to recover the assets to pay debts, the right of the distributees to sue immediately arises, and the statute then ceases to run as against the administrator, or as against them by virtue of his right to sue.—*Weir v. Monahan*, (Miss.) 7 So. 201.

5. This statute is not one which, having commenced to run, runs uninterruptedly, notwithstanding the absence of a person competent to sue; and when, upon the destruction of the administrator *de bonis non's* right to sue, the infants are under a guardianship, without any right in the guardian himself to sue, the statute is stayed until the disability is removed.—*Weir v. Monahan*, (Miss.) 7 So. 201.

Suspension.

6. When an amendment to a complaint relates to the commencement of the action, and no new matter or claim is introduced thereby, the statute of limitations ceases to run at the filing of the original complaint.—*American Union Tel. Co. v. Daughtry*, (Ala.) 7 So. 660.

7. In an action on a contract alleged to have been made with plaintiff, an amended complaint showing that the contract was made with plaintiff and another jointly, and that plaintiff had acquired the interest of the latter, introduces no new cause of action, so as to be barred by the statute of limitations.—*Sublett v. Hodges*, (Ala.) 7 So. 296.

8. In tort against a common carrier for the negligent breach of a duty growing out of a contract of shipment, Code Ala. 1886, § 2619, limiting the action to one year, does not bar new counts added by amendment after the year, which correct a mistake as to the destination or other imperfect statement of the subject-matter, and add new facts more clearly showing the negligence, or otherwise varying the mode, in which the defendant has violated its duties as a carrier.—*Alabama G. S. R. Co. v. Thomas*, (Ala.) 7 So. 762.

Disabilities and exceptions.

9. Where the bar of the statute of limitations is completed after the enrollment of a decree and sale of land under it, a bill to set the sale aside on the ground of fraud in the procurement of the decree must allege with precision when and how complainant came to a knowledge of the fraud, and

that such a fraud was discovered within one year prior to the filing of the bill, within Code Ala. § 2680.—*Duncan v. Williams*, (Ala.) 7 So. 416.

Acknowledgment.

10. Where a new promise was relied on to prevent a bar by limitation of a note held by a county treasurer, the fact that a messenger carried from the promisor to a subsequent treasurer a letter which contained \$25, and according to witnesses' memory read, "Inclosed I hand you \$25, which you will credit on my note in the county treasury. I will come down soon, and pay you the balance of the note," was sufficient proof of the new promise to prevent a bar.—*Heflin v. Kinard*, (Miss.) 7 So. 498.

Criminal prosecution.

11. On the trial of an indictment for failure to perform services for a surety in a confessed judgment for fine and costs,—an indictment which, under Code Ala. § 3714, must be brought within one year from the commission of the offense,—the evidence showed only the filing of a complaint before the judge of the county court, charging the defendant with the crime for which he was indicted beyond the year, the issuance by that officer of a warrant for the arrest of the defendant on that charge, and the return of the warrant "for an *alias*." There was nothing tending to show that an *alias* was ever issued; that the defendant was ever arrested on, or appeared to answer, that charge; or that the defendant was bound over to or appeared in the circuit court, whence the indictment was certified, to answer that prosecution. *Held*, that the indictment was not a continuation of the former proceedings in such manner as to bring the prosecution within the exception to the statute of limitations applicable to the offense. — *Giles v. State*, (Ala.) 7 So. 271.

Liquor Selling.

See *Intoxicating Liquors*.

Local Option.

See *Intoxicating Liquors*, 2-12.

LOTTERIES.

What constitutes.

Defendant gave exhibitions consisting of acrobatic contortions, magic lantern, music, and the like; and between the acts sold medicines. The exhibitions were given in a tent. There was no charge for entrance; the only fee charged was for the occupancy of a seat. Before the exhibition defendant distributed tickets to the public, free, each ticket entitling the holder to a chance for the prizes, 8 in number, there being some 8,000 tickets. The distribution was made by choosing 2 persons from the audience, who selected by lot 8 tickets from a large number of duplicates which were thrown by the defendant at random on the stage. These tickets were numbered, and the persons holding the corresponding numbers were entitled to the prizes, according to their number. *Held* not a lottery, as there was no consideration paid directly or indirectly for the chance of participating in the distribution. — *Yellow-Stone Kit v. State*, (Ala.) 7 So. 888.

Lunatic.

See *Insanthy*.

Magistrate.

See *Justices of the Peace*.

MALICIOUS PROSECUTION.

Pleading.

1. In an action for the wrongful suing out of an injunction, plaintiff discloses a cause of action by alleging that the plaintiff in injunction had voluntarily abandoned his writ, and had discontinued

his action.—*Barthe v. City of New Orleans*, (La.) 7 So. 70.

2. In an action for a malicious prosecution, an exception of no cause of action will be sustained if it appears from plaintiff's own petition, and from the judgment set up as his acquittal, that the prosecution was not actuated by malice or without probable cause.—*Barthe v. City of New Orleans*, (La.) 7 So. 70.

Damages.

3. Where, in an action for rent, a writ of provisional seizure, sued out by plaintiff, was dissolved on the ground that the lease had actually terminated before suit was brought, but plaintiff had probable cause for thinking that the tenancy still existed, defendant could recover only actual damages in an action for the malicious prosecution of the writ.—*Ivers v. Ryan*, (La.) 7 So. 61.

MANDAMUS.

To enforce contracts, see *Constitutional Law*, 15.
Inspect books of national bank by stockholders, see *Banks and Banking*, 5, 6.

Jurisdiction of supreme court.

1. The supreme court will not grant a *mandamus* to a probate judge, when an application for the writ has not been first made to and refused by a circuit court or other court of commensurate jurisdiction. — *Ramaguano v. Crook*, (Ala.) 7 So. 247.

To courts and judicial officers.

2. *Mandamus* is the proper remedy to compel a chancellor to make an order of restitution of money paid on a decree afterwards reversed on appeal.—*In re Walter*, (Ala.) 7 So. 400.

3. *Mandamus* does not lie to compel a district judge, who has affirmed a judgment sustaining a plea to the jurisdiction, to pass upon the merits of the controversy in the suit brought before the lower court. Such merits are not before him for review on an appeal from a judgment on the plea by the inferior tribunal.—*State v. King*, (La.) 7 So. 72.

To executive officers.

4. Acts La. 1880, No. 28, § 1, authorizes the governor "to institute proceedings, to employ counsel, and to make the necessary agreements to recover for the state the lands * * * donated by several acts of congress to the state, some of which have been illegally disposed of by the federal government," etc. "The governor is especially authorized herein to make all agreements and contracts to carry out the purposes of this act." It also provides that the state shall incur no expense "other than an allowance to be made by the governor out of the lands * * * recovered." The register of the state land-office is required to furnish the necessary data, and prepare patents for the governor's signature to the lands granted in pursuance of the contract authorized. *Held*, that where relator, in pursuance of a contract with the governor, whereby he was to receive one-half of the lands recovered by him, obtained patents from the United States for large tracts, a ministerial duty devolved upon the register to prepare, and upon the governor to sign, patents to relator for one-half thereof, and *mandamus* will lie to compel its performance.—*State v. Nicholls*, (La.) 7 So. 788.

5. A proceeding for *mandamus* against the register of the state-land office to coerce his performance of duties purely ministerial is not a suit against the state.—*State v. Nicholls*, (La.) 7 So. 788.

To state board of liquidation.

6. The board of liquidation, consisting of the executive officers of the state, appointed by Act La. No. 3 of 1874, for the purpose of funding the state debt, and reducing it to an amount therein prescribed, is clothed with discretion as to the time and manner of executing the functions vested in it, and hence *mandamus* will not lie to compel it to meet and decide whether a particular class of

bonds are valid and fundable.—*State v. Board of Liquidation*, (La.) 7 So. 706.

To the recorder of conveyances.

7. *Mandamus* does not lie to the recorder of conveyances to compel him to cancel inscriptions showing title to land in certain parties, unless it is shown conclusively by final and executory judgment that the same have been decreed to be erased, contradictorily with the parties concerned.—*Raymond v. Villers*, (La.) 7 So. 900.

8. Parties in whose favor inscriptions exist on the conveyance books of the parish, cannot be forced to litigate their rights in proceedings against the recorder to cancel the inscriptions.—*Raymond v. Villers*, (La.) 7 So. 900.

To corporations.

9. Under Act La. No. 138, of 1888, providing that where a corporation has contracted with a parish or municipal corporation to grade, repair, reconstruct, or care for any levee, and shall fail to perform such contract, its performance may be compelled by the parish or municipal corporation by a writ of *mandamus*, the writ will not lie to compel the construction, under a contract, of a new levee.—*State v. New Orleans & N. E. R. Co.*, (La.) 7 So. 226.

Procedure.

10. A written request by the president of the board of health, in its name and signed by him as president, that the county commissioners levy a tax to defray the expenses of the board, is a sufficient compliance with Act Fla. June 7, 1889; and a return of the county commissioners to an alternative writ of *mandamus*, seeking to compel the assessment and levy of the tax, which admits the receipt of such a communication, but denies that it is the action of the board, and does not deny that the writer is president, or that his communication was authorized by the board, when the writ alleged that the request was made by the board, is evasive and insufficient.—*State v. Rose*, (Fla.) 7 So. 370.

Manslaughter.

See *Homicide*, 5.

Markets.

Regulations in cities, see *Municipal Corporations*, 7-12.

MARRIAGE.

See, also, *Husband and Wife*.

License.

1. Code Ala. 1886, §§ 2815, 2818, provide that the judge of probate shall forfeit \$300 if he issues a license to marry to a woman under 18 years of age, who has never before been married, without first obtaining the consent of the minor's parents or guardian to such marriage. Held, that if the father was living his consent was necessary, and the consent of the mother was not sufficient, though the father was temporarily absent from the state.—*Riley v. Bell*, (Ala.) 7 So. 155.

2. The probate judge cannot excuse himself on the ground that he was misled as to the minor's age by her personal appearance, and by her representations that she was over 18 years old, unless "an affidavit was made before him by such minor, or by some other credible person, claiming to know the fact that such minor was of the age required by law," as required by section 2819.—*Riley v. Bell*, (Ala.) 7 So. 155.

Proof—Record.

3. Where the record of a marriage in another state is admitted in evidence, a book admitted to be "the last Code" of that state is admissible to show who is the proper custodian of its marriage records, under Code Ala. § 2790, which provides that the statutes of another state, purporting to be printed by its authority, are evidence, without further proof.—*Hawes v. State*, (Ala.) 7 So. 302.

4. Code Ala. § 2780, which provides that "registers of marriages * * * kept in pursu-

ance of law * * * may be certified by the custodian thereof, and, when so certified, are presumptive evidence of the facts therein stated, as well as of the law or rule in pursuance of which such registry was made, and of the authority to certify the same," applies as well to records made and kept without as to those kept within the state.—*Hawes v. State*, (Ala.) 7 So. 302.

Married Women.

See *Divorce*; *Homestead*; *Husband and Wife*.

Map.

See *Boundaries*, 1.

MASTER AND SERVANT.

Contract of hiring—Compensation.

1. In a suit for work and labor done under a contract to milk defendant's cows and care for his stock, where defendant pleads as set-off damages for loss of stock through plaintiff's neglect, testimony of defendant and other witnesses that, in their opinion, the cattle died because of plaintiff's neglect, without stating particular acts of neglect, is not sufficient to sustain the plea.—*Krou v. Verkentoren*, (Ala.) 7 So. 428.

Master's liability to third persons.

3. Where a person is detected in breaking open a railroad car in the night-time, and, when discovered, jumps out and runs and refuses to stop when halted, and is thereupon fired at and shot by an employe of the train, the criminal's joint and contributory fault would bar his recovery in a civil action for damages against the railroad company.—*Candiff v. Louisville, N. O. & T. Ry. Co.*, (La.) 7 So. 601.

8. Where a railroad conductor, on discovering that a car had been broken open, believing that it had been done by a certain person, walks up to such person, as he is standing quietly at a station, saying and doing nothing, and shoots him down without a word, such act constitutes murder, entirely beyond the scope of any employment or function of the conductor, for which the company could not be held responsible.—*Candiff v. Louisville, N. O. & T. Ry. Co.*, (La.) 7 So. 601.

4. In order to recover punitive damages for injuries caused by the negligence of defendant's servant, it is not necessary to show knowledge by defendant of habitual negligence or incompetency of the servant, and, if plaintiff attempts to show it, a failure will not prevent recovery.—*Southern Exp. Co. v. Brown*, (Miss.) 7 So. 318.

5. Where it appears that an agent of defendant company was paid a certain salary for his services; that the defendant furnished a wagon, and the agent furnished and fed the horse, and employed the driver, for which he was allowed an extra sum; that the driver was engaged about the business of defendant and was liable to be discharged by it, though the agent testified that he was his servant,—a finding that the driver was the servant of defendant, so as to render it liable for his negligence, will be sustained.—*Southern Exp. Co. v. Brown*, (Miss.) 7 So. 318.

Negligence of master—Injuries to railroad employes.

6. Under Code Ala. 1886, § 2590, which provides that a master shall not be liable to his servant for an injury caused by defective machinery unless the defect arose from, or was not discovered owing to, the negligence of the master, it was error to charge generally that, in the absence of contributory negligence, defendant was liable for an injury caused to an employe by a defect in the engine.—*Memphis & C. Ry. Co. v. Askew*, (Ala.) 7 So. 823.

7. Acts Ala. 1886-87, p. 100, §§ 1, 2, require locomotive engineers to be licensed where they "operate or drive an engine on the main line or road-bed of any railroad in this state," and not otherwise; and therefore, in a suit by a brake-

man against a railway company for an injury caused by the alleged negligence of an engineer who had no license, it was error to charge that he was required to have a license, and that the want of one tended to show the company's negligence, when the accident occurred in a freight-yard, in the use of a yard engine, and the engineer was employed only for yard work.—*Memphis & C. Ry. Co. v. Askew*, (Ala.) 7 So. 823.

8. A railroad company is not liable in punitive or exemplary damages for its negligence in causing the death of an employee, unless malice or oppression forms part of the act resulting in such death.—*McFee v. Vicksburg, S. & P. R. Co.*, (La.) 7 So. 720.

9. A railroad company is liable for damages for the death of an employee in a wreck caused by rotten cross-ties and unsafe condition of its road-bed.—*McFee v. Vicksburg, S. & P. R. Co.*, (La.) 7 So. 720.

10. The fact that there was only one brakeman on a train of ten loaded cars, and that only one brake was applied while it was being let down a steep grade to make the coupling, in doing which plaintiff was injured, was sufficient evidence to go to the jury on the question of defendant's negligence.—*Georgia Pac. Ry. v. Propst*, (Ala.) 7 So. 635.

Negligence of master—Evidence.

11. Where plaintiff, being charged with contributory negligence in not using coupling sticks, as required by a printed rule of the company, denied all knowledge of such a rule, it was competent to introduce the rule upon that subject, but not the entire printed rules upon all subjects.—*Memphis & C. Ry. Co. v. Askew*, (Ala.) 7 So. 823.

12. In view of his denial, it was competent to prove that plaintiff had frequently seen other employees use the coupling sticks.—*Memphis & C. Ry. Co. v. Askew*, (Ala.) 7 So. 823.

13. It was not competent to prove that the rules were "frequently referred to" by the employees generally in the discharge of their various duties.—*Memphis & C. Ry. Co. v. Askew*, (Ala.) 7 So. 823.

Negligence of vice-principal.

14. A railroad company is not liable to a person injured through the negligence of a contractor or his servants engaged in constructing its road, where it appears that the contractor had the general control and direction of the manner of doing the work.—*Rome & D. R. Co. v. Chasteen*, (Ala.) 7 So. 94.

15. Plaintiff was injured while coupling cars in a train transporting materials for constructing defendant's road, and, with others operating the train, was employed by the contractor, who was building the road. *Held*, that an instruction "that if the jury believe from the evidence that the defendant, by the negligence of its agents in operating its train, injured the plaintiff, * * * and that this was done without any negligence on the part of the plaintiff, then the verdict of the jury must be for the plaintiff," is misleading in assuming that defendant's negligence was the primary issue in the case.—*Rome & D. R. Co. v. Chasteen*, (Ala.) 7 So. 94.

16. An instruction that if the jury believe "from the evidence that [the contractor] was operating the defendant's road from Gadsden to Atalla, and conveying freight and passengers between those points and receiving reward therefor, then the defendant is responsible for the negligence of the agents and servants of said [contractor], if the jury believe from the evidence there was any negligence on their part," is erroneous, in assuming that the contractor was operating the road under an unauthorized contract with defendant, and that he could not have operated the road for the purposes specified, and at the same time exercised an independent occupation as to the work of construction.—*Rome & D. R. Co. v. Chasteen*, (Ala.) 7 So. 94.

17. The court refused to charge that defendant was not liable for plaintiff's injuries if they were sustained while C. (the contractor) was operating the road, without regard to the circumstances un-

der which the operations were carried on. *Held* that, as the request was not predicated on the hypothesis that the jury would find that C. was an independent contractor, the refusal was proper.—*Rome & D. R. Co. v. Chasteen*, (Ala.) 7 So. 94.

Negligence of fellow-servants.

18. A section master employed by a railroad company, and a section hand working under him, both of whom are engaged at the same manual labor, are fellow-servants.—*Lagrone v. Mobile & O. R. Co.*, (Miss.) 7 So. 432.

19. A railroad company is not liable for an injury to its brakeman, caused by a want of sufficient sand in the sand-box on the engine, if the insufficiency be due to the failure of that servant whose duty it is to fill the sand-boxes suitably, before the trains start to perform his duty properly, when it does not appear that the company was negligent in his selection and retention, as he is a fellow-servant of the brakeman.—*Louisville, N. O. & T. Ry. Co. v. Petty*, (Miss.) 7 So. 851.

Contributory negligence.

20. A servant in a railroad yard is guilty of contributory negligence, who jumps from a moving engine in front of it, and between the rails, and is run over, when there is nothing to prevent his jumping to the side of the track, and he could do so with comparative safety.—*Dandis v. Southern Pac. R. Co.*, (La.) 7 So. 792.

Assumption of risks.

21. A derrick was held by guys, those on one side being known to be insecurely attached to a building which was being taken down. One of the trusses of the roof was attached and swung to the derrick, and was about to be lowered. The roof had been so weakened by the slipping of the building that a row of trusses fell of their own weight, one striking the guys and carrying down the derrick with the span attached. A servant was standing on the truss swung to the derrick. The fall carried him down and killed him. The danger was imminent and apparent. The men had been warned, and some had quit the work after a like fatal accident several days before. *Held*, that the servant assumed the risk, and was guilty of contributory negligence, having continued the work after the danger became so plain and imminent that a man of ordinary prudence would not have taken the risk.—*Pollich v. Seilers*, (La.) 7 So. 786.

MAYHEM.

Indictment.

1. When the indictment charged the defendant with "feloniously" inflicting a wound less than mayhem, under Act La. 1838, No. 17, and omitted the words "maliciously and willfully," as contained in the statutory definition of the offense, no judgment could be entered upon the plea of guilty, as the indictment charged no offense against the law.—*State v. Watson*, (La.) 7 So. 125.

Instructions.

2. In a prosecution for the offense of inflicting a wound less than mayhem, under Act La. 1838, No. 17, amending Rev. St. § 794, it was the duty of the trial judge to give the jury instruction as to the true meaning and significance of the word "maliciously" as it occurs in that statute, and in this respect nothing more was required.—*State v. Cook*, (La.) 7 So. 64.

Measure of Damages.

See Damages.

MECHANICS' LIENS.

Who may claim.

1. The mechanic's lien law of Alabama (Code 1886, §§ 3018-3048) creates (section 3018) a lien for work done or materials furnished in constructing or repairing any building on land by virtue of "any contract with the owner or proprietor there-

of," and declares (section 3046) that "every person, including married women, * * * for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words 'owner or proprietor.'" *Held*, that an oral contract with a married woman, without the assent of the husband, is sufficient to create a lien for work done or materials furnished, notwithstanding Code Ala. 1886, § 2846, which limits the wife's power to make contracts to those in writing, "with the assent of the husband expressed in writing." *Wardsworth v. Hodge*, 7 So. 194, followed. — *Cutcliff v. McAnnally*, (Ala.) 7 So. 381.

Proceedings to perfect.

2. A building contract provided for the construction of a house, and the furnishing of the material, for a stipulated compensation, payable in several specific installments according to the progress of the work; the last, including a sum retained by the owner as security for faithful performance, being payable on the completion of the house. While in the process of construction, the house was willfully burned by the owner's agent, without the contractor's fault. *Held*, that the owner's obligation to repay the sum retained as security accrued on the destruction of the house, within the meaning of Code Ala. 1876, § 8444, which requires every contractor who seeks to enforce a mechanic's lien to file his demand within six months after the indebtedness has accrued. — *Cutcliff v. McAnnally*, (Ala.) 7 So. 381.

3. Act Fla. March 7, 1877, (McClell. Dig. p. 721,) required subcontractors and laborers claiming a lien on a building to give notice thereof to the owner in writing, etc. Act Feb. 16, 1885, requires that in proceedings to enforce such a lien such notice shall be given to the owner as the court may require. *Held*, that this act repeals the former, which is not "re-enacted and published at length," as required by Const. Fla. 1885, art. 3, § 16, in the case of revision or amendment. — *Barbour v. Van Camp*, (Fla.) 7 So. 162.

Enforcement.

4. In an action to enforce a mechanic's lien, the affidavit of the plaintiff described the property upon which he claimed a lien as being a steam saw-mill located at a town or place called "Emerson," on the S., F. & W. R. R., 14 miles south of Live Oak, Suwannee county, Fla. *Held* a sufficient description, where the plaintiff claimed no lien upon the land. — *Emerson v. Gainey*, (Fla.) 7 So. 526.

5. The proceedings prescribed by the statute for the enforcement of a mechanic's lien are purely legal, and confer no equity powers upon the court; and a proceeding at law, under the statute, to enforce a lien is not unconstitutional. — *Emerson v. Gainey*, (Fla.) 7 So. 526.

6. In an action to enforce a mechanic's lien, where the affidavit of plaintiff claims a lien for the use of his tools, to which he is not entitled under the statute, and the evidence failed to show the amount, if any, allowed for them, no cause for reversal is shown. — *Emerson v. Gainey*, (Fla.) 7 So. 526.

Memorandum.

Of sale, see *Frauds, Statute of*, 1, 2.

Merger.

See *Mortgages*, 9, 10.

Minor.

See *Guardian and Ward; Infancy*.

MISCEGENATION.

Indictment.

1. An indictment which avers that "B., a negro man, and L., [defendant,] a white woman, did intermarry or live in adultery or fornication with each other," sufficiently charges the crime of miscegenation. — *Linton v. State*, (Ala.) 7 So. 261.

Evidence.

2. On an indictment for miscegenation the state cannot attack the character for chastity of female defendant. — *Linton v. State*, (Ala.) 7 So. 261.

3. Under Code Ala. 1886, § 2, cl. 5, which makes the term "negro" to include the term "mulatto," a conviction on an indictment charging cohabitation with a negro is supported by proof of cohabitation with a mulatto. — *Linton v. State*, (Ala.) 7 So. 261.

4. Proof of the parties living together in adultery for a single day with the intention to continue the relation is sufficient, and it is not necessary to establish any agreement or understanding between them that sexual intercourse should continue. — *Linton v. State*, (Ala.) 7 So. 261.

5. In a prosecution for miscegenation, it is not error to allow the state to make proffer to the jury of the person charged in the indictment to be the paramour of defendant, in order that they may determine his color by inspection. — *Linton v. State*, (Ala.) 7 So. 261.

Misjoinder.

Of parties, see *Parties*, 6.

MORTGAGES.

See, also, *Chattel Mortgages*.

Parties in foreclosure proceedings, see *Husband and Wife*, 23, 24.

Restraining sale under foreclosure, see *Injunction*, 5-7.

Subrogation to rights of mortgages, see *Subrogation*, 1-4.

What constitutes equitable lien, see *Liens*, 1.

What constitutes.

1. A bill which alleges that complainant, having a perfect equity in land, procured the holder of the legal title to convey it to defendant, to secure a debt which complainant owed to defendant, who then agreed to convey the land to complainant on payment of the debt, and that afterwards defendant took possession of the land, states facts showing that the conveyance to defendant was intended as a mortgage. Distinguishing *Mosely v. Mosely*, 5 So. 732. — *Parmer's Adm'r v. Parmer*, (Ala.) 7 So. 657.

Antichresis.

2. A contract purporting to be a sale *a réméré*, which divides the price, which was for an antecedent debt, to be returned in two installments, and declares the forfeiture of the right to redeem on a failure to pay the first installment due, is pig-norative in character, and an *antichresis*, as defined by Rev. Civil Code La. art. 3176. — *Fayne v. Hubbard*, (La.) 7 So. 572.

Mistake—Reformation.

3. Where a deed of trust accidentally omits to include land that was intended to be included, the mortgagee is entitled to have it reformed as against the widow and heir of the grantor, and a subsequent mortgagee of the land with notice of complainant's rights. — *Brinson v. Berry*, (Miss.) 7 So. 822.

Requisites and validity.

4. Where a foreign corporation lends money, and takes a mortgage therefor, in violation of Const. Ala. art. 14, § 4, prohibiting a foreign corporation from doing any business in the state without having one known place of business and an authorized agent therein, the promise of the mortgagor to pay is void, and a bill to foreclose the mortgage cannot be maintained. — *Farrior v. New England Mortgage Security Co.*, (Ala.) 7 So. 200.

5. Where the mortgage recites that it is "made," and the acknowledgment is taken, in Alabama, it is *prima facie* shown that the loan of the money and taking of the security by mortgage was transacted in said state, though the loan was made payable in another state. — *Farrior v. New England Mortgage Security Co.*, (Ala.) 7 So. 200.

Requisites and validity—Description.

6. The mortgage conveyed "the following-described tract or parcel of land, to-wit, the property known as 'K.'s Grist and Saw Mill and Gin,' together with all the privileges and appurtenances belonging thereto. * * * The evidence showed that two acres of land on which the mill and gin were situated had always been used in connection therewith, and were necessary to the enjoyment. Held, that they were embraced in the description, "the tract or parcel of land known as 'K.'s Grist and Saw Mill and Gin Property," or, if not, were appurtenant thereto.—*Kimbrell v. Rodgers*, (Ala.) 7 So. 241.

Construction and effect.

7. A general warranty in the mortgage of the undivided interest of one of seven co-tenants in a tract afterwards allotted to him by partition vests in the mortgagee the title to the one-seventh, but cannot extend the title to the whole allotment.—*Howze v. Dew*, (Ala.) 7 So. 239.

8. Where one of seven co-heirs to several parcels of land mortgages all of his interest as heir in one of the parcels, and afterwards, in a suit for partition, one-half of the parcel is allotted to the mortgagor as his share of the whole estate, the lien of the mortgage covers only the one-seventh originally conveyed, and does not extend to the whole allotment.—*Howze v. Dew*, (Ala.) 7 So. 239.

Merger.

9. A judgment *in personam* against the maker of promissory notes secured by a special mortgage, in which there is a recognition of the mortgage and a decree for its enforcement, merges the notes, but not the mortgage, which thereafter retains the same force, effect, and rank as before.—*Lalanne v. Payne*, (La.) 7 So. 481.

10. Since the confiscation of land under Act Cong. July 17, 1863, did not divest the fee, which remained in the former owner, but passed only an estate during the life of such owner to the adjudicatee under the proceedings, where such adjudicatee was likewise a mortgage creditor, his claim as such was not lost by confusion, under Rev. Civil Code La. art. 2217.—*Citizens' Bank v. Hyams*, (La.) 7 So. 700.

Failure to satisfy—Penalty.

11. In an action for a statutory penalty under Code Ala. § 1899, providing that a mortgagee who, having received the sum secured by his mortgage, fails for three months after written request to satisfy of record his mortgage, shall forfeit to the mortgagor the sum of \$200, unless during that time a suit is pending in which the fact of satisfaction is in issue, a petition alleging payment, and a request to satisfy, and that for more than three months thereafter, though no suit contesting the payment was pending, the mortgagee failed to comply with such request, states a cause of action.—*Steiner v. Ellis*, (Ala.) 7 So. 808.

Foreclosure.

12. In case the defendant in a suit for foreclosure raises the question of the nullity of a sale made to the plaintiff *pendente lite* by way of an answer, and reconventional demand, a previous tender is not a condition precedent thereto, particularly when the sale has been made in the foreclosure of a special mortgage, and the mortgagee becomes the purchaser, and attributes the whole of the price to the satisfaction of his mortgage claim.—*Learned v. Walton*, (La.) 7 So. 723.

13. A clause in an act of conventional mortgage stipulating a waiver of the benefit of appraisalment is valid in law.—*Learned v. Walton*, (La.) 7 So. 723.

14. A sequestration of property which is immovable by destination, and forms part of realty under mortgage, but which has been removed therefrom by the mortgagor, as an ancillary proceeding for the recovery and restoration thereof to the mortgaged premises for seizure and sale, is a legal and valid proceeding, and does not have the effect of changing executory proceedings into those *via ordinaria*.—*Learned v. Walton*, (La.) 7 So. 723.

15. In case some third person opposes the claim of the mortgage creditor, and sets up title in herself to the property thus sequestered, and the former retorts in an answer that the third opponent's title is simulated and fraudulent, this pleading does not have such effect.—*Learned v. Walton*, (La.) 7 So. 723.

16. When the mortgagor enjoins the sale, and the mortgagee, in his answer, prays judgment for the mortgage debt, his right thereafter to proceed under the writ of seizure and sale enjoined is abandoned and lost.—*Learned v. Walton*, (La.) 7 So. 723.

17. A creditor seizing a plantation under a writ of seizure and sale, in foreclosure of a mortgage, has a right to require the sheriff holding the property, to cultivate it while under seizure for the account of the mortgagor, upon making the necessary advances for that purpose; and he has the right to recover the amount of such advances, and the value of his services.—*Learned v. Walton*, (La.) 7 So. 723.

18. In a suit to foreclose a mortgage, a bill which states that complainant, who is a foreign corporation, has complied with the laws of the state which authorize a foreign corporation to do business in the state, and that the mortgage sued on was executed and delivered in the state, is not sufficient, as it does not aver that the corporation was authorized to do business in the state at the time the mortgage was executed and delivered.—*Farrior v. New England Mortgage Security Co.*, (Ala.) 7 So. 200; *Mullens v. American Freehold Land & Mortgage Co.*, Id. 201.

Decree.

19. That the original promissory note secured by the mortgage, or other proper evidence of the indebtedness, is not shown by the record to have been filed or produced before the master, is a question affecting the regularity of the decree of foreclosure and sale, as distinguished from its legality or validity.—*Lenfesty v. Coe*, (Fla.) 7 So. 2.

20. The regularity of a decree of foreclosure and sale cannot be questioned on an appeal taken from a personal decree rendered for the balance of the amount reported by the master to be due on the former decree, over and above the proceeds of the sale of the mortgaged property.—*Lenfesty v. Coe*, (Fla.) 7 So. 2.

Personal decree for deficiency.

21. On the death of the mortgagor, a personal decree for a deficiency may be had against his personal representative.—*Weir v. Field*, (Miss.) 7 So. 355.

22. Under Code Miss. § 1935, providing that, in foreclosure proceedings, upon report of sale, the court shall give personal judgment for such balance as defendant may be liable for, motion for such judgment need not be made at the term of court when the sale is confirmed, but at any time before the execution of the decree is barred by limitation.—*Weir v. Field*, (Miss.) 7 So. 355.

23. A sale under a decree of foreclosure cannot, after a lapse of 40 years, be attacked for error apparent on the records of the foreclosure proceedings, however flagrant.—*Duncan v. Williams*, (Ala.) 7 So. 416.

Redemption.

24. A creditor, to whom the holder of a legal title conveys land in which the debtor and his wife have a perfect equity, upon his agreement to reconvey to the debtor on the payment of the debt, and who afterwards enters, is only a mortgagee in possession, and a bill to redeem may be filed at any time before the statutory bar of 10 years is complete.—*Seawright v. Farmer*, (Ala.) 7 So. 201.

25. Though the prayer to redeem from a mortgage the whole of property in which complainant's wife had a half interest may be for broader relief than that to which he is entitled, because the wife's undivided half interest does not pass by the conveyance, she not having been a party to the mortgage, that is no reason for denying the redemption of complainant's own interest.—*Seawright v. Farmer*, (Ala.) 7 So. 201.

26. A bill to redeem a tract of land in the possession of the mortgagee, and for an accounting for the rents and profits, where complainant owns but an undivided half interest in the land, and the mortgage binds only his interest, is not demurrable because it seeks broader relief than complainant is entitled to.—*Parmer's Adm'r v. Parmer*, (Ala.) 7 So. 657.

Power of sale.

27. The limitation of two years, within which sales under a power in a mortgage must be disaffirmed for irregularities, is not a statutory, but a judicial, limitation, and rests on the presumption of ratification, after the lapse of two years, "in ordinary cases."—*Alexander v. Hill*, (Ala.) 7 So. 288.

28. A sale of land under a power contained in a mortgage, at which the mortgagee himself becomes the purchaser, is not void as to the mortgagor, but only voidable; and, until the latter disaffirms the sale, he has no interest in the land which he can convey.—*McCall v. Mash*, (Ala.) 7 So. 770.

29. Where a mortgagee has purchased at his own sale under a power, which did not authorize him to become the purchaser, the infant heirs of the mortgagor, who was dead at the time of the sale, will be allowed to disaffirm it any time within two years after attaining their majority, provided 20 years have not elapsed.—*Alexander v. Hill*, (Ala.) 7 So. 238.

30. A mortgagee, who purchases either by himself or through an agent, at a sale made by himself under the power contained in the mortgage, which does not authorize him to become the purchaser, may come into equity to have the infirmity of his title, resulting from the mortgagor's right to disaffirm the sale, removed by a confirmation of the sale, if the mortgagor so elects, or by a resale under a decree of the court.—*Craddock v. American Freehold Land & Mortgage Co.*, (Ala.) 7 So. 196.

Multifariousness.

See *Equity*, 15, 16.

MUNICIPAL CORPORATIONS.

See, also, *Counties; Highways; Schools and School-Districts; Towns.*

Horse railway, liability to keep streets in repair, see *Horse and Street Railroads.*

Power to prohibit sale of liquor, see *Intoxicating Liquors*, 18.

Incorporation and powers.

1. A municipal corporation cannot control the owners of property in the mode or manner of constructing their buildings, within certain designated limits, in the absence of express legislative authority.—*State v. Schuchardt*, (La.) 7 So. 37.

2. A provision in a city charter authorizing the municipality to prevent the reconstruction in wood of old buildings, within certain limits, does not include the power to prevent the repairing with shingles the roofs of buildings originally covered with similar materials.—*State v. Schuchardt*, (La.) 7 So. 67.

Ordinances.

3. In the absence of a legislative grant of power to that end, the police juries of Louisiana have no authority to pass an ordinance prohibiting the running of railroad trains through the villages of their parish at a greater speed than six miles an hour.—*State v. Miller*, (La.) 7 So. 673.

4. The city of New Orleans, by virtue of the authority vested in it by section 7 of its charter to maintain the public health and to suppress all nuisances, has power to pass an ordinance prohibiting smoking in street-cars under penalty of fine and imprisonment.—*State v. Heidenhain*, (La.) 7 So. 631.

5. Under the charter of the city of New Orleans, (Act La. No. 20 of 1882, § 7,) providing that the council shall have power to pass such ordi-

nanances as may be necessary to light the streets, etc., the council may make a contract for lighting for more than one year, and their power in this regard is not limited by sections 63 and 64, providing for annual levies to meet current expenses.—*New Orleans Gas-Light Co. v. City of New Orleans*, (La.) 7 So. 559.

6. A contract made by a city council for lighting the city for a period of 10 years at a specified rate is not a restriction upon the legislative power of the council.—*New Orleans Gas-Light Co. v. City of New Orleans*, (La.) 7 So. 559.

Regulation of markets.

7. In a city ordinance providing that no private market shall be established within a walking distance of six blocks of any public market, a "block" means a "square" or "block" as those words are generally understood.—*State v. Natal*, (La.) 7 So. 181.

8. An ordinance establishing a public market forbade the sale of fresh meat at other places unless authorized by the council. "Private markets" at which it might be sold were provided for by an ordinance passed on the same day, which was afterwards held to be invalid. *Held*, that the two were so dependent that the prohibitory clause of the first fell with the second.—*City of Jacksonville v. Ledwith*, (Fla.) 7 So. 885.

9. Acts Fla. 1887, c. 3775, art. 3, § 4, provides that the mayor and council of Jacksonville may, by ordinance, establish and regulate markets; and section 2, that no bill shall become a law unless signed by the mayor, or passed over his veto. An ordinance provided that private markets could be established when authorized by resolution of the council, and that they should be maintained in accordance with the rules of the board of health. *Held*, that the ordinance was void; that the power to regulate markets must be exercised by the council subject to the mayor's veto, and that it could not be delegated to the board of health.—*City of Jacksonville v. Ledwith*, (Fla.) 7 So. 885.

10. A city authorized to regulate the sale of meat, poultry, fish, fruits, and vegetables may prohibit their sale except at markets duly established under its power to establish and regulate markets.—*City of Jacksonville v. Ledwith*, (Fla.) 7 So. 885.

11. If reasonable facilities for selling at public markets are given, an ordinance restricting there to the sale of fresh meats is not an illegal restraint of trade, nor a monopoly.—*City of Jacksonville v. Ledwith*, (Fla.) 7 So. 885.

12. The main object of erecting or renting a building being to provide a market-house, the use of part of it for holding municipal courts does not render illegal the erection or renting of the building under a power to establish markets.—*City of Jacksonville v. Ledwith*, (Fla.) 7 So. 885.

Contracts.

13. The city of New Orleans, by ordinance, granted to the respondent railroad company the right to occupy a portion of the river front, and to erect wharves thereon, on condition, among other things, that it should pave L. street, the grant not to go into effect until the consent of the wharf lessees was obtained. The validity of the ordinance having been attacked in a suit by the city against respondent, another ordinance was adopted, reciting the litigation, and the willingness of respondent, notwithstanding, to construct wharves on the portion of the river front granted, and stipulating that, should such grant be declared illegal, the money expended by respondent would be refunded. Nothing was said about the obligation to pave L. street, but it was stipulated that nothing in the ordinance should relieve respondent from any of the obligations imposed by the former ordinance. The suit mentioned was discontinued. The required consent of the wharf lessees was given in a writing which recited that it was executed in pursuance of the former ordinance, and immediately after the execution of such instrument respondent went into possession of the portion of the river front granted. *Held*, that respondent was bound to pave L. street.—*State v. New Orleans & N. E. R. Co.*, (La.) 7 So. 84.

14. The city of New Orleans had the power to contract for a water supply, under the provisions of her charter; and, having this power to contract, the price, the kind of water, and the amount, are matters of legislative discretion, vested in the city council; and when the city confines herself within the limits of her powers to contract, this legal discretion exercised by the city council will not be inquired into by the courts, in the absence of fraud and corrupt and extravagant legislation.—*Conery v. New Orleans Water-Works Co.*, (La.) 7 So. 8.

15. The town of New Decatur, organized under Code Ala. c. 1, tit. 14, §§ 1486-1516, with the usual and ordinary municipal powers, has no power to establish a quarantine against property and persons, and a contract for services to be rendered in connection therewith is *ultra vires* and void.—*New Decatur v. Berry*, (Ala.) 7 So. 893.

16. Under the charter of the city of New Orleans, section 21, providing that all contracts for public works or materials ordered by the council shall be offered by the comptroller in presence of the finance committee of the council, and let to the lowest bidder, the commissioner of public works, who by section 24 is given general charge and superintendence of his department, cannot bind the city by a contract for the purchase of materials for such department.—*Burchfield v. City of New Orleans*, (La.) 7 So. 448.

17. In the absence of express statutory authority, a municipal corporation cannot make a permanent and exclusive contract with a water company to build water-works and supply it with water. Such authority cannot be implied from the general power conferred by its charter to contract for the needs of the municipality.—*Greenville Water-Works Co. v. City of Greenville*, (Miss.) 7 So. 409.

18. In the absence of express legislative authority, a municipal corporation has no power to utter unconditional obligations to pay money which will have the attributes of negotiable instruments in the hands of a *bona fide* purchaser before maturity.—*Neugass v. City of New Orleans*, (La.) 7 So. 565.

19. A contract made by a city with an electric light company to furnish it lights for 10 years, at a given price per light, with a stipulation that the city shall annually appropriate out of its current revenues a sum sufficient to pay what is then due under the contract, is not within the prohibition of Rev. St. La. § 2448, of a city's contracting any debt without providing means in the same ordinance to pay both principal and interest.—*New Orleans Gas-Light Co. v. City of New Orleans*, (La.) 7 So. 559.

Defective streets—Contributory negligence.

20. Where one stumbles on a plank, nailed on a bridge across the gutter on a street, because he failed to look to see if the bridge was level, though an electric light was burning brightly near by, and he knew that similar planks were nailed on other bridges in the neighborhood, his own want of ordinary care will prevent his recovery for the resulting injuries.—*Peetz v. St. Charles St. R. Co.*, (La.) 7 So. 688.

Change of street grade—Damages.

21. Under Const. Ala. 1875, art. 14, § 7, requiring a corporation invested with the right of eminent domain to "make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements," a city is liable in damages to the value of a house and lot caused by a change in the grade of the adjacent sidewalk to the street level, though there was no actual taking of complainant's property.—*City Council of Montgomery v. Maddox*, (Ala.) 7 So. 488.

22. The measure of damages is the decrease in the value of premises arising from the change in the grade.—*City Council of Montgomery v. Maddox*, (Ala.) 7 So. 488.

Liabilities and indebtedness.

23. Claims against a city arising under a contract providing that they shall be paid on the first day of each month, or as soon thereafter as they

may be properly ordananced for, draw interest only where there is money in the treasury, and the city, notwithstanding demand, refuses to pay.—*Fernandez v. City of New Orleans*, (La.) 7 So. 57.

Taxation.

24. Act La. 1882, No. 20, conferring on the city of New Orleans the power to impose a license tax, and Act La. 1882, No. 119, conferring the power to enforce the collection of any and all taxes due to any political corporation, carry with them, necessarily, the power to impose just such a penalty as may be imposed by state laws; and further authorize the city council to adopt the state license law as its own.—*City of New Orleans v. Firemen's Ins. Co.*, (La.) 7 So. 83.

25. Const. La. art. 206, provides that no political corporation shall impose a greater license tax than is imposed by the general assembly for state purposes. *Held*, that where the license tax levied by the city does not exceed that levied on the same occupations in the city by the state, it is valid, even if the state should have invalidated her own license tax by illegal discrimination between persons pursuing the same business in different subdivisions of the state. Such objection must be urged against the state's tax and contradictorily with her.—*City of New Orleans v. Pontchartrain R. Co.*, (La.) 7 So. 88.

26. License taxes must be graduated, and therefore need not be equal and uniform.—*City of New Orleans v. Pontchartrain R. Co.*, (La.) 7 So. 88.

27. A contract between a municipal corporation and a railroad company, by which the latter pays a bonus for the franchise therein conferred by the city, cannot be construed as conferring an immunity from the payment of a license on its business by the company, in the absence of an express stipulation to that effect in the contract.—*City of New Orleans v. Orleans R. Co.*, (La.) 7 So. 59.

28. In the act establishing the municipality of Jacksonville, where power is given to levy taxes on "all property and privileges taxable by law for state purposes," and to tax and regulate auctioneers and other named avocations, "and all other privileges taxable by the state," the word "privileges" does not mean technical privileges, but occupations like those designated, and a market, being a franchise or technical privilege, is not taxable by the city for revenue purposes.—*City of Jacksonville v. Ledwith*, (Fla.) 7 So. 885.

29. The authority of a city to provide for the inspection, and to regulate the sale, of meats and other things, does not give power to tax for revenue the occupation of selling them, but justifies such fees and charges as will cover the expense of inspection and police supervision.—*City of Jacksonville v. Ledwith*, (Fla.) 7 So. 885.

30. Act La. No. 81 of 1888, requires the council of New Orleans, in making up their annual budget of expenditures, to include therein the amount necessary to meet the expenses of the public schools, provided that such amount shall not exceed the statement of the school board already made, nor be less than \$250,000. *Held* that, in so far as it requires the appropriation of a particular sum, the act is void, since, under Const. La. art. 229, which declares that "the legislature shall provide that every parish may levy a tax for the public schools therein" the legislature has no power to compel the city of New Orleans, which represents the parish of Orleans, to levy such a tax, or to make an appropriation in lieu thereof.—*State v. City of New Orleans*, (La.) 7 So. 674.

Actions.

31. Under Act La. No. 81 of 1873, which requires the city of Monroe, theretofore exempted from payment of parish taxes, to pay one-fourth of the expenses incurred by the parish of Ouachita for the repairs of public buildings owned by the parish, and situated within the corporate limits of the city, the city cannot be held liable for the one-fourth part of the cost of erecting a new jail for the parish.—*Parish of Ouachita v. City of Monroe*, (La.) 7 So. 717.

32. Act La. No. 81 of 1883, § 71, requires the council of New Orleans, in making up their annual budget of expenditures, to include therein the

amount deemed necessary to meet the expenses of the public schools, provided that such amount shall not be less than \$250,000; and the school board is authorized to enforce the provisions of the statute by *mandamus*. *Held* that, on such *mandamus* proceedings, the city has the right to set up the defense that the law is unconstitutional, and the court will not refuse to pass upon its merits.—*State v. City of New Orleans*, (La.) 7 So. 674.

Murder.

See *Homicide*, 1-4.

National Banks.

See *Banks and Banking*, 5, 6.

NAVIGABLE WATERS.

Control of banks.

The owner of coal-boats and barges, moored to the river bank within the city limits of New Orleans, has no authority, derivable from the proprietor of riparian property, through a lease, to build houses in which to store apparatus and tackle, and shelter his men, by resting their foundations on piles driven in *batture* outside the levees; since the city is entitled to the sole control and management of the river banks for the public use, and may determine on what part of the *batture* landing places, etc., may be established.—*Sweeney v. Shakespeare*, (La.) 7 So. 739.

Necessary Parties.

See *Parties*, 1, 2.

NEGLIGENCE.

Contributory, see *Carriers*, 21-24; *Master and Servant*, 20.

Defective bridges, see *Bridges*, 6.

Injuries to passengers, see *Carriers*, 18-25.

Of master, see *Master and Servant*, 6-17.

Remote and proximate cause.

1. The negligence of the servants of a railroad company in leaving planks loose on a highway where passing wagons might throw them upon the track will not render the company liable for injuries to a person caused by the derailling of a train by one of such planks on the track, where it is proved that before the accident a person moved the planks to a place from which they could not be moved to the track except by design.—*Mire v. East Louisiana R. Co.*, (La.) 7 So. 473.

2. The plaintiff shipped a stallion in a freight-car of the defendant, and to insure ventilation left the side door open, nailing some strips of board across the opening. The slats were kicked off, and the stallion escaped uninjured, and, after wandering some distance, strayed upon the track at another point, and was killed by defendant's train. *Held*, that the plaintiff's negligence resulting in the liberation of the animal was not the proximate cause of the injury, and would not preclude a recovery.—*Louisville & N. R. Co. v. Kelsey*, (Ala.) 7 So. 648.

Dangerous premises.

3. It is not necessary, in order to recover damages for injuries received from a falling building, that the owner should have had notice of its dangerous condition.—*Tucker v. Illinois Cent. R. Co.*, (La.) 7 So. 124.

4. Where a building has been made unsafe by the acts of trespassers, which it was within the power of the owner to prevent, the owner is liable for injuries received by one on whom the building fell.—*Tucker v. Illinois Cent. R. Co.*, (La.) 7 So. 124.

Contributory negligence.

5. Where the contributory negligence of plaintiff is shown by his own proof, it is no ground of objection that defendant did not specially plead and

prove it.—*McMurtry v. Louisville, N. O. & T. Ry. Co.*, (Miss.) 7 So. 401.

6. In a suit by a city fireman against a railway company for personal injuries received in consequence of the overturning of a hose-cart on which he was riding, alleged to have been caused by coming in contact with an improperly placed rail, the fact that plaintiff knew the street to be dangerous was not proof of contributory negligence, and that question was properly left to the jury.—*Elyton Land Co. v. Mingea*, (Ala.) 7 So. 666.

7. It is not necessary that the contributory negligence should be the sole cause of the injury in order to bar recovery, but it is sufficient if it be one of two or more concurring efficient causes.—*North Birmingham St. R. Co. v. Calderwood*, (Ala.) 7 So. 860.

Imputed negligence.

8. In a suit by a city fireman against a railway company for personal injuries received in consequence of the overturning of a hose-cart on which he was riding, alleged to have been caused by coming in contact with an improperly placed rail, the negligence of the driver of the hose-cart could not be imputed as contributory negligence to plaintiff, when it appeared that he had no authority or control over the driver.—*Elyton Land Co. v. Mingea*, (Ala.) 7 So. 666.

9. The fact that plaintiff and the driver were both in the employ of the city, and engaged in a common enterprise, did not render them mutually responsible for each other's acts.—*Elyton Land Co. v. Mingea*, (Ala.) 7 So. 666.

Pleading.

10. A complaint that defendant undertook, for reward, to have his stallion serve plaintiff's mare, and so negligently performed his undertaking that, in the effort to serve, through defendant's negligence the stallion so injured the mare that she died, sufficiently alleges the duty and negligence of defendant.—*Jones v. Darden*, (Ala.) 7 So. 928.

Evidence.

11. In an action for personal injuries by a fall caused by plaintiff's mule stepping through a hole in a bridge approaching a railroad crossing, which it was the duty of the company to maintain, evidence of the mule's habit of stumbling is relevant, as tending to show contributory negligence.—*Patterson v. South & North Ala. R. Co.*, (Ala.) 7 So. 437.

12. When plaintiff's evidence to fix negligence on defendant tends to show contributory negligence on the part of plaintiff, it is not error to refuse to charge "that the burden of proof establishing contributory negligence rests on defendant."—*North Birmingham St. R. Co. v. Calderwood*, (Ala.) 7 So. 860.

NEGOTIABLE INSTRUMENTS.

Negotiability.

1. The city of New Orleans issued certain certificates of indebtedness, subject to the provisions of an ordinance, which was printed on the backs of the certificates, "(1) that any creditor of the city to whom an appropriation has been made, but in whose favor the comptroller cannot draw a warrant until there be money in the treasury to the credit of the appropriate amount, not otherwise appropriated, shall be authorized upon demand to receive a transferable certificate of ownership entitling him or bearer to receive a cash warrant; (2) that the creditor shall sign a receipt therefor, stipulating that the cash warrant shall be claimed only on the surrender of the certificates, and the acceptance of the warrants shall be an acceptance of the conditions of the ordinance; (3) that the certificate shall not novate or affect the nature of the claim, but shall be simply an evidence of transferable ownership." *Held*, that the certificates are not unconditional obligations to pay, but only evidences of transferable ownership; and title thereto does not pass by delivery where the person named therein has not signed the receipt which by the terms of the ordinance is a

condition precedent to the issue of the certificate.—*Neugass v. City of New Orleans*, (La.) 7 So. 565.

Modification.

2. An indorsement on a note before its day of payment, postponing its maturity, must be considered as incorporated into it, and made part of it, so as to make the note payable at the date fixed by the indorsement, as though the date had been originally written in the note.—*Sagory v. Metropolitan Bank*, (La.) 7 So. 638.

Accommodation papers.

3. The holder of accommodation paper acquired before maturity, without notice or knowledge of any equities or agreement existing between the maker and the payee of the note, is entitled to the same protection which is extended to the holder of negotiable paper acquired before maturity.—*Weill v. Trosclair*, (La.) 7 So. 232.

4. The defense, in a suit on a note, that the maker is not liable thereon, on the ground that the note was extended as an accommodation for the payee and the suing holder, must be clearly proved, in order to prevail.—*Weill v. Trosclair*, (La.) 7 So. 232.

Indorsement and transfer.

5. An indorsement in blank vests the legal title to a note in one who takes it as owner, and the note itself, in the absence of rebutting proof, is *prima facie* evidence of ownership.—*Lakeside Land Co. v. Dromgoole*, (Ala.) 7 So. 444.

6. Indorsements on a note past due, postponing the day of payment, do not revive the note, and invest it with the negotiability it possessed before its original maturity, and one purchasing a note so indorsed takes it subject to all equities existing between the parties thereto.—*Sagory v. Metropolitan Bank*, (La.) 7 So. 638.

7. Where a person has indorsed a note, and the maker takes the benefit of the insolvent laws, and the holder of the note takes part in the proceedings, and votes for the discharge of the maker of the note, the indorser is released.—*Succession of Latchford*, (La.) 7 So. 638.

8. Where one who is bound, as indorser, for the balance unpaid on a note, jointly with another, indorses a second note for an amount equal to such balance, which is given to the bank which discounted the first in consideration of an extension of time thereon, and acquiesces in the bank's retention of such first note, and then pays the whole of the second note, he can recover nothing from the bank on the ground that he was only liable for a part thereof, since his payment goes to extinguish his sole liability on the first note.—*Woods v. Halsey*, (La.) 7 So. 451.

9. Where the indorser of a note, on the representations of the maker that it had been paid, indorses another note jointly with him, which is turned over to the bank discounting the first note for an extension of the amount remaining due on the first note, in whose retention by the bank such indorser afterwards acquiesces, the second note does not extinguish his liability on the first, but he remains bound on both.—*Woods v. Halsey*, (La.) 7 So. 451.

10. A note indorsed as collateral security was returned to the indorsers for collection. They had agreed with a creditor to procure and turn it over to him in payment of his demand, and informed him that it was then held as collateral security by a firm to whom they had telegraphed to send it, and with whom they had an arrangement for the return thereof, and represented that they in fact owned it. On its arrival no further questions were asked, and the note was accepted without notice that it was sent and receipted for, for collection only. *Held*, that the creditor was not a purchaser without notice of the rights of the indorsee so sending it.—*Carter v. Lehman, Durr & Co.*, (Ala.) 7 So. 735.

11. Where a note has been paid by the maker, but afterwards falls into the hands of a third person, one who purchases from him after the maturity of the note cannot recover thereon though he did not know that it had been paid, and though such third person had indorsed thereon credits of inter-

est dated after the maturity of the note.—*Metropolitan Bank v. Bouny*, (La.) 7 So. 564.

Actions on—Pleading.

12. In an action on a bill of exchange accepted by defendant, a plea that the acceptance was for a debt due plaintiffs by a third person; that defendant did not promise to pay the debt when made, or request plaintiffs to give credit to the third person; that the acceptance was not in consideration of any forbearance to, or release of, the third person; that no security for the debt was given up; and that defendant has received no advantage and plaintiffs no detriment from the acceptance,—is good on demurrer.—*Ohleyer v. Bernheim*, (Miss.) 7 So. 819.

13. Code Ala. § 2594, requires suits upon bills of exchange and promissory notes payable at a bank or banking-house, to be brought in the name of the person having legal title. *Held*, that a plea which averred want of legal title in plaintiff, but failed to aver that the note was payable at a bank or banking-house, was not demurrable, when that fact appeared from the complaint.—*Lakeside Land Co. v. Dromgoole*, (Ala.) 7 So. 444.

14. Where, in a suit against an indorser of a bill of exchange, the complaint simply averred non-payment and notice, and notice was denied, a replication that defendant was the real debtor, "owing the debt represented by the bill of exchange, the consideration thereof being goods and merchandise sold by plaintiffs to defendant," is a departure, and a demurrer thereto was properly sustained.—*Bolling v. McKenzie*, (Ala.) 7 So. 653.

15. The replication is also insufficient because it fails to negative the legal implication that the bill in the hands of the indorser represented a debt due him from the drawer.—*Bolling v. McKenzie*, (Ala.) 7 So. 653.

16. Another count of the replication averred that, since the protest of the bill, "the defendant, with knowledge that the usual steps of demand, protest, and notice were not duly taken, acknowledged his liability as indorser on said bill, and promised plaintiffs to pay the same." *Held* that, although the allegation of a promise to pay was insufficient because the promise was not alleged to have been made before the bringing of the suit, the acknowledgment of continuing liability was good without such allegation, and a demurrer to the count was erroneously sustained.—*Bolling v. McKenzie*, (Ala.) 7 So. 653.

Evidence.

17. In an action on a note dated in another state, and containing a waiver of exemptions, defendant contended that the waiver referred only to the laws of such state. *Held*, that the exclusion of evidence offered by defendant to show that the note was executed and delivered at the place of its date, and that he was then living in the state where suit was brought, if error, was harmless.—*Holland v. Bergan*, (Ala.) 7 So. 770.

18. Where the absence of a written lease is not satisfactorily accounted for by proof of its loss or destruction, it is proper, in an action on a note given for rent, which contains no such stipulation, to exclude evidence tending to prove a stipulation in the lease to make repairs, or evidence of any damages suffered in the destruction of goods by rains, in consequence of the failure to make such repairs.—*Burks v. Bragg*, (Ala.) 7 So. 156.

19. Evidence as to why, at the time of executing the note, he made no claim for damages to his goods, caused by the failure of his landlord to make repairs, is also inadmissible.—*Burks v. Bragg*, (Ala.) 7 So. 156.

NEW TRIAL.

Newly-discovered evidence.

1. An application for a new trial, based on newly-discovered evidence, is properly overruled, on the assignment of the trial judge that the witnesses relied upon were summoned by the accused to attend the trial, and were personally present during the trial, and were not interrogated by him.—*State v. Dorsey*, (La.) 7 So. 837.

Displacement of judge pending trial.

2. The trial of a cause having been commenced, and a portion of the evidence taken, when the sitting judge was displaced by the appointment of his successor, the reintroduction of the testimony that was adduced before the judge *ex officio* was all the defendant could require.—*Brinkman v. Huyghe*, (La.) 7 So. 76.

Non Compos Mentis.

See *Insanity*.

Nonsuit.

See *Practice in Civil Cases*, 1.

Notice.

Bona fide purchasers, see *Vendor and Vendee*, 20.

Of appeal, see *Appeal*, 17, 18.
tax-sales, see *Taxation*, 27.

Nuncupative Will.

See *Wills*, 4-6.

OBSTRUCTING JUSTICE.

Indictment.

1. Under Act La. 1883, No. 11, defining and punishing the offense of resisting an officer of the state "while serving, or attempting to serve or execute, the process, writ, or order of any court," an indictment which alleges merely that the officer resisted was "in the due and legal execution of his office" is insufficient.—*State v. Johnson*, (La.) 7 So. 538.

2. An indictment for aiding, inciting, and advising a witness not to answer a subpoena is sustained by evidence that defendant aided, incited, and advised a witness not to permit an attachment to be served on him as a defaulting witness.—*Farrow v. State*, (Miss.) 7 So. 349.

OFFICE AND OFFICER.

See, also, *Judge; Justices of the Peace; Schools and School-Districts*, 1-4; *Sheriffs and Constables; States and State Officers*.

Road officers, see *Highways*, 1.

Compensation.

1. The salary of an officer being fixed by the constitution, an appropriation large enough to permit his being paid more will not justify a payment in excess of the salary.—*State v. Bloxham*, (Fla.) 7 So. 873.

2. Const. Fla. 1886, art. 18, § 8, provides that on its ratification the commissioner of land and immigration shall assume the office of commissioner of agriculture, and that his duties as such shall be prescribed by the first legislature. *Held*, that from its ratification, the commission of lands and immigration was entitled only to the salary fixed by the new constitution for the commissioner of agriculture.—*State v. Bloxham*, (Fla.) 7 So. 873.

Officers de facto.

3. The right of a *de facto* officer, holding office under color of title, cannot be inquired into collaterally.—*Town of Kissimmee City v. Cannon*, (Fla.) 7 So. 523.

Removal—Grounds.

4. One who has been drinking to excess six or eight times a year, at intervals of from one to two months, for over three years, whose fits of intoxication lasted from one to two days, and once for two or more weeks, is guilty of "habitual drunkenness" within Const. Ala. art. 7, §§ 1-4, relating to the removal of officers.—*State v. Savage*, (Ala.) 7 So. 133.

— Proceedings.

5. A report of a grand jury, which states that an officer should be removed "for and on account

of his habitual drunkenness while in such office prior to and down to the making of this report," sufficiently complies with Code Ala. § 4839, requiring a grand jury, if it finds that an officer should be removed, to report to the court, "setting forth the facts."—*State v. Savage*, (Ala.) 7 So. 7.

6. Under Code Ala. 1886, § 4840, requiring the attorney general to institute proceedings to impeach certain officers, when it appears from the report of any grand jury that any such officer ought to be removed for any of the causes enumerated in section 4818, the information, if it refers to the report of a grand jury, and is accompanied by it as the authorization, is *prima facie* sufficient, without specifically setting forth the contents of the report.—*State v. Savage*, (Ala.) 7 So. 7.

Opinion Evidence.

See *Evidence*, 17-19.

ORDERS.

Appealable, see *Appeal*, 4-7.

Construction—Effect.

A written direction to pay, when collected, the proceeds of a particular claim against a third person held by the drawee as attorney of the drawer, is merely an equitable assignment of the claim; and the law does not raise, in favor of the payee against the drawer, a promise to pay in the event that the claim cannot be or is not collected.—*Curry v. Shelby*, (Ala.) 7 So. 922.

Ordinance.

See *Municipal Corporations*, 3-12.

Parent and Child.

See *Guardian and Ward; Infancy*.

Parol Evidence.

See *Evidence*, 25-30.

PARTIES.

See, also, *Specific Performance*, 7.

In action against husband or wife, see *Husband and Wife*, 22-24.

partition proceedings, see *Partition*, 4.

Joinder, action to set aside fraudulent conveyance, see *Fraudulent Conveyances*, 17.

Residence of necessary parties, see *Venue in Civil Cases*.

To suit to dissolve corporation, see *Corporations*, 19, 20.

Necessary parties.

1. The heirs of a deceased administrator *de bonis non*, who conveyed land under a sale made pursuant to an order of the probate court by his predecessor in the administration, and received a deed back from his grantees, are essential parties defendant to a bill brought by the heirs of the intestate to set aside the sale, and have the land declared assets of the intestate.—*Deans v. Wilcoxon*, (Fla.) 7 So. 163.

2. In a suit to enforce a vendor's lien by an assignee of bonds given for the purchase money, the assignor is not a necessary party.—*Kirk v. Sheets*, (Ala.) 7 So. 736.

Proper parties.

3. The vendor's mortgagee is not a proper party to a suit to rescind a contract of sale, as he is not concerned in the transactions between the vendor and vendee; the land being always subject to his claim.—*Orendorff v. Tallman*, (Ala.) 7 So. 321.

Real party in interest.

4. Attorneys, investing money held by them as trustees, and taking a note payable to themselves, may sue thereon in their own names, though part of the money belong to a foreign succession.—*Peters v. Pacific Guano Co.*, (La.) 7 So. 790.

Joinder.

5. Where a partner has assigned all his interest in the firm property, including a mortgage, the assignee is properly joined with the other partner in an action for the conversion of the mortgaged property.—*Keith v. Ham*, (Ala.) 7 So. 284.

How misjoinder taken advantage of.

6. A misjoinder of complainants, apparent on the face of a bill, must be taken advantage of by demurrer; and an objection on that ground, made for the first time on the hearing, is too late, and cannot be considered on appeal.—*Lehman, Durr & Co. v. Greenhut*, (Ala.) 7 So. 299.

PARTITION.**In general.**

1. When the surviving member of a community subsequently dies, leaving individual debts unpaid, the administration of her succession must institute suit for partition of the property held in indivision by it and third persons, as required by Rev. Civil Code La. art. 1135, and the heirs of the predeceased spouse dying without debts are third persons in that sense.—*Succession of Dumestre*, (La.) 7 So. 624.

By whom.

2. One of the heirs of an entire tract, of which a part has been assigned to the widow as dower, may compel partition of the residue.—*West v. West*, (Ala.) 7 So. 830.

8. Where, after a sale for partition, a prior judgment creditor of a joint tenant has his execution levied on the joint tenant's undivided interest in the land, and buys it in, he does not become a tenant in common with all the purchasers of the separate tracts conveyed at the partition sale, but is only tenant in common with each individual purchaser to the extent of his debtor's undivided interest in that tract, and he cannot maintain a bill against all the purchasers in one suit for a second partition.—*Inman v. Prout*, (Ala.) 7 So. 842.

Parties.

4. A sale in partition among joint tenants made by the probate court, under Code Ala. 1876, § 3514, is valid as to a judgment creditor of one of the joint tenants whose lien was acquired before the application for partition was filed, for such creditor is not a necessary party to the proceeding for partition.—*Inman v. Prout*, (Ala.) 7 So. 842.

Representative of minors.

5. Proceedings to partition land owned in common between a father and his minors, under Act La. No. 25 of 1878, which requires that the minors be represented by their tutor, are void where their interests were represented by a stranger appointed as dative tutor, for such appointment is void, as the father cannot abdicate his tutorship.—*James v. Mayor*, (La.) 7 So. 618.

Pleading.

6. A bill filed by the guardian of a lunatic heir to an entire tract, part of which has been assigned to the widow as dower, praying a partition of the residue and a sale of his ward's undivided interest in the reversion, is multifarious.—*West v. West*, (Ala.) 7 So. 830.

7. A bill for partition filed by the guardian of a lunatic is not repugnant in seeking an account of the rents and profits, and also a sale of his ward's interest.—*West v. West*, (Ala.) 7 So. 830.

Private sale.

8. Act La. No. 25 of 1878 authorizes the sale of property held in indivision between minors and others, at private sale, on compliance with the requirements therein contained, and sanctions the title passed to purchasers under such sales.—*Bruhn v. Firemen's Bldg. Ass'n*, (La.) 7 So. 556.

9. Under Act La. No. 25 of 1878, authorizing partition by private sale of property owned in common with minors, "on the advice of a family meeting * * * duly convened to represent the mi-

nors," while it is necessary that the proceeding should be conducted contradictorily with the tutor of the minors, if it appears that she participated therein, and approved the same, failure to cite her will be cured.—*Bruhn v. Firemen's Bldg. Ass'n*, (La.) 7 So. 556.

10. Under Act La. No. 25 of 1878, authorizing the sale of property, owned in part by minors, at private sale, a judgment in partition for sale at public auction is not necessary; but the consent of the co-proprietor of age, and that of a family meeting on behalf of the minors with the concurrence of the tutor, and the homologation of the proceedings by the court, are sufficient.—*Durruty v. Musacchia*, (La.) 7 So. 555.

Decrees.

11. A judgment rendered, in a partition suit, in favor of plaintiffs, who are thereby correctly named, and against the only defendant therein, who is incorrectly named in part, is a valid and binding judgment against the party alleged to be co-owner, and asked to be, and who was, cited.—*Succession of Corrigan*, (La.) 7 So. 74.

PARTNERSHIP.

Levy on firm property, see *Attachment*, 2. Release, see *Release and Discharge*.

What constitutes.

1. Where a widow succeeds to the ownership of her deceased husband's mercantile business, conducted in the name of her husband and another, but in which the other, as between themselves, was not a partner, being a mere employee, receiving as his compensation one-half the profits, not exceeding \$100 per month, the fact that she furnished the other with money to be invested in merchandise as a help in disposing of the broken stock on hand, in collecting outstanding accounts, and in winding up the business, does not create a new partnership between her and him, nor authorize him to incur a debt binding on her.—*Merchants' & Planters' Nat. Bank v. Rice*, (Ala.) 7 So. 647.

Authority of husband of partner.

2. Where, in a contract of partnership between a wife and a third person, it is stipulated that her husband shall represent the wife in all partnership business, and that his acts shall be binding on the firm, "the same as if he were a member of said firm," such stipulation vests him with all the powers of a partner, and his signature of the firm name to notes given in the business of the firm is as binding as if signed by a partner.—*State Nat. Bank v. Scott*, (La.) 7 So. 720.

Firm property.

3. The legal title to an undivided interest in land passes to each of two partners by a deed, which recites the payment of the consideration by them individually, and conveys to them and their heirs by a firm name containing the surnames of both.—*Southern Cotton Oil Co. v. Henshaw*, (Ala.) 7 So. 760.

4. An assignment by one member of a firm of all the interest he has in the stock of goods, notes, and accounts due to the firm, vests the assignee with the interest of the assignor in a mortgage held by the firm to secure a note due to it.—*Keith v. Ham*, (Ala.) 7 So. 234.

Rights and remedies inter se.

5. Complainant, having bought an interest in a mercantile business and advanced money, afterwards made a contract with his partner by which the latter agreed to close up the business on a certain date, when complainant might, at his option, receive the amount he had paid for his interest, and the advances made by him, with interest, or the amount he had invested, and half the profits. The partner executed a deed of trust on land owned by him individually, to secure his compliance with the contract. He died before the day for closing up the business arrived, and complainant took charge, sold the goods, and paid the firm debts. Held that, at the time agreed upon, complainant could elect to be a creditor of the firm to the extent of his investment and interest, or to

remain a partner.—*Brinson v. Berry*, (Miss.) 7 So. 323.

Bill for settlement.

6. A partnership was formed in 1870, and the articles of copartnership stipulated that it should continue for three years; but it was in fact continued until 1884 or 1885, when it was dissolved by mutual consent. *Held*, that a bill for its settlement would lie, filed within six years from the actual dissolution or credit, or other like partnership transaction on account between the partners, from which a promise on the part of the surviving partner to pay the balance found against him on final settlement may be implied.—*Haynes v. Short*, (Ala.) 7 So. 157.

Surviving partners.

7. Where the brother and late partner of a deceased administers the partnership property, and he and the widow, who has a community interest therein, have annual settlements whereby, through mutual fault, his accounts are brought into inextricable confusion, it is within the discretion of the court to dismiss proceedings instituted by the widow, the only party in interest, to compel him to account for the whole, and to leave the parties where they have placed themselves.—*Succession of Gassie*, (La.) 7 So. 454.

8. Where a bill by the representatives of a deceased partner shows that the partnership has not been fully settled, and that there has been no adjustment of the expenses of the concern, and that the surviving partner has the assets of the partnership, including the entire capital which was paid in by the deceased partner, and refuses to pay the same to the personal representatives of the latter, it sufficiently shows that there is no adequate remedy at law, and a general demurrer for want of jurisdiction will be overruled.—*Haynes v. Short*, (Ala.) 7 So. 157.

— Receivers.

9. It is the duty of a surviving partner to take an account of stock, and keep a record of all sales of the partnership effects; and if he fails to do so, and there is danger of loss to the estate of the deceased, a receiver may be appointed.—*Word v. Word*, (Ala.) 7 So. 412.

Actions.

10. Under Code Ala. § 2605, providing that any one of the partners may be sued for the obligation of all, a partnership may sue an individual for a debt created by a former partnership composed of defendant and a member of plaintiff firm.—*Alexander v. Jones*, (Ala.) 7 So. 903.

11. Where a trustee, under a deed of trust executed by one partner on partnership property as security for an individual debt, has recovered the property in replevin against the partner executing the deed, who was in possession of the property, the other partner must resort to equity in order to recover it from the trustee, as one part owner cannot maintain an action at law against his co-owner for the joint property.—*Hoff v. Rogers*, (Miss.) 7 So. 356.

Partner in commendam.

12. In insolvency proceedings to wind up the business of an insolvent commercial partnership, a partner *in commendam*, who claims to be a creditor of his copartner, does not occupy a better position than a full or active partner, and hence he cannot be allowed, as against creditors, to enforce a pledge, granted to him by his copartner, on the latter's share of the partnership property.—*Sherwood v. His Creditors*, (La.) 7 So. 79.

Passengers.

See *Carriers*, 16, 17.

PAYMENT.

See, also, *Release and Discharge*.

What constitutes.

1. It sufficiently appeared that a draft was taken as payment on a mortgage from the facts
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that the amount of its face, less discount, was credited upon the back of the mortgage, and also upon defendants' books as a payment thereon; that no objection was made by defendants to a statement rendered long after the draft was dishonored, in which they were charged with the amount thereof as a payment; and that defendants, after the dishonor, rendered three statements to plaintiffs in which the amount of the draft was credited as a payment.—*Whitley v. Dunham Lumber Co.*, (Ala.) 7 So. 810.

Evidence.

2. Under plea of payment, evidence of an agreement that an item in the nature of a cross-demand should be credited as a payment *pro tanto* is competent, and will sustain a decree allowing the item to be credited on the claim in suit.—*McCurdy v. Middleton*, (Ala.) 7 So. 655.

Voluntary payment.

3. One who pays money on a decree which is afterwards reversed on appeal is entitled to restitution of the amount paid.—*In re Walter*, (Ala.) 7 So. 400.

4. It is no answer to a petition for restitution that petitioner will be decreed to pay the same amount on the next hearing.—*In re Walter*, (Ala.) 7 So. 400.

Performance.

Of contract, see *Contracts*, 4.

PERJURY.

What constitutes.

1. False testimony, on trial of an indictment for robbery, that the witness overheard defendant, at the trial before the committing magistrate, say to another person, who was also on trial before the magistrate, "I do not believe I will swear to that," and the other's reply, "What did you want to tell me a damned lie for; you had better stick to it, if you know what is good for you,"—is not perjury, since it is immaterial to the issue.—*Jennings v. State*, (Miss.) 7 So. 462.

2. On indictment for perjury on the trial of a criminal case, it is no defense that defendant was induced to testify falsely by threats against his life, made out of court, and some time before the trial.—*Bain v. State*, (Miss.) 7 So. 408.

3. Where the perjury assigned was in defendant's falsely testifying before the grand jury that a person against whom a charge was being investigated had induced him to sign a due-bill by false pretense that it was another paper, and that his signature was wanted only as a witness, defendant cannot justify his testimony on the ground that he gave it under advice of counsel, since the matter involved presented no question of law.—*Barnett v. State*, (Ala.) 7 So. 414.

4. Where a person is indicted for perjury in falsely testifying that another person, by false pretenses, obtained his signature to a paper, it is no defense that defendant's signature consisted in making his mark only.—*Barnett v. State*, (Ala.) 7 So. 414.

Indictment.

5. An indictment for perjury which states the substance of the proceeding in which the false testimony was given, the materiality of the testimony, the name of the officer by whom the oath was administered, and that he was authorized to administer it, the fact testified to on which perjury is assigned, and that the testimony was willfully and corruptly false, is sufficient, under Code Ala. 1886, § 3908, prescribing the requisites of an indictment for perjury.—*Barnett v. State*, (Ala.) 7 So. 414.

6. In an indictment for perjury, an allegation that, in a certain case, it became material to know whether a cow bore a certain brand, and that defendant falsely swore that she did bear such brand, sufficiently charges the materiality of what defendant swore.—*State v. Gonsoulin*, (La.) 7 So. 658.

Evidence.

7. On indictment for perjury in testifying falsely before the grand jury during the investigation of a charge against a person for obtaining defendant's signature to a bill of sale under false pretenses, evidence of defendant's testimony in regard to the bill of sale is admissible without producing the instrument.—*Barnett v. State*, (Ala.) 7 So. 414.

Petitory Action.

By purchaser at judicial sale, see *Judicial Sales*, 2.

PHYSICIANS AND SURGEONS.**License to practice.**

1. Code Ala. 1886, §§ 1296-1298, provide that a graduate of a medical college in the United States, whose diploma is recorded, may practice medicine without a license in any county having only a medical board established by the county commissioners; but where there is a board of medical examiners, organized according to the constitution of the state medical association, and in affiliation with it, a license or certificate of qualification from such board is necessary. Section 4078 provides for the punishment of any person practicing medicine without a license, diploma, or certificate, or who is not "a regular graduate of a medical college of this state, having had his diploma legally recorded." *Held*, that a graduate of a medical college of another state, whose diploma is recorded, is not indictable for practicing without license or certificate from a board of medical examiners in the county, organized under or in affiliation with the state association. Following *Brooks v. State*, 6 So. 902.—*Stough v. State*, (Ala.) 7 So. 150.

Liability for services.

2. Where a physician, in the beginning, renders his services solely on the patient's responsibility, the burden is on him to prove that on his proposal to discontinue them a third person agreed to become responsible therefor; and in the absence of an express agreement to that effect the mere fact that the third person requested him not to discontinue his visits, and that after the patient's death the third person, who had been appointed administrator, failed to deny his responsibility for the claim, on the presentation of a bill against him individually, will not warrant the direction of a verdict in the physician's favor, but the question of the individual liability of the third person should be left to the determination of the jury.—*Curry v. Shelby*, (Ala.) 7 So. 922.

3. Where the only question in an action by a physician for his services, the rendition of which is not disputed, is whether a third person agreed to become responsible therefor, testimony that the patient had himself employed another physician is properly excluded as irrelevant.—*Curry v. Shelby*, (Ala.) 7 So. 922.

PLEADING.

See, also, *Account Stated*, 2; *Assumpsit*, 4; *Death by Wrongful Act*, 4; *Detinue*, 1; *Injunction*, 9; *Malicious Prosecution*, 1, 2; *Negligence*, 10; *Set-Off and Counter-Claim*, 3.

In action on contract, see *Contracts*, 7.

—negotiable instrument, see *Negotiable Instruments*, 12-16.

partition proceedings, see *Partition*, 6, 7.

Pleading and proof, see *Subrogation*, 5; *Frauds, Statute of*, 5.

Demurrer.

1. A demurrer which is not called to the attention of the court, and is not ruled on, must be considered as abandoned.—*Elyton Land Co. v. Morgan*, (Ala.) 7 So. 249.

2. Pending a trial, which was by the court without a jury, plaintiff moved for leave to withdraw his replication, and to demur to the plea. *Held*, that it was error to deny his motion.—*Crescent Brewing Co. v. Handley*, (Ala.) 7 So. 912.

Answer.

8. In a suit on an instrument importing an absolute promise to pay a sum certain within a certain time, defendant can only set up as a defense thereto that the promise was conditional, by a sworn plea; Code Ala. § 2770, declaring that "every written instrument, the foundation of the suit, purporting to be signed by the defendant, must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit."—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

Verification.

4. A plea not verified, as required by statute, is properly stricken from the files.—*Gaston v. State*, (Ala.) 7 So. 340.

Amendment.

5. In an action against a telegraph company for failure to deliver a message, where it appears that the message was signed and delivered to defendant by plaintiff's brokers, so that the legal title to the contract closed by such message was in them, it is proper to allow an amendment to the complaint making it the suit of such brokers to the use of plaintiff.—*American Union Tel. Co. v. Daughtry*, (Ala.) 7 So. 660.

6. An amendment of a complaint which proposes to change the name of the sole defendant from the "Atlanta & West Point Railroad and Western Railway of Alabama, a foreign corporation," to the "Western Railway of Alabama Company," a domestic corporation, is so radical a departure that the supreme court will hold it a violation of the rule that there can be no change of the sole party defendant by amendment.—*Western Ry. of Alabama v. McCall*, (Ala.) 7 So. 650.

7. Where a case is tried as if the action was in form *ex delicto*, a new trial will not be granted because the trial judge refused a motion to amend the complaint by adding a count formally and substantially in case.—*Sharpe v. National Bank*, (Ala.) 7 So. 106.

8. The plaintiff, having originally declared under a count for defendant's negligence generally, in failing to keep its track in proper condition, and a count for such negligence as being a violation of its contract with the city, the subsequent addition of a third count, alleging such negligence as a violation of a city ordinance, was not the introduction of a new cause of action.—*Elyton Land Co. v. Minge*, (Ala.) 7 So. 666.

Pleading and proof—Variance.

9. Though it is immaterial whether plaintiff technically surrendered a lease and delivered possession to defendant, yet, if he alleges these facts in a complaint to recover on an agreement to pay for such relinquishment, he must prove them before he can recover.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

10. Where an ordinance prohibits trains of street-cars from stopping on the east side of a street when moving westward, or on the west side when moving eastward, and in an action against the street-car company for negligence the complaint alleges that the negligence was the failure of the train to stop a sufficient length of time on the west side of the street to enable plaintiff to alight, and the evidence shows a failure to stop a train going west on the east side, there is a fatal variance.—*North Birmingham St. R. Co. v. Calderwood*, (Ala.) 7 So. 860.

11. Plaintiff, suing for the price of work done under a contract alleged to have been made with him, is entitled to recover even if it be shown that the contract was made with him and another, whose interest plaintiff had acquired when the action was commenced.—*Sublett v. Hodges*, (Ala.) 7 So. 296.

Objections waived.

12. Where issue was joined on an insufficient count, which had not been demurred to, and there was evidence to warrant a finding of its truth, the plaintiff was entitled to verdict and judgment thereon, and the judgment will not be reversed on

a mere assignment of error.—*Georgia Pac. Ry. Co. v. Propst*, (Ala.) 7 So. 635.

PLEDGE.

What constitutes equitable lien, see *Liens*, 1.

Validity of pledge.

1. A factor, whose general business as such is known to a bank, cannot pledge to it for his own debt goods of his principal, by indorsing to it a bill of lading, reading, "Received of [the principal] 38 bales cotton, consigned to [the factor,]" but without negotiable words, and not indorsed by the principal, though Laws La. 1868, Act 150, § 6, provides that any bill of lading may be transferred by indorsement, and any one to whom it may be transferred shall be deemed the owner so far as to give validity to a pledge by him.—*Lalande v. His Creditors*, (La.) 7 So. 895.

Rights of pledgee.

2. Where a person, to secure a debt and further advances, pledges and assigns, among other collateral, the note of a third person, secured by a deed of trust, and the note is afterwards satisfied, the pledgee cannot apply the security of the trust-deed to satisfy any part of the pledgee's indebtedness.—*Newman v. Bank of Greenville*, (Miss.) 7 So. 403.

3. Where the maker of a note pledges bank-stock to the payee to secure it, with authority to him to sell the security and apply the proceeds to the note if it be not paid when due, and when the note becomes due has the stock transferred on the books of the bank to the payee, who then cancels the note, the transfer is absolute, and the maker cannot afterwards recover the stock by offering to pay the note.—*Small v. Saloy*, (La.) 7 So. 450.

Discharge of lien.

4. A bill of lading having been by agreement sent to the factor to whom the goods were consigned, with instructions to remit the proceeds to a pledgee, the lien is not lost, under Rev. Civil Code La. art. 3162, providing the pledge must be actually put and remain in the possession of the creditor or of a third person agreed on by the parties.—*Peters v. Pacific Guano Co.*, (La.) 7 So. 790.

5. A bill of lading was pledged to two creditors, and by their consent the factor, to whom the goods were consigned, remitted to one of them a sum sufficient to pay both. The debtor falsely represented that the other had waived payment out of that consignment, and the money was applied on other debts. *Held*, only a partial discharge, leaving the pledge in full force for the balance due.—*Peters v. Pacific Guano Co.*, (La.) 7 So. 790.

Purchase of pledge by pledgee.

6. A purchase of pledged stock by the pledgee at a private sale, made without notice to the pledgor, and of which stock the pledgee retains possession, does not transfer the title, or dissolve the relation of pledgor and pledgee.—*Sharpe v. National Bank*, (Ala.) 7 So. 106.

— Ratification.

7. In the absence of knowledge that a sale of pledged stock was private, and that the pledgee was the purchaser, the execution of a note by the pledgor for the unsatisfied balance due the pledgee after receiving information that the stock had been sold, does not amount to a ratification of the sale, unless the pledgor's intent in so acting was to ratify, irrespective of the character of the sale, and of who was the purchaser.—*Sharpe v. National Bank*, (Ala.) 7 So. 106.

Conversion by pledgee.

8. Where a part owner of stock pledges it for his individual benefit, with the authority and consent of his co-owner, the pledgee is estopped to set up the co-owner's title as a defense to an action by the pledgor for its conversion.—*Sharpe v. National Bank*, (Ala.) 7 So. 106.

9. A complaint which, after stating that shares of stock had been pledged to defendant, avers that "defendant, in consideration of the premises, then and there undertook and promised plaintiff" to

hold the stock only as pledgee, but that, in violation of its promise, defendant sold and converted the stock to its own use, without giving plaintiff notice of the sale, and in which plaintiff seeks to recover as damages the full value of the shares alleged to have been converted, though informal, is good as a complaint in case.—*Sharpe v. National Bank*, (Ala.) 7 So. 106.

POWERS.

Of sale in mortgages, see *Mortgages*, 27-30.

Construction.

1. A conveyance of the interest of a deceased partner, in land held by the members of the firm as co-tenants, is not authorized under letters of attorney by his heirs giving power to the surviving partner "to settle all matters growing out of the firm business, to settle up and divide his estate, and to do all acts necessary to accomplish that end."—*Southern Cotton Oil Co. v. Henshaw*, (Ala.) 7 So. 760.

Authentication.

2. Acts of procuracy under private signature become authenticated when attached to and form parts of judicial proceedings, or are incorporated in an authentic act.—*Succession of Lehmann*, (La.) 7 So. 38.

PRACTICE IN CIVIL CASES.

See, also, *Appeal*; *Certiorari*; *Costs*; *Deposition*; *Error*; *Writ of*; *Exceptions*, *Bill of*; *Judgment*; *Jury*; *New Trial*; *Parties*; *Pleading*; *Prohibition*, *Writ of*; *Reference*; *Removal of Causes*; *Trial*; *Venue in Civil Cases*; *Writs*.

Nonsuit.

1. In the absence of a reconventional demand on the part of defendant, when the plaintiff fails to appear and prosecute his suit either in person or by attorney, a judgment of nonsuit only can be rendered against him, as provided by Code Prac. La. art. 536.—*Saunders v. Mangum*, (La.) 7 So. 715.

Docketing—Succession.

2. The opening of a succession is an independent proceeding, which ought to be docketed under a proper title, and numbered and allotted, as required by the constitution of Louisiana; and proceedings where there has been a failure to meet these requirements cannot be ratified by tutor or minors who have no right to waive the failure.—*James v. Mayor*, (La.) 7 So. 618.

Order striking demurrer from files.

3. Where the arguments on a demurrer and on motion to strike it from the files are heard together, and the court should properly have overruled the demurrer, an order striking it from the files will not be reversed.—*Wood v. Meyer*, (Miss.) 7 So. 359.

Prejudice.

Error without, see *Appeal*, 40.

Presumption.

See *Evidence*, 8-5.

On appeal, see *Appeal*, 36, 37.

PRINCIPAL AND AGENT.

See, also, *Attorney and Client*.

License tax on agency, see *License*, 2.

Notice to agent, see *Husband and Wife*, 2.

Liability of agent to principal.

1. An agent cannot acquire an interest adverse to his principal. If he purchases property of which he has the management, and which belongs to his principal, he must be considered as holding it in trust for his principal.—*McClendon v. Bradford*, (La.) 7 So. 78.

2. A counter-letter, retained by the agent who sells property for his principal, showing that a

less sum was received than that actually expressed in the deed, has no effect against the principal, not a party thereto, who sues to recover the price of the property.—*McClendon v. Bradford*, (La.) 7 So. 78.

PRINCIPAL AND SURETY.

Discharge of surety.

1. Where an insurance company receives from its defaulting agent all his assets, of every kind, and disposes of them, and applies the proceeds in partial payment of his defalcation, without the knowledge or consent of the sureties on his bond, such action operates as a discharge of the sureties, under Rev. Civil Code La. art. 3061, providing that such discharge shall result where, "by the act of the creditor, the subrogation to his rights * * * can no longer be operated in favor of the surety."—*New England & Mut. Life Ins. Co. v. Randall*, (La.) 7 So. 679.

2. Where persons have become sureties on a bond conditioned that H. shall pay for goods to be furnished to him, individually, and H. forms a partnership with another, the sureties are not liable for the default of the firm, though they knew of and consented to its formation, parol evidence being inadmissible to show such knowledge and consent, and thus to vary the terms of the bond.—*Crescent Brewing Co. v. Handley*, (Ala.) 7 So. 912.

Fraudulent representations.

3. Charges that the surety on a note was induced, by fraudulent representations, to obligate himself, must be established by irrefutable affirmative proof implicating the creditor, to upturn the otherwise unequivocal and absolute agreement.—*Rench v. Keenan*, (La.) 7 So. 589.

Rights of surety against creditor.

4. Where a creditor has applied the proceeds of a judicial sale of his debtor's land to the payment of a note secured by junior mortgage thereon, and then sues the surety on a note secured by prior mortgage on the same land, the surety may compel him to credit the amount already received on the note secured by the prior mortgage instead of on the other.—*Rench v. Keenan*, (La.) 7 So. 589.

Privileged Communication.

See *Witness*, 8.

PRIZE-FIGHTING.

Indictment.

1. As it is doubtful whether, to constitute a "prize-fight," there must be a fighting in public, and as Act Miss. March 7, 1882, making it "unlawful for any persons to engage in prize-fighting in this state," was intended to prohibit prize-fighting which is public in character, and tends to disturb the peace, it is not sufficient to indict under this statute by the use of the statutory words only; but the facts which, if proved, would show the defendant to be guilty of the statutory offense must be charged.—*Sullivan v. State*, (Miss.) 7 So. 275.

2. The indictment must charge that the persons fought together, and against each other, in order to constitute the offense of "engaging" in the fight, and an indictment which charges that S. did unlawfully engage in a prize-fight with K., "to-wit, did then and there enter a ring, commonly called a 'prize-ring,' and did then and there, in said ring beat, strike, and bruise said" K., is defective as the *videlicet* excludes the conclusion that K. fought.—*Sullivan v. State*, (Miss.) 7 So. 275.

Probate.

Of wills, see *Wills*, 8, 9.

Process.

See *Writs*.

PROHIBITION, WRIT OF.

When lies.

An order staying proceedings by creditors, rendered on an application for a respite, does not strip the lower court, which rendered it, of jurisdiction over a suit by creditors to annul it, coupled with a prayer for conservatory process; and prohibition does not lie to prevent such court from hearing and determining such suit.—*State v. Judge Tenth Judicial Dist.*, (La.) 7 So. 69.

Promissory Notes.

See *Negotiable Instruments*.

Public Improvements.

See *Municipal Corporations*, 21, 22.

PUBLIC LANDS.

School lands.

1. The title to school indemnity lands granted by the United States under Act Cong. May 20, 1826, is in the state in trust to use the lands or the proceeds of their sale for school purposes; and by Act Cong. Feb. 15, 1843, the state is authorized to sell and to convey a fee-simple title thereto; and under Rev. St. La. §§ 2951, 2952, the power to make such conveyance is vested in the governor and the register of the state land-office.—*State v. Nicholls*, (La.) 7 So. 738.

Patents.

2. A patent issued by the state, under Act Ala. Jan. 15, 1828, authorizing the sale of public school lands granted to the state by congress, is, under Code Ala. § 2781, providing that "patents * * * must be received in evidence without further proof," admissible in evidence, and raises a presumption that all required preliminary proceedings as to the selection of the lands by the general government, and for their sale, have been properly complied with, and, when accompanied by uninterrupted and notorious possession for 30 years, will prevail, as a legal title, against a certificate of entry subsequently issued by the United States land-office.—*Knabe v. Burden*, (Ala.) 7 So. 92.

Grants.

3. Lands granted by act of congress to the state of Alabama, to aid in the construction of certain railroads, and afterwards conveyed by the state to defendant railroad company, were mortgaged back to the state by an instrument containing a provision, authorized to be inserted by Act Ala. 1869-70, pp. 89-92, that defendant should have the privilege of "selling said lands, or any part thereof, in accordance with the acts of congress granting the same." *Held*, that one who derived title to a portion of such lands from a subsequent sale by defendant, made in direct violation of said acts of congress, took subject to the lien of the mortgage.—*Miller v. Swann*, (Ala.) 7 So. 771.

QUIETING TITLE.

When action lies.

1. When plaintiff has only an equitable title, derived from an agreement between herself and her co-devisees to divide the estate, by which the lot in controversy was allotted to her, a bill to remove a cloud will lie, though defendants are in possession.—*Echols v. Hubbard*, (Ala.) 7 So. 817.

2. A deed which is in fact only an option after its revocation, or after the expiration of the time limited, without performance or an offer to perform, is a cloud on the title; and its delivery and cancellation will be decreed.—*Borst v. Simpson*, (Ala.) 7 So. 814.

Evidence.

3. In an action to cancel a deed as a cloud on plaintiff's title, the bill averred that plaintiff's father bought the land from G. and had the title

made to plaintiff's grandfather, who paid the purchase money, which was afterwards accounted for by the father as an advancement, but failed to aver that G. had title, or that he was ever in possession. It was proved that plaintiff's father was never in possession. *Held*, that plaintiff failed to show a sufficient title as against an innocent purchaser, for value and without notice, of one in possession, who held under a fraudulent tax-title. —*Chiles v. Gallagher*, (Miss.) 7 So. 208.

Decree—Cancellation.

4. Where, on a bill to remove a cloud and cancel title, both parties claim from a common source, and defendant proves that he has secured the title derived from that source, he is entitled on his cross-bill to the relief of cancellation against plaintiff. —*People's Bank v. West*, (Miss.) 7 So. 518.

5. Nor is that relief to be denied because complainant in the cross-bill can try the validity of plaintiff's title by ejectment, for Code Miss. § 1883, provides that the real owner, whether in possession or not, can have cancellation decreed of any evidence, claim, or pretense of title which may cast suspicion on his title. —*People's Bank v. West*, (Miss.) 7 So. 518.

Qui Tam and Penal Actions.

Penalty for failure to satisfy mortgage, see *Mortgages*, 11.

RAILROAD COMPANIES.

See *Carriers; Horse and Street Railroads*.

Action for value of stock, see *Corporations*, 11.

Injuries to employees, see *Master and Servant*, 6-18.

Depot site.

1. Laws Miss. 1883, c. 26, § 2, provides that the railroad commissioners are authorized to designate the site of any new depot, and to prescribe the number and dimensions of the rooms therein, and provides for a penalty of \$50 per day against a railroad neglecting to comply with such order. *Held*, that the penalty cannot be enforced where a new depot was ordered to be built, but the number of rooms was not prescribed. —*State v. Alabama & V. R. Co.*, (Miss.) 7 So. 502.

Construction of road.

2. Where a railroad company fails to comply with the provisions of Act Cong. March 3, 1875, granting the right of way to railroads through the public lands of the United States, the company has no right to run its road through the land of a homesteader who had complied with the terms of the homestead law, although the homesteader had not at the time received his patent from the government. —*Savannah, F. & W. Ry. Co. v. Davis*, (Fla.) 7 So. 29.

3. A railroad company that has not complied with the terms of Act Cong. March 3, 1875, granting to railroad companies the right of way through the public lands, cannot assail the title of a homesteader found in possession of land through which the company desires to run its road. —*Savannah, F. & W. Ry. Co. v. Davis*, (Fla.) 7 So. 29.

Flowage.

4. In an action against a railroad company for obstructing water-courses and causing plaintiffs' land to be overflowed, it appeared that two streams ran through plaintiffs' land, and crossed defendant's road-bed, and that in one of them defendant erected and maintained for a few years a bulk-head which diverted the course of the water, and threw it on plaintiffs' land. Defendant also cut a ditch with its open face next to its road-bed, and threw up a levee across the entire western border of plaintiffs' land, which caused the water from both streams to be thrown back on the land; and, in repairing its trestles used for the outflow of the streams, defendant cut off the old piles which supported the trestles above the surface of the water, and left them to catch the drift, leaving but a small channel for the escape of the waters. *Held*, that the company was liable for the injury, though

the flow of water and accumulations in the streams were increased by natural causes, such as the clearing of the land and loosening of the soil by cultivation. —*Mississippi & T. R. Co. v. Archibald*, (Miss.) 7 So. 212.

5. One who purchases land subsequent to the building of the railroad, and with a full knowledge of the construction of the road-bed and trestles, may recover damages for the overflow of the land caused by obstructions erected by the company, though the company has done nothing to contribute to the injury since the acquisition of title by plaintiff, as the injury is a continuing one. —*Mississippi & T. R. Co. v. Archibald*, (Miss.) 7 So. 212.

Municipal aid.

6. On a question as to the validity of certain bonds issued by a county to a railway company, it was claimed that the issue was not authorized by two-thirds of the qualified voters, as required by Const. Miss. art. 12, § 14, and that such fact would appear from an inspection of the registration lists. The board of supervisors, in the performance of their duties, had declared that two-thirds of the voters had voted for the measure. *Held*, that a purchaser was not required to go behind such returns, and one who purchased for value, without actual notice of the wrongfulness thereof, was entitled to recover. —*Madison County v. Brown*, (Miss.) 7 So. 516.

Consolidation.

7. The power of a railroad company to acquire land in aid of the construction of its road will not pass to a consolidated corporation of which it forms a part, unless its line, when completed according to its charter, will form a continuous track with those of the other constituents of the consolidated corporation, so as to admit of the passage of trains without break or interruption; Code Ala. 1886, § 1883, providing that railroad companies whose tracks, when completed, admit the continuous passage of cars, without break or interruption, may consolidate themselves into one corporation, which shall possess all the powers, rights, and franchises of its constituent members. *Railway Co. v. Wilks*, 6 So. 34, followed. —*Georgia Pac. Ry. Co. v. Gaines*, (Ala.) 7 So. 332.

Accidents at crossings.

8. In an action for the death of plaintiff's intestate, it was shown that deceased was driving a team in an open field along a road that crossed a railroad track; that when he approached the crossing he looked straight ahead, and did not stop, and so was struck by a passing train; that on either side of the crossing the view of the track was unobstructed for half a mile; that persons heard the train at that distance from the railroad, and that the engineer, on discovering that deceased was dangerously near the crossing, blew the whistle, and rang the bell. *Held*, that deceased was guilty of contributory negligence that would defeat a recovery, though defendant's servants were negligent in not blowing the whistle a quarter of a mile from the crossing, as required by the company's rules. —*Brown v. Texas & P. Ry. Co.*, (La.) 7 So. 682.

Stock-killing cases.

9. Where a horse is run down and killed by a train of cars, the burden is upon the railway company to show freedom from negligence, under Code Ala. §§ 1144, 1147. —*Louisville & N. R. Co. v. Kelsey*, (Ala.) 7 So. 648.

10. A railway company is liable for an animal killed by the failure of the engineer to keep a diligent lookout, though, after perceiving it, he used all possible means to avoid striking it. —*East Tennessee, V. & G. R. Co. v. Watson*, (Ala.) 7 So. 813.

11. The failure to ring the bell or blow the whistle to frighten away stock near the track may be negligence; and an instruction that there is no duty to do either is properly refused. —*East Tennessee, V. & G. R. Co. v. Watson*, (Ala.) 7 So. 813.

12. It is not error to refuse to instruct the jury that, though plaintiff makes a *prima facie* case

by proving the killing of his mule, yet they cannot find for him unless the facts and circumstances proved show negligence on the part of the company, as Code Miss. § 1059, places the burden on the railroad company to show a want of negligence in such cases.—*Louisville, N. O. & T. Ry. Co. v. Smith*, (Miss.) 7 So. 212.

Stock-killing cases—Pleading.

13. A declaration against a railroad company to recover damages for killing a mule on its road need not be more specific in its allegation as to locality than to state the county in which the killing occurred.—*Jacksonville, T. & K. W. Ry. Co. v. Wellman*, (Fla.) 7 So. 845.

14. Negligence is alleged with sufficient certainty in a complaint against a railroad company for killing stock by stating that "because of the negligence or want of skill of the defendant's servants in the management and running of the train" it ran over and killed a colt.—*East Tennessee, V. & G. R. Co. v. Watson*, (Ala.) 7 So. 813.

— Evidence.

15. In an action against a railroad company for killing plaintiff's mule, the report of an employee of the company, as to the killing of an animal, is not admissible as evidence on behalf of the company, unless it be shown that it was the duty and business of the employee to make such report, and that it was made contemporaneously with the occurrence.—*Jacksonville, T. & K. W. Ry. Co. v. Wellman*, (Fla.) 7 So. 845.

16. In an action against a railroad company for killing plaintiff's mule, the engineer in charge of the engine had testified for the company, and on cross-examination was asked, "What would be the consequence if you should kill stock carelessly and negligently, and should report it to your company?" The question was objected to, on the ground that it was new matter, and was irrelevant and incompetent, but the court overruled the objection. *Held*, that the question was proper, as a means of furnishing the jury a test of the value of his evidence through his relation to the company, and his interest and inclination towards the parties.—*Jacksonville, T. & K. W. Ry. Co. v. Wellman*, (Fla.) 7 So. 845.

— Sufficiency.

17. Evidence that the tracks of a horse which was killed by a train were seen several hundred steps on the track, but that the engineer and fireman were both engaged at their duties on the engine, and neither of them saw the horse until he was struck, is insufficient to justify a verdict against the company.—*Howard v. Louisville, N. O. & T. Ry. Co.*, (Miss.) 7 So. 216.

18. In an action against a railroad company for killing a mule, the engineer testified that while he was running his train about 23 miles an hour he saw the mule about 10 yards in front of his engine; that he blew the stock alarm, and did all in his power to prevent a collision, but could not avoid striking the mule. There was no conflict in the evidence. *Held*, that it was error to refuse to charge the jury to find for defendant.—*Louisville, N. O. & T. Ry. Co. v. Smith*, (Miss.) 7 So. 212.

19. Acts Fla. 1887, c. 3740, makes the fact of injuring or killing live-stock by the engine, etc., of a railroad company, when proven to the satisfaction of the jury, *prima facie* evidence of negligence. In an action for killing plaintiff's mule this fact was proved, and the evidence was conflicting in regard to the particular carelessness which it was claimed led to the injury. *Held*, that a verdict for plaintiff would not be disturbed.—*Jacksonville, T. & K. W. Ry. Co. v. Wellman*, (Fla.) 7 So. 845.

20. In an action against a railroad company for negligently killing plaintiff's mare, there was evidence that the accident occurred on a clear, starlit night, and that before she was killed the mare ran for 300 yards down the track in front of defendant's train. The engineer testified that he was on the lookout, but only saw the mare when within 30 yards of her, and that it was then impossible to stop

the train. *Held*, that the negligence of the engineer in failing to see the mare was a question for the jury.—*Kent v. Louisville, N. O. & T. Ry. Co.*, (Miss.) 7 So. 391.

21. Where the evidence for plaintiff in an action against a railroad company for negligently killing plaintiff's stock is to the effect that the remains of the animals were scattered along the track for more than 300 yards; that they ran some distance on the track in front of the train, which was going up grade, before being struck; that the whistle was not blown until the first one was struck; and that the distance from where they were first seen to where the first animal was struck was 300 yards; while the evidence for defendant is that the animals jumped on the track about 100 feet in front of the engine, and that everything was done to prevent the collision,—the question should be submitted to the jury.—*Cage v. Louisville, N. O. & T. Ry. Co.*, (Miss.) 7 So. 509.

22. In an action against a railroad company for killing plaintiff's mule, plaintiff proved that no stock alarm was given. The evidence for defendant was that it was nearly dark at the time of the accident; that the head-light of the engine had been lighted a short time before; that the whistle blew and the bell was rung for the road crossing; that only the fireman saw the mule, and he did not have time to call the attention of the engineer to it till too late to prevent the collision; and that the train was long and heavy, going down-grade, and running very rapidly, and could not have been stopped if the attempt had been made when the mule was first seen. *Held*, that defendant was not negligent.—*Kansas City, M. & B. R. Co. v. Myers*, (Miss.) 7 So. 821.

23. In an action against a railroad company for the negligent killing of plaintiff's stock, the conductor and engineer testified that they first saw the stock 35 or 40 feet ahead of the train, between the track and a fence running parallel to it; that they ran along the fence 200 feet, to where it stopped against a trestle, and there jumped on the track in front of the train; that the train of 16 cars loaded with iron, and carrying 160 pounds of steam, could not have been stopped under 500 feet; and that as soon as the stock were seen brakes were applied, and every effort made to stop. Plaintiff showed that the distance from where the stock were seen to the trestle was 336 feet; that to that point, from half a mile below, the grade was so heavy that it was difficult for trains to get over it; and that there were fresh tracks running from where the stock were seen, directly down the track, to where they were killed. *Held*, that the question of defendant's negligence was for the jury.—*Kansas City, M. & B. R. Co. v. Doggett*, (Miss.) 7 So. 278.

Fires.

24. In an action for burning cotton, instructions that the burden of proof is on plaintiff, not only to show negligence on the part of defendant, but also that he himself was free from negligence, are not accurate statements of the law, and are properly refused.—*Louisville, N. O. & T. Ry. Co. v. Natchez, J. & C. R. Co.*, (Miss.) 7 So. 350.

25. An injury caused by fire communicated by a train is an injury "inflicted by the running of the locomotives or cars" of a railroad company, within the meaning of Code Miss. § 1059, making proof of such an injury *prima facie* evidence of negligence.—*Louisville, N. O. & T. Ry. Co. v. Natchez, J. & C. R. Co.*, (Miss.) 7 So. 350.

RAPE.

Attempt to commit.

1. On a trial for an attempt to commit a rape, the prosecuting witness testified that, while riding horseback, she stopped her horse, intending to ask defendant's assistance in holding it while a train was passing; that, after the train had passed, defendant caught hold of her riding skirt; and that she struck her horse, and in this way got loose from defendant. *Held*, that a verdict of guilty would be set aside, as these facts do not give rise to a reasonable inference that defendant intended

to commit a rape.—*Green v. State*, (Miss.) 7 So. 826.

Indictment.

2. Under Crim. Code Ala. § 8739, which provides for the punishment of "any person who has carnal knowledge with any female under ten years of age, or abuses such female in the attempt to have carnal knowledge of her," an indictment is sufficient which charges that defendant "did carnally know or abuse in the attempt to know, * * * a girl under the age of ten years."—*McGuff v. State*, (Ala.) 7 So. 35.

Evidence.

3. In a prosecution for rape, statements made by defendant several months before the offense was committed, tending to show his carnal passion for prosecutrix, and his belief that she would not yield to his desire, are admissible.—*Barnes v. State*, (Ala.) 7 So. 33.

4. Evidence that prosecutrix's husband was jealous of her, or jealous of her and defendant, or objected to prosecutrix's being with defendant or other men, is inadmissible to support defendant's claim of prior intimacy with her, it being merely conjectural as to that fact.—*Barnes v. State*, (Ala.) 7 So. 33.

5. Evidence that the husband of prosecutrix told witness of the alleged injury, and went with him to the place where the husband said it had happened; that witness did not know it was the place or that the husband knew it was; and that they found there no indications of a struggle,—is inadmissible, the *locus in quo* not being properly identified.—*Barnes v. State*, (Ala.) 7 So. 33.

6. Where complaints were made by prosecutrix to her husband after the alleged injury, it is permissible for the state to prove the particulars by him.—*Barnes v. State*, (Ala.) 7 So. 33.

Verdict.

7. On an indictment for rape, a verdict of "guilty of an assault with intent to commit rape" is authorized by Rev. St. La. § 1053, providing that where one is indicted for a crime the jury may return a verdict that defendant is not guilty of the crime charged, but is guilty of an attempt to commit the same.—*State v. May*, (La.) 7 So. 60.

Real Action.

By purchaser at judicial sale, see *Judicial Sales*, 2.

Reasonable Doubt.

See *Criminal Law*, 67-71.

Receivers.

Of firm, see *Partnership*, 9.

Recognizance.

See *Bail*.

Reconvention.

See *Set-Off and Counter-Claim*.

RECORDS.

Estoppel by, see *Estoppel*, 2.
On appeal, see *Appeal*, 28-31.

Establishment of destroyed records.

Under Act No. 102 of 1863, providing for the establishment of destroyed records in the courthouse at Alexandria, in Rapides parish, by judgment in a suit brought for the purpose of such establishment, to which all parties in interest must be made parties, the record and judgment in the suit has the force and effect of the original record destroyed, and is the best evidence of its contents.—*Starnes v. Hadnot*, (La.) 7 So. 672.

Redemption.

From mortgage foreclosure, see *Mortgages*, 24-26.
taxation, see *Taxation*, 36.

REFERENCE.

Report—Setting aside.

1. A chancellor has authority to set aside the report of a referee *ex mero motu*, and order another reference, with different directions as to the taking of an account, or for the purpose of receiving additional evidence, not at variance with the principles settled by the decree.—*McCurdy v. Middleton*, (Ala.) 7 So. 655.

Correction.

2. Upon sustaining an exception to the report of a referee going to a single item of the account, which should have been, but was not, allowed, the chancellor may make the correction, thereupon state the account, and render a decree accordingly, without further reference.—*McCurdy v. Middleton*, (Ala.) 7 So. 655.

RELEASE AND DISCHARGE.

See, also, *Payment*.

Of surety, see *Principal and Surety*, 1, 2.

Proof.

Former partners both testified to the fact of a release of the retired partner from liability for a firm debt. The retired partner was insolvent at the time of dissolution, and the other took the entire stock, assumed the debts, and continued the business. He had an expectancy by inheritance, of which the creditor was aware. The creditor, in trying to force payment from him, never mentioned the retired partner as being held for the debt. His name was not at first in the affidavit to the account when suit was brought, but was subsequently interlined. He declared to the sheriff having the execution issued on the judgment that the creditor and his copartner fully understood that it was not his debt. The testimony of the creditor was confused and inconsistent. *Held*, that the release was established.—*Rice v. Tobias*, (Ala.) 7 So. 765.

Remote and Proximate Cause.

See *Negligence*, 1, 2.

Removal.

Of guardian, see *Guardian and Ward*, 6.

REMOVAL OF CAUSES.

Application.

1. Under the removal of causes act, the right of removal is determined on the face of the petition as matter of law. The facts alleged are taken as true, and cannot be contested in the state court.—*Guinault v. Louisville & N. R. Co.*, (La.) 7 So. 62.

2. If verification of the petition for removal be essential, the affidavit of the attorney for a foreign corporation is sufficient.—*Guinault v. Louisville & N. R. Co.*, (La.) 7 So. 62.

Effect.

3. On filing of a petition for removal of a cause from a state to a federal court, which on its face shows that the cause is within the statutes of the United States, by which alone the right of removal is governed, the state court loses jurisdiction *eo instanti*, without the necessity of a formal order of removal.—*Stix v. Keith*, (Ala.) 7 So. 423.

4. On filing of such petition, an issue of fact arising thereon can only be tried in the federal court, on motion made there to remand the cause to the state court.—*Stix v. Keith*, (Ala.) 7 So. 423.

Refusal to grant.

5. A party failing to obtain a removal loses none of his rights by defending the action in the state courts when forced into a trial.—*Stix v. Keith*, (Ala.) 7 So. 423.

6. In such case, an order of removal may be made after reversal of a judgment against the petitioner by the supreme court of the state.—*Stix v. Keith*, (Ala.) 7 So. 423.

Reports.

Of referees, see *Reference*.

Res Adjudicata.

See *Judgment*, 8-12.

Rescission.

Of contracts, see *Equity*, 2-10; *Sale*, 8.

Review.

On appeal, see *Appeal*, 32-42.

Review, Bill of.

See *Equity*, 23.

Revocation.

Of wills, see *Wills*, 7.

RIPARIAN RIGHTS.

See, also, *Navigable Waters*.

Conveyance of, see *Deed*, 8.

Accretion.

In ejectment, where the evidence shows that the land in dispute lies outside of one of the lines of plaintiff's land, which, at the time, bordered on a bay which has since become filled up, thus making the land in dispute, and that this bay had been ceded to the state, plaintiff cannot recover, as title to the land is in the state.—*Buras v. O'Brien*, (La.) 7 So. 682.

Risk of Employment.

See *Master and Servant*, 21.

Rivers.

See *Navigable Waters*; *Riparian Rights*.

Roads.

See *Highways*.

ROBBERY.**Evidence.**

1. On the trial of an indictment for robbery, unsworn statements by the victim of the robbery, which she was heard to make several hours after the alleged robbery, purporting to be explanatory of the transaction, are inadmissible in evidence.—*Moses v. State*, (Ala.) 7 So. 101.

2. In a prosecution for robbery, a witness was permitted to testify that defendant had made three several statements to him as to where she had obtained the articles of jewelry discovered in her possession. The first was that she had gotten them from her husband. The other two statements he did not remember, "except that they were different from each other and from the first statement." *Held*, that the testimony should have been excluded.—*Moses v. State*, (Ala.) 7 So. 101.

SALE.

See, also, *Judicial Sales*; *Vendor and Vendee*.

On Sunday, rights of seller's creditors, see *Sunday*, 2.

When title passes.

1. An agreement between a vendor and vendee, entered into when they commenced to take the inventory of the goods sold, that the inventoried goods should belong to the vendee, "to do with as he pleased" in respect to the matter of selling to customers, does not clearly imply a waiver of the stipulation, in a written contract between the par-

ties, that the vendor should retain title until the goods are paid for.—*Stone v. Waite*, (Ala.) 7 So. 117.

Breach of warranty—Damages.

2. Under Rev. Civil Code La. art. 2503, providing that "the parties may, by particular agreement, add to the obligation of warranty which results of right from the sale," where a person, in selling a horse, specially guarantees that he is free from a certain disease, and it is afterwards found that he did have such disease, the buyer may recover, not only for this particular horse, but for other horses to which the disease is communicated, and which die therefrom; nor can the seller escape liability on the ground that he did not know the horse was diseased.—*McKee v. Jones*, (Miss.) 7 So. 848.

Rescission.

3. Where the sale of a chattel on credit is rescinded by the seller, the fact that the latter fails to deliver the vendee's note on the return of the chattel does not make him guilty of a conversion of the chattel, the rescission of the sale rendering the note valueless.—*Volking v. Huckabay*, (Miss.) 7 So. 825.

Conditional sales.

4. Where a note is given in payment for a machine to which title is to remain in the seller until the note is paid, and is left with a third person, who is to receive chattels in payment, and surrender the note to the maker, and after this surrender is made the chattels are claimed under execution by the maker's creditors, the redelivery of the note by him to the third person, agreeing that it should be considered that no payment had been made, vests the title to the machine again in the seller, though the holder of the note had no other authority than to receive payment thereof, and surrender it.—*Bolling v. Kirby*, (Ala.) 7 So. 914.

5. When it is agreed in notes given for the unpaid purchase money of machinery that the title to the machinery shall remain in the seller until the payment of the notes, the reserved title is merely a security for the payment, and the seller may waive it, and treat his debt as an ordinary debt of the purchaser.—*Tanner & De Laney Engine Co. v. Hall*, (Ala.) 7 So. 187.

6. In such a case, when the seller levies an attachment on the machinery and buys it at the sale, he waives his lien, acquires a new and complete title to the machinery, and is entitled to any increase of price obtained at a subsequent sale.—*Tanner & De Laney Engine Co. v. Hall*, (Ala.) 7 So. 187.

7. Code Miss. § 1800, provides that, "if any person shall transact business as a trader or otherwise," in his own name, and fail to disclose the names of his partners or principals by placing up a sign in his business house, all the property used in the business shall, as to his creditors, be treated as his property. *Held*, that where an hotel-keeper purchased a cooking-range under a recorded agreement that title was to remain in the seller until the price was paid, one who succeeded him as owner of the hotel cannot hold the range by virtue of this section.—*John Van Range Co. v. Allen*, (Miss.) 7 So. 499.

8. Plaintiff sold machinery to A., reserving the title until the same should be paid for, and A. and defendant formed a manufacturing company, and advertised under the name of A., with the addition of the words "Manufacturing Co." The articles of incorporation were never approved. Defendant afterwards became a creditor of the company, and had the machinery sold under execution to satisfy his debt. *Held*, that the machinery was not liable for the company's debts under Code Miss. 1880, § 1800, which provides that, if any person shall transact business as a trader, or otherwise, with the addition of the words "and Company," "and Co.," or like words, and fail to disclose the name of his principal or partner, all the property used or acquired in such business shall be liable for his debts, as the machinery was not used in such business with the consent of plaintiff.—*Adams v. Berg*, (Miss.) 7 So. 225.

SCHOOLS AND SCHOOL-DISTRICTS.

School lands, see *Public Lands*, 1.

Officers—School superintendent.

1. Act Miss. March 7, 1888, which provides for the election of county superintendents of education in part only of the counties of the state, does not thereby conflict with Const. Miss. art. 8, § 1, requiring "a uniform system of free public schools."—*Wynn v. State*, (Miss.) 7 So. 858.

2. Const. Miss. art. 1, § 18, provides that "no property or educational qualification shall ever be required for any person to become an elector." Article 7, § 2, makes all male inhabitants of the state, with certain exceptions, who are 21 years of age, qualified electors; and section 4 provides that "no person shall be eligible to any office * * * who is not a qualified elector." The constitution prescribes special qualifications for many offices created by it. *Held*, that for other offices no qualifications were required, except that of being a qualified elector; and therefore section 2 of the act of March 7, 1888, which provides that "no person shall be eligible to such office of county superintendent of education who does not hold a first-grade certificate," was unconstitutional.—*Wynn v. State*, (Miss.) 7 So. 858.

Treasurer of school-board.

3. The fact that the books of the treasurer of a school-board, whose accounts have been settled, and who has received a discharge, appear to have been kept in a confused and irregular manner, and differ from his settlement with the board, does not create any liability on his bond, where it is not shown that he received any money for which he failed to account.—*Parish School Board v. Packwood*, (La.) 7 So. 587.

4. Where a school-board has examined and approved the accounts and vouchers of its treasurer, and granted a discharge, the discharge is conclusive unless procured by fraud; and, in an action by the successor of such board to rescind the settlement and discharge, the burden is on plaintiff to show fraud.—*Parish School Board v. Packwood*, (La.) 7 So. 587.

Assault by teacher.

5. On the trial of a school-master for assault and battery committed upon a pupil, the evidence showed that, after a severe chastisement administered in the school-room, defendant followed the pupil into the school-yard, and struck him with a limb or stick, and then put his hand in his pocket as if to draw a knife; that he afterwards struck him in the face with his fist, and hit him over the head with the butt-end of the switch. From these blows the eye of the boy was "considerably swollen," and was "closed for several days." Defendant was apparently very angry all the time, and was very much excited; and, after he got through with the whipping, he remarked, in an excited, angry voice, in the presence of the school and others, that he "could whip any man in China Grove beat." *Held*, that there was ample room for the inference of legal malice, such as to warrant a verdict of guilty.—*Boyd v. State*, (Ala.) 7 So. 268.

Taxation.

6. Act Miss. March 18, 1886, requiring the board of supervisors of each county, annually, to levy upon the taxable property of each county a tax of three mills on the dollar for school purposes, but which does not include a levy upon the taxable property within the limits of a town which is a separate school-district, is not unconstitutional because the schools in the town may get the benefit of a tax on a larger amount of property, in proportion to the number of children of the school age, than the county.—*Bordeaux v. Meridian Land & Industrial Co.*, (Miss.) 7 So. 286.

7. By Code Miss. 1880, towns having 1,000 inhabitants could elect to be separate school-districts, and by section 781 the board of mayor and aldermen are authorized to levy a tax sufficient to maintain the free public schools in such town.

By the preceding section, boards of supervisors are authorized to levy a tax upon the taxable property of the county for the maintenance of schools in the county. *Held*, that the act of March 18, 1886, requiring the board of supervisors of each county, annually, to levy upon the taxable property of such county a tax of three mills or more on the dollar, does not include a levy upon the taxable property within the limits of a town which is a separate school-district, as the term "county" was manifestly used in the sense of a school-district outside of a town which is one.—*Bordeaux v. Meridian Land & Industrial Co.*, (Miss.) 7 So. 286.

8. The statute of Mississippi limits county taxation for Marion county to 13 mills, only 3 mills of which are for school purposes, but provides that the levy may be 15 mills, where the county owes debts. *Held*, that, in addition to the levy of 3 mills for school purposes, a levy may be made to pay teachers' warrants issued in a previous year, provided such additional levy does not raise the amount of taxation above 15 mills, since such warrants are debts of the county.—*Cowart v. Taxworth*, (Miss.) 7 So. 850.

Scire Facias.

On bail-bond and judgment, see *Bail*, 11-18.

SET-OFF AND COUNTER-CLAIM.

Debt due to garnishee, see *Garnishment*, 8.

When allowed.

1. Code Ala. § 2632, providing that "when the defendant pleads a set-off to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant is nevertheless entitled to his set-off, where it was a legal, subsisting claim at the time the right of action accrued to the plaintiff on the claim in suit," applies, in a suit to redeem land sold under a power in a mortgage, to a set-off which existed in favor of plaintiff at the time default by the mortgagor was made, the saving provisions of the statute not being defeated by the fact that the mortgagee sold under the power instead of filing a bill to foreclose, and thus forced the mortgagor to take the initiative in the courts.—*Conner v. Smith*, (Ala.) 7 So. 150.

2. Under Code Ala. § 2678, providing that mutual debts, liquidated or unliquidated demands, not sounding in damages merely, may be used as a set-off, a claim in favor of a mortgagor against the mortgagee for conversion of personality may be relied on by the assignee of the equity of redemption, in a suit to redeem land sold under a power of sale in the mortgage, to reduce the mortgage debt, where the claim was transferred to the assignee before the mortgagee began proceedings under the mortgage, though it was after default by the mortgagor.—*Conner v. Smith*, (Ala.) 7 So. 150.

Pleading.

3. Failure by a defendant to plead a set-off in an action brought against him in a foreign state will not prevent him from relying on such set-off in an action on the judgment brought in Alabama, where the settled doctrine is that defendant's failure to plead a set-off will in no wise affect or impair his right so to do in a subsequent action by the same plaintiff.—*Roach v. Privett*, (Ala.) 7 So. 808.

Evidence.

4. Where it is shown that defendant had obtained judgment on certain counter-claims set up in defense of an action on a note, testimony as to the advice which induced him to procure judgment thereon is not admissible.—*C. Aultman & Co. v. Gamble*, (Ala.) 7 So. 248.

Settlement.

See *Payment; Release and Discharge*.

Of accounts of executors, etc., see *Executors and Administrators*, 16-24.

Sewing-Machines.

License tax on agencies, see *License*, 2.

SHERIFFS AND CONSTABLES.

Indemnity bond to sheriff, who may sue thereon, see *Bonds*.

Duties and liabilities.

1. In an action against a constable for money collected under final process, and not paid over, and for statutory damages, it is no defense to allege that he retained the money merely because the defendant in execution insisted on its application to some other debt.—*Mackey v. Smith*, (Miss.) 7 So. 222.

2. Where a constable levies an attachment for rent on cotton, corn, and potatoes, and the tenant replevies the two latter, but leaves the cotton, which is sold, it is no defense to an action against the constable for failure to turn over the proceeds, that he desired the direction of the court as to their application, as such attachment is in the nature of final process, and returnable to no court.—*Mackey v. Smith*, (Miss.) 7 So. 222.

Unlawful seizure.

3. A plea in justification by a sheriff, that he had taken the property under an execution in his hands, issued out of a certain court in favor of the plaintiff therein and against the defendant therein, the husband of the present plaintiff, is insufficient, in its description of the process, in failing to show the validity of the process, and that the property belonged to the defendant in the execution, or was liable to it.—*Daniel v. Hardwick*, (Ala.) 7 So. 188.

4. A demurrer to a plea in justification by a sheriff, that he took the property on an execution against plaintiff's husband, having been sustained, and defendant having failed to plead over, he cannot on the trial introduce evidence of the judgment and execution, for the purpose of showing that the plaintiffs therein were creditors of the husband, and that the wife's claim is fraudulent as to them.—*Daniel v. Hardwick*, (Ala.) 7 So. 188.

Shipping.

Taxation of vessels, see *Taxation*, 2.

Special Grand Jury.

See *Grand Jury*, 2.

SPECIFIC PERFORMANCE.

Contracts enforceable.

1. A person cannot be compelled to perform a contract to purchase land where it appears that his vendor's title was acquired by partition of land owned in common by a father and his minor children, in which partition the minors were not represented by their tutor, as required by Act La. No. 25 of 1878.—*James v. Mayor*, (La.) 7 So. 618.

2. Where defendant leases land, reserving the right to cancel the lease in case a sale of the land is made, and a sale is made within the specified time, which is agreed to by defendant, who fails to cancel the lease, the purchaser is entitled to a decree for specific performance, with damages for the delay.—*Thurman v. Pointer*, (Miss.) 7 So. 215.

3. Where there is a contemporaneous written agreement by the grantee named in a trust-deed in the nature of a mortgage, that, in default of payment by the grantor of the sum secured, he will purchase the land at a price to be fixed by appraisal, the performance of the conditions of such a contract, and acquiescence therein by the party thereto who does not sign it, is a sufficient consideration for its enforcement against the other, who does.—*Atkinson v. Whitney* (Miss.) 7 So. 644.

Laches of complainant.

4. A delay for 14 years to bring an action for specific performance is not sufficiently excused by

a general averment of ignorance, without distinct allegations of specific facts showing good reasons therefor.—*Haggerty v. Elyton Land Co.*, (Ala.) 7 So. 651.

5. A bond for a deed, stipulating that the erection of certain improvements within six months is the principal consideration of sale, and that a failure so to do will work a forfeiture, must be strictly construed, and inexcusable neglect to make the required improvements for two years is a good defense to a bill by the heirs of the purchaser for specific performance.—*Haggerty v. Elyton Land Co.*, (Ala.) 7 So. 651.

6. Where a purchaser of lands who had agreed to erect thereon one residence within four months, and another within a year, was notified within the four months, and while building the first house, to surrender possession to the vendor, who shortly after sued in ejectment, the failure to build the second house within the year was not the laches of the purchaser, and did not estop him from obtaining equitable relief.—*Powell v. Higley*, (Ala.) 7 So. 440.

Parties.

7. A purchaser from a married woman of property bought by her during coverture with her paraphernal funds cannot be compelled to accept title until presumption that it is community property has been overcome by proper proof; and, when it appears that a judicial mortgage is recorded against the husband, the purchaser may require such mortgage creditor to be made a party to a suit by the vendor for specific performance.—*Durruty v. Musacchia*, (La.) 7 So. 535.

Relief denied—Lien for reimbursements.

8. Where plaintiff asked a specific performance, and failed to make out a case for it, but showed facts entitling him to have a lien declared upon the premises for reimbursements, the case was properly retained for the purpose of giving such relief.—*Powell v. Higley*, (Ala.) 7 So. 440.

STATES AND STATE OFFICERS.

Actions against state, see *Mandamus*, 5.

License by state, see *License*.

Action by state.

1. Code Ala. § 2573, authorizes suits in ejectment by the state in all cases where under like circumstances an action could lie between individuals.—*Gaston v. State*, (Ala.) 7 So. 340.

2. Under Code Ala. § 960, cl. 4, the state may maintain ejectment for lands constituting the sixteenth sections, which it holds in trust for the several townships of the state.—*Gaston v. State*, (Ala.) 7 So. 340.

Statutes.

Amendment, see *Carrying Weapons*, 1.

Stock.

Corporate stock, see *Corporations*, 8-12.

Killed by locomotive, see *Railroad Companies*, 9-23.

SUBROGATION.

Rights of mortgagees.

1. Payment of a note secured by mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party to whom he paid; but the payment will extinguish the debt, and the mortgage given to secure it; and the claim for reimbursement will constitute the party who paid an ordinary creditor of him for whose benefit the payment was made.—*Weil v. Enterprise Ginney & Manuff'g Co.*, (La.) 7 So. 623.

2. After pleading title by purchase to certain notes secured by mortgage, and a consequent subrogation to the priority under the mortgage, plaintiff cannot be permitted, after judgment go-

ing against him because such purchase was not proved, to set up title by subrogation; especially where that theory was expressly repudiated originally.—*Weil v. Enterprise Ginnery & Manuf'g Co.*, (La.) 7 So. 623.

3. Where a wife paid a balance due on a mortgage of land in which she had a life-interest, executed by the husband and wife for his debt, her devisees are entitled, as against his heir, to be subrogated to the right of the mortgagee to the extent of the amount so paid.—*Ohmer v. Boyer*, (Ala.) 7 So. 663.

4. Though at law an absolute deed intended to operate merely as a mortgage is absolutely void as to the existing creditors of the grantor, yet in equity, where no actual fraud is proven, the grantee, who assumed the payment of the grantor's unpaid purchase-money notes, will be permitted to hold his deed as a means of reimbursement for freeing the land from the purchase-money lien.—*Ruse v. Bromberg*, (Ala.) 7 So. 384.

Pleading and proof.

5. A party who claims the ownership of a note secured by mortgage, and a subrogation to the mortgage, by means of a purchase, must be held to his pleadings, and be denied the right of proving his right of subrogation by some other mode.—*Weil v. Enterprise Ginnery & Manuf'g Co.*, (La.) 7 So. 622.

Summons.

See *Writs*.

SUNDAY.

Validity of contract made on Sunday, see *Conflict of Laws*, 1.

Sunday games.

1. Playing at cards or dice on Sunday is not within the prohibition of Code Miss. 1880, § 2951, forbidding "farces or plays of any kind, or any games, tricks, juggling, * * * or any such like show or exhibition," etc., on that day, as this refers to public exhibitions.—*Rucker v. State*, (Miss.) 7 So. 223.

Sunday sales.

2. The fact that a bill of sale was executed on Sunday, in pursuance of the terms of a sale which was really made on Friday, did not invalidate such sale.—*Foster v. Wooten*, (Miss.) 7 So. 501.

—Rights of sellers' creditors.

3. The law will not aid a vendor or his creditor to recover property delivered and paid for under a sale that was void because made on Sunday; and, on the trial of an attachment levied by a creditor of the vendor of such a sale upon chattels in the hands of the vendee, it was error to charge that sales of personal property made on Sunday are void, and pass no title, as tending to mislead the jury into the belief that such chattels were still subject to attachment as the property of the vendor.—*Foster v. Wooten*, (Miss.) 7 So. 501.

Surviving Partners.

See *Partnership*, 7-9.

Tacking.

Possessions, see *Adverse Possession*,

TAXATION.

See, also, *Constitutional Law*, 8-12.

For school purposes, see *Schools and School-Districts*, 6-8.

In cities, see *Municipal Corporations*, 24-30.

Of banks, see *Banks and Banking*, 1-3.

Taxable persons and property.

1. A conveyance in the form of a deed contained the condition that the grantor might "redeem" the property within five years, on the payment of a sum equal to the consideration and

interest, and provided that a failure to pay such sum when due, or to pay the interest annually, should operate to make the conveyance absolute; that until default grantor should retain possession of the property. On the question arising as to whether the grantee was assessable for taxes as a mortgagee, parol evidence showed that at the time of the conveyance the grantor was indebted to the grantee in the exact amount of the consideration named, to secure the most of which the latter held a mortgage on the lands conveyed; that he was also largely indebted to others; that this instrument was made under an arrangement to enable him to get out of debt; that the grantee thereupon released and surrendered all evidences of indebtedness against him; that neither afterwards considered any debt existing between them; that subsequently grantor gave grantee a quitclaim deed surrendering his rights to "redeem," and took a lease. *Held*, that the right of grantor was to repurchase only, and that grantee was not liable to taxation as a mortgagee.—*Thomas v. Board of Sup'rs*, (Miss.) 7 So. 552.

2. Vessels are subject to state taxation, like any other property, and as such are liable to seizure for taxes levied and due thereon; and such seizure is not a proceeding *in rem* to be governed by rules of admiralty.—*Oteri v. Parker*, (La.) 7 So. 570.

3. The taxation of the capital stock of a private corporation is a taxation of its property, and not of its franchises and privileges; and Code Ala. § 473, requiring that the chief officer of such a corporation shall make return of all taxable property, stating the number of shares of stock, their par and market value, and the items of property in which its capital stock is invested, was not intended to be determinative of the character of the capital stock, but only to prescribe a method of listing the property of the corporation, and furnish data from which to ascertain the assessable value of whatever its capital was invested in.—*State v. Stonewall Ins. Co.*, (Ala.) 7 So. 753.

4. Code Ala. § 453, subd. 9, providing that the capital stock of private corporations, etc., shall be taxable, except so much thereof as may be invested in property otherwise taxed, was only intended to prevent double taxation of taxable property, and does not render taxable such portion of the capital stock of an insurance company as is invested in Alabama state bonds, which, by section 451, subd. 2, are made non-taxable.—*State v. Stonewall Ins. Co.*, (Ala.) 7 So. 753.

Exemptions.

5. Const. La. 1879, § 207, exempted from taxation for 10 years, property employed in certain manufactures. An amendment promulgated May 12, 1888, extended the exemption 20 years from the adoption of the constitution of 1879, and included therein manufactures of ice. Taxes for 1888 were assessed to an ice factory, under Laws La. 1836, Act 98, which requires tax-rolls to be completed March 31st, and filed with the collector by May 1st, and makes the taxes collectible from the filing of the rolls. *Held*, that on March 31, 1888, the taxes became a charge on the property, and the amendment, not being retroactive, did not exempt therefrom.—*Louisiana & N. O. Ice Co. v. Parker*, (La.) 7 So. 898.

6. The publisher of a newspaper, whose business involves the conversion of raw material, by means of mechanical and manual labor, into new and distinct articles fit for use and in demand in commerce, is a manufacturer, within the meaning of Const. La. art. 206, exempting manufacturers from the payment of license taxes.—*State v. Dupre*, (La.) 7 So. 727.

7. The exemption from taxation, under Const. La. art. 207, of property employed in manufactures, continues as long as the factory exists and the property is set apart for the purpose required, and it is not lost by temporary interruptions in operation.—*Waterbury v. Atlas Cordage Co.*, (La.) 7 So. 783; *Hernsheim v. Atlas Steam Cordage Co.*, *Id.* 784.

8. The exemption from taxation, under Const. La. art. 207, of property employed in manufactures, is forfeited during the continuance of a lease made for the purpose of closing the factory to limit production and prevent competition.—*Waterbury v. Atlas Cordage Co.*, (La.) 7 So. 788; *Hernsheim v. Atlas Steam Cordage Co.*, Id. 784.

9. Under Const. La. art. 207, exempting from taxation the capital, machinery, and other property employed in the manufacture of textile fabrics, such property used in making cordage, rope, and twine is not taxable.—*Waterbury v. Atlas Cordage Co.*, (La.) 7 So. 788; *Hernsheim v. Atlas Steam Cordage Co.*, Id. 784.

Assessment.

10. In assessing land for taxation, the probability that a projected railroad may not be built, in which event the land would be comparatively worthless, will not be considered.—*Union Investment Co. v. Board Sup'rs*, (Miss.) 7 So. 509.

11. The lots of an investment company were assessed for taxation at \$30 each. In a few instances the lots of individuals at the same place were assessed at a less valuation, but in all other cases at a much greater valuation, than \$30, which they testified was a fair valuation. The investment company had sold some of its lots at \$50 to \$200, and had never offered any as low as \$30. *Held*, that the assessment would not be disturbed as excessive.—*Union Investment Co. v. Board Sup'rs*, (Miss.) 7 So. 509.

12. An assessment of "lots 7, 8, and 9 of block 5, Ocean Springs, in section 30, township 7, range 8," as "lots 7, 8, 9, and 10 of block 5, O. S., section —, township 7, range 8," is void, and does not authorize the sale of the land.—*Wing v. Minor*, (Miss.) 7 So. 347.

13. Forty acres of a quarter section of land was assessed for taxation at \$2.50 per acre, and the other 120 at \$1 per acre, but no description was given by which either portion could be identified. Plaintiff owned the north half of the quarter section, while the south half was owned by two persons. *Held*, that the assessment was void for uncertainty.—*Sims v. Warren*, (Miss.) 7 So. 226.

14. A mortgage creditor of a delinquent taxpayer, having taken executory proceedings in the foreclosure of his mortgage, and at public auction caused the mortgaged property to be adjudicated to him, occupies the same relation to the assessment of the property for taxes as the mortgagor and tax-payer, and hence he cannot object that the property was assessed as belonging to the survivor of a community while it was in fact community property, where such survivor had paid the taxes for several years, and thus ratified the assessment.—*Factors' & Traders' Ins. Co. v. Levi*, (La.) 7 So. 625.

15. The charge by a tax debtor that the assessment of property situated in the city of New Orleans is illegal because it was made by a single assessor without the action or concurrence of a majority of the board of assessors, as the law requires, does not involve a mere matter of form; but it involves a radical defect, which may be urged or set up whenever an effort is made to collect the tax based on such an assessment.—*Oteri v. Parker*, (La.) 7 So. 570.

16. The charges of illegality of an assessment of property in New Orleans on the grounds that the assessor failed to visit or examine the property assessed, that the assessment rolls had not been legally authenticated, that some of the property was not the tax debtor's exclusively, but that it was owned by him jointly with others, do not involve radical defects, but simply matters of form, which should be judicially invoked before the 1st of November of the year in which the respective assessments were made, as required by law.—*Oteri v. Parker*, (La.) 7 So. 570.

17. Entries on the minutes of the assessment board of the parish of Orleans at the end of each year that "the assessment rolls of the several assessment districts of the parish of Orleans having been filed with the recorder of mortgages, and there being no further business to transact, the board adjourned," afford conclusive evidence that

the assessment of each district was subjected to the action of the board within the requirements of the law.—*Oteri v. Parker*, (La.) 7 So. 570.

Equalization—Notice.

18. Act Fla. June 8, 1889, (*Kissimmee City act*), by section 6 provides that the town council shall act as a board of equalization of assessments of real estate, and that if the board shall increase any value fixed by the assessor they shall cause 10 days' notice of such increase to be given to the owner, and meet on a certain day to hear objections to such increase. *Held*, that where the assessor made valuations in a memorandum book, and afterwards consulted with members of the board in regard thereto, and adopted their suggestions in raising his valuations on the final assessment, this was not such raising of valuations by the board as required notice thereof to be given to the owners.—*Kissimmee City v. Cannon*, (Fla.) 7 So. 523.

Collection.

19. In Mississippi taxes cannot be collected by suit.—*Board of Sup'rs v. Johnston*, (Miss.) 7 So. 590.

20. A tax collector has no authority to seize for taxes property other than that which was assessed therefor, without first complying with the provisions of Act La. No. 85 of 1888, § 54.—*Oteri v. Parker*, (La.) 7 So. 570.

21. Const. La. art. 211, which provides that "tax on movable property shall be collected in the year in which the assessment is made," does not prohibit the collection of such taxes during the following or in a subsequent year; and failure to collect them in the year in which the assessment is made does not operate as a remission of the same.—*Oteri v. Parker*, (La.) 7 So. 570.

Lien.

22. Const. La. art. 176, which provides that "no mortgage or privilege on immovable property shall affect persons unless recorded or registered, * * * except * * * privileges for taxes, * * * provided that such privileges shall lapse in three years," applies to such tax liens only as are unrecorded.—*Factors' & Traders' Ins. Co. v. Levi*, (La.) 7 So. 625.

Sales for non-payment.

23. Act La. 1884, No. 82, providing that the purchaser of land adjudicated to the state shall assume all unpaid taxes, he cannot plead the prescriptions of three and five years against them, nor can he contest the validity of the assessment.—*Martinez v. State Tax Collector*, (La.) 7 So. 796.

24. On a sale of land adjudicated to the state for taxes, under Act La. 1884, No. 82, providing that the purchaser shall assume all unpaid taxes, and take the land subject thereto, payment of such taxes may be enforced under Act 1888, No. 80, providing for the sale of all lands adjudicated to the state, which have not been disposed of or redeemed.—*Martinez v. State Tax Collector*, (La.) 7 So. 796.

25. Where a lot which, under the ancient division of the town, was a part of "lot 6," is assessed and sold for taxes under a different description contained in a new map of the town, which is recognized by the citizens generally, and by the town officials, but which has not been formally adopted by them, the owner thereof is not affected by the sale, if he did not know of the map, but recognized the lot as part of "lot 6," and so described it to the assessor.—*Richter v. Beaumont*, (Miss.) 7 So. 857.

26. Under Code Ala. 1886, § 542, providing that "no property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes," and Id. § 540, authorizing the collector "to levy upon any personal property of delinquent tax-payers for the payment of their taxes," the tax collector may levy on and sell a mule purchased by the delinquent tax-payer after the tax was assessed against him.—*Solomon v. Willis*, (Ala.) 7 So. 160.

Notice.

27. Where a statute requires notice to be given to the owner of land before it can be sold for tax-

cs. notice must be given to all the co-tenants, and a sale under a notice given to only one co-tenant is void.—*Howze v. Dow*, (Ala.) 7 So. 389.

Tax-titles.

28. Act La. 105 of 1874, which provides that "any action to invalidate the title to any property purchased at tax-sale under * * * any law of this state shall be prescribed by a lapse of three years from the date of such sale," applies only where the sale was made by virtue of some law, and not to cases where an inspection of the title shows that the sale was not made in conformity to any existing law.—*Surget v. Newman*, (La.) 7 So. 781.

29. A holder of a tax-title, who sues to recover against owners in possession, is bound to establish his title, and can receive no aid from prescription.—*Waddill v. Walton*, (La.) 7 So. 737.

30. A tax-deed made under Acts La. 1880, No. 107, which provides that "the tax collector shall not receive a bid for a less amount than the sum necessary to pay all taxes * * * that may be due," is void when made in pursuance of a sale for a less amount than the taxes due.—*Waddill v. Walton*, (La.) 7 So. 787.

31. A tax-deed made under Acts La. 1880, No. 107, which provides for the sale of all property "forfeited or sold to the state for delinquent taxes or licenses," and describing the property as having been forfeited to the state on a given date, and for taxes of a given year, is void when it appears that the property was not forfeited on the date nor for the taxes stated.—*Waddill v. Walton*, (La.) 7 So. 787.

32. Acts Miss. 1867, p. 247, § 18, provides that lands struck off to the levee boards on sale for taxes should be "exempt from state taxation for levee purposes or otherwise until the same shall be sold or disposed of by the board: provided, that any party seeking to redeem any land so struck off to the board" shall first pay all state, county, and levee taxes that would have been due on said land if the same had remained the property of the person offering to redeem. Acts 1884, p. 182, §§ 1, 2, direct the auditor of public accounts to deliver a quitclaim deed of the state's title to levee lands purchased from the levee commissioners of the first district, Hinds county, when "all state, county, and levee taxes due thereon" have been paid. *Held*, an auditor's deed of such lands, given on proof that all taxes had been paid thereon up to date, exclusive of the time they were held by the levee board, conveyed an indefeasible title.—*Murdock v. Chaffe*, (Miss.) 7 So. 519.

33. The burden is upon the grantee of such deed to see that all taxes due have been paid; and a deed received upon the auditor's assurance that all taxes were paid, when in fact the taxes due for one year were not paid, was invalid.—*Murdock v. Chaffe*, (Miss.) 7 So. 519.

34. Complainant, a purchaser at a tax-sale, sought to restrain the sale of the same property for taxes of previous years. The answer of the city averred that complainant was not in fact the purchaser, but that the property was bid in by her father, who was the husband and trustee of the owner, and procured the certificate to be issued in her name, and to be delivered to him; complainant furnishing no money for the purchase. *Held* that, the answer being unsworn, and therefore (Code Ala. 1886, § 3424) not evidence, complainant was not required to prove that the money with which the purchase was made was furnished by her, and not by the tax-payer, or by the husband and trustee of the latter.—*Thorington v. City Council*, (Ala.) 7 So. 363.

35. The fact that the purchaser at a tax-sale is the daughter of the tax-payer, and that the husband and trustee of the latter made the bids, and handed in the money, is not enough to stamp the transaction as fraudulent, nor to shift the burden on the purchaser of showing that the money used in the purchase was hers.—*Thorington v. City Council*, (Ala.) 7 So. 363.

Redemption.

36. Code Miss. § 531, provides that the owner of lands sold for taxes may redeem within one year,

and that infants and persons of unsound mind may redeem within a year after attaining full age or sanity. *Held*, that where adults and infants are co-tenants of lands sold for taxes, and the limitation has expired as to the adults, the infants can only redeem their interest, and not the whole tract.—*Wilson v. Sykes*, (Miss.) 7 So. 492.

Erroneous taxation—Remedies of owners.

37. Where land should be assessed in separate lots, an assessment in blocks or several parcels in gross will not be set aside if the owner, by listing his property in that manner, consented to such mode of assessment. He is estopped to complain.—*Kissimmee City v. Drought*, (Fla.) 7 So. 525.

38. Where part of an assessment was legal, and part illegal, because some of the lots were not assessed separately, as required by Act Fla. June 8, 1889, (*Kissimmee City act*), the lot-owner is not entitled to any relief unless he has paid the taxes on the portion legally assessed, as required by Const. Fla. art. 9, § 8.—*Kissimmee City v. Cannon*, (Fla.) 7 So. 523.

Taxation of Costs.

See *Costs*, 2.

TELEGRAPH COMPANIES.

Failure to transmit message.

1. An action will not lie against a telegraph company, either under the statute or at common law, for failure to transmit a verbal message, orally delivered to the operator, in the absence of evidence of a custom to that effect.—*Western Union Tel. Co. v. Dozier*, (Miss.) 7 So. 325.

2. In an action by a physician against a telegraph company for failure to transmit a message to him, a verdict in plaintiff's favor will be set aside, where it appears that no message for transmission to plaintiff was charged or paid for, but that, after two ineffectual attempts to reach other physicians, the operator voluntarily inquired for plaintiff, and was informed that he was not in town.—*Western Union Tel. Co. v. Dozier*, (Miss.) 7 So. 325.

Incorrect transmission.

3. A message was received by a telegraph company to be sent to plaintiffs' attorney at N., and the agent at the transmitting office informed the agent at N. of the number of words contained in the message, and, having sent the message, received from the agent at N. the signal indicating that it had been properly received, and contained the number of words indicated. In an action for negligent delivery, the agent at N. admitted that the word "six" had been omitted before the words "hundred and sixty-three," and that the word "answer" was dropped, but testified that the atmospheric conditions at N. were not favorable when the message was received. *Held*, that the evidence showed gross negligence on the part of the company.—*Western Union Tel. Co. v. Goodbar*, (Miss.) 7 So. 214.

Delay in delivery.

4. A telegraph company is liable for negligence causing delay in the delivery of a telegram instructing C. to buy certain land for plaintiff, where it appears that, if the message had been transmitted in due course of business, it would have enabled plaintiff to purchase for \$3,000 property worth \$5,000.—*Alexander v. Western Union Tel. Co.*, (Miss.) 7 So. 280.

5. Another person had also sent a message instructing C. to buy the property for him. If both messages had been transmitted without delay, the latter would have reached C. first, and plaintiff would have lost his opportunity to purchase the property. *Held*, that this was no defense to plaintiff's action.—*Alexander v. Western Union Tel. Co.*, (Miss.) 7 So. 280.

Failure to deliver.

6. When the sender of a message has the right to sue a telegraph company for breach of contract

in failing to deliver the message, he can also recover damages for mental anguish of which such failure was the proximate cause.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

7. The telegraph company is liable for the damages directly arising from its failure to deliver a message directing plaintiff's brokers to sell a quantity of cotton on his account for delivery at specified times, though the message was in cipher, and the company was not informed of its contents, nor of the fact of plaintiff's prior purchase of the same quantity of cotton to be delivered at the same time.—*American Union Tel. Co. v. Daughtry*, (Ala.) 7 So. 660.

8. As affecting the telegraph company's liability, it is immaterial whether or not any contractual relations existed between plaintiff and the persons to whom the directions contained in the telegram were addressed.—*American Union Tel. Co. v. Daughtry*, (Ala.) 7 So. 660.

9. The fact that the business of a telegraph office is insufficient to justify the employment of a separate operator or messenger to deliver messages does not excuse the company from liability for failure to deliver from that office a message which it has elsewhere received for transmission.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

Failure to deliver—Regulations of company.

10. In case of a claim for damages against a telegraph company for failure to deliver a message, which is required to be presented in writing within 60 days, the bringing of suit therefor, and service of process, within the time, is equivalent to such presentation.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

11. A regulation of a telegraph company, printed on blanks, prescribing limits within which a message will be delivered free, and requiring a deposit to cover delivery charges if the message is to be delivered outside of the limits, is reasonable; and where the person to whom a message is addressed lives outside the prescribed limits, it is incumbent on the sender of the message, who knows of the regulations, to ascertain the fact, and make the required deposit.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

12. The illiteracy of the sender is no excuse for his failure to comply with such regulation.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

13. In an action for failure to deliver a message within a reasonable time, where the defense is that the person to whom it was addressed lived outside of the free-delivery limits, and that plaintiff (the sender) failed to comply with the regulation of the company requiring a deposit to pay for delivery in such case, the burden is on plaintiff to prove that such person lived within the limits.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

Limitation of liability.

14. A stipulation that the telegraph company shall not be liable for failure to deliver a message in a greater sum than that paid for the service is void, as the company cannot contract to limit its liability for its own negligence.—*American Union Tel. Co. v. Daughtry*, (Ala.) 7 So. 660.

15. In a suit against a telegraph company for failure to deliver a message which, though not repeated, was correctly and without delay transmitted to the office from which it was to be delivered, a regulation of the company limiting its liability for failure to deliver to repeated messages only, has no application.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

Evidence.

16. In an action for failure to deliver a telegram within a reasonable time, where the message was to a doctor, summoning him professionally, evidence on behalf of the telegraph company that the doctor's charges had not been paid, and that it was not his custom to make such visits without prepayment, is inadmissible.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

17. In such suit, evidence as to the financial condition of the telegraph company is inadmissible.—

Western Union Tel. Co. v. Henderson, (Ala.) 7 So. 419.

18. In a suit against a telegraph company to recover damages for mental suffering caused by failure to deliver a message, natural utterances or expressions indicative of pain or suffering caused by such failure are competent original evidence.—*Western Union Tel. Co. v. Henderson*, (Ala.) 7 So. 419.

TENANCY IN COMMON AND JOINT TENANCY.

Rights and remedies inter se.

1. One who defends on the merits in ejectment by his co-tenant, and denies his title, cannot object that there was no ouster nor demand of possession before action.—*Southern Cotton Oil Co. v. Henshaw*, (Ala.) 7 So. 760.

2. A husband and wife lived, with the wife's mother, on the latter's land, under an agreement whereby the husband was to pay the taxes. By mistake, the mother had the land assessed under a wrong description, and the husband paid the taxes, under such description, without knowledge of the error. The land was forfeited to the state for non-payment of taxes during this joint occupancy, and, after the expiration of the period of redemption, was purchased by third persons. Held that, after the mother's death, and after the husband and his family had ceased to occupy the land, it was no violation of any duty he owed to the mother's heirs, as tenants in common with his wife, for the husband to purchase the land from the third persons for the benefit of his minor children.—*Whitehead v. Curry*, (Miss.) 7 So. 497.

3. The owner of an undivided interest in land agreed to give his co-tenants further time to pay an indebtedness due him, in order to induce them to join him in a suit for partition, his object being to sell the land, and so dispossess another co-tenant; and it was agreed that he should purchase the land, and reconvey to each of his co-plaintiffs his interest therein upon payment of the amount of his debt in three equal annual installments. The suit was brought, but, while it was pending, he procured a sale of defendant's interest under foreclosure, so that further proceedings in the partition suit were rendered impossible. Held that, notwithstanding this, he must perform his contract with his co-plaintiffs as to the extension of time on their indebtedness, and cannot proceed to collect it until the time agreed on has expired.—*Penonilh v. Abraham*, (La.) 7 So. 533.

Adverse possession.

4. The possession of one co-tenant is *prima facie* that of the other, and there must be something amounting, in law, to an ouster, before ejectment will lie, or the statute of limitations begin to run between them.—*Coogler v. Rogers*, (Fla.) 7 So. 391.

Theaters and Shows.

License, see *License*, 1.

Title.

Of laws, see *Constitutional Law*, 1-4.
Tax-titles, see *Taxation*, 23-35.

Torts.

See *Death by Wrongful Act*; *False Imprisonment*; *Malicious Prosecution*; *Negligence*; *Trespass*; *Trover and Conversion*.

Measure of damages for, see *Damages*, 3-5.
Of servants, see *Master and Servant*, 2-5.

TOWNS.

See, also, *Highways*; *Schools and School-Districts*.

Corporate funds.

When a suit has been brought in the name of the state to test the validity of the election of a

person as mayor of a town, and the council have authorized him to employ counsel to defend such suit at the expense of the corporation, an injunction will lie, at the suit of a tax-payer, against such appropriation of the corporate funds.—*Fleck v. Spencer*, (Fla.) 7 So. 642.

TRADE-MARKS.

What will be protected.

1. A manufacturer can distinguish the goods that he manufactures and sells by a peculiar label, and no other person has a right to adopt his label or trade-mark, or one so like his as to lead the public to suppose the article to which it is affixed is the manufacturer's.—*El Modelo Cigar Manuf'g Co. v. Gato*, (Fla.) 7 So. 28.

2. A manufacturer cannot acquire the right of a trade-mark in the use of his own name to the exclusion of the right of another person by the same name, and whose place of business is in the same place.—*El Modelo Cigar Manuf'g Co. v. Gato*, (Fla.) 7 So. 28.

3. When a man manufactures his goods at a particular place, he may use the name of that place, in combination with other words, as a trade-mark to distinguish the origin or ownership of his goods, and no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place.—*El Modelo Cigar Manuf'g Co. v. Gato*, (Fla.) 7 So. 28.

Infringement—Damages.

4. A party whose trade-mark has been violated is entitled to recover all profits realized by the wrong-doer from sales of the spurious articles, and also all damages resulting from such violation.—*El Modelo Cigar Manuf'g Co. v. Gato*, (Fla.) 7 So. 28.

TRESPASS.

By animals, see *Animals*, 1.

Who may maintain.

1. In 1873, plaintiff begun to occupy land belonging to his father under oral license that, on a certain contingency, it should be conveyed to him. Plaintiff paid the taxes, but the land was assessed to his father, and payment was made on it as part of the father's land. In 1882 the father granted to a railroad a right of way over all his land, and the road was built across the land occupied by plaintiff without objection from him. Plaintiff's father sued the company for trespass on land, including that occupied by plaintiff, and recovered for damage to another portion. He thereafter compromised with the company, and in 1887 conveyed to it a right of way across lands, including the section in which the land occupied by plaintiff was situated. During this litigation plaintiff asserted no claim. In an action against the company for cutting trees on the land, under a right given in the second grant to it, plaintiff alleged that, in 1886, his father had conveyed the land to him, but the conveyance was not produced, and it was not claimed to have been recorded. *Held*, that plaintiff was not shown to be the owner of the land, and could not recover.—*Louisville, N. O. & T. Ry. Co. v. Day*, (Miss.) 7 So. 849.

Continuing trespass—Damages.

2. An action for trespass upon real property must be commenced within three years, under *McCl. Dig. Fla.* p. 733, § 10, otherwise it is barred by the statute of limitations; and a charge that in a continuing trespass the statute does not begin to run at the time the cause of action accrued, but that the action might be brought at any time during the continuance of the trespass, and that plaintiff could recover damages for the whole time, whether the suit was commenced in the time prescribed by the statute or not, is erroneous.—*Savannah, F. & W. Ry. Co. v. Davis*, (Fla.) 7 So. 29.

3. Where there is a continuing trespass, the party injured is entitled to recover any damages he may sustain in consequence of such trespass, at any time within three years before the commencement

of suit, and he can bring successive suits against the defendant as long as the trespass is continued.—*Savannah, F. & W. Ry. Co. v. Davis*, (Fla.) 7 So. 29.

Defenses—Burden of proof.

4. One who takes timber from the land of another, and justifies under a contract with a tenant, has the burden of proving the latter's authority.—*Ladd v. Shattock*, (Ala.) 7 So. 764.

Trespass to Try Title.

See *Ejectment*.

TRIAL.

See, also, *Appeal*; *Certiorari*; *Evidence*; *Exceptions*; *Bill of*; *Error*; *Writ of*; *Judgment*; *Jury*; *New Trial*; *Pleading*; *Practice in Civil Cases*; *Witness*.

Conduct of trial.

1. Just as the jury retired, counsel excepted to a ruling as to how much of an affidavit for continuance, on account of the absence of a witness, should be considered; whereupon the court stated that he would reopen the whole case, and allow each side to introduce testimony, reargue the case, and present further instructions, and would exclude the affidavit. The jury was then brought back, and the witness, who had arrived in court, was sworn and testified. *Held* no error.—*Royton v. Illinois Cent. R. Co.*, (Miss.) 7 So. 320.

Reception of evidence.

2. The admission or rejection of cumulative evidence in rebuttal rests in the discretion of the trial judge.—*Jacksonville, T. & K. W. Ry. Co. v. Wellman*, (Fla.) 7 So. 845.

Arguments of counsel.

3. A witness having used a diagram in testifying, opposing counsel may also use it in commenting on his evidence, though it was not formally put in evidence.—*East Tennessee, V. & G. R. Co. v. Watson*, (Ala.) 7 So. 813.

Instructions.

4. Where a complaint in the first count alleges that plaintiff surrendered the lease to defendant, and in the second count alleges that he delivered possession, an instruction to find for defendant generally, if it is found that there was no surrender of the lease, is bad, as it neither goes to the whole case, nor is confined to that part of the case to which it applies.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

5. Nor in such case is an instruction good which charges that if the jury find that plaintiff did not surrender the lease, and did not deliver possession, they must find for defendant, as plaintiff's right to recover on one count or the other depends on the proof of one of these facts only.—*Dexter v. Ohlander*, (Ala.) 7 So. 115.

6. Plaintiff's evidence to show that the defendants employed him to do the work in question, and agreed to pay him a specified price for it, being contradicted by that of defendants, which tended to show that they had made the contract with another person, it is error to instruct the jury to find for the defendants if they believe their evidence.—*Sublett v. Hodges*, (Ala.) 7 So. 296.

7. The following charge was properly rejected as argumentative: "In this case there is no complaint that any of the crew on the train were incompetent or unfit for the positions they occupied; and you cannot consider any testimony, or any arguments of counsel, bearing on that matter."—*Georgia Pac. Ry. Co. v. Propst*, (Ala.) 7 So. 635.

8. The following charge was properly rejected as argumentative: "If you believe the evidence in this case, you are bound to believe that the defendant's servants in charge of the train were competent and fit to perform their respective duties, and you cannot consider arguments of counsel for the plaintiff to the contrary."—*Georgia Pac. Ry. Co. v. Propst*, (Ala.) 7 So. 635.

9. Instructions that, "although the presumption is that a written request was received if it was delivered to the mail, * * * that presumption is rebutted by the evidence of the defendants that they did not receive the request, unless the jury shall refuse to believe that evidence," and, "if the defendants have sworn that they did not receive it, * * * the fact that it * * * was placed in the post-office or mail * * * is not sufficient to show that the defendants did receive it, unless the jury believe that what they have sworn to is not worthy of credit," are argumentative, and properly refused.—*Steiner v. Ellis*, (Ala.) 7 So. 808.

Instructions—Exceptions.

10. Under Code Ala. § 2758, which permits a party to reserve by bill of exceptions any charge or decision of the court that would not otherwise appear of record, the exception must be taken before the jury retires; and an exception to a portion of the general charge comes too late when taken after the jury has returned and asked for further instructions.—*Hays v. Solomon*, (Ala.) 7 So. 921.

Verdict.

11. Where the verdict returned by a jury is not responsive to the issues, and is unauthorized by law, it is not error for the court to refuse to receive it, and repeat to the jury its former instructions, that they may retire and make a finding according to law, although the counsel of plaintiff are absent from the court-room.—*Traylor v. Hughes*, (Ala.) 7 So. 159.

TROVER AND CONVERSION.

Title to maintain.

1. The possession of a trustee, under a deed of trust, before foreclosure, is insufficient to sustain an action for the conversion of crude turpentine, taken from trees on the land before his possession was acquired, and sold to defendant.—*Farmers' Loan & Trust Co. v. Avera*, (Miss.) 7 So. 858.

2. An indorsee in blank of a promissory note transferred as collateral security, has title and possession sufficient to support an action of trover, of which he is not divested by returning it to the indorser for collection.—*Carter v. Lehman, Durr & Co.*, (Ala.) 7 So. 735.

What constitutes conversion.

3. Plaintiffs shipped defendant 5,000 cigars upon an agreement that he "could take what he wanted at \$35 per thousand," and he elected to take 2,000, and packed away the remaining 3,000, which were appropriated by the public during the yellow fever epidemic, when the defendant was absent from the city. *Held*, that an action of trover would not lie against defendant.—*Traylor v. Hughes*, (Ala.) 7 So. 159.

4. A note was given in payment of a machine, the title to which was to remain in the seller until the note was paid. On default in payment the seller demanded the machine from the purchaser's wife, he having left the state, and her father refused to allow the seller to take it. *Held*, that the father was guilty of conversion.—*Bolling v. Kirby*, (Ala.) 7 So. 914.

5. But if such refusal was only to procure time to determine whether it had been paid for, with an agreement that if it had not it should be surrendered, the father is not liable for conversion where the original purchaser comes and removes the machine in the mean time, without his knowledge or consent.—*Bolling v. Kirby*, (Ala.) 7 So. 914.

Trustee Process.

See *Garnishment*.

TRUSTS.

Implied trusts.

1. A widow who had possession of a note payable to testator, but not indorsed by him, nor

shown to have been delivered to her, obtained from the maker a new note payable to herself, and received payments thereon. *Held*, that the note remained a debt due the estate, for which suit could be brought by the executors, but the widow could not be considered a trustee for those entitled to the note, and be made, as such, to render an account for the payments so received.—*Buie v. Buie*, (Miss.) 7 So. 344.

Resulting.

2. Where a father advances money to pay for land purchased by his son, and charges the amount, and by his will directs the same to be accounted for by the son in the distribution of his estate, the son is the equitable owner of the land, though the title was taken by the father.—*Chiles v. Gallagher*, (Miss.) 7 So. 208.

3. A bill alleging that complainants are the owners of certain land by inheritance; that it was sold for taxes; that, being themselves unable to redeem, they procured defendant to advance the necessary money to the purchaser at the tax-sale, and take the title to himself as security; that they now offer to pay the same, with interest, to defendant, and ask that a conveyance be made to them,—is not demurrable for want of equity.—*McLemore v. Carter*, (Miss.) 7 So. 357.

4. B. gave money to W. wife which to enter certain land for him, and W. neglected to enter the land, but retained the money. B. died, leaving all his property to J. for life, remainder over. J. qualified as administratrix, obtained the money from W., entered the land in her own name, and sold it. A suit was brought 83 years after the entry to establish a resulting trust in the land in favor of the remainder-men. *Held*, that, as the authority to enter the land died with B., the legal status of the transaction by the administratrix was a conversion of the money, and no trust results in the land.—*Bass v. Bass*, (Ala.) 7 So. 243.

Beneficiaries.

5. A husband, by deed of trust, gave a life-estate in lands to his wife, with full right to the rents and profits, and provided that at her death, if he were then dead, one-half of the lands "shall inure to and belong to my devisees, and, in default of devisees, to the heirs at law" of his wife, "and the remaining half shall inure and belong to the devisees, and, in default of devisees, to the heirs at law" of the grantor. The grantor died intestate, and afterwards his wife died, having willed all her property equally to the three defendants. *Held*, that plaintiff, the niece and heir at law of the husband, and defendants were tenants in common, the former owning a one-half interest, and the latter a one-sixth interest each.—*Ohmer v. Boyer*, (Ala.) 7 So. 668.

Undue Influence.

See *Equity*, 9, 10; *Wills*, 1, 2.

Unlawful Seizure.

See *Sheriffs and Constables*, 3, 4.

USURY.

What constitutes.

1. A stipulation in a note to pay "all costs for collecting the above, not less than ten per cent.," includes an attorney's fee for bringing suit, and does not render the contract usurious, though only a reasonable fee could be recovered.—*Williams v. Flowers*, (Ala.) 7 So. 439.

2. A person applied to a building association to build a house for him, and the association cleared the title to the lot on which the building was to be erected by extinguishing the vendor's lien thereon, and built the house on said lot, which was accepted by the applicant. The applicant conveyed said lot and improvements to the building association, which afterwards, according to an agreement, sold the same property to such person for the sum which it advanced on the property, with a premium thereon of 10 per cent. as the price, with

a vendor's privilege and special mortgage retained. *Held*, that the contract was a legal one, and the premium of 10 per cent. was not interest, and was therefore not usury.—*Succession of Latchford, (La.) 7 So. 638.*

Recovery back.

8. Code Miss. § 1141, declares that "if a greater rate of interest than 10 percent. shall be stipulated for in any case, all interest shall be forfeited." *Held* that, where a greater rate was charged and paid, the contract being executed, only the excess could be recovered back.—*Dickerson v. Thomas, (Miss.) 7 So. 508.*

Variance.

See *Criminal Law*, 54, 55; *Pleading*, 9-11.

VENDOR AND VENDEE.

See, also, *Deed; Fraudulent Conveyances; Judicial Sales; Sale; Specific Performance.*

Agreements relating to lands, see *Frauds, Statute of*, 3, 4.

The contract.

1. Under a contract of sale of lands made in his own name by one who had no title, but who was authorized thereto by the owner, the vendee acquired only an equitable right.—*Powell v. Higley, (Ala.) 7 So. 440.*

2. A bond for a deed stipulated that the erection of certain improvements within six months was the principal consideration of sale, and that a failure so to do would work a forfeiture. *Held*, that the performance of such a condition is not waived by permitting the property to be taxed in the purchaser's name, and buying it at tax-sale, nor by a failure to re-enter as on condition broken.—*Haggerty v. Elyton Land Co., (Ala.) 7 So. 651.*

3. A contemporaneous written agreement by the grantees named in a trust-deed in the nature of a mortgage, that, in default of payment by the grantor of the sum secured, he will purchase the land at a price to be fixed by appraisement, is binding on both if acquiesced in by the grantor, though not signed by him.—*Atkinson v. Whitney, (Miss.) 7 So. 644.*

4. Acquiescence will be deemed sufficient in such a case where, after default in the payment of the debt, both parties join in the selection of appraisers, as provided in the agreement, and the grantor after appraisement tenders a deed, and demands the balance due above the debt secured.—*Atkinson v. Whitney, (Miss.) 7 So. 644.*

Appraisement of land.

5. In the absence of fraud, an appraisement will not be disturbed for overvaluation.—*Atkinson v. Whitney, (Miss.) 7 So. 644.*

6. A failure to survey a body of land does not make the appraisement of "\$5.50 per acre" void for uncertainty where the contract providing therefor described the tract as containing "680 acres, more or less."—*Atkinson v. Whitney, (Miss.) 7 So. 644.*

7. An error in reporting the name of the owner in the statement of appraisement will not invalidate it where the right land was properly appraised and described therein.—*Atkinson v. Whitney, (Miss.) 7 So. 644.*

Rights and remedies.

8. When an owner sells from a larger tract a fixed quantity of land, to be cut off from one side by a line thereafter to be fixed, the fact that he subsequently sells a part of the same land to a third person does not affect the right of the first purchaser to his quantity, and to have the line so run as to give such quantity.—*Keller v. Shelmire, (La.) 7 So. 587.*

Rescission.

9. In a suit to rescind an exchange of lands and to cancel the conveyance of complainant on the ground of fraudulent representations as to the value and location of lots conveyed by defendant, the testimony showed that the exchange was made

in March, and that in April complainant discovered that the lots were not as valuable as represented, nor situated where he had been led to suppose them to be. There was a mortgage on the lots, which complainant assumed in consideration of six additional lots. In May he began to negotiate with defendant for the exchange of other lands, and in July he wrote to defendant's agent, stating that he wished to exchange the lots included in the second agreement, as well as those in the first exchange, for renting property, so that he might be able to meet the interest due on the mortgage in September. In August he notified defendant that he would not execute the second agreement, and offered to rescind the exchange already consummated. *Held*, that he had waived his right to rescind by continuing to treat the property as his own after discovery of the alleged frauds.—*Lockwood v. Fitts, (Ala.) 7 So. 467.*

10. An offer to rescind, six months after complainants learned of the vendor's want of title, is made within a reasonable time when it appears that complainants were strangers, and citizens of another state, and that yellow fever was prevalent where the vendors lived during the time between the discovery and the offer.—*Orendorff v. Tallman, (Ala.) 7 So. 821.*

11. A deed which is in fact only an option is revocable at any time before performance or an offer to perform.—*Borst v. Simpson, (Ala.) 7 So. 814.*

Vendor's lien.

12. A vendor who sells land, retaining the title as security for the purchase money, sustains the same relation to the vendee, so far as the question of security is concerned, as does a mortgagor to a mortgagor, and, if the security of the land is insufficient, may restrain the vendee from cutting timber on the land.—*Moses v. Johnson, (Ala.) 7 So. 146.*

13. The averment by the vendee that the value of the land would be enhanced by clearing it is affirmative matter, the burden of proving which is on him.—*Moses v. Johnson, (Ala.) 7 So. 146.*

14. Where land is purchased by a husband, and his note executed for the unpaid purchase money, the vendor's lien on the land is not waived or lost by reason of the fact that the conveyance is made to his wife, or because the husband used some of her money in making the first payment.—*Davis v. Smith, (Ala.) 7 So. 159.*

15. Under Code Ala. 1936, § 1764, providing that "the transfer of a bond, bill, or note given for the purchase money of lands, whether the transfer be by delivery merely or in writing, expressed to be with or without recourse on the transferrer, passes to the transferee the lien of the vendor on the lands," the transfer of a purchase-money note, by delivery merely, does not pass the legal title, and the payees are still necessary parties to a bill to enforce the lien.—*Davis v. Smith, (Ala.) 7 So. 159.*

16. A bill in equity to enforce a vendor's lien filed by an assignee of the debt need not state when the assignment was made.—*Kirk v. Sheets, (Ala.) 7 So. 736.*

17. In a bill to enforce a vendor's lien it is unnecessary to aver the ability and readiness of vendors to make title, where it cannot be inferred from the facts in the bill that the purchase money is not to become due and payable until a deed of conveyance is made.—*Davis v. Smith, (Ala.) 7 So. 159.*

18. Attorney's fees can be recovered in a suit in equity to enforce a vendor's lien, when the notes given for the unpaid purchase money contain a stipulation by vendee to pay a reasonable attorney's fee in case of a suit on the notes.—*Johnson v. Durner, (Ala.) 7 So. 245.*

19. The failure of the owner of a note secured by vendor's privilege on certain lots to aver and enforce such privilege expressly, amounts to a waiver of the same, in an action brought by him on the same note secured by a different act on the same and other lots, when he alleges only the second act, and has all the lots sold *in globo*; for in such a case it is impossible to discriminate what portion of the proceeds of sale could accrue to the

note secured by vendor's privilege on part of the lots.—*Bench v. Keenan*, (La.) 7 So. 589.

Bona fide purchasers.

20. The possession of land by a tenant is sufficient notice of the landlord's title under an unrecorded deed to put a purchaser on inquiry.—*Levy v. Holberg*, (Miss.) 7 So. 481.

VENUE IN CIVIL CASES.

Residence of necessary parties.

1. The judgment debtor against whom garnishment proceedings have been instituted, in an action to subject the proceeds of the judgment to a claim against the judgment creditor, is a material defendant in a suit to enjoin such action, within the meaning of Code Ala. § 3421, requiring a bill to be filed in the district in which a material defendant resides.—*Street v. Selig*, (Ala.) 7 So. 236.

2. In a suit to enjoin an action to subject the proceeds of a judgment to the payment of a claim against the judgment creditor, an attorney having a lien on such judgment for his services in procuring it is not a material defendant, within the meaning of Code Ala. § 3421, requiring a bill to be filed in a district where a material defendant herein resides.—*Street v. Selig*, (Ala.) 7 So. 236.

Venue in Criminal Cases.

See *Criminal Law*, 15-19.

Verdict.

See *Criminal Law*, 74-77; *Trial*, 11.

Verification.

Of pleading, see *Pleading*, 4.

Vessels.

See *Taxation*, 2.

Vice-Principal.

See *Master and Servant*, 14-17.

Voluntary Payment.

See *Payment*, 3, 4.

Wages.

Lien for, see *Liens*, 4.

Warehousemen.

Larceny from, see *Larceny*, 1.
Liability of carrier, see *Carriers*, 7-11.

Warranty.

See *Sale*, 2.

Ways.

See *Highways*.

Weapons.

See *Carrying Weapons*.

Wife's Separate Estate.

See *Husband and Wife*, 3-9.

WILLS.

See, also, *Executors and Administrators*.

Undue influence.

1. C., the sole business agent and confidential advisor of testatrix, a woman of about 80 years of age, simple-minded and timid, and without any family, induced her to sign a will, without either having it read by or to her. The will gave C. the residuary legacy, which he represented to testatrix would not exceed \$2,000, when in fact it

exceeded \$30,000. *Held*, that the presumption was that the legacy was procured by C. through undue influence.—*Lyons v. Campbell*, (Ala.) 7 So. 250.

2. Testatrix devised to L., who was rector of the church in which she was a communicant, over \$100,000. L. had the will written, suggested its provisions, and induced her to sign it, and then left the state, and saw testatrix afterwards but once in 20 years. In a subsequent will, made at the suggestion of C., the legacy to L. was reduced to less than \$40,000. *Held*, that these facts did not authorize the inference that the legacy to L. was obtained through undue influence.—*Lyons v. Campbell*, (Ala.) 7 So. 250.

Execution—Attestation.

3. A will was prepared at testator's dictation, and at his request three persons were called to witness its execution. The paper was then handed to him, with the remark, "Here is your will," whereat he put on his spectacles and either read or glanced over it, and then signed it. He then asked the witnesses if they could identify his signature, and, after examination, they said they could and thereupon subscribed it within a few feet of him and where he could see them by turning his head upon the pillow, which he was easily able to do. *Held* a sufficient attestation.—*Walker v. Walker*, (Miss.) 7 So. 491.

Nuncupative wills.

4. Rev. Civil Code La. art. 1578, requires that nuncupative wills shall be dictated by the testator and written by the notary, and that express mention shall be made therein that all the formalities required by the section have been observed. Article 1595 provides that if the formalities required in the execution of wills are not observed, they shall be void. *Held*, that a will which declares that the notary was called to write at testatrix's dictation her last will, and that she dictated to him the following as such will, is void, as omitting to state that he wrote it.—*Miller v. Shumaker*, (La.) 7 So. 455.

5. Under Rev. Civil Code La. art. 1578, it is a sacramental requirement of a notary that he shall make express mention of all formalities, provided in said article, having been fulfilled, but not that they were done at one time, and without turning aside to other acts.—*Succession of Murray*, (La.) 7 So. 126.

6. The law does not make it the duty of notaries to state that witnesses to a nuncupative will are not disqualified, in the sense of Rev. Civil Code La. art. 1591, which declares that certain persons are "incapable of being witnesses to testaments," but it does make it their duty to state that they are residents of the place where the will is executed, under article 1578.—*Succession of Murray*, (La.) 7 So. 126.

Revocation.

7. A will, showing by its whole tenor that it was intended to contain all the testamentary dispositions of the deceased, revokes a prior will, in so far as it contains dispositions incompatible with those contained in the will last made.—*Succession of Bobb*, (La.) 7 So. 60.

Probate and contest.

8. Code Ala. 1886, § 1989, provides that a will may be contested by a person interested therein by filing in the court where it is offered for probate allegations that the will was not duly executed or other valid objection. Section 2000 provides that any person interested in a will, who has not contested the same in the probate court, may contest the validity of the same by bill in chancery. *Held* that, to contest in chancery, it is necessary to state some valid objection to the will, which may, however, be in the same general terms as when the will is contested in the probate court.—*Lyons v. Campbell*, (Ala.) 7 So. 250.

9. Under Code Ala. 1886, §§ 2000, 2001, providing that any person interested in a will may contest the validity of the same by bill in equity, certain legacies may be declared invalid by a court of chancery, leaving the remainder of the will unaffected.—*Lyons v. Campbell*, (Ala.) 7 So. 250.

Construction.

10. A testator directed that, in the event of the death of one son without issue living at his death, then his portion was to be divided equally among the children of another son. *Held*, that only those children who were living at the time of the death of the former son without issue took under the will.—*Phinizy v. Foster*, (Ala.) 7 So. 886.

11. A will provided "that my whole estate be kept together and enjoyed by my beloved wife, S., and my children," five in number, naming them, (one of whom afterwards died unmarried,) and appointed the wife sole executrix, "with all the privileges and rights of buying, selling, and conveying my property * * * that I would have if living." *Held*, that the widow and children took equal shares, their rights accrued simultaneously, and, where the lands were levied upon in the hands of the widow's grantees to satisfy a debt incurred before the grant, such levy was null except as to her undivided one-fifth interest.—*Dryer v. Crawford*, (Ala.) 7 So. 445.

Rights of devisees and legatees.

12. Where land is devised and money bequeathed in trust for testator's granddaughter for life, with remainder to her children, the trustee has no power, at the instance of the granddaughter, and with the consent of a court of chancery, to invest the money in land, so as to conclude the rights of the remainder-men. Code Miss. 1880, § 2112, which permits a conversion of property belonging to a ward for the purpose of changing the character of the investment, where it is to the interest of the ward, has no application.—*West v. Robertson*, (Miss.) 7 So. 224.

Legacy charged on land.

13. A devise of land to M., "to have free from any incumbrance whatever, except that so long as my daughter Polly may live with him he shall board her and pay her a yearly stipend of twenty dollars," fixes a charge on the land for the board and yearly stipend of the daughter.—*Crossett v. Clements*, (Miss.) 7 So. 207.

14. Where lands devised are charged with a legacy, the lapse of the devise by the death of the devisee in the testator's life-time does not cause the lapse of the charge in favor of the legatee.—*Cady v. Cady*, (Miss.) 7 So. 216.

15. Testator, after devising certain lands to each of his three children, W., J., and M., directed his executor to sell the residue of the estate, real and personal, and to apply the money to debts of the estate, and divide the residue in certain proportions, among his three children. He then provided that J. and M. should bear the care and expense of maintaining and educating his two grandchildren, and that the grandchildren, on coming of age, should each receive \$500, to be paid jointly by J. and M. *Held*, that the legacies given to the grandchildren were charges primarily on the land specifically devised to J. and M.—*Cady v. Cady*, (Miss.) 7 So. 216.

WITNESS.

See, also, *Deposition; Evidence.*

Competency—Infancy.

1. A boy 14 years of age, who states upon his examination that he knows that it is wrong to lie, but did not know that he would be punished if he swore to a lie, is not a competent witness.—*McKelton v. State*, (Ala.) 7 So. 38.

2. A child, 7½ years of age, is a competent witness, where it appears, on her examination by the judge, that she has an intelligent comprehension of the belief that falsehood is not only morally wrong, but will be severely punished in the future.—*McGuff v. State*, (Ala.) 7 So. 85.

Privileged communications.

3. Communications to a confidential clerk of a firm of attorneys, made by one who knows that such clerk is not an attorney, and who does not know his relations to the firm, and without showing any desire to have the clerk carry the com-

munications to the attorneys, are not privileged.—*Hawes v. State*, (Ala.) 7 So. 302.

Transactions with decedents.

4. In a suit against one D. and the administrator of a decedent on a joint demand, D. is not a competent witness for the administrator as to conversations between decedent, the plaintiff, and himself.—*Sublett v. Hodges*, (Ala.) 7 So. 296.

5. One to whom plaintiff had given an interest in a contract, but who within a few days thereafter sold it back to plaintiff, is not a competent witness for plaintiff as to conversations between the latter and one of the other parties to the contract, who has since died, and whose administrator is a party to the suit, under Code Ala. 1886 § 2765, which provides that neither party shall be allowed to testify against the other as to any transactions with, or statements by, any deceased person whose estate is interested in the result, unless called to testify thereto by the opposite party.—*Sublett v. Hodges*, (Ala.) 7 So. 296.

6. Code Miss. § 1602, provides that no person shall testify to establish his own claim for or against the estate of a deceased person which originated during the life-time of such deceased person, or any claim he has transferred since the death of such decedent. *Held* that, in a suit on a note by the indorsee of a deceased payee, the testimony of the maker, in his own behalf, that he had paid the amount thereof to the deceased, was improperly excluded.—*Cole v. Gardner*, (Miss.) 7 So. 500.

7. Code Ala. § 2765, provides that neither party shall be allowed to testify against the other as to transactions with any deceased person whose estate is interested in the result of the suit or proceeding unless called to testify thereto by the opposite party. *Held* that, in a proceeding in the probate court, by the administratrix and widow of an intestate, to declare his estate insolvent, where the heirs appear and deny the insolvency, a creditor who joins in the issue with the heirs, and denies the insolvency, but whose claim is resisted by the heirs as unjust, cannot, to establish his claim, testify as to transactions with the intestate.—*Dolan v. Dolan*, (Ala.) 7 So. 425.

8. Nor is his testimony made competent by his being called by the administratrix, where it appears that it is to her interest, as widow, to have the claim established. In such case, not being actually opposed to the witness in interest, she is not the "opposite party" within the meaning of the statute.—*Dolan v. Dolan*, (Ala.) 7 So. 425.

Examination.

9. It is improper to ask a witness if a certain portion of his testimony is as truthful as the balance.—*Rains v. State*, (Ala.) 7 So. 515.

10. On a murder trial, it is not error for the trial judge to propound leading questions to witnesses of tender years for the purpose of ascertaining whether or not the witnesses understand the obligations of an oath, and an objection to this mode of examination of the witnesses is frivolous.—*Hodge v. State*, (Fla.) 7 So. 593.

11. A witness may be permitted to refresh his memory by referring to a published article written by him from notes of a conversation held by him with defendant, and which he testifies contains the substance of what defendant said, the notes having been destroyed.—*Hawes v. State*, (Ala.) 7 So. 302.

Cross-examination.

12. On cross-examination of a witness, who testifies that no whistle was sounded at the time of a railroad accident, an inquiry whether it might not have been, and he not have heard it, may be excluded as mere matter of opinion for the jury to determine.—*East Tennessee, V. & G. R. Co. v. Watson*, (Ala.) 7 So. 813.

13. Where a witness on his examination in chief has testified that he had never heard anything against defendant, he can be asked, on cross-examination, if he had heard that defendant had worn "stripes."—*Holmes v. State*, (Ala.) 7 So. 193.

Credibility.

14. Where the defendant testifies in his own behalf, it is error to charge that, if the jury believed

"that any witness who has testified in this case has any feeling or interest in the result of this trial, then the jury should consider such feeling or interest, in connection with all the evidence in the case, in determining how far, if at all, they will believe such witness, or consider such testimony."—*Woods v. State*, (Miss.) 7 So. 495.

Credibility—Impeachment.

15. A witness cannot be impeached by proof of particular acts, either criminal or immoral.—*Smith v. State*, (Ala.) 7 So. 52.

16. No question, the object of which is to impeach the testimony of a witness, can be put unless a foundation for it has been previously laid, and the witness put on his guard.—*State v. Johnson*, (La.) 7 So. 670.

17. On an indictment for murder, a question as to the general reputation of a witness for veracity is properly excluded, where it does not call for such reputation in the neighborhood where such witness lives.—*State v. Johnson*, (La.) 7 So. 670.

18. On an indictment for murder, where defendant brings himself within the rule in introducing evidence of general reputation for the purpose of impeaching the credibility of a witness, it is error to exclude such evidence.—*Hodge v. State*, (Fla.) 7 So. 593.

19. A witness cannot be impeached by proving that he had, at the preliminary hearing, made statements different from his testimony on the trial, unless the statements ascribed to him, which had been reduced to writing, are produced, and his attention called to them.—*State v. Callegari*, (La.) 7 So. 130.

20. Evidence that bribes and other inducements to testify against defendant were offered to his accomplices, who had testified at the trial, is not admissible to discredit them as witnesses, where it is not attempted to show that they accepted such inducements.—*Cheatham v. State*, (Miss.) 7 So. 204.

21. Under Code Miss. 1880, § 1607, providing that the record of conviction of a witness of any "crime" may be given in evidence as affecting his credibility, and section 8106, declaring that "any violation" of law is a crime, within the meaning of section 1607, the record of the conviction of a witness for larceny of a hog, without felonious intent, is admissible to affect his credibility.—*Helm v. State*, (Miss.) 7 So. 437.

22. It is competent, in impeaching the credibility of a witness, to prove her general character bad, without limiting the inquiry to matter of veracity; but it is not permissible to inquire into her virtue and chastity, or to show she is a common prostitute.—*McInerney v. Irvin*, (Ala.) 7 So. 841.

23. Where a person has testified to his friendship for a witness whose character he is called to impeach, it is competent, on cross-examination, to ask him if he did not once go to arrest the witness with a gun, on a warrant sworn out by himself, since the evidence sought to be elicited tends to contradict his previous testimony.—*Barnett v. State*, (Ala.) 7 So. 414.

Attachment for witness.

24. On an indictment for murder, where counsel for defendant knows that one of his witnesses cannot be found, his statement, in answer to inquiries put by the court, that another witness is the only one against whom an attachment is desired, is a waiver of attachment against the first witness.—*State v. Johnson*, (La.) 7 So. 670.

25. On an indictment for murder, an attachment cannot be required against an absent witness when it appears that he is not in the state, and was not served, and there is no showing that the accused was ignorant of his absence, that his testimony is material, and that his attendance can be secured for an early trial.—*State v. Johnson*, (La.) 7 So. 670.

26. Compulsory process against witnesses, to substantiate the grounds of a motion for new trial on an indictment for murder, will not be granted where the testimony would be cumulative only of that heard on the trial, and due diligence was not

used to secure the attendance of the witnesses for the trial.—*State v. Johnson*, (La.) 7 So. 670.

WRITS.

See, also, *Attachment; Certiorari; Execution; Garnishment; Habeas Corpus; Injunction; Mandamus; Prohibition, Writ of.*

Service of process.

1. Code Ala. § 2731, provides that, "when the summons is executed twenty days previous to the return term thereof, the cause * * * stands for trial that term." Section 11 provides that "the time within which any act is provided by law to be done must be computed by excluding the first day and including the last." *Held*, when a summons was executed 20 days before the return-term, counting the first day thereof, the cause was properly tried at that term.—*Thrower v. Brandon*, (Ala.) 7 So. 442.

2. A citation to an appellee, issued by a clerk of a circuit court, is the process of the supreme court, and must be served in Florida by the sheriff of the latter court in person or by deputy, and service made by any other sheriff simply by virtue of his office, and not as deputy of the sheriff of the supreme court, is not legal.—*Williams v. Hutchinson*, (Fla.) 7 So. 852; *Jensen v. Walther*, Id. 854.

3. Process of the supreme court was returned as served by the sheriff of a county, who was, however, not the sheriff of that court, and a motion was made to amend the return so as to show that it was served by the sheriff of the supreme court through him as deputy. The only proof of such deputation was that the sheriff of the supreme court delivered to a predecessor of the sheriff claimed to be such deputy a paper constituting such predecessor and his successors in office his deputy to execute all process of the supreme court in the county of which he was sheriff, and a certificate of the sheriff of the supreme court stating that the sheriff making the service was his deputy. *Held*, that the motion should be denied, as the proof does not show the person making the service received or accepted the paper, or other appointment of himself as deputy.—*Williams v. Hutchinson*, (Fla.) 7 So. 852; *Jensen v. Walther*, Id. 854.

— Non-residents.

4. Rev. Code Miss. 1880, § 1857, providing that service of "summons" on a non-resident defendant "shall be in lieu of a publication of such summons, and shall authorize further proceedings against such defendant as if he had been duly summoned in this state," does not authorize a personal judgment against a non-resident so served; section 2467 providing that, on judgment by default against a non-resident who has been served as provided in section 1857, no execution shall issue except against the property attached in the suit.—*Cudabac v. Strong*, (Miss.) 7 So. 543.

5. Plaintiff, a married woman, sold to defendant land which she had purchased during coverture with her paraphernal funds. Defendant objected to the title, and, in a suit for specific performance, requested that the holder of a judicial mortgage recorded against plaintiff's husband be made a party. *Held* that, where the mortgage creditor was an absentee, he might be properly brought into court through a curator *ad hoc*, the proceeding being substantially one *in rem*, having for its sole object to fix the status of the property, and to determine the validity of his apparent lien upon it, in order to enforce a contract respecting the same.—*Durruty v. Musacchia*, (La.) 7 So. 555.

6. Plaintiff, alleging that she had purchased of defendants, citizens of the District of Columbia, an interest in a judgment rendered in their favor in Louisiana, sued them in the parish in which such judgment was rendered, praying enforcement of the contract of purchase, and recognition of her ownership as against defendants, who are seeking to effect a compromise of the suit in which the judg-

ment was rendered, now pending on appeal to the supreme court of the United States. *Held* that, as the object of plaintiff's suit is to enforce a contract as to specific property within the jurisdiction of the court, it is in the nature of an action *in rem*, and service of citation on a curator *ad hoc* appointed by the court for the non-resident defendants is sufficient, and will render the judgment binding on them as to the property affected thereby.—*Young v. Upshur*, (La.) 7 So. 557.

Return.

7. A return to a citation, in an action against a corporation, which recites only that it was

served by leaving a copy with M., a person found at the domicile of the corporation, its general manager and president being absent, is defective as not stating whether the sheriff learned such person's name by interrogating him and omitting the date of the service, and a judgment based thereon will be reversed, and the cause remanded, so that the return may be amended to conform to the facts of the service.—*O'Hara v. Independence Lumber & Imp. Co.*, (La.) 7 So. 583.

Wrongful Attachment.

See *Attachment*, 12.

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